

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY,
IN THE ABUJA JUDICIAL DIVISION,
HOLDEN AT COURT NO. 11 BWARI, ABUJA.**

BEFORE HIS LORDSHIP: HON. JUSTICE O. A. MUSA.

SUIT NO: FCT/HC/CV/314/2020

BETWEEN:

AVASTONE GLOBAL SERVICES LIMITED --- CLAIMANT

AND

SALMARS PROPERTIES LIMITED --- DEFENDANT

RULING

DELIVERED ON THE 6th JULY 2021

By a Notice of Preliminary Objection dated **the 9th day of December, 2020** and filed on the same day, the Applicant is praying this Honourable to dismiss or strike out this suit on the grounds which it indicated as follows:

1. This suit is an abuse of court process as the claimant had earlier filed a similar suit in District Court comprised in a **Plaint No. CV/73/2020** filed on 10/8/2020 between Avastone Global Services Ltd. Vs. Salmars Properties Ltd. which said suit was dismissed on the 30th day of October, 2020.
2. The agreement between the parties provides for an arbitration clause wherein parties shall first explore arbitration in resolution of dispute prior to any litigation and the Claimant has not initiated any arbitration prior to instituting this suit.

3. The court lacks Jurisdiction to entertain this suit as the court is (sic) an abuse of court process.

In support of this Notice of Preliminary Objection is an affidavit of four (4) paragraphs deposed to by one Lucy Eze said to a litigation secretary in the law firm of **Benson Ibezim & Co** standing for the Applicant. Paragraph three (3) of that supporting affidavit is of particular prominence and germane to the disposal of the application as a result of which I am compelled to reproduce it verbatim as follows:

3. That I was informed by Mr. Donatus Egwimchukwuezi, a director of **SALMARS PROPERTIES LIMITED** on the 8th day of December, 2020 in our office at Suite 1, 3rd floor, Standard Plaza, No. 2 Kusti Close, Off Amino Kano Crescent, Wuse II, Abuja, at 2 pm during office review of this case of the following facts which I verily believe to be true, as follows;
 - i. That sometime in 2019, the Claimant and the Defendant executed a Real Estate Joint Venture Agreement wherein it was agreed that the claimant would develop the Defendant/ Objector's piece of land measuring 1.13 HA Situate and known as Plot 843, Cadastral Zone B03, Wuye District, Abuja. Photocopy of the said agreement is hereby attached and marked as **EXHIBIT SAL A**.
 - ii. The agreement expressly provided that the Claimant shall achieve 100% completion of the project in a period of Sixteen (16) months from the date of the agreement.
 - iii. That the Claimant at the end of sixteen months agreed for the completion of the project failed to achieve even 25% completion of the project.

- iv.** That by reason of the failure of the Claimant to achieve completion of the project as agreed by the parties in the Real Estate Joint Venture Agreement, the Defendant/ Objector took back its property pursuant to clause 10 of the Real Estate Joint Venture Agreement between the parties.
- v.** Prior to the taking over of the property, the Defendant/ Objector served on the Claimant a letter of Notification of Retaking over of Plot 843, Wuye District, Abuja on the 23rd of July, 2020.
- vi.** The Claimant being dissatisfied with the manner the Defendant/Objector took over the property in accordance with the terms of the agreement, on the 6th day of August, 2020 obtained an ex-parte order against the Defendant seeking to stop it from taking over of the site, and on 10th August, 2020 filed a plaint in the same District Court, Wuse Zone 6, Abuja comprised in **Plaint No. CV/73/2020**, wherein it claimed amongst others, **'a declaration that the defendant's failure/neglect and refusal to comply with clauses 22, 23, 24, and 31, of the agreement entered by both parties was a total breach'**. Photocopy of the said plaint is hereby attached and marked as **Exhibit SAL 'B'**.
- vii.** That clause 22, 23, and 24 of the Real Estate Joint Venture Agreement provides that parties shall resort to arbitration in the event that there is any dispute or controversy arising from the operation, construction, interpretation, or application of the Real Estate Joint Venture Agreement.

- viii.** The claimant alleged in the same suit that the Defendant/ Objector breached the terms of the Real Estate Joint Venture Agreement when it (the Defendant) took over its property in accordance with clause 10 of the Real Estate Joint Venture Agreement.
- ix.** That the Defendant herein filed two separate motions challenging the ex-parte order (the act of taking over having been completed prior to issuance of same) and the competency of the suit as same was filed without recourse to arbitration as provided in the agreement between the parties. Certified true copies of the said motions are herein attached and marked as **EXHIBIT SAL 'C' AND 'D'** respectively.
- x.** That the claimant herein never responded to any of the motions. Hearing notices were served on the Claimant and the Claimant and its counsel never showed up again in court after obtaining the ex-parte order and while the applications were yet pending at the District Court, the Claimant herein filed this suit without discontinuing the suit it had instituted at the District Court.
- xi.** That instead of commencing arbitration proceedings against the Defendant in accordance with clauses 22, 23, and 24, (arbitration clauses) of the Real Estate Joint Venture Agreement, the Claimant instituted the said suit which was dismissed. The certified true copy of the ruling dismissing the said suit is hereby attached and marked as **EXHIBIT SAL 'E'**.
- xii.** This suit is on the same subject matter with the dismissed suit and has the same parties.

In opposition, the Claimant/Respondent filed a counter-affidavit of eight (8) paragraphs which was deposed to by one NWA-UWA JOSEPH said to be a Solicitor in the employ of Ikechukwu Ezechukwu SAN & Co representing the Claimant. Of significant relevance in the determination of the instant application are the content of paragraphs 4, 5, 6 and 7 of the said counter-affidavit which are hereby reproduced:

4. That having gone through the contents of the affidavit in support of the preliminary objection filed by the Defendant/ Objector, I wish to state as follows:

- a. That the Claimant denies all the depositions in paragraphs 3 (i) to (ix) of the Affidavit in support of the Notice of Preliminary Objection and states instead that the parties entered into a Real Estate Joint Venture Agreement in respect of the land measuring 1.13 hectares known as Plot 843, Cadastral Zone B03, Wuye District, Abuja.
- b. That truly there was an arbitration clause in the agreement that provided that parties shall resort to arbitration in the event that there is any dispute or controversy arising from the operation, construction, or interpretation therein.
- c. That under clause 31 of the Real Estate Joint Venture Agreement provided thus;

“where the developer stops construction work or neglects the property, the land owner has the right to terminate the contract within thirty (30) days but shall give (30) days’ notice of his intention to terminate this agreement to the other party and termination shall be effective at the

execution of the terms of termination as may be mutually agreed by the parties". The said agreement mentioned herein is attached and marked as EXHIBIT 'JA'.

- d. That Pursuant to the above, the Defendant/Objector wrote a letter dated 22/07/2020 titled: **"Notification of Re-taking over of Plot 843, Wuye District, Abuja by Salmars Properties Limited from Avastone Global Services Limited"** and wrote another the following day dated 23/07/2020 titled: **"Notification of Re-taking over of site (Plot 843, Wuye District, Abuja) Pursuant to agreement of parties"**. The said letters are hereby attached and marked as **EXHIBITS JB and JC.**
- e. That one (1) day after the notification letter was written and delivered to the Claimant, the Defendant came to the property with some mobile policemen, took over the property and displaced all the workers of the Claimant on the property in total disregard of Clause 31 of the Agreement and the arbitration clause they relying on now.
- f. That as stated in Paragraph 3 (vi) of the affidavit in support of the Preliminary objection, the Claimant was dissatisfied with the manner the Defendant/ Objector took over the property, so it obtained an ex-parte order against the Defendant just to preserve the *res*.
- g. That we know that the District Court does not have Jurisdiction on the merit of the matter but only on the act of injustice perpetrated by the Defendant.

- h. That the Defendant/ Objector created a situation of helplessness that made it impossible for the Claimant to first resort to arbitration and that in order not to be a breach of peace we had to approach this Honorable Court.
 - i. That the arbitrary actions of the Defendant/ Objector in taking over the property without first abiding by the provisions of the agreement before taking over can only be resolved by the courts.
5. That I know for a fact that the court has the power to make an order stating proceedings in the matter pending the arbitration supposing the Defendant is interested in abiding by the provisions of the agreement entered into by the parties.
6. That the Claimant state that this instant suit does not in any way amount to an abuse of court process as the said suit in suit No. CV/73/2020, between AVASTONE GLOBAL SERVICES LTD and SALMARS PROPERTIES LTD which has been struck out and no longer subsists.
7. That it will enhance the course of Justice for this Honorable Court to dismiss this application of the Defendant as same in frivolous, vexatious, and overreaching to the Claimant.

Yet in reaction to the Claimant/Respondent's counter-affidavit, the Defendant/Objector filed a further affidavit of four (4) paragraphs deposed to by the same **Lucy Ezeas** in the supporting affidavit. I shall refer to its paragraph three which is tangential to the resolution of the contested issues as follows:

3. That I was informed on 8th March, 2021 in our office at Suite 1, 3rd floor, Standard Plaza, No. 2 Kusti Close, Off Amino Kano Crescent,

Wuse II, Abuja, by Mr. Donatus Egwimchukwuezi, the Managing Director of the Defendant during office review of this case at 2 pm of the following facts which I verily believe to be true, as follows;

- a. That He is the Managing Director of the Defendant/ Objector and the one that had negotiation with the Claimant /Respondent regarding Plot 843 Wuye District, Abuja that culminated in the execution of the first and 2nd Real Estate Joint Ventures Agreement between the parties.
- b. That he has seen and read the counter Affidavit filed by the Claimant in response to the notice of Preliminary Objection.
- c. That Clause 31 of the Real Estate Joint Venture Agreement relates to abandonment of the project or stopping of work during the period of 16 months duration of the project.
- d. That Clause 31 of the Real Estate Joint Ventures Agreement has nothing to do with giving of any notice when the period for the execution of the project has elapsed as in the instant case were the 16 months agreed duration for 100% completion of the project had completely elapsed.
- e. That the site was taken over not by reason of stopping construction or neglect of the property but by reason of effluxion of 16 months agreed upon by the parties for the completion of the project as contained in Clause 10 of the agreement duly executed by the parties.
- f. That the one day notice given to the Claimant for taking over was not even provided in Clause 10 of the agreement between the parties as the Claimant was bound to hand over the site on its own

- on the expiration of the sixteen months that was agreed for 100% completion of the project where it failed to achieve the completion.
- g. That Clause 31 of the agreement has nothing to do with the failure to complete within the agreed time of 16 months as provided in the agreement and that Clause 31 is only applicable within the 16 months period as agreed and not after the expiration.
 - h. That in response to paragraph 4(f) of the counter affidavit, the Ex-parte Order was set aside and the court also held that there is arbitration clause and that the Claimant has not taken that option and consequently dismissed the suit of the Claimant, The certified true copy of the ruling of the FCT District Court is hereby attached and marked as Exhibit SAL 1.
 - i. That in response to Paragraph 4(g) of the counter affidavit, the Objector upon service of the ex-parte order challenged the Jurisdiction of the Court on the ground of arbitration clause in the agreement and the Claimant never withdrew its suit and allowed the suit to be determined on the merit of the applications that were filed challenging the competency of the suit and the propriety of the order.
 - j. That clause 4(g) of the counter affidavit is self-contradictory and that the court had Jurisdiction as the Claimant submitted to the Jurisdiction of the Court and never challenged the Jurisdiction again and never withdrew its case from the Court to the point of decision of the court, which has not been challenged nor set aside.

- k. That in response to paragraph 4(h), there is no situation created by the Objector that stopped the Claimant from resorting to arbitration as stipulated in the agreement.
- l. That in response to paragraph 4(i), the taking over of the site as contained in the agreement of the parties is not an arbitrary action and that taking over of the site is not reason why arbitration will not be resorted to.
- m. That the Defendant/ Objector, has always abided by the terms of the agreement as against the Claimant that has never abided by the terms of the agreement.
- n. That this suit is an abuse of court process having been decided that there is arbitration clause for which no action can exist in court without resort to arbitration and that suit No. CV/73/2020 between Avastone Global Services Ltd. vs. Salmars Properties Ltd. Was decided based on the strength of the motion on notice challenging Jurisdiction and the said decision has not been set aside or appealed against.
- o. That the filling of this suit after the dismissing of the case of Avastone Global Services vs. Salmars Properties Ltd. Again with full knowledge of arbitration clause is gross abuse of court process.

The above factual x-ray bears out succinctly the factual props of each individual case and offers a helpful insight into the background culminating in this Notice of Preliminary Objection as filed by the Defendant/Objector. One thing stands out from the agitations of the parties in combat which is that there exists an arbitration clause in their **Real Estate Joint Venture Agreement** which they both mutually executed and which has been

identified by the Defendant/Objector as **EXHIBIT SAL A** while the Claimant/Respondent identified it as **EXHIBIT JA**. There is no contention that up until the time of the presentation of the instant suit by the Claimant, no arbitral proceedings has taken place to resolve whatever issues that has pitted the combatants against each other. I have adverted very carefully to all the arguments urged upon this Court as encapsulated in the various written addresses of the parties to this forensic contest. Against the backdrop of the facts relied on as earlier reproduced, I have accorded an intimate study of the agitations of the parties inclusive of all the legal authorities cited and relied on in propelling their individual cases. An arbitration clause is a provision inserted in a contract providing for compulsory arbitration in case of dispute as to rights and liabilities under such contract, refer to ***BCC Tropical Nigeria Ltd. V. The Government of Yobe State of Nigeria & Anor (2011) LPELR-9230(CA) (P. 13, paras. D-F)***.

There is no doubt that Arbitration in Nigeria is governed by the **Arbitration and Conciliation Act (Chapter 18, Laws of the Federation of Nigeria 2004)** (called the **ACA** henceforth), which incorporates the 1985 **UNCITRAL Model Law on International Commercial Arbitration** (called henceforth the **UNCITRAL Model Law**) all of which are binding both on the parties and this Court in the examination and determination of the sole issue isolated for this Court's resolution which, according to the Defendant/Objector, is *whether this Court has the jurisdiction to entertain this suit* (page 6 of the Defendant/Objector's written address. The **ACA** is applicable to commercial disputes. The scope of "commercial" is broad and defined at Section 57 as

“all relationships of a commercial nature” including “trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail, or road”

The prominence given to arbitration clauses is well depicted by the Supreme Court in **NNPC v. Clifco Nigeria Limited (2011) 10 NWLR (Pt. 1255) 209**, where the Supreme Court, relying on the earlier English case of **Heyman v. Darwin Ltd. [1942]**, loudly affirmed that an arbitration clause survives the novation of an agreement in this scintillating prose:

Generally, in arbitration agreements, where the arbitration clause is a part, the arbitration clause is regarded as separate. So where there is novation, purpose of contract may fail but the arbitration clause survives. See: *Heyman v. Darwin Ltd. (1942) AC 356 at 373*. The purpose of arbitration might have failed, but the arbitration clause which is not one of the purposes of the contract survives. The two courts below were correct when they found that modification of the terms of the obligation in the original contract with new terms on 27-9-99 did not extinguish the arbitration clause in the original contract.

From the above, it could be seen that arbitration is even a separate contract from the contract in which it is embedded. There is an agreement between the hostile parties, deducible from the depositions in their various

affidavits, to the effect that this solitary issue of arbitration clause came up before the Lower Court, that is the Chief District Court and a finding made thereon. The Ruling of that Court on this issue is contained in **EXHIBIT SAL E**. What was the finding of that Court on this issue? That Court, after finding that indeed there is an arbitration clause in the agreement willingly entered into by the parties, came to this view:

“There is nothing before the Court showing that this dispute has been referred to any arbitration as encapsulated in the agreement and also in paragraph (sic) 22, 23, and 24 of the exhibit A attached to this application which has not been controverted by the Respondent, who did not file any counter to that effect and therefore the deposition contained therein are deemed admitted ...the suit is hereby suit struck out and dismissed having been in contravention of clause (sic) 22, 23, and 24 (Arbitration clause) of the Real Estate Agreement executed by both parties Exhibit A.”

The above Ruling was delivered on the **30th day of October, 2020**. I consider the above findings flawless, unblemished and totally in accord with the facts presented before that Court. The Claimant in the present suit, who was equally the Plaintiff at the lower Court, initiated this suit on the **20th day of October, 2020**. Going by our Gregorian calendar, it means that the present suit was brought during the pendency of the suit at the lower court. The fact that the Claimant perceived the lower court as not possessing the requisite jurisdiction to entertain the subject matter before it (as was brought by the Claimant itself) does not make it less of an abuse of Court Processes by commencing the instant proceedings while that before

the lower court was yet to abate. This seals, effectively, the lips of the Claimant in paragraph 6 of its counter-affidavit where it erroneously asserted:

That the Claimant state that this instant suit does not in any way amount to an abuse of court process as the said suit in suit No. CV/73/2020, between AVASTONE GLOBAL SERVICES LTD and SALMARS PROPERTIES LTD which has been struck out and no longer subsists.

In this Court, the same disabling issue of non-adherence to the arbitration clause prior to resorting to litigation stubbornly persists and continues to gnaw at the Claimant/Respondent. That fact remains an inhibiting factor to the successful invocation of this Court's jurisdiction in that the suit was commenced in violation or circumvention of **a condition precedent to the exercise of jurisdiction.**

This is the law as ordained by the ancient and venerable authority of **GABRIEL MADUKOLU V JOHNSON NKEMDILIM 1962 2 SCNLR 341** which I am bound to follow. I must reject the contention of the Defendant/Objector to the effect that this suit is *res judicata* by virtue of the proceedings that went on before His Worship Ahmed B. Ndajiwo who presided at the Chief District Court. This is because, the subject matter of the Claimant's claims before this Court as per its Writ of Summons were not treated on the merit before the Lower Court. At most, we can be talking about issues of estoppel as per the issues of non-compliance with the arbitration clause. *Res judicata* and issue estoppel must be well distinguished as they are distinct from each other. This distinction was

brought to light by the Supreme Court in the cases of **Mogo Chinwendu V. Nwanegbo Mbamali (1980) 3 SC 31** and **Ezewani v. Onwordi (1986) 4 NWLR (Pt.33) 27 SC**.

It is embedded in **Clause 23** of the **Real Estate Joint Venture Agreement** freely entered into by the parties that "*The arbitration shall be conducted in accordance with Arbitration and Conciliation Act CAP A-8 LFN 2004 (or any subsequent law in force at that time)*"

In the circumstances that have now crystalised before me, I am firmly convinced that the provision of **Section 5 of ACA** has become relevant and for complete understanding of the path which this Ruling is toeing, I shall Endeavour to reproduce them thusly:

5. (1) If any party to an arbitration agreement commences any, any party action in any court with respect to any matter which is the subject of an arbitration agreement to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to state the proceedings.

(2) A court to which an application is made under subsection (1) of this section may, if it is satisfied-

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

(b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

It could be seen that Section 5 provides for three conditions which must be satisfied by an Applicant, before the court may exercise its discretion to make an Order for stay of proceedings pending arbitration. The said trinity conditions are that, firstly, the Applicant must have taken no step in the proceedings, secondly, there must be no sufficient reason why the matter should not be referred to arbitration and thirdly, *the Applicant must at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.*

Pertaining to the third arm, the attitude of the Nigerian Courts has been that a mere deposition in an affidavit by an Applicant is insufficient for the purposes of satisfying the third condition of section 5 of the ACA. In the case of **MV PANORMOS BAY V OLAM (2004) 5 NWLR (Part 865) 1** the Court of Appeal held that:

"By virtue of Section 5 of Arbitration and Conciliation Act, a party applying for stay of proceedings in an action pending reference to arbitration in order to succeed must show in his affidavit evidence in support of the application by means of documentary evidence, the steps he took or intends to take for the proper conduct of the arbitration. It is not enough for him to merely depose that he is ready and willing to do all things necessary for causing the said matter to be decided by arbitration."

Yet again, in the case of **UNITED BANK FOR AFRICA PLC V TRIDENT CONSULTING LIMITED (2013) 4 CLRN 119** the Court of Appeal decided that:

"Before a stay may be granted pending arbitration, the party applying for a stay must demonstrate unequivocally by documentary and/or other visible means that he is willing to arbitrate. He does it satisfactorily by notifying the other party in writing of his intention of referring the matter to arbitration and by proposing in writing an arbitrator or arbitrators for the arbitration"

It is now ripe at this stage to ask the question: what are the practical steps which the Defendant/Objector has taken to ensure the arbitration takes place as envisaged under the **Real Estate Joint Venture Agreement**, I or one may ask? Even though the Applicant did not expressly ask for "stay of proceedings" but sought for the Order of striking out or dismissal, I make bold to say that given the background of this suit and the governing law which the contracting parties opted for themselves, the relief permissible by the governing law is that of staying proceedings. For so long as the reason or basis of the Defendant/Objector's plea is arbitration clause, what he seeks is stay of proceedings and he has some duties to fulfill under the circumstances. At paragraph 4 (g) of the Claimant's affidavit, the following deposition is found

- a. That we know that the District Court does not have Jurisdiction on the merit of the matter but only on the act of injustice perpetrated by the Defendant.

After ruminating over the above reproduced paragraph and taking into consideration that the Defendant/Objector has not demonstrated practical steps to initiate and follow through the arbitration proceedings which all along in this proceedings he has been clinging unto, I am left with the

impression that certain conducts of both parties in the entire saga are rather unfortunate and leave much to be desired.

Flowing from the outcome of my intimate study of the foregoing provision of the ACA, I am minded to refuse the Order of either striking out this suit or dismissing same. I am rather persuaded that the justice of the case dictates that I should order as follows:

- a. The relief for striking out this suit or dismissing same is hereby refused by me.
- b. The Claimant herein must set in motion Clauses 22, 23 and 24 of the **Real Estate Joint Venture Agreement** not later than seven (7) working days from the date of the delivery of this Ruling;
- c. The Defendant/Objector must respond promptly to any of the steps laid down in Clauses 22, 23 and 24 of the **Real Estate Joint Venture Agreement** which the Claimant/Respondent is to trigger.
- d. The present proceedings as brought by the Claimant is hereby stayed **PENDING** the conclusion of Arbitration or where Clause 24 of **Real Estate Joint Venture Agreement** becomes the case.

This shall be my Ruling which earlier reserved on 6th day of July, 2021.

APPEARANCE

Ejike Oganyi Esq. with	}	For the Claimant/Respondent.
Daniel Eze Esq.		

J. I Ozuruonye Esq. for the Defendant/Applicant.

Sign
Hon. Judge
06/07/2021