

IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT HIGH COURT MAITAMA –ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE S.U. BATURE

COURT CLERKS: JAMILA OMEKE & ORS

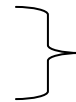
COURT NUMBER: HIGH COURT NO. 31

CASE NUMBER: SUIT NO. FCT/HC/CV/2212/2020

DATE: 1ST APRIL, 2021

BETWEEN:

1. KAMBA CONSULTANT COMPANY LTD
2. ENGR. FRED .O. ELIKE



PLAINTIFFS

AND

1. BORMAN AND COMPANY LTD.
2. DR. (MRS.) AISHA VALERIE LAWAL



DEFENDANTS

APPEARANCE:

C. M. Chikwe Esq for the Plaintiff/Respondent.

I. N. Okonkwo Esq for the Defendants/Applicants.

RULING

By a Notice of Preliminary Objection dated 17th day of August, 2020 and filed on 18th day of August, 2020, brought pursuant to Section 6 (6) of the Constitution of the Federal Republic of Nigeria 1999 (AS Amended) and under inherent Jurisdiction of this Honourable Court.

The Applicant herein prayed the Court for the following Orders:-

An order striking out this Suit for lack of Jurisdiction.

And for such further other orders as this Honourable Court may deem fit to make in the circumstance of this case.

The grounds upon which this Preliminary Objection was based are as follows:-

- (1) That the Plaintiff did not explore the option of Arbitration before resorting to litigation as provided in the Memorandum of Understanding signed by both parties, thereby making this suit incompetent.
- (2) That the 1st Defendant a limited liability Company with registered office address in Oyo State was neither served nor Obtained leave of Court before service, therefore the Jurisdiction of this Honourable Court cannot be invoked against the 1st Defendant.

Filed in support of the Preliminary Objection is a 6 paragraphed Affidavit deposed to by one Chisom Ibe, a litigation Clerk in the law firm of Bethsaida Chambers Solicitors to the Defendants. Attached to the supporting Affidavit are annexures marked as Exhibits A-E respectively.

Addressing the Court on 17/02/2021 Learned Counsel to the Defendant, Emeka Ugowuowo Esq moved the Preliminary Objection and urged the Court to dismiss this suit.

Equally filed in support of the Preliminary Objection is a written address dated the 17th day of August, 2020. In the said written address, Learned Counsel to the Defendants formulated two issues for determination to wit:-

- (1) Whether this Honourable Court has Jurisdiction to entertain this suit when there is an Arbitration clause in the memorandum of understanding signed by both parties.
- (2) Whether this Honourable Court has jurisdiction to entertain this suit when service on the 1st Defendant, a limited liability Company was defective.

In arguing the issues Counsel submitted on issue one that the duty of Court to act on agreement of parties to resort to arbitration was reinstated by the Supreme Court in the case of **THE OWNERS OF THE M. V. LUPEX V. NIGERIAN OVERSEAS CHATERING AND SHIPPING LTD (2003) LPELR-3195 (SC) P. 18, PARA E-F.**

Also Counsel referred the Court to the case of **OYO STATE GOV'T & ORS V. MOGOKE VENTURES (NIG) LTD (2015) LPELR-41531 (CA) P. 26-27, PARA D AND KURUBO V. ZACH. MOTISON (NIG) LTD (1992) 5 NWLR (PT. 293) 102.**

Consequently, Counsel urged the Court to decline jurisdiction in the matter as the Plaintiffs failed to seek the remedy of Arbitration before litigation as agreed upon by the parties as per the Arbitration clause in the agreement signed by both parties.

Submitting on issue two, Counsel referred the Court to Section 94 of the Sheriff and Civil Process Act, Section 104 of the Companies and Allied matters Act and Order 7 Rule 8 of the Civil procedure Rules of the FCT High Court, 2018 and stated that the registered office address of the 1st Defendant which is its head office is No. 9 Fajuji Street, Ibadangra, Ibadan Oyo State and that the 1st Defendant has no other place of business within the Jurisdiction of this Honourable. That the Plaintiffs served both Defendants at the residential address of the 2nd Defendant at Wuse II, Abuja clearly violating the Rules of this Court pertaining to service of Court processes on companies. Reliance was placed on the cases of **ATLANTIC DAWN LTD & 7 ORS V. G-NET COMMUNICATION (2019) LPELR-47772 (CA) P. 287, PARA C; WEMA BANK PLC V. BRSTEM-STERR (NIG) LTD (2011) 6 NWLR (PT. 1242) 67; MEN LTD V. ASIOGU (2008) 14 NWLR (PT. 1108) at 587.**

Finally, Counsel urged the Court to decline jurisdiction in the matter, reference was made to the case of **CBN V. S. A. P NIG. LTD (2005) 3 NWLR (PT. 911)P 425 AT 461.**

In response to the Notice of Preliminary Objection, the Claimants filed a 38 paragraphed Counter Affidavit deposed to by one Eng. Fred. O. Elike, the 2nd Plaintiff in this case. Attached to the Counter Affidavit are annexures marked as Exhibits A to E respectively. Equally filed in support is a written address dated 8th day of February, 2021.

Addressing the Court the Learned Counsel to the Claimants adopted their processes aforementioned and urged the Court to dismiss the Preliminary Objection. He contended moreso that the Defendants ought to file their Pleadings on which they will anchor their preliminary Objection and that Arbitration clause does not oust Jurisdiction of the Court.

In the said written address, Learned Counsel distilled three issues for determination to wit:-

- (1) Whether the Respondent followed the due process of law before bringing the Preliminary Objection before this Honourable Court.
- (2) Whether this Honourable Court has the power to stay proceedings in the event where any of the parties in a Contract circumvents the Arbitration clause in an agreement,
- (3) Whether the Honourable Court, has the power to sever any cause of action that does not form part of the Arbitration clause/Agreement.

In arguing the issues Counsel submitted on issue one that the Defendant/Applicant erred in law when it filed the notice of Preliminary Objection without first filing the statement of Defence according to the Rules of this Honourable Court since Demure proceedings are not allowed. He referred the Court to order 23 Rule 1 of the Civil Procedure Rules 2018 of the Rules of this Court.

It was contended by the Learned Counsel that the Defendant cannot be complaining of the circumvention of the Arbitral clause of the parties and at the same time breaching the Rules of this Honourable Court, as the Rules of Court are meant to be obeyed and respected. In support Counsel cited

the cases of **OJUGBELE V. LAMIDI (1999) 10 NWLR (PT. 621) P. 17 PARAS c- e; WILLIAMS V. HOPE RISING FUNDS SOCIETY (1982) 2 SC. AT 145 AND A-G FEDERATION V. BI-COURTNEY LIMITED (2012) NWLR (PT. 1321)481-486, paras F-G. D-E.**

Consequently, counsel urged the Court to dismiss the Preliminary Objection of the Defendants as being premature and against the Rules of this Court.

On issue two, Counsel submitted that this Honourable Court has the power to stay proceedings in any matter where the parties agreed to submit any issue arising out of a valid Contract and direct the parties to honour the terms contained in an agreement. Counsel referred the Court to Section 5 of the Arbitration & Conciliation Act Cap. A18 LFN, 2004.

In his further submission, Counsel stated that the extant law on Arbitration does not contemplate striking out of an action already filed before or pending before the Court where any of the parties to an agreement had circumvented the Arbitration Clause. Reference was made to the case of **MAINSTREET BANK CAPITAL & 1 OR V. NIGERIAN REINSURANCE CORPORATION PLC (2018) 14 NLR (PT. 1640) P. 445-454, PARAS C-D.**

In another submission, Counsel stated that an arbitration does not have the power to terminate the action already filed before the Court as it is only procedural. In support, Counsel cited the cases of **R. C. O & S LTD V. RAW BOWNE LTD (2004) 5 NWLR (PT. 1401); CONFIDENCE INSURANCE LTD V. TRUSTEES OF O. S. C. E (1999) 2 NWLR (PT. 591) at 373 page 5340545; METUH V. FRN (2017) 11 NWLR (PT. 1575) PP176, PARAS E-F. Also referred to is clause 12 of Exhibit D.**

Again, Counsel stated that Section 6 (6) (b) of Constitution of Federal Republic of Nigeria recognizes the right of any person who feels aggrieved to approach any of the Court provided in the Constitution to initiate any

processes for the purpose of Justice and for the determination of any question as to the Civil Rights and obligations of that person.

Consequently, Counsel submitted that the call by the Defendant/Applicant under paragraph 2.3 that the Court should decline jurisdiction is not only misconceived but borne out of bad intent and an attempt to mislead this Honourable Court. Reliance was placed on the case of **MAIN STREET BANK CAPITAL LTD & 1 OR V. NIGERIAN REINSURANCE CORPORATION PLC (SUPRA)**.

Therefore, Counsel urged the Court to make an Order staying proceedings if the Court considers it necessary or order the parties to proceed to Arbitration.

On issue three, Counsel submitted that this Honourable Court has the powers to secure the Claims of the Plaintiff which does not fit under the Contract of procurement of lifting license or which cannot be referred to the Arbitration and proceed to hear it on merit.

The Learned Counsel referred the Court to paragraphs 26, 27, 28 and 29 of the Counter Affidavit and stated that at no time did the Mercedes Benz of the Plaintiff/Respondent form part of the Contract between parties.

Moreso, Counsel referred to paragraph 4 (n, o and p) of the Applicant's Affidavit and Exhibit D and stated that instead of the Defendant's/Applicant's to follow the due process of law by going to Court or even resorting to the Arbitration under which they were urging the Court to dismiss or decline jurisdiction, they opted to take law in to their hands by unlawfully seizing an object/property that does not form part of the Contract. Reliance was placed on the cases of **AGBAI V. OKOGBUE (1991) 7 NWLR (PT. 204) pages 447-448, paras H- A. GOVERNOR OF LAGOS STATE V. OJUKWU (1986) 1 NWLR (PT. 18) at page 62.**

Consequently, Counsel submitted that going by the action of Defendant's/Applicant's who by their action terminated the Contract by way

of resort to self-help cannot now turn around and move the Court to decline the jurisdiction to entertain the case of the Plaintiffs.

However, Counsel stated that if the Court is mindful of sending the parties to arbitration looking at the whole scenario, he urged the Court to sever the claims by separating the issue contained in the parties agreement and deal with the seizure of the Plaintiff's Car as contained in the Claims/Reliefs 4-7 in the Endorsement separately. He cited in support the case of **UDOM V. UMANA (2016) 12 NWLR (PT. 1526) PAGE 218-219, PARAS G-A.**

Finally, Counsel urged the Court to order for the separation of the Claims particularly Claims 4-7 from claims 1-3 and proceed with the ones that deals with the seizure of the Car since it did not form part of the Contract.

On the other hand, the Defendants filed a reply on points of law on 15/2/2021 wherein the Learned Counsel in response to the issues raised by the Claimant submitted on issue one that, the Defendants preliminary Objection borders on the issue of jurisdiction as can be gleaned firm the said preliminary Objection. Reliance was placed on the case of **INAKOJU & ORS V. ADELEKE & ORS (2007) LPELR- 1510 (SC) Page 293, para F.**

On distinction between demurer and objection to jurisdiction, Counsel cited the cases of **AJAYI V. ADEBIYI & ORS (2012) LPELR-7811 (SC) P. 49-50 PARAS E-G; NATIONAL DEPOSIT INSURANCE CORPORATION V. CENTRAL BANK OF NIGERIA (2002) 7 NWLR (PT. 706) P.272.**

Therefore, Counsel submitted that order 23 Rule 1 of the Rules of this Court 2018 cited by the Claimants is not applicable in the instant case and urged the Court to so hold.

On the second issue raised and addressed by the Claimant, Counsel in his reply on point of law submitted that Section 5 of the Arbitration and conciliation Act places no obligation on the Defendant to apply for stay of proceeding as the clear and ordinary meaning of word "may" as used in

the said Section 5 (1) (Supra) is permission and not mandatory. Reliance was made to the case of **JOHN O. & ORS V. IGBO-ETITI LGA (2012) LPELR-19926 (CA) PAGE 7-11.**

Therefore, Counsel submitted that the Claimants bearing in mind the provisions of law and the Arbitration clause in the Agreement between the parties without first exploring arbitration before commencing the instant action against the Defendants shows nothing but bad faith on the side of the claimant. Consequently, Counsel urged the Court to so hold and dismiss the suit to enable the Claimants put their house in order.

On the third issue, Counsel in his reply submitted that the issue of severance of pleadings or Writ does not apply in the instant suit. That the issue of severance of Writ or pleadings has its conditions and Applications of which the instant case being a pure civil matter does not fall under same. On the doctrine of equity, Counsel cited the case of **REICHIE V. NIGERIA BANK OF COMMERCE AND INDUSTRY (2016) LPELR-40051 (SC) P. 26, PARA F.**

Finally, Counsel urged the Court to dismiss the suit in its entirety against the 1st Defendant as defective as deposed to by the Defendants in their Affidavit and the Claimants never addressed the facts in that regard in their Counter Affidavit. Reliance was placed on the case of **MABAMIJE V. OTTO (2016) LPELR-26058 (SC) P. 18, PARAS B-D.**

I have carefully perused the notice of Preliminary Objection, the reliefs sought, the grounds upon which same was based the supporting Affidavit, the annexures attached therewith and the written address. I have equally gone through the Counter Affidavit in opposition together with the Exhibits attached therewith and the written address. I have considered also the reply on points of law.

Let me begin by saying that this Preliminary Objection was predicated upon two grounds. However, I will start by the one I consider most important in resolving or considering this Preliminary Objection i.e that the 1st

Defendant a limited liability Company with registered office address in Oyo State was neither served nor leave of Court obtained before service, therefore the jurisdiction of this Honourable Court cannot be applied against the 1st Defendant.

I have gone through the depositions in the Supporting Affidavit particularly paragraph 4 u, v, & w and for ease of reference, I shall reproduce them hereunder.

Paragraph 4 (u) reads thus:-

"That the 1st Defendant is a Limited Liability Company registered under CAMA with registered address at No. 9 Fayuyi Street, Ibadangra, Ibadan Oyo State. The registered address as shown on the official website of corporate Affairs Commission Abuja is herein attached and marked as Exhibit E."

Paragraph 4 (v) reads thus:-

"That the 1st Defendant has not been served according to Rules of this Court".

Paragraph 4 (w) reads thus:-

"That the 1st Defendant having office outside the Jurisdiction of this Court ought to be served with the leave of this Honourable Court."

In addition, I have perused Exhibit E attached to the Supporting Affidavit which shows that the address of 1st Defendant is 9 Fayuyi Street, Ibadangra, Ibadan Oyo.

Consequently, from the record of the Writ there is no proof of service with the Originating Process as required by Law. In this respect I refer order 7 Rule 8 of the Rule of this Honourable Court which provides thus:-

"Subject to any statutory provision requesting service on a registered company corporation or body corporate, every Originating Process requiring personal service may be served on a registered company, Corporation or body corporate by delivering at the head office or any other place of business of the organization within the Jurisdiction of the Court."

In the instant case, the Claimant in his Counter Affidavit did not show or depose to the fact the 1st Defendant has a place of business within the jurisdiction of this Court to effect service on it.

On that note, I refer to the case of **EMERALD ENGINEERING SERVICES LTD & ANOR VS INTERCONTINENTAL BANK PLC (2010) LPELR-19782 (CA) PAGE 20-21, PARA D** where it was held thus:-

"The law is settled that failure to serve process as required goes to the root of the Court's conceptions of the proper procedure in litigation. Service of process on the Defendant so as to enable him appear to defend the ruling being sought against him is a fundamental condition precedent to the Court's acquisition of jurisdiction and competence. Where there is no service or there is a procedural irregularity in service, the subsequent proceedings are a nullity abnatio."

Similarly, it was held in the case of **F.B.N & ANOR VS OJEMUDIA (2017) LPELR- 43322 (CA) page 11-12 para E** that:-

"There is no gain saying the fact that not only meet service of process on the Defendant of all originating processes, the said service must also be properly effected. Failure to serve a process where such service of process is required renders the proceedings or any order made against the party not served with the process null and void."

See also the case of **NJOEMANA VS UGBUMA & ANOR (2014) LPELR 22494.**

In view of the foregoing, the 1st Defendant having not be properly served as required by law, it means that parties are not proper before the Court which goes to the jurisdiction of Court to hear and determine the suit. I so hold.

However, it is trite law that service of Court process is a procedural issue which can be regularized and the Court must maintain its jurisdiction of substantial justice, rather than technical justice. See the case of **MOBIL VS LASEPA (2002) 18 NWLR (PT. 786) 1 AT 32.**

To this end, having stated earlier that the service is not proper on the 1st Defendant, this Honourable Court cannot proceed to make pronouncement on the issue of arbitration clause because proper parties are not before the Court which invariable means that the jurisdiction of the Court is not activated as such.

In the circumstances therefore, and in the interest of justice the purported service on the 1st Defendant is hereby set aside and the Claimant is hereby ordered to do the needful after which the Court will assume jurisdiction when parties are proper before the Court.

Signed

HON. JUSTICE SAMIRAH UMAR BATURE.

01/04/2021.