

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT KUBWA, ABUJA

ON THURSDAY THE 16TH DAY OF JUNE, 2021

BEFORE HIS LORDSHIP: HON. JUSTICE K. N.OGBONNAYA

JUDGE

SUIT NO.: FCT/HC/CV/15/19

BETWEEN:

SUNMART PROGRESS NIGERIA LTD.

----- }
}

PLAINTIFF

AND

1. D.A. CONSTRUCTION LIMITED

2. DEPUTY SHERRIFF OF FCT HIGH COURT

----- }
}

DEFENDANTS

RULING

Upon the receipt of the Originating Summon filed by the Claimant, the 1st Defendant filed a Preliminary Objection challenging the jurisdiction of this Court to entertain this Suit. They stated that the Suit constituted in hostile and amounts to an abuse of Court Process.

That the Claimant's Cause of Action bothers on setting aside a Consent Judgment purportedly obtained by deception, misrepresentation of facts, arms-twisting and concealment of the truth and fraud which are contentious facts. Again, that the issues are contestable

issues which cannot be decided by Originating Summons. That Order 2 Rule 2 (1) (b) High Court Rules where claim is based on allegation of fraud, the proper mode of commencement is by Writ of Summons. And that the Court lacks the jurisdiction to entertain the matter by Originating Summons since it bothers on allegation of fraud.

They want an Order striking out the Writ for being incompetent and lacking in jurisdiction.

In the Written Address the Defendant/Applicant raised a sole Issue for determination which is:

“Whether the mode of commencing this Suit robs Court off the jurisdiction to entertain this Suit.”

It submitted that in the instant case, the issue is contentious and it bothers on allegation of fraud, deception, misrepresentation of facts, undue pressure, arm-twisting and concealment of fact/truth making the Precious Igwe, the new CEO of the Claimant to part with the sum of Forty Three Million Naira (₦43, 000,000.00). That the issue can only be resolved by calling of evidence and not by Originating Summons. That the allegation are hostile, contentious and are facts in dispute and cannot be resolved through Originating Summons as same must be proved beyond reasonable doubt since it bothers on allegation of crime and fraud. They relied on the following cases:

**Dawlang V. COP Enugu & Anor
(2017) LPELR – 43449 (CA) 26 – 28**

Okedinachi Nelson – Moore V. Medicine Plus Anor

**(2014) LPELR – 24089 PP 31 – 32 Paragraph E – B
(CA)**

That the disputed facts alleged by the Claimants are substantial, contentious and that the proper mode of commencing such action is by Writ of Summons so that pleadings can be filed and exchanged to determine the issue in controversy between the parties. They relied on the case of:

**PDP V. Atiku Abubakar
(2007) 3 NWLR (PT. 1022) 515 @ 540**

That the action, being contentious and hostile amounts to an abuse of Court Processes having not been initiated by due process of law as required, robs the Court of the jurisdiction and competence. They referred to the case of:

**Lawal V. Oke
(2001) 7 NWLR (PT. 711) 115 @ 116**

**Braithwaite V. Skye Bank PLC
(2013) 5 NWLR (PT. 1346) 1 @ 15**

That this Court lacks the jurisdiction to entertain the Suit since it was wrongly instituted and therefore proceeding to hear same will lead to an exercise in futility. They relied on the case of:

**Nigeria Labour Congress V. FRN
(2018) 7 NWLR (PT. 1619) 561 @ 570 Paragraph F (SC)**

They urged Court to strike out and dismiss the Originating Summons for being incompetent, invalid, void ab initio and an abuse of Court Process which robs the Court of the jurisdiction to entertain the Suit.

Upon receipt of the Preliminary Objection the Plaintiff filed a Counter Affidavit of 7 paragraphs. In the 6 pages Written Address they raised an Issue for determination which is:

“Whether or not the Preliminary Objection could be sustained.”

The Plaintiff Counsel submitted that Consent Judgment can only be set aside by a fresh action or by an appeal with the leave of Court but not by a Motion on Notice. Such can even be done by a non-party to the Consent Judgment who feels that the Order in the Consent Judgment would affect it. He referred to the case of:

Ecobank V. Olive Energy Oil Gas Limited & 1 Or (2018) LPELR – 441112 (CA)

That the proper way of setting aside a Consent Judgment is to have a substantive action which may be by Originating Summons or Writ of Summons instituted in a Court of competent original or co-ordinate jurisdiction. He relied on the case of:

Edim V. Odan Community & Ors (1980) LPELR – 1022 (SC)

That the present case commenced by Originating Summons is a proper procedure accepted by this Court. That there is no substantial dispute as to the facts in the case. That there is absolutely no dispute as to facts presented before this Court in form of evidence. Again, that there are documents before the Court from which the conflicts in the Affidavit evidence can be resolved and

as such there is no need to call evidence. They relied on the case of:

**Union Bank V. Awmar Property Limited
(2018) 2 NWLR (PT. 1626) 64 (SC)**

That Plaintiff has commenced this action to set aside the said Consent Judgment obtained by deception, misrepresentation of facts and concealment of truth and fraud.

That the contention of 1st Defendant in his Preliminary Objection is not based on sound law and is totally misconceived. That filing a Counter Affidavit does not make a matter disputable. But Court has the discretion to determine whether matter is disputable or contentious. That commencing an action wrongly by Originating Summons does not defeat such action. They relied on the case of:

**NPF V. Omotosho
(2019) 3 WRN 32 @ 47**

That even where facts of an action are contested, requiring pleading to be ordered, it is within the discretion of the Court to Order such going by **Order 2 Rule 1 and Rule 3 (1) – (3)**.

That this action was commenced by Originating Process accepted by the Court and as such they urged Court to so hold. That Court has jurisdiction to entertain the Suit. They urged Court to dismiss the Preliminary Objection and assume jurisdiction accordingly.

COURT:

Consent Judgment can be challenged where there is allegation that it was obtained by fraud or deceit.

There are laid down procedure for challenging a Consent Judgment. That is by fresh action filed by the aggrieved party or by an appeal which must be filed by the leave of the Court. Such application to challenge the Consent Judgment can be made by an application to set aside the Consent Judgment.

In this Preliminary Objection, the 1st Defendant is challenging the Suit of the Claimant on the ground of lack of jurisdiction and incompetency, in that the Suit is commenced by wrong procedure – Originating Summons and not by Writ. It is imperative to state that the parties have entered into a Consent Judgment earlier in Suit No.: FCT/HC/CV/1128/16 on the 15th of February, 2018 in respect of breach of contract by one of the parties to the contract. The Claimant in this Suit has filed an Originating Summons raising two (2) questions on whether this Court was right to have held that all issues were settled in the said Consent Judgment in respect of issue of Breach of Contract and if the Court still has jurisdiction to entertain Originating Summons and the Claimant is entitled to the Reliefs sought. They also want the Court to determine whether the said Terms of Settlement of 15th February, 2018 in Suit No.: FCT/HC/CV/1128/16, the 1st Defendant is entitled to forcible execution of the said

Consent Judgment against the Claimant when the Judgment was obtained by fraud.

The 1st Defendant in response filed a Preliminary Objection challenging the Court's jurisdiction and competency of the Court of this action in that it was started by wrong procedure.

By provision of Order 2 FCT High Court Rules, Originating Summons is one of the procedures for commencing an action. It is chiefly used where there are questions raised in which the Court is called upon to interpret such question and to give or make consequential Order as the case may warrant. Originating Summons is done or used where parties want a directive of the pleading in which case they have both agreed on the facts of the case. See the case of:

**Dawlang V. Enugu State & Anor
(2017) LPELR – 43449 @ 27**

Once a Suit or an action is properly constituted, the subject matter within what the Court can entertain territorially and subject matter wise and it comes to the Court, initiated by a due process permitted by law, it is said that such Court has the competency to try the case. Anything to the contrary, it will be held that Court has no competency to entertain the Suit. See the case of:

Lawal V. Oke Supra @ P. 115

Where the Court has no competency, any of its finding will be a nullity. So where there is a lack of

competence, the Court lacks jurisdiction also. See also the case of:

Briathwaite V. Skye Bank Supra

Failure to properly commence a Suit goes to the root of Court's jurisdiction to entertain same.

In any contract legally entered by parties, they are bound by the terms and condition set out in such contract. That is more so where such terms are spelt out in writing according to the wishes of the parties. Any failure to observe such terms and condition amount to a breach of the contract by the defaulting parties. The major exception is where the terms are void for illegality obtained by fraud or the parties decided to agree to alter the said terms.

In the contract at the centre of the debacle in this Suit, the parties agreed that:

“This is a fixed priced non-fluctuating contract.”

That means that the prices or cost of contract or the contract sum is static and cannot be altered or fluctuated. Again, they agreed that the payment shall be made by stage payments in advance against each milestone as per work schedule as set out in the Agreement particularly for Phase I. meanwhile the contract work is set out for three (3) stages – stage 1, 2 & 3. Again, they agreed that schedule for Phase 2 & 3 of the work shall be subsequently worked out and agreed by both parties. The agreed payment for first

stage is One Hundred Million Naira (₦100, 000,000.00) against the first milestone which was to be made in advance to kick-start the project. This means that the payment shall be made in advance against each of the milestone as per the attached schedule to the Phase I work and not for the 2nd & 3rd Phases. Again the stage payment is at the beginning of each stage.

It is trite that the principle of *functus officio* will not apply where the Judgment of the Court upon which the principle is predicated was obtained by fraud, mistake or misrepresentation.

In this case, in the Originating Summon, the Plaintiff is challenging the decision of the Court in the Suit No.: FCT/HC/CV/1128/16 – a Consent Judgment, in that the Judgment did not settle the issue of breach of contract and that the Court has no jurisdiction to entertain same if it is not so. Again, that as such the 2nd Defendant is not entitled to execute the said Consent Judgment against the Plaintiff since the Judgment was obtained by fraud, deception, concealment of truth, misrepresentation of facts and undue pressure on the Claimant.

It has been held in plethora of case that a Consent Judgment can be set aside by filing a fresh action by the aggrieved party or by an appeal filed by an interested and affected 3rd party. Such action to set aside a Consent Judgment can be by way of Originating Summon or Writ of Summon. See the case of:

Afegbua V. A-G Edo State & Anor

(2001) LPELR 192 – 193

Where such action is filed, shall be predicated on an allegation of the Judgment being obtained by fraud. See the case of:

Talaba V. Adeseye
(1972) 8 – 9 SC

Akambi V. Durosaro
(1998) 12 NWLR (PT. 577) 284

Such setting aside shall be by fresh action by the affected party who must establish the allegation of fraud. Again, it is up for the party who is challenging a Consent Judgment to use a procedure permitted by law which is most convenient to it and not on the party who is alleged to have committed the fraud to dictate the procedure to be followed in challenging the Consent Judgment.

In this case, the Claimant has commenced the challenge of the Consent Judgment of the Court entered into by the parties in the contract/Suit by Justice O.O. Goodluck on the 12th February, 2018. The Defendant had challenged the procedure stating that the Plaintiff ought to have come by way of Writ of Summon rather than Originating Summon. Going by the nature of the question posed and the Reliefs sought as well as the decision of the Supreme Court, it is clear that the Claimant coming by way of Originating Summon to challenge the said Consent Judgment is very proper. They were party to the Suit No.: FCT/HC/CV/1128/16 upon which the challenged

Consent Judgment is predicated. They need not come by way of a Writ as the 1st Defendant is claiming. The Plaintiff is right to have come by way of Originating Summon given the nature of the question raised and the reliefs sought. It is for the Defendant to appeal if they so wish. It is important to state that the Plaintiff has through the application raised issue of fraud in obtaining the said Consent Judgment. It is then left for the Court to determine in the Originating Summon at the right time whether or not there merit in the Plaintiff commencing this application by filing the Originating Summon and whether they have proved allegation of fraud.

As it stands, the question before this Court is whether the action in the Suit HC/BW/15/19 was properly commenced by the Plaintiff? The Court therefore has the requisite jurisdiction to entertain same. Again, giving the fact that the action is properly commenced since the Plaintiff is a party to the Suit upon which the Consent Judgment was predicated, they have right to commence this action by filing the Originating Summon. Again, the subject matter is within the territorial jurisdiction of this Court. The Court also has the subject matter jurisdiction to entertain same. Besides, Originating Summon is one of recognized ways to entertain a Suit before this Court. This Court also has a right to entertain same based on the financial (jurisdiction) grounds. In the final analysis, this Court has the requisite jurisdiction and competence to entertain this Suit. So this Court holds that the Defendant's submission in the Preliminary Objection as

to jurisdiction and competence of the Court to determine and entertain this Suit is misleading, misconceived, unmeritorious and is therefore dismissed on that ground.

This Originating Summon/the Suit of the Plaintiff is not an abuse of Court Process. To start with, the Plaintiff, has like the 1st Defendant, did not deny there was a Consent Judgment. The same Plaintiff was party of to the said Consent Judgment. The issue before this Court is that the said Consent Judgment was obtained fraudulently because the Defendant the Defendant did not disclose to the Judge the truth of the issues as regards the contract and its breach. The Plaintiff is asking Court to interpret whether the Judge was right to hold that there were settlement of issues in respect of the breach of contract by one of the parties. That if that is not so, that the Judge then does have a right and power to entertain the case. There is also question that the Defendants has no right to forcibly execute the said Consent Judgment which they claimed was obtained by fraud and deception as well as concealment of the truth among other thing. Those two (2) questions are what the Court has the jurisdiction to entertain. Asking Court to answer such question is not an abuse of Court Process as the Defendant is claiming in this Preliminary Objection.

Establishing the allegation of fraud in the cause of determining these questions need not be by way of filing a Writ of Summon which will warrant call of evidence and full hearing, such issue can be

determined by this Court through Originating Summon and not by filing Writ of Summon as the Defendant is postulating in this Preliminary Objection. So this Court holds. The Plaintiff need not file a Writ of Summon because Originating Summon suffices. After all, as a party, the Plaintiff has a right to file a new action as it did in challenging the Consent Judgment. That new action can be by Originating Summon or Writ. The Plaintiff choose to come by way of Originating Summon. They are right to have done so. It is their choice. There is no provision of the law that insists such new action must be by way of Writ of Summon. There was no re-litigation of issue challenging the Consent Judgment.

Allowing the Plaintiff to file the action by Originating Summon is not hostile. It is not an abuse of Court Process and will not in any way affect or stop the Defendant from putting up a strong Counter Affidavit to challenge the said Originating Summon.

The issue in the case in which the Judgment was obtained is not on allegation of fraud. Going by the Reliefs of the Plaintiff sought in the Suit upon which the Consent Judgment was obtained by fraud, concealment and misrepresentation of facts. There is no Judgment where issue of fraud was raised before the present Suit. Where, as in this case, there are documents before the Court from which the conflict between the parties in the Affidavit can be resolved, there is no point calling oral evidence or going by way of Writ of Summon to resolve the issues. The Court can

only resort to Writ where the conflict is significant and material.

In this case, all the conflict raised by can be resolved going by the documents attached by the parties for and against. This Court has the right to resolve them as the issue of conflict is narrow and can be determined without call of evidence. See the case of:

**Union Bank V. Awmar Property Limited
(2018) 2 NWLR (PT. 1626) 64 (SC)**

**Peter V. Jackson
(2002) FWLR (PT. 113) 376**

**Ezechukwu V. Onwuka
(2016) 5 NWLR (PT. 1506)**

**Oke V. Mimiko (No.2)
(2014) 1 NWLR (PT. 1388) 92 – 93 Paragraphs G – D**

In this case, the facts were known and confirmed by the parties in their respective Affidavit and Counter Affidavit as the case may be. Again, commencing an action wrongly as the 1st Defendant is purportedly submitting cannot make a Court to dismiss the action. Such wrong commencement cannot defeat this action. See the case of:

**NPF V. Omotosho
(2019) 3 WRN 32 @ 47 per Ogakwu JOA Page 76
Line 30 – 35**

This Court has the discretion to Order such stipulated application of Order 2 FCT High Court Rules 2018.

This Court has right to make Orders in the interest and quick dispensation of justice.

In the final analysis, this Court has both territorial, financial and subject matter jurisdiction to entertain this Suit. The Suit was well commenced by Originating Summons as there are no conflicting issues in dispute to warrant call of Witness or oral testimony. Again, the Plaintiff filing the fresh action to challenge the Consent Judgment is the right procedure to follow as the facts and issues are not conflicting or strange to the parties. There is also competency in filing this Suit.

Therefore the Preliminary Objection challenging the Suit cannot stand because it is unmeritorious and is therefore dismissed.

This is the Ruling of this Court.

Delivered today the ____ day of _____ 2021 by me.

**K.N. OGBONNAYA
HON. JUDGE**