

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA

BEFORE HIS LORDSHIP: HON. JUSTICE Y. HALILU
COURT CLERKS : JANET O. ODAH & ORS
COURT NUMBER : HIGH COURT NO. 14
CASE NUMBER : SUIT NO: CV/1103/2020
DATE: : FRIDAY 3RD DECEMBER, 2021

BETWEEN:

1. DAN SARAT COMPANY NIGERIA LIMITED. } CLAIMANTS
2. ONIUM NIGERIA LIMITED } }

AND

NATIONAL INFORMATION TECH. } DEFENDANT
DEVELOPMENT AGENCY (NITDA) } }

RULING

This consolidated Ruling is made at the instance of M/9869/2020 and M/5340/2020 filed by Defendant/Applicant and Claimant/Respondent in that order.

The aforementioned motions were consolidated when they both came up for hearing on 6th October, 2021.

M/9869/2020 is supported by affidavit and written address duly adopted in support of the application in view. The said application was brought pursuant to Order 43 Rules 1(i) of this Court seeking an Order striking out this suit on the ground that it is statute – barred and that the Claimants did not exhaust internal mechanism of arbitration before instituting the suit.

The grounds upon which the application was brought and the affidavit therein deposed to by EneEchikwonye stated that the Claimants' suit was filed over nine years after the cause of action accrued.

That the Claimants instituted this action against the Defendant without exhausting the internal mechanism of arbitration as agreed in the contract between the parties.

That the letter of Claimants' solicitor dated 15th October, 2019 only mentioned arbitration and did nothing more.

In line with law and procedure, a written address was filed wherein two issues were formulated for determination to wit;

1. Whether or not this Suit is statute-barred.

2. Whether or not the Claimants validly resorted to arbitration as agreed by the parties in their contract agreement.

On issue one, ***whether or not this Suit is statute-barred.*** Learned counsel submits, that an action against a public officer shall not be instituted unless it is commenced within three (3) months from the time the cause of action arose. Section 2(a) of the Public Officers Protection Act, CAP P41, Law of the Federation of Nigeria, 2004 and ***LAFIA LOCAL GOVERNMENT VS. GOVERNOR NASARAWA STATE (2012)7 SCNJ 648 at 680*** were cited.

In the instant case, the two letters of completion of the work by the Claimants dated 4th January, 2011 was served on the Defendant on 17th January, 2011. That was the time the cause of action accrued and

that was when time began to run for the purposes of Public Officers (Protection) Act. However, the Claimants went into a deep slumber from January, 2011 up to February, 2020 (a period of over nine years) when they purported to commence this Suit. The test of time begins to run when all the facts which are material to be proved to entitle the Plaintiff to succeed are complete. Such facts became complete in this case as at January, 2011. ***FAROLY VS ESTABLISHMENT (2011)5 NWLR (Pt. 1241) P. 457 at 479*** was cited. As with every general rule, there are exceptions. One of the exceptions is where the dispute is on a contract. However, the exception regarding contract is not blank. ***TAJUDEEN VS. CUSTOMS, IMMIGRATION & PRISONS SERVICE BOARD (2010) ALL FWLR Pt. 522 P. 1740 at 1751*** was cited. In the instant case, it is

obvious that the alleged breach is in course of performance and execution of public duty by the Defendant. The Defendant also raised the issue that it was the Claimants that breached the contractual terms and conditions by failing to complete the contract that gave rise to the dispute. The Court was then urged to hold in favour of Defendant/Applicant.

On issue two, *Whether or not the Claimants validly resorted to arbitration as agreed by the parties in their contract agreement.*

Learned counsel submits that it is trite that both parties to a contract and the court are bound by terms of a contract. The primary role of the court is to interpret and enforce the terms of the contract. It is not the duty of the court to make a contract for the parties. ***KAYDEEVENT LTD. VS. MIN. IF FCT***

&ORS (2010) SCN, P. 120 at P. 144 – 145 Ratio 2 Paras G – I was cited.

Learned counsel further submits that the Claimants did not comply with Article 10 of their contract agreement dated 3rd of November, before they approached this Honourable Court. The Claimants made what looks like halfhearted reference to arbitration hidden towards the end of their Solicitor's letter of demand dated 15th October, 2019 and did nothing more. The Claimants also did not issue an arbitration notice in accordance with the above requirements. They only mentioned arbitration towards the end of their Solicitor's letter of demand (Exhibit "E"). They did not make proposal for appointment of arbitrator(s). Article 3 and 6 of the Arbitration Rules in the First Schedule to the Arbitration and Conciliation Act, Cap A18

LFN. Upon service, the Claimants filed a counter affidavit of 3 paragraphs in opposition to the Notice of Preliminary Objection made by the Defendant.

It is the deposition of the Claimant as distilled from the affidavit of MorufAfolabiAfuape that this suit is not statute barred. That the Public Officers Protection Act is not applicable to the subject matter of this Suit. That the subject matter of this Suit is in fact based on contract. The Respondents did in fact intimate the Applicant of their willingness to go into Arbitration. However, the Respondent Solicitor's Letter was not responded to. That the preliminary objection is devoid of any merit, frivolous and ought to be dismissed with substantial cost.

In support of the counter affidavit is a written address wherein, 2 issues were formulated for determination to wit;

- 1. Whether this Suit is statute barred.*
- 2. Whether the Claimant has complied with the Arbitration clause as agreed in their contract agreements.*

On issue one, *whether this Suit is statute barred.* Learned counsel submits that the said section, section 2(a) of the Public Officers Protection Act (which prescribes a period within which a party may institute an action against public officers) that the Applicant in their submission relied on only applies to actions in respect of breach in the performance or execution of a public duty. ***TAJUDEEN VS.***

C.I.P.S.B (2010) 4 NWLR (Pt. 1184), 325 was cited for the judicial interpretation for the above.

On issue two, *Whether the Claimant has complied with the Arbitration clause as agreed in their contract agreements.* Learned counsel submits that the Claimants duly complied with the Arbitration clause in the contract executed between the parties. The Honourable Court is invited to look at Exhibit ‘A’, which is the letter written by the Claimants’ Solicitor invoking the Arbitration clause. It is worthy of note, as earlier stated that the said Exhibit ‘A’ which was not responded to by the Defendant, as a result, the Claimants had no choice than to approach this Honourable Court to enforce their rights and claims under the duly executed contracts.

Learned counsel concludes by urging this Honourable court to dismiss the preliminary objection filed on behalf of the Defendant/Applicant in its entirety with substantial cost.

On Motion No. **M/5340/2020**, the Claimant/Applicant sought for an order entering summary Judgment against the Defendant as per paragraphs 34 (a-g) of statement of claim in this suit.

In support of the application is a 39 paragraph affidavit duly deposed to by Engineer OlaniyiOluwaseunAdebayo. That on the 7th May, 2010, the Defendant asked the Claimants to Register with her, with a non-refundable fee of Ten Thousand Naira (N10,000.00) if they (Applicants) wanted contract from the Agency. That the Claimants thereafter registered with the Defendant and receipts

were issued to them. That on 16th of August, 2010, 3 (three) contracts were awarded to the 1st Claimant as follows:-

- a. Arabic Secondary School, Makurdi, Benue State with reference NITDA/HQ/PPU/VOL1/20/2020 dated 16th August, 2020.
- b. Area Community High School, Owode-yewa Ogun State vide letter of award, NITDA/HQ/ PPU/VOL1/20/2010 dated 16th August, 2010.
- c. Baptist Boys' High School, Abeokuta, Ogun State vide letter of award, NITDA/HQ/PPU/VOL1/20/2010 dated 16th August, 2010.

The Applicant further avers that on 16th August, 2010, 3 (three) contracts were awarded to the 2nd Claimant as follows:-

- a. Sabo High School, Sabo Local Government Area, Kaduna, Kaduna State, reference NITDA/HQ/PPU/ VOL1/20/2010.
- b. Ipokia High School, Ipokia Ogun State vide letter of award NITDA/HQ/PPU/VOL1/20/2010 dated 16th August, 2010.
- c. St. Paul's Comprehensive Secondary School, Ogwuikpele, Ogbaru, Anambra State vide letter of award NITDA/HQ/PPU/VOL.1/210.

The Applicant also avers that all the contracts in paragraph 11 and 12 above were duly executed vide the agreement for provision of infrastructure for schools between the Claimants and the Defendant.

The contract sum for the provision of the infrastructure was N25,000,000.00 (Twenty Five Million Naira) for each of the contracts. The

Claimants on the 6th of October, 2010 wrote two letters of acceptance to the Defendant accepting the contract awards. That on the 15th of October, 2010, the Claimants respective companies requested for 15% mobilization fee for each. Mobilization fee of N3,750,000.00 (Three Million, Seven Hundred and Fifty Thousand Naira) only for each, the contracts were paid to the Claimants. That January, 2011, the Claimants/Applicants had duly executed and delivered all the contracts inclusive of the ones stated in paragraphs 11c and 12c above) to specifications and a team of Inspectors from the Defendant's office certified them to be duly executed. In 2014, another team of inspectors came from the Federal Ministry of Special Duties who also inspected the projects and certified them to be duly executed. That the principal of Baptist Boys

High School, Abeokuta, Ogun State also wrote the Defendant intimating them of the successful completion of the contract. That despite the fact that a total of three(3) contracts were awarded to the 1st Claimant were completed the same time, the Defendant only paid for two(2) i.e (in paragraph 11a&b above) leaving the one in paragraph 11c (i.e Baptist Boys' High School, Abeokuta, Ogun School, Ogwuikpele, Ogbaru, Anambra State) unpaid for. The remaining balance of the contract in paragraph 11c (i.e Baptist Boys' High School, Abeokuta, Ogun State) is to the tune of N21,250,000.00 (Twenty One Million, Two Hundred and Fifty Thousand Naira only). That the remaining balance of the contract in paragraph 12c (i.e St. Paul's Comprehensive Secondary School, Ogwuikpele, Ogbaru, Anambra State) is to the tune of N21,250,000.00 (Twenty One

Million, Two Hundred and Fifty Thousand Naira) only.

The Applicant avers further, that the Claimants are also required to remit as tax to the coffers of the Federal Government 10% of the contract sum which is about N2,500,000.00 (Two Million, Five Hundred Thousand Naira) only. By deducting the said 10% from the remaining balance, the Claimants are entitled to N18,750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only. That the excuse given by the Defendant was that they were short of funds but pleaded to pay as soon as money is available. The Claimants wrote series of letters of demand to the Defendant which receipts were acknowledged, the Defendant still refused to pay the Claimants for the remaining two jobs done. That on 15th February, 2018, the then Chairman Senate

Committee on Local content, Senator Solomon OlamilekanAdeola wrote the Defendant, on behalf of the Claimant to request payment for the two jobs done. On the 10th of April, 2018, the Defendant responded to the above letter acknowledging their indebtedness to the Claimants and undertook to pay after all due process has been complied with. Since then, the Claimants did not hear of anything from the Defendant on the debt. That sometime in January, 2019, the Claimants had to instruct their Solicitor to write a letter of demand to the Defendant. When the Claimants did not receive any response from the Defendant, the Claimants' Solicitor also wrote a letter to the Defendant invoking the arbitration clause in the contract agreement to resolve the matter. Despite the fact that these letters were acknowledged, the Defendant did

not respond to same. That having exhausted possible avenues to get the money, the Claimants were forced to instruct their Solicitor to write a pre-action letter to the Defendant. The Defendant still refused to respond to same and pay up its debts to the Claimants. The respondent does not have a defence in this suit.

The Applicant in line with law and procedure filed a written address wherein learned counsel formulated sole issue for determination to wit;

Whether the Applicants are entitled to the grant of this application in the circumstances of this case.

Learned counsel submits on behalf of the Applicant that this Honourable Court has jurisdiction to grant this application. Order 11 of High Court of Federal

Capital Territory, Abuja (Civil Procedure) Rules 2018 and ***ATAGUBA & CO. VS GURA (NIG) LTD. (2005)8 NWLR (Pt. 927) Page 448 Paras D – E*** were cited.

Learned counsel further submits that the Applicants have deposed in the affidavit in support of this application, that the Defendant has no defence in this suit. This Honourable court is therefore urged to grant the application. ***CO-OPERATIVE & COMMERCE BANK (NIGERIA) PLC. VS. SAMED INVESTMENT COMPANY LIMITED (2000) 4 NWLR (Part 651) 19, 30.***

Learned counsel also submits that for the Applicants to be entitled to summary judgment, the Applicants must satisfy the twin conditions of the existence of a contract and from which, contract arose a claim for a

liquidated sum of money. The Claimants/Applicants have satisfied the two vital requirements. The claim is based on a liquidated money demand as can be gleaned from the affidavit in support of the Application.

The Honourable Court is therefore urged with the totality of submissions adumbrated, to enter Judgment against the Defendant as per the claim in the Writ of Summons.

Upon service, the Defendant/Respondent filed a counter affidavit of 5 paragraphs.

It is the deposition as distilled from the affidavit of EneEchikwonye that the Defendant is not indebted to the Claimants as per their writ of summons, statement of claim and affidavit in support of motion for summary judgment. That all the allegations in

the Claimants' statement of claim and paragraphs 11 – 39 of the Claimants' affidavit supporting the motion for summary judgment are misleading and untrue.

The Respondent avers that the Claimants entered into two different written contract agreement for the supply of IT Infrastructure for schools with the Defendant, and the contracts are guided by terms and conditions voluntarily agreed to and signed by both parties. That under Exhibits "A" & "B" respectively, payment of the remaining balance of the contract sum beside the 15% mobilization fees is subject to completion of the project, inspection and issuance of certificate of completion by the Defendant. That the Claimants did not complete the respective contracts awarded to them in accordance with Exhibit "A" & "B".

That the Defendant did not issue certificate of completion to any of the Claimants due to the fact that the two contracts in dispute were not completed. The Claimants could not complete their respective contracts as awarded and eventually abandoned the work. That the Claimants without any inspection report and certificate of completion as per the contract agreements started requesting for payment. In view of the breach of contract by the Claimants, the Defendant did not facilitate any further payment in that regard. The Claimants continued with their inordinate demand for payment on the allegation that the contracts were completed. That it was when the Defendant refused to be intimidated by the Claimants that they filed this Suit claiming that the contract was completed and requesting for

outstanding contract sum as claimed in the Writ of Summons and statement of claim.

The Respondent further avers that this suit lacks merit and the Defendant/Respondent will be very much interested in defending it at a full trial. That the Defendant/Respondent has a valid defence to the claims of the Claimant as per writ of summons and the accompanying processes. That it is in the interest of justice to refuse this application for summary Judgment.

In support of the counter affidavit is a written address wherein, a sole issue was formulated for determination to wit;

Whether from the content of the counter affidavit, the Defendant has disclosed a defence on the merit and triable issues requiring the

Claimants to explain certain matters with regards to their claim for this Honourable Court to order for a full trial?

Learned counsel dwell on law to say, that in an action filed under summary Judgment/undefended list procedure, the court is required to consider the evidence and facts as contained in the affidavit evidence opposing hearing of the case under the said procedure. ***DIN VS. OKOSE (2014)16 NWLR (Pt. 1432) at Page 130 and OKORO VS. OKORO (2009) ALL FWLR Pt. 489 P. 480 at 487 – 488*** were cited.

Learned counsel further submits, that the Defendant has disclosed a defence on the merit based on facts. The facts deposed to in the Defendant's counter affidavit have disclosed the true representation of

affairs between the Claimants and the Defendant which led to the non-issuance of the certificate of completion due to non-compliance with the contract agreement, and the subsequent breach of contract.

Learned counsel also submits that it is vital to note that the object of the summary Judgment procedure is not to shut out the Defendant from contesting the action brought by the Claimant. ***DELTA HOLDINGS (NIG) LTD. VS OBORO (Supra)*** were cited. In fact, even where a Defendant does not file anything, it is not automatic that Judgment will be given for the Claimant. ***NKETIM VS. ORON (2009) ALL FWLR Pt. 483 P. 1407 at 1427 – 1431*** were cited.

Learned counsel concludes, that the counter affidavit of the Defendant has disclosed a good, strong and

triable defence to the claims of the Claimants as per their writ and accompanying processes to warrant this suit to be transferred to the general cause list.

Counsel urge this Honourable Court to order for a full-blown trial.

COURT:-

By the nature of the present action, procedure allows for the court to take both applications together but determine firstly the issue of jurisdiction.

It is the law that when jurisdiction to determine a matter is challenged, the court, first, shall take step to resolve such an issue in view of the infectious threshold nature of jurisdiction.

Defendant/Applicant has raised the fact that the suit of Claimant is statute barred and the fact that parties

had agreed to submit themselves to Arbitration as issues robbing this court of jurisdiction.

On the issue of statute barred, learned counsel relied on section 2 (1)(a) of the Public Officers Protection Act Cap. P41 Laws of the Federation of Nigeria 2004 to say that Claimant having not brought the instant action within the three months grace period cannot maintain the present action as stated in the preceding part of this ruling.

Defendant/Applicant made heavy weather on the two letters of Claimant dated 4th January, 2011, served on Defendant on 17th January, 2011 which were letters of completion of the work by Claimants.

Defendant's counsel is of the view that the date on the letter remained the day the cause of action

accrued, and that Claimant ought to have filed the present suit in 2011 and not 2020.

I have read the authority of ***LAFIA LOCAL GOVT. VS GOVERNOR NASARAWA STATE (Supra)*** cited by learned counsel for the Defendant/Applicant.

I have equally read the facts in the case of ***FAROLY VS ESTABLISHMENT (supra)***.

I need to mention that the present suit was filed by Claimants for the outstanding balance payment of the two contracts for the provision of IT infrastructure at the Baptist Boy's High School, Abeokuta, Ogun State and Anambra State which was awarded by Defendant, which stood at N18,750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) and N18,750,000.00

(Eighteen Million, Seven Hundred and Fifty Thousand Naira) respectively.

The details of the contract are contained in the award letters both dated 16th August, 2010.

I hereby reproduce the said award letters of contract to the 1st and 2nd Claimants by the Defendant, respectively;

*“The Managing Director,
Dan Sarat Company Nigeria Ltd.,
Abuja.*

LETTER OF CONTRACT AWARD

I have been directed to inform you that the Management of National Information Technology Development Agency (NITDA) has approved that your company be awarded the contract for the provision of IT Infrastructure located at Ipokia High School, Ipokia, Ogun State at a total cost of N25,000,000.00 (Twenty –

Five Million Naira only) taxes inclusive. This award is subject to the execution of a contract agreement specifying the Scope of work to be executed by your company and the Terms and Conditions governing same.

A Director of your company is expected to consult our Legal Department for further necessary action.

Congratulations.”

“The Managing Director,

Onium Nig. Ltd.,

Abuja.

LETTER OF CONTRACT AWARD

I have been directed to inform you that the Management of National Information technology Development Agency (NITDA) has approved that your company be awarded the contract for the provision of IT Infrastructure located at Ipokia High School, Ipokia, Ogun State at a total cost of N25,000,000.00 (Twenty – Five Million Naira only) taxes inclusive. This award is subject to the execution of a contract agreement specifying the Scope of work to be

executed by your company and the Terms and Conditions governing same.

A Director of your company is expected to consult our Legal Department for further necessary action.

Congratulations.”

Above revelation underscores the fact that Claimants were awarded contract by Defendant to supply IT Infrastructure to Baptist Boys High School, Abeokuta, Ogun State and Anambra State.

It is therefore most instructive to state at this earlier moment the very basic reason behind the Public Officers Protection Act, and when same shall ensure in favour of a public officer.

Any person acting in the execution of public duties shall be protected under the Public Officers Protection Act as provided by the Public Officers

Protection Act Cap. P41, Laws of the Federation of Nigeria, 2004. SC rightly held the view that the Public Officers Protection Act is designed to protect public officers against any action, prosecution or other proceedings done in pursuance of or execution of any law, public duty or authority, or for any alleged neglect or default in the execution of any law, duty or authority.

See *EKOGU VS ALIRI (1009) 3 NWLR (Pt. 179)*.

It follows therefore, that the public officers protection Act being a statute of limitation, protects such public officers who acted in official capacity from being sued outside the three months regulation period of the act complained of or injury within three months next after the ceasing thereof. Clearly, the Public Officers Protection Act removes the right

of action, enforcement Act and the right to judicial relief in a plaint. A party is then left with empty cause of action which he cannot enforce because the alleged cause of action is statute – barred and cannot be maintained.

See *EGBE VS ADEFARASIN (NO. 1) (1985) 1 NWLR (Pt. 3) 549.*

FADARE VS A.G OYO STATE (1982) 4 SC 1.

From above, it is clear peradventure that the protection of such a public officer is confined only to situation where such an officer was acting on official duty.

Authorities are bound that the Public Officers Protection Act, do not apply in contract cases or in action founded on breach of contract.

The following cases are instructive; ***CBN VS ADEDEJI (2004) 13 NWLR (Pt. 890) 226.***

NPA VS CONSTRUZIONI GENERALI FARSURA COGEFAR SPA (1974) 1 ALL NLR (Pt. 2) 463.

ALAO VS V.C UNILORIN (2008) 1 NWLR (Pt. 1069) 421.

OSUN STATE GOVT. VS DALAMI (NIG). LTD (2007) ALL FWLR (Pt. 365) 439 at 452 paragraphs A-F SC.

The argument of learned counsel for the Defendant/Applicant on this score that the suit of Claimants is statute barred for non-compliance with Public Officers Protection Act cannot stand in the eyes of the law arising from the preceding well established position of the law.

Any such argument proffered in support of the Public Officers Protection Act, is therefore clearly a waste of time and resources, the argument of Defendant/Applicant in this case, inclusive.

Defendant's argument on the issue of statute barred is refused and dismissed.

I shall proceed to look at the issue of Arbitration as claimed by Defendant's counsel as one of the basis for the preliminary objection.

It is the argument of Defendant/Applicant that parties had agreed to refer themselves to arbitrations in the event of any misunderstanding arising from the contract, but that Claimant never did but rather decided to instate the present action.

It is indeed the law that parties are bound by the terms of contract they freely enter – into.

A party shall not be allowed to shirk from obligation freely entered into for whatever reason.

Above underscores the importance of sanctity of contract.

See ***LARMIE VS DATA PROCESSING MAINTENANCE & SERVICES (D.P.M) LTD. (2005) 12 S.C (Pt.1) 93 at 103.***

ARJAY LTD. VS A.M.S. LTD (2003) 2 -3 S.C 1.

For the purposes of clarity, I shall reproduce the said Arbitration clause contained in the agreement in question which Defendant/Applicant has made reference to.

“Any question, dispute difference or controversy arising out of, concerning, in consequence of in relation to, or in connection

with this Agreement or as to the interpretation of any of the provisions thereof or the validity or invalidity of the performance under it which cannot be settled by mutual negotiation between the parties shall, at the request of either of the parties hereto, be submitted to an arbitrator agreed upon by the parties and where they are unable to reach an agreement in accordance with the Arbitration and Conciliation Act Cap. 19 Laws of the Federation (LFN) 1990.”

From the clause of the Arbitration afore – reproduced, there is no mention of the fact that Claimant upon satisfactory completion of the contract and where they is not paid, shall refer to Arbitration.

The clause touching on Arbitration clearly touches on circumstances where there is misunderstanding in the course of performance of the contract and not after performance of the contract.

It is on record that Claimants were paid for 4 of the awarded contracts out of six contracts awarded by Defendant.

The last two contracts have remained unpaid hence the present action.

Where there is Arbitration clause in an agreement i.e contract as in this instance, same shall be construed *esjus – dem* “during performance of the contract” and not when the contract has been satisfactory performed as in this case and there seem to only be dispute as to delayed payment and nothing more.

Above situation was espoused in the case of ***K.S.M.H VS M.I.E.E (2021) 3 NWLR (Pt. 1287)***.

This clearly explains it that there was no dispute as to performance of the contract in issue to be referred to Arbitration.

Arbitration cannot be used as a sword to decapitate the heads of Claimants who have duly executed the contracts awarded them.

Supposing without conceding that parties had agreed to refer to arbitration, such a party who intends to raise objection on that ground shall not take any other step after filing its memorandum of appearance, to avoid compromising its position.

This is in obedience to the provision of section 5(1) of the Arbitration and conciliation Act.

The said Act has this to say:-

Section 5 (1) of the Act provides:-

“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, any party to the arbitration agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings apply to the court to stay proceedings.”

It is on record that Defendant’s counsel filed memorandum of conditional appearance, pre-actions counselling certificate, notice of intention to defend, statement of defence, preliminary objection, etcetera – etcetera.

Can Defendant who has taken the steps afore – enumerated, turn around and benefit from his wrong?

Clearly, the act of filing the processes in question has left the right of Defendant to raise the issue of Arbitration in the said Agreement as basis for its challenge to jurisdiction most compromised.

The case of ***OBEMBE VS WEMABOD ESTATE LTD. (1977) ALL NLR 130***, is very instructive.

The argument of Defendant/Applicant on the issue of Arbitration, therefore, shall be refused for the reason advanced. Same refused and dismissed.

On the whole, the said preliminary objection No. M/9869/20 is hereby and accordingly dismissed.

Having considered the said Preliminary Objection to a forlorn of judicial be debris, I shall now turn my search right on the application for summary judgment brought pursuant to Order 11 of the Rules of the High Court of the FCT Abuja (Civil Procedure) Rules 2018.

The application for summary judgment is predicated upon the material placed by Claimants/Applicants in support of their writ of summons and statement of claim.

The following are the claim of Claimants as indorsed on the statement of claim, as follows:-

- a. A Declaration that the Defendant is indebted to the 1st Claimant to the tune of N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only on account of the contract

awarded to it at Baptist Boy's High School, Abeokuta, Ogun State.

- b. An Declaration that the Defendant is indebted to the 2nd Claimant to the tune of N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only on account of the contract awarded to it at St. Paul's Comprehensive Secondary School, Ogwuikpele, Ogbaru, Anambra State.
- c. An Order directing the Defendant to pay to the 1st Claimant the sum of N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only being the outstanding balance of its indebtedness to the 1st Claimant.
- d. An Order directing the Defendant to pay to the 2nd Claimant the sum of N18, 750,000.00

(Eighteen Million, Seven Hundred and Fifty Thousand Naira) only being the outstanding balance of its indebtedness to the 2nd Claimant.

- e. 15% interest per annum on the N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) from January, 2011 until the day of judgment and 15% thereafter till the judgment debt is fully and finally settled.
- f. An Order directing the Defendant to pay to each Claimant the sum of N5,000,000.00 (Five Million Naira) as General damages.
- g. Cost of this suit valued at N2,500,000.00 (Two Million Five Hundred Thousand Naira) only.

I need to observe that the procedure under Order 11 and 35 of the Rules of this court is both for claim for liquidated demands save for the fact that a Claimant

under Order 11 of the Rules shall file its writ of summons and statement of claim before filing such an application for summary judgment, whereas under Order 35 of the Rules of this Court, a Claimant shall file writ of summons which shall be marked undefended.

A Defendant so served with application for summary judgment under Order 11 of the Rules shall file its usual statement of defence and counter affidavit stating its side of the story.

Upon consideration of the application, where the court is satisfied that there is evidence of uncontested liquidated money demand, it shall give judgment or ask parties to join issues by filing Defence for a full contest or trial where there are grey area satisfactory shown in the counter affidavit

of Defendant. It is spent that Defendant awarded contract to the Claimants.

It is also settled that Claimants executed the said contracts to the satisfaction of Defendant who have paid some of the contract and left some unpaid. Exhibits “O” and “P” i.e letters of completion of the project dated the 4th January, 2011 sent to the Defendant notifying them of completion of the contract is apt.

Exhibit “Q” i.e the letter from the principal of the school where one of the contract was executed i.e Baptist Boys High School Abeokuta, to the Defendant intimating them about the completion of the contract is equally very instructive. Copies of Claimants’ letter to Defendant i.e Exhibit “R” series demanding payment of the executed contract sum

which were acknowledged by Defendant is of importance here.

I have also seen and read the contents of a letter written by Chairman Senate Committee on local contents to the Defendant vide Exhibit “S” urging Defendant to pay Claimants for the two remaining jobs executed, which was responded by Defendant vide their letter dated the 15th February, 2018, annexed as Exhibit “S1” whereof Defendant acknowledged their indebtedness to Claimants and further undertook to pay the said outstanding upon their completion of due process.

The said payment has remained unpaid till this moment.

A Defendant who does not have defence to the claim of a Claimants shall not be afforded opportunity to

dribble and cheat such a Claimant who's claim is for liquidated money demand and where the counter reveals no credible defence.

A counter affidavit so filed shall contain facts capable of beclouding the contents of affidavit in support of the application for judgment under Order 11 of the Rules of this Court.

Such counter affidavit must condescend to facts so deposed to for the court to refuse judgment at that earliest time. A mere denial of Claimants' claim or liability or vague insinuation devoid of any evidential value cannot represent facts competent enough to cast doubts on the claims of a Claimant.

See UBA PLC. VS JARGABA (2007) 5 SC 1.

In denying the application of Claimants for summary judgment, Defendant filed counter affidavit of 5 paragraphs and written address.

The said agreement between the parties was annexed as Exhibit “A”.

I have read the respective paragraphs of the counter affidavit of the Defendant where Defendant denied the fact that Claimant was not issued job completion to show execution of the contract to satisfaction, and also that Claimants have not completed the said contract and cannot be entitled to any such payments.

I shall reproduce paragraph 1.1(b) of the said Agreement which seem to provide for job completion certificate.

1.1 (b)

“The outstanding balance of the sum, less the requisite taxes shall be paid on completion of the Project subject to inspection and the issuance of a Certificate of Completion from NITDA.”

Claimants on their part, filed further and better affidavit where they stated that Defendant’s averment that the contract was not completed is an afterthought, and that Defendant had always shown intention to pay the said contract sum.

Claimants further stated that similar payments of four out of six of the contracts they executed took three years to be paid i.e from 2011 – 2014.

The statement of account of Dan Sarat Company Nigeria Limited (1st Claimant) was annexed to show the said payments.

It is necessary to observe here that the letter Defendant wrote in reply to the letter of the Senate Committee Chairman on local content left Defendant vulnerable and compromised.

Defendant who admitted liability cannot now resile with intention to shirk from its responsibility.

Defendant has not shown any such certificate of job completion issued Claimants for the four other jobs done by Claimants which were paid to show any such precedence.

What more... the letter written by the principal of Baptist Boy's High School Abeokuta, to the Defendant where the contract is domiciled, intimating Defendant of the completion of the contract by the Claimants is equally most indicting on the Defendant.

Defendant is a Government Agency which ought to be an embodiment of decency and sincerity.

Defendant who awarded contract to the Claimants which have remained unpaid cannot be running from pillar to post all with a view to frustrating Claimants who have duly executed the said contract by making unfounded, unwarranted and most bizarre deposition in its counter affidavit. This is an affront to morality, societal norm and public policy.

Defendant who has no credible defence to the claim of Claimants, seem to be behaving like the proverbial ostrich.

There is no hiding place for the Defendant in this court.

What Defendant has put up in its counter affidavit is nothing more than a sham defence. Defendant is not

Ronaldo or Messi (adjudged best players in the world) and cannot therefore successful dribble the Claimants and frustrate them out of Judgment. What the Defendant has put forward in this case is a sham defence which does not avail them at all. In ***SANUSI BROS (NIG) LTD. VS. COTIA C.E.I.S.A (2000) 11 NWLR (Pt. 679) 566, Uwaifo, JSC,*** stated as follows:-

“The law is clear that if a Defendant decides to go on stage to contest an application for summary Judgment, he cannot rely on a sham defence.”

Defendant clearly is speaking from both sides of its mouth.

Morality cannot be legislated, but behavior can be regulated.

The law may not change the heart, but it can restrain the heartless. I say no more.

Claimants have made out a valid claim in their statement of claim and I have no doubt in my mind that Defendant have not made any superior evidential argument in its defence to the statement of claim on the one hand, and counter affidavit to the application for summary judgment pursuant to Order 11 of the Rules of this court, on the other hand. I shall not waste the time of court and parties by allowing for a full blown hearing.

This is a convenient situation for me to leverage on the provision of Order 11 of the Rules of this court to avoid unnecessary delay in the determination of the suit when clearly Defendant is most unlikely to put up any better or superior fight.

Accordingly, judgment is hereby entered in favour of the Claimants and the following declarations are hereby made:-

- a. A Declaration that the Defendant is indebted to the 1st Claimant to the tune of N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only on account of the contract awarded to it at Baptist Boy's High School, Abeokuta, Ogun State, is **hereby granted**.
- b. An Declaration that the Defendant is indebted to the 2nd Claimant to the tune of N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only on account of the contract awarded to it at St. Paul's Comprehensive Secondary School, Ogwuikpele, Ogbaru, Anambra State, is **hereby granted**.

- c. An Order directing the Defendant to pay to the 1st Claimant the sum of N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only being the outstanding balance of its indebtedness to the 1st Claimant, is **hereby granted.**
- d. An Order directing the Defendant to pay to the 2nd Claimant the sum of N18, 750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) only being the outstanding balance of its indebtedness to the 2nd Claimant, is **hereby granted.**

Next is Pre and Post judgment interest.

Pre – judgment is either statutory or contractual. No such proof before the court was established on

whether the claim for pre- judgment interest was statutory or contractual.

This head of claim is refused and dismissed.

Next is post judgment interest. I have taken into consideration the circumstances of this case, vis – a vis the naira devaluation. I am of the view that this is a deserving situation to award post judgment interest. Pursuant to Order 29 Rule 4 of the Rules of this court, I hereby award 10% as post judgment interest.

Next is damages and cost of this action.

I make no such orders arising from the fact that no such contemplation is contained in the said award letters which has culminated to the instant claim for summary judgment.

In summation, I hereby proceed to enter judgment as follows:-

1. Defendant clearly is indebted to the 1st Claimant to the tune of N18,750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) and N18,750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) and Ordered to pay the said amount to the 1st Claimant;
2. Defendant clearly is indebted to the 2nd Claimant to the tune of N18,750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) and N18,750,000.00 (Eighteen Million, Seven Hundred and Fifty Thousand Naira) respectively.

3. I hereby award 10% as post judgment interest.

Justice Y. Halilu
Hon. Judge
3rd December, 2021

APPEARANCE

V.S Iwuchukwu, Esq. – for the Claimants.

C.O.C Emeka – Izima, Esq. with Francis Adejo,
Esq, - for the Defendant.