IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISON
HOLDEN AT HIGH COURT MAITAMA – ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE SAMIRAH UMAR BATURE

COURT CLERKS:	**JAMILA OMEKE & ORS**
COURT NUMBER:	**HIGH COURT NO. 25**
CASE NUMBER:	**SUIT NO. FCT/HC/CV/3449/20**
DATE:	**12/7/2021**

BETWEEN:

M/S GREENSOLS ENERGY REVOLUTION LTD.....CLAIMANT

AND

(1). ENERGY COMMISION OF NIGERIA
(2). THE DIRECTOR GENERAL/CEO OF ENERGY COMMISSION OF NIGERIA
....DEFENDANTS

APPEARANCES:
M.K Fidelis Esq for the Claimant.

RULING

By a Notice of Preliminary Objection dated 10th February 2021 and filed same day; brought pursuant to Order 7(1)(a) of the Limitation Act, Section 5(1) of the Arbitration and Conciliation Act Cap 17, LFN, 2004 and Order 43 Rule 1(1) and (2) of the High court of the Federal Capital Territory (Civil Procedure) Rules, 2018 and under the inherent jurisdiction of this Honourable Court, the Applicants herein prayed the Court for the following reliefs:

"(a). An Order of this Honourable Court dismissing Suit No. CV/3449/2020 for being statute barred.

(b). Assuming but not conceding that the case is not statute barred, we pray in the alternative for the Order Court to stay proceeding in this suit pending reference of dispute between parties to an Arbitration Panel by the Honourable Court.

(c). An for such further Order or Orders of this Honourable may deem fit to make in the circumstances of this case."

The grounds predicating the application are as follows:

"(i). The Claimant's cause of action arose in 2014 while the Claimant commenced this action on 16th December 2020 over 6 years after the cause of action accrued.

(ii). That the Claimant's cause of action is wholesomely based on simple Contracts.

(iii). That the Statute of Limitation is averse to action(s) brought under simple contract which was commenced outside the statutory allowed period of six (6) years from the date the cause of action arose.

(iv). That Article 20 of the Contract Agreement executed between the Claimant and the Defendant contains arbitration clause hence robs the Honourable Court the requisite jurisdiction to adjudicate on the matter except to refer same to Arbitration Panel."

In support of the Notice of Preliminary Objection is an Affidavit of 6 paragraphs deposed to by Raji Emmanuel Temitope, a Litigation Clerk in the Law Firm of Omega Reigns Chambers, Counsel the Defendants/ Applicants; Exhibits as well as a Written Address dated 10th February 2021.

Meanwhile, in response to the Notice of Preliminary Objection, the Claimant/Respondent filed a Reply on points of law dated and filed 1st March 2021.

In further response to same, the Defendants/Applicant filed a Response on points of law dated and filed on 26th March 2021.

In the Written Address of the Defendants/Applicants a sole issue for determination was formulated by E. R. Kogbodi Esq to wit:-

> ***"Whether the action of the Claimant/Respondent as constituted on the Writ of Summons and Statement of Claim is statute barred and should be dismissed by the Order of this Honourable Court."***

In arguing the issue, learned Counsel submitted that the Claimant/ Respondent in this case instituted this action against the Defendant on the 16th, December 2020, while the cause of action arose sometime in 2014, well after six (6) years prescribed by the Limitation Act.

Submitted, that it is trite principle of law that Limitation Law takes away the right of the Claimant/Respondent to sue after the period stipulated in the Limitation Law and this has been given a judicial stamp of approval. Reliance was placed on the cases of ***SOLOMON V MONDAY (2015) ALL FWLR Pt. 76, Pg. 1655 (P.1717) Para E; C.B.N V OKOJIE (2015) ALL FWLR (Pt. 807), P. 311, Ratio 17, Paras A – B; FMC CORPORATION & ANOR V SCOA PETROLEUM SERVICES LTD & ORS (2016) ALL FWLR (Pt. 828) P. 875, Ratio 4, Paras C – H.***

Finally, Counsel urged the Court to grant the application and dismiss Suit No. CV/3449/2020 for being statute barred.

Meanwhile, in the Claimants Reply on points of law learned Counsel A. C.M. Adebowale Esq submitted that it is beyond argument that the crux of the Claimant's case is that the balance sum of **N5, 616, 000 (Five Million Six Hundred Thousand Naira)** only which represents 50% of the contract sum due and payable to them by the Defendants has remained unpaid since 2014 when the first tranche of 50% of the contract sum was paid despite repeated demands. That in the instant case, the cause of action therefore arose when the demand for the payment of the outstanding 50% of the contract sum was made in writing.

Reliance was placed on the case of ***AKAT (NIG) LTD & ANOR V UNITY BANK (2016) LPELR-431098 (CA).***

Submitted further that although there had been series of oral and written demands from the Claimant to the Defendant for the payment of the claimed sum and most important of all is the demand for payment of the outstanding contract sum made by Counsel to the Claimant dated 2nd but received on the 3rd of November, 2020 by the Defendants. Counsel referred to the said demand letter attached to the suit as Exhibit C, and urged the Court to discountenance the argument of the Defendant that the case is statute barred.

On referring the case to Arbitration Panel, it is submitted that it is noteworthy that this contract was executed over a decade ago. That the first payment of 50% of the contract sum was made in 2014, four years after the completion of the contract leaving a balance of 50% unpaid till date.

Submitted moreso, that the Defendant did not aver anywhere in their Affidavit that the remaining 50% of the contract sum has remained unpaid due to any dispute between the parties, in which case it would have been imperative to resort to arbitration. That, the Claimant upon conclusion of the **Contract** in 2010 was issued with a certificate of completion which brought the Contract to a conclusion. That the instant case is a post Contract proceeding aimed only at recovering debt and not for the interpretation of the Contract between the parties which should have warranted reference to Arbitration.

Learned Counsel submitted moreso, that it is not every dispute arising from or connected with a Contract with an Arbitration Clause that must be referred to arbitration, that such must be an issue contemplated by the Arbitration Clause.

Reliance was placed on the case of ***ROYAL EXCHANGE ASSURANCE V BENTWORTH FINANCE (NIG) LTD (1976) LPELR – 2961 SC.***

That Arbitration Panels are constituted to resolve issues of breach of contract where there is any and not to recover debt as in the instant case.

In conclusion, learned Counsel made reference to the case of ***KHALID V ISMAIL & ANOR (2013) LPELR-22325 (CA)*** in arguing that the instant Preliminary Objection is an attempt to further subject the Claimant to untold hardship.

Learned Counsel finally urged the Court to dismiss the Preliminary Objection and enter Judgment in their favour.

In the Reply on points of law of the Defendants/Applicants, it is submitted that the Claimant/Respondent did not file a single Counter Affidavit to challenge the facts relied upon by the Defendants/Applicants on the issue of the suit being statute barred.

Counsel submitted further that an admission made expressly or impliedly is admissible against an adverse party in proof of the truth of the facts asserted in the Statement. Reliance was placed on the case of ***MONIER CONSTRUCTION COMPANY LIMITED V AZUBUIKE (1990) 5 SCNJ, 75*** and ***SEISMOGRAH SERVICES (NIG) LIMITED V EGUFE (1976) 9 and 20 SC, 135 at 146.***

That failure of the Claimant/Respondent to file a Counter Affidavit to this Preliminary Objection is an admission which needs no further proof in line with Section 75 of the Evidence Act, 2011. Reliance was also placed on the case of ***KAYILI V YILBUK (2015) ALL FWLR (Pt. 775) 347, Ratio 5 (PP: 378) Para G.***

Submitted further that where the issue of statute of Limitation is raised, it is the statement of Claim or Affidavit of the Claimant that will guide the Court; and that the Claimant/Respondent did not deny that it was last paid in 2014 which is after 6 years, thus caught up by the Limitation Act. Reliance was placed on the case of ***C.B.N V OKOJIE (2015) ALL FWLR (Pt. 807) Pg. 511, Ratio 17 (Paras A - B) (SC).***

However, learned Counsel submitted, that assuming without conceding that this case as presently constituted is not statute barred, in the alternative Counsel prayed that the case be referred to Arbitration Panel for adjudication. Reliance was made to the Arbitration Clause in the parties' Contract i.e Exhibit 3 in support of the Preliminary Objection.

Submits further that the Claimant/Respondent deliberately did not refer to the Contract Agreement or Exhibit Contract of Agreement between the parties which runs foul of Section 176(d) of the Evidence Act, 2011.

Reliance was also placed on the case of ***N.S.C (NIG) V INNIS – PALMER (1992) NWLR (Pt. 218) 422 (CA).***

Reference was also made to Article 20 of Exhibit 3, and Section 5(1) of the Arbitration and Conciliation Act Cap 19, LFN, 2004, as well as the cases of ***ONWARD ENTERPRISES LIMITED V MR. "MATRIX" AND 2 ORS (2010) ALL FWLR (Part 543) at Ratio 3, per MISHELIA, J.C.A at PP. 1835-1837,*** and the Court of Appeal decision in the case of ***CONFIDENCE INSURANCE LTD V TRUSTEE OF O. S.C.E (1992) 2 NWLR (Pt. 591), P. 373 @ 386, paras E- G, per Achike J.C.A.***

Likewise, learned Counsel also cited the case of ***ONWARD ENTERPRISES LIMITED V MR. "MATRIX' AND 2 ORS (supra) ratio 6, para B – D at P. 1841.***

Learned Counsel also submitted that the cases cited by Counsel to the Claimant/Respondent are Undefended List matters/or cases as applicable general principle. But, that the existence of Arbitration Clause in the Contract Agreement of the parties, these cases and principles are not relevant, and the Court in this circumstance, should stay further action assuming without conceding that it is not statute barred.

That submissions for the Claimant as canvassed are sentiments which has no place in our judicial administration, but the question of facts and laws.

Counsel cited the case of ***IMEGWU V OKOLOCHA (2013) 9 NWLR (Pt. 1359) 347 (sc) Ratio 9 (PP. 373, Paras D-E).***

In conclusion, learned counsel submitted that the case of the Claimant/Respondent is dead and has no longer life in it and urged the Court to dismiss same or in the alternative should the Court hold that it is not statute barred, to refer parties to Arbitration and stay further proceedings.

Now, I have carefully considered this Preliminary Objection, the reliefs sought, the grounds predicating same, the supporting affidavit, the Exhibits annexed and the Written Address.

Likewise, I've equally considered the Reply on points of law of the Claimant/Respondent as well as the Defendants/Applicants Response to same.

In my view, the issues for determination are as follows: -

> ***"(1). Whether this suit is statute barred?***
>
> ***(2). If the suit is not statute bared, whether the Court should stay proceedings and refer parties to arbitration in view of the Arbitration Clause in their Agreement?"***

It is settled law, that by virtue of Section 7(1)(a) of the Limitation Act. Cap.552 LFN, actions bordering on simple Contract become statute barred after 6 years.

Now, it is instructive to note that it is trite law that in order to discover whether a cause of action is statute barred, the Court limits itself to the Claimant's pleadings and has no need to examine the pleadings of the Defendant (if any).

In support of this, I refer to the case of ***YAKUBU V NITEL LTD (2006) 9 NWLR (Pt. 890) P. 392, Paras H – B,*** where Sanusi J.C.A. held as follows:-

> ***"...What determines whether a cause of action is statute barred or not is the claim in the Writ of Summons or Statement of Claim alleging when the wrong giving rise to the cause of action was committed and, of course the date when the suit was filed..."***

Similarly, the Court held in the case of ***MUOMAH V SPRING BANK PLC (2006) 3 NWLR (Pt. 890) at Page 575-576, paras, H – D, per Mukhtar, JCA*** as follows:-

> ***"The period of limitation in respect of any case runs from the date the cause of action accrued or from the moment the cause of action arose. To determine the date of the cause of action, one must look at the Writ of Summons, the averment in the Statement of Claim and the evidence adduced in Court in order to find out when the wrong which gave the Plaintiff right to the cause of action arose. In other words, in determining whether a suit is statute barred or not, the Court is expected to examine the Writ of Summons and the Statement of Claim vis-a-vis the***

date of filing the suit. It is from the precise date upon which the cause of action arose that time will begin to run..."

Therefore, it is trite law that in an action for recovery of debt, such as in this case, the cause of action accrues upon demand for the payment of the debt. Where no demand is made, a cause of action does not arise and no action can be commenced in Court. So, until such a demand is issued, no right of action would arise and accrue to enable commencement of legal action in a Court of law for the recovery of the debt in question.

On this premise, I refer to the case of ***GOODWILL COMPANY LTD V CALABAR CEMENT COMPANY LTD (in Liquidation) & ORS (2009) LPELR-8351 (CA) at PP.25 – paras D – E, per Jean Omokri J.C.A,*** where the Court held: -

"Now, in an action for the recovery of a debt as in the instant case, the cause of action accrues upon demand for payment of the debt."

See also the case of ***KOLO V F.B.N PLC (2002) LPELR – 7166 (CA).***

Therefore, in the instant case, a careful look at paragraphs 7, 8, 9 and 20 of the Claimant's Affidavit in support of the Writ of Summons will show that several Demands including a letter of Demand was made by Claimant to the Defendants. For ease of reference, I hereby reproduce the said paragraphs hereunder as follows: -

"(7). After series of demands by the Claimant, 50% of the said sum to the tune of Five Million, Six Hundred and Sixteen Thousand Naira (₦5, 616, 000) only was paid to our client sometime in 2014 leaving the balance sum of Five Million, Six Hundred and Sixteen Thousand Naira (N5. 616,000) unpaid.

(8). That the Claimant caused her Solicitors–IDOR ATTORNIES, to write a demand letter dated the 2nd day of November, 2020 to the Defendants and when there was no response from the Defendants, a reminder letter dated the 26th of November, 2020 was also sent to them. The said demand

and the reminder letters are attached and marked as EXHIBITS C & D.

(9). That the Defendants acknowledged receipt of the demand and reminder letters in their letter of December, 4th 2020. The said letter is attached and marked as Exhibit E.

(10). That despite these series of written and oral demands, the said balance sum of Five Million, Six Hundred and Sixteen Thousand Naira (N5, 616, 000) only has remained unpaid till now, hence this action."

I also refer to Exhibits B, C and D annexed thereto.

Exhibit C is a demand letter by Claimant dated 2nd November 2020 addressed to the Director/CEO Energy Commission of Nigeria demanding for payment of the debt owed. i.e the balance of the contract sum to the tune of (N5, 616, 000) only.

On the face of the Writ of Summons, this suit was filed on the 16th of December 2020. Therefore, it is my considered opinion that the Claimant's cause of action arose at the time Exhibit C was written to the Defendants on the 2nd day of November 2020, therefore time began to run effectively from when the Defendants had clearly acknowledged receipt of the Claimant's letter. Defendants' acknowledgment is dated December 4, 2020.

Therefore in the instant case, although the Claimant did not file a Counter-Affidavit to challenge Defendant's averment on this issue, it was effectively argued in their reply on points of law.

Besides, the issue of whether the suit is statute barred is a matter of law. I so hold

In view of all these, I am of the view that Claimant's suit is not statute barred. I so hold.

Before I conclude, let me quickly refer to the case of ***COMMISSIONER FOR FINANCE IMO STATE & ORS V KOJO MOTORS LTD (2008)***

LPELR – 45075 (CA) per MBABA J.C.A at PP. 30 -31 paras D – F where it was held thus:

> ***"It should also be added that it would be immoral and legally offensive in my opinion, for a party to seek to invoke the rule of statute bar, just to defeat a legitimate claim for refund of money and escape responsibility, after taking advantage of a contract and benefit from the transaction for what is called upon to account..."***

To this end therefore, the 1st issue for determination is hereby resolved in favour of the Claimant/Respondent against the Defendants/Applicants.

On the second issue for determination which is whether the Court ought to stay proceedings and refer parties to arbitration in view of the Arbitration Clause in their agreement, it is trite that an Arbitration Clause embodies the agreement of both parties that if any dispute should occur with regard to the obligations which the other party has undertaken to the other, such dispute should be settled by a Tribunal of their own Constitution and choice.

Please the case of ***ROYAL EXCHANGE ASSURANCE V BENTWORTH FINANCE (NIG) LTD (1976) LPELR – 2961 (SC).***

It is averred in paragraph 4d of the Affidavit of the Defendants/Applicants that the letter dated December 4, 2020 did not acknowledge any indebtedness by 1st Defendant to the Claimant to any sum of money claimed.

Further in paragraphs 4(e), (f) and g, it is averred thus: -

> ***"(4)(e). That the purported sum of N5, 616, 000.00 (Five Million, Six Hundred and Sixteen Naira) only claimed as balance of money by the Claimant against the Defendants have been caught by the statute of limitation, the Claimant having been last paid in the sum of N5, 616, 000.00 (Five Million, Six Hundred and Sixteen Naira) only in 2014.***
>
> ***4(f). That also Article 20 of the contract agreement between the***

Claimant and 1st Defendant made provision for Arbitration therein in dispute situation(s).

4(g). That the Claimant and the Defendants are expected to explore mediation procedure in resolving all disputes between them before resort to Court."

Now Article 20 of the Agreement of the parties provides:

"All disputes, differences, or claims arising from the interpretation or implementation of the provisions of this agreement which cannot be settled amicably, shall be resolved in accordance with the provisions of the Arbitration and Conciliation Act, CAP A 18 Laws of the Federation of Nigeria 2004."

Therefore, it is trite law for a dispute between parties to be referred to Arbitration, by virtue of an Arbitration Clause, "the dispute must be within the contemplation of the clause".

Having carefully studied the Arbitration Clause i.e Article 20 reproduced earlier, it is quite clear that it includes **claims** arising from the interpretation or implementation of the provisions of the agreement itself.

Now although learned Claimant/Respondent's Counsel has argued in his reply on points of law, that referral to Arbitration must be on an issue contemplated by the Clause and that in the instant case it is not a breach of contract but recovery of debt, it is my considered view that the word "claims" inserted in the Arbitration Clause includes claim for recovery of debt.

On this premise, I humbly refer to the Dictionary definition of the word "claim" in the Black's Law Dictionary 9th Ed, at Page 281, which states thus: -

"(1). The aggregate of operative facts giving rise to a right enforceable by a Court<

(2). The assertion of an existing right; and right to payment or to an equitable remedy, even if contingent or provisional

(3). <u>A demand for money,</u> property, or a legal remedy to which one asserts a right..."

(Underlining mine).

In the case at hand, it is clear from the Claimant's Writ of Summons filed under the undefended List as well as the Supporting Affidavit, that the claim is for recovery of debt arising from the agreement i.e. Exhibit 2 annexed to the Defendants/Applicants Preliminary Objection. Therefore, recovery of debt falls within the contemplation of Article 20 of Exhibit 2 i.e the Arbitration Clause. I so hold.

Besides, to effectively counter the averments in the Supporting Affidavit of the Defendants/Applicants, the Claimant/Respondent ought to have filed a Counter Affidavit to challenge the said averments. But, it was not done in this case.

I have considered the fact that the agreement was made since 17th January 2011, and Claimant states in their Supporting Affidavit that the contract was since completed and outstanding balance is still yet unpaid. However, the Claimant/Respondent has not put anything before the Court to warrant the Court not to refer this matter to arbitration.

Section 5(1) of the Arbitration and Conciliation Act, Cap 19, LFN 2004 provides:-

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

However, one of the conditions for the grant of stay pursuant to Section 5(1) of the Act (supra) is that a party seeking the stay must have taken no steps in the proceedings.

On this premises, I refer to the case of ***HANOVER TRUST LTD V UNIQUE VENTURES CAPITAL MANAGEMENT CO. LTD & ANOR (2014) LPELR-23359 (SC), per Augie JSC (then J.C.A) (PP. 47 - 49), Paras B – A.***

See also the case of ***RICH FLOUR MILLS (W.A) LTD V UNTY BANK PLC (2015) LPELR – 40862 (CA).***

Likewise, by the provisions of Section 5(2)(a) of the Act (supra) the Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the Arbitration Agreement.

In addition, Section 5(2)(b) states that the Court must be satisfied that the Applicant at the time when the action was commenced still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

Therefore, since there's an arbitration clause in the parties' agreement and Defendants/Applicants have shown willingness to resort to Arbitration and in the absence of any Counter Affidavit, it is my humble opinion that they've satisfied this Court that this matter ought to be referred to arbitration. I so hold.

Consequently, I hereby refer parties in this suit to Arbitration as per the Arbitration Clause in their Agreement.

Accordingly therefore, I hereby stay proceedings in this suit with No. FCT/HC/CV/3449/20, pending determination of the Arbitration proceedings.

Signed:

Hon. Justice Samirah Umar Bature
12/7/2021