IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON TUESDAY, THE 25th DAY OF JANUARY, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/281/2021
MOTION NO.: M/4569/2021

BETWEEN:

1) **ASSETSPHERE LIMITED**
2) **HAMMER ASSOCIATES LIMITED**
3) **WESTPOINT PROPERTY DEVELOPMENT COMPANY LIMITED**
4) **ARTHUR MONROE LIMITED**
5) **PARK DAVIDS LIMITED**
6) **THREE FIVE PROPERTIES LIMITED**
7) **NG PROPERTIES LIMITED** **CLAIMANTS**

AND:

CROWN REALTIES LIMITED **DEFENDANT**

RULING

This is a Ruling on the Notice of Preliminary Objection brought by the Defendant challenging the suit of the Claimants.

The Claimants has commenced this suit by way of Writ of Summons claiming against the Defendant the following reliefs:

1) *An Order of this Honourable Court compelling the Defendant to allocate to each of the Claimants, the specific property each Claimant herein applied for and made substantial part payment for in accordance with the terms of the offers.*
2) *In the alternative, a refund by the Defendant to the Claimants of the sums paid for the properties by the Claimants to the Defendant, to wit, the sums of:*

i)	*Assetsphere Limited*	*₦36,309,000*
ii)	*Hammer Associates Limited*	*₦36,309,000*
iii)	*Westpoint Property Development Company Limited*	*₦112,565,250*
iv)	*Park David Limited*	*₦39,947,250*
v)	*Arthur Monroe Limited*	*₦39,947,250*
vi)	*Three Five Properties Limited*	*₦42,703,500*
vii)	*NG Properties Limited*	*₦42,703,500*

3) *Interest on the above sums calculated at the rate of 21% per annum from 14th November 2012 until judgement and thereafter at the rate of 7% until final payment of the judgement sum.*
4) *Damages for breach of contract in the sum of ₦20,000,000 in favour of the first Claimant, ₦20,000,000 in favour of the second Claimant, ₦50,000,000 in favour of the third Claimant, ₦21,000,000 in favour of the fourth Claimant, ₦21,000,000 in favour of the fifth Claimant, ₦30,000,000 in favour of the sixth Claimant, ₦30,000,000 in favour of the seventh Claimant.*
5) *The cost of the action.*

Responding to the suit of the Claimants, the Defendant filed a Preliminary Objection challenging the jurisdiction of the Court and seeking the following reliefs:

a) ***AN ORDER*** *of this Honourable Court striking out the Claimants' suit as presently constituted for want of competence/jurisdiction to entertain same.*
b) ***AND FOR SUCH FURTHER ORDERS*** *as the Court may deem fit in the circumstance.*

The grounds upon which the Defendant's objection was based are as follows:

1) *That the present suit before the Honourable Court is incompetent as it was not duly authorised by the Board of Directors or the members of the respective Claimants in a meeting duly convened for that purpose or at all.*
2) *The Writ of Summons herein is incompetent for failure of the Claimants to produce a sufficient affidavit in verification of the endorsement on the Writ to authorize or warrant the sealing of the Writ by the Registrar of this Court.*
3) *The Writ of Summons was sealed and issued in contravention of the provisions of the rules of this court.*
4) *That the Court lacks jurisdiction to hear and determine this suit.*

In support of the Defendant's Preliminary Objection was a 10-paragraph affidavit deposed to by one Obioma Chikwendu, the Litigation Secretary in the law firm of the Counsel to the Defendant. In the affidavit, the Deponent, who derived his information from the Defendant's Project Officer stated that none of the Claimants had ever communicated with or contacted the Defendant since May 2011, adding that none of the Claimants had ever requested the Defendant to refund money to it. Rather, it was a different family member of the late Barrister Onyeka (the deceased lawyer) that had written on several occasions for refund of the monies as if same were monies belonging personally to the deceased lawyer. This letter from the deceased lawyer's elder brother (one Dr Ben Anyene) was attached to the affidavit and marked as **Exhibit A**.

In addition to this, the Deponent also swore that the law firms of Chukwuemeka Egwim Esq. and Nnaemeke Nnubia Esq. had written three letters (dated 3rd November 2016, 28th November 2016, and 13th March 2017 respectively) to the Defendant apparently claiming that the monies being

claimed by the Claimants in this suit belonged to Barrister Onyeka C. Anyene and formed part of his estate for distribution to the beneficiaries of his estate. These letters were attached to the affidavit and marked as **Exhibits B, B1 & B2**.

It was further sworn on behalf of the Defendant that the Defendant through its letter dated 13th April 2017, written on its behalf by its Solicitors, Madumere & Madumere, rebuffed the claims in **Exhibits B1, B2 & B3**. This letter from the law firm was attached to the affidavit and marked as **Exhibit C**. the Deponent asserted that upon the Claimants' failure to recover the funds furtively from the Defendant purportedly as forming part of the estate of Barrister Onyeke C. Anyene (deceased), Nnaemeka Nnubia Esq. and his principals instituted this action in the names of the Claimants herein without the knowledge or consent of the said Claimants. It was the Deponent's claim that the present suit was neither authorised by the respective Board of Directors of the Claimants nor their respective Members (shareholders) in a general meeting.

He added that the form of the Writ of Summons applicable in this suit is the General Form of Writ of Summons contained in the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules, 2018 as Form 1; that the said Form 1 is contained at pages 137 to 139 of the said Rules and that it has its last provision as "*A sufficient affidavit in verification of the endorsement on this Writ to authorize the sealing produced to me this ….. day of ….. 20…..*" *(Signature of Registrar)*. He averred that the processes filed by the Claimants in this suit including their Writ of Summons had no affidavit verifying the endorsement on the Writ as filed by the Claimants before the Writ was issued. He added that the Defendant had not taken any other steps in this suit before filing this application. He concluded that it would be in the interest of justice to

dismiss/strike out the suit and that the Claimants would not be prejudiced if this Honourable Court upholds this Preliminary Objection.

In the written address in support of the application, the Defendant through its Counsel formulated one issue for the Court to consider, to wit: "***Whether this Court has the requisite competence or jurisdiction to hear and determine the instant suit as presently constituted?"*** In his argument on the issue Learned Counsel for the Defendant contended that superior courts in a plethora of cases have laid down the criteria for determining whether or not a court has the competence to entertain an action brought before it.

In stating these criteria, Learned Counsel cited the cases of ***Madukolu v Nkemdilim (1962) 2 SCNLR 341, Ohakim v. Agbaso (2011) All FWLR (Pt 553) 1806 at 1832 paras A-C, Attorney General of the Federation v. Abacha (2011) All FWLR (Pt 566) 445 at 467 paras A-C***. Learned Counsel submitted that the criteria must exist concurrently for a Court to have the competence to entertain a suit and that where one was missing, the Court would lack the competence to entertain the suit.

Counsel for the Defendant divided the sole issue into two sub-issues, which are: (i) whether the institution of this suit was duly authorized by the respective board of directors or members (shareholders) of the Claimants in a meeting called for that purpose or at all: and (ii) whether the Writ of Summons in this suit was duly sealed and issued?

In arguing the first sub-issue, Learned Counsel contended that it was a settled law that where a wrong has been done to a company, it is only such a company that can sue to remedy the wrong done to it. Counsel cited section 341 of the Companies and Allied Matters Act 2020 Act No. 3 of 2020. He further argued that it is trite that a company is a juristic personality and by virtue of section 87 of CAMA 2020, it can only act through its members in a

general meeting, the Board of Directors, an officer, or agent of the company based on the authority given to that effect by the members in a general meeting or board of directors.

Relying on sections 89 and 90 of the CAMA 2020, Counsel went further to argue that it was clear that an act of a company must have emanated from or being ratified by a resolution by either the board of Directors, the Managing Director or the Members in a general meeting. He pointed out that it has been deposed to in paragraphs (e) and (f) of the affidavit in support of the application that the institution of the present suit was not authorized by any of the shareholders or board of directors of the companies whose names are used as Claimants in the suit. In considering the question as to who has the authority to institute an action or brief Counsel on behalf of a company, learned Counsel relied on the cases of ***Ejekam v. Devon Ltd (1998) 1 NWLR (Pt 534) 417*** and ***Ladejobi v Odutola Holdings Ltd (2002) 3 NWLR (Pt 753) 121 at p. 150 paras E-H*** and stated that there is no doubt that any action instituted in the name of a company must be authorized by the board of directors or members in a general meeting convened for that purpose; while also adding that the only cognisable evidence of such authority is a resolution passed by the relevant meeting to that effect.

This position of the law, he argued, is not the case in the instant case. In the instant case, according to him, the relevant organs of the companies used as Claimants in this case did not authorize the institution of this suit or the use of the name of the companies as the Claimants in the suit. This fact , he insisted, is reinforced by the fact that none of the Claimants has contacted the Defendant by any means including by written letters in respect of the monies which are the subject matter of this suit. Rather it is one of the lawyers who acted for the beneficiaries of the late Barrister Onyeka C. Anyene who is laying

claim to the monies that has instituted this suit purportedly for the companies used as Claimants herein. From the deposition in the affidavit in support of the application, Learned Counsel stated that it has been shown that none of the companies whose names are used as Claimants in the suit actually authorized the institution of this suit in their names. Learned Counsel therefore contended that the non-authorization of the institution of this suit by the respective companies whose names are used as Claimants herein satisfies or falls within criterion number (b) in paragraph 4.1 of its written address; that is to say, that there is a feature in the case which prevents the Court from exercising its jurisdiction. He maintained that this feature is the lack of authority to institute the action on behalf of the Claimants.

In arguing the second sub-issue, Learned Counsel cited the provisions of Order 6 Rule 2(1) of the Rules of this Court to the effect that the Registrar of the Court shall seal every originating process and, upon doing so, the process shall be deemed to be issued. By virtue of Order 1 paragraph 5 of the Rules of this Court, originating process is defined to mean any Court process by which a suit is initiated. By the provisions of Order 2 Rules 1 and 2 of the Rules of this Court, Writ of Summons is one of the originating processes for the initiation of proceeding before this Court. Learned Counsel contested that the purport of the above provisions as they relate to Form 1 is that before the Registrar of this Court will seal and issue a Writ of Summons, the Claimant must produce sufficient affidavit verifying the endorsement of the Writ. And without such an affidavit being produced to the Registrar, he is not authorized to seal the Writ.

According to the Counsel to the Defendant, the Claimants did not produce any affidavit verifying the endorsement on the Writ before the Registrar sealed and issued same. Counsel also submitted that the Writ in this suit which was

sealed and issued by the Registrar without the production of the requisite verifying affidavit is incompetent and robs the Court of the competence to entertain this suit. He also submitted that based on the facts of this case and the above reproduced provisions of the Rules of this Court, this case did not come before this Court initiated by due process of law and upon the fulfilment of a condition precedent to the exercise of jurisdiction. He referred the Court to criterion number (c) in paragraph 4.1 of the written address in support of the Preliminary Objection and contended that it has not been met.

Finally, Learned Counsel submitted that having failed to satisfy two out of the three criteria listed in paragraph 4.1 of the written address as enunciated in cases of ***Madukolu v. Nkemdili; Ohakim v. Agbaso and Attorney General Federation v. Abatcha***, the suit is incompetent and robs the Court of the competence to entertain same. Learned Counsel therefore pray this Honourable Court to decline jurisdiction based on the argument and strike out the suit.

In opposition to the Defendant's Notice of Preliminary Objection, Learned Counsel to the Claimants filed a 9-paragraph Counter-Affidavit deposed to by one Ikechukwu Egwa, a legal practitioner in the law firm of the Claimants' Counsel. In support of the application was a written address in which Learned Counsel formulated two issues for determination:

1) Whether this Honourable Court has the jurisdiction to entertain this suit as presently constituted?
2) Whether the Defendant's application does not go against Order 23 of the Rules of this Honourable Court?

In his argument on Issue One, Learned Counsel to the Claimants stated that the Defendant has argued in his written address that the Claimants have filed this suit without authorization from the Claimants but has failed to place before

the Honourable Court any proof of that averment. He submitted that it is trite law that he who asserts must prove, adding that the Defendant has failed to prove its assertion that there was no authorization from the Claimants before the institution of this suit. Counsel relied on the provisions of section 131(1) of the Evidence Act 201, to the effect that whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. He cited the case of ***Owena Mass Transportation Co Ltd v. Okonogbo (2018) LPELR-45221 (CA)*** in support.

It was the contention of Counsel for the Claimants that the Defendant has not discharge the burden of proving that the Claimants did not get authorization from their respective boards of directors or shareholders. He further submitted that the Defendant relied on the provisions of section 341 of the Companies and Allied Matters Act 2020 which, according to Counsel for the Claimants, does not apply in any way or form to the circumstances of the case as the said section talks about protection of minority against illegal and oppressive conduct or action by or against the company, which is not the case in this matter as the Claimants claim against the Defendant is for specific performance or, in the alternative, refund of the money paid by the Claimants to the Defendant. Furthermore, he submitted that contrary to the Defendant's argument in his written address, the Claimants' key witness clearly stated in his affidavit that he had authority of the Claimants to depose to the affidavit on their behalf.

Counsel pointed out that the Defendant's argument that the Claimants' Writ of Summons in the suit was not duly issued for failure to produce a verifying affidavit and, to that extent, the Court lacks jurisdiction should be jettisoned by the Court. He maintained that even if there is any non-compliance with the

Rules of Court with regards to the process filed by the Claimants, it is one of form only and not of substance and amounts only to irregularity curable by Order 5 Rule 1 of the Rules of this Honourable Court. He added that by the provisions of the Rules of this Honourable Court, such irregularity shall not nullify a proceeding. Learned Counsel relied on the said Order 5 Rule 1(1) – (3) of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018.

It was further argued on behalf of the Claimants that the Defendant's application was not filed within a reasonable time as provided by the Rules of this Court. Counsel for the Claimants pointed out that the Defendant was served with the Claimants' originating process on the 9th of March 2021 but chose to file its response on the 14th of July (three months after being served) and, then, served the Claimants' Counsel with its application on the 17th of September 2021 (two months after filing same).

According to the Counsel for the Claimants, Order 5 Rule 2 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018 provides that an application to set aside for irregularity any step taken in the course of any proceedings may be allowed where it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. Learned Counsel further submitted that the Defendant has not brought its application within a reasonable time and, to that extent, Counsel urged the Court to discountenance the argument of the Defendant in paragraph 4.14 and 4.19 of its written address. Finally, learned Counsel submitted on Issue One that flowing from his argument, the Court has jurisdiction to entertain this suit as presently constituted.

On Issue No 2, learned Counsel submitted that the Rules of this Honourable Court provides in Order 23 Rule 1 that no demurrer shall be allowed. He

defined a demurrer proceeding as an attempt to quash a claim on point of law without necessarily denying the claims as set out with a Statement of Defence. Counsel relied on the case of ***Onokomma v. Union Bank (2017) LPELR-42748 (CA)***. he submitted that the Defendant's application is a demurrer, same having been filed without the Defendant entering its defence.

He added that the Defendant was served with the Claimants' originating process on the 9th of March 2021. It filed its Memorandum of Conditional Appearance on the 22nd of March 2021 and that since that time till the time of filing the Counter-Affidavit to the Notice of Preliminary Objection, the Defendant had not filed its Statement of Defence; choosing, rather, to serve the Claimants with its Notice of Preliminary Objection on the 17th of September 2021. Learned Counsel also argued that the position of the Rules of this Honourable Court is clear, to wit, that the Defendant having failed to file its defence cannot be granted audience on its application. Counsel relied on the case of ***Ibrahim v. A.P.C. (2019) 16 NWLR (Part 1699) pages 444, particularly at page 460***. He also argued that the Defendant has not complied with the provisions of Order 23 Rule 2(1) and therefore urged the Court to dismiss the Defendant's application.

Finally, Learned Counsel to the Claimants submitted that the Court has jurisdiction to entertain this suit as it is presently constituted, and that the Defendant's application is a demurrer which should not be entertained by the Court. He, accordingly, urged the Court to dismiss the Defendant's application.

In his reply on points of law, the Defendant through his Counsel responded to certain issues of law that were raised in the Claimants' written address. Learned Counsel started off by replying to paragraphs 3.1 to 3.4 of the Claimants' written address where Counsel to the Claimants submitted that he

that asserts must prove and argued that the Defendant failed to prove its assertion that the Claimants did not authorise the institution of this suit. In responding to this, Counsel to the Defendant submitted that the principle of law that he who asserts must prove applies to the person who asserts the positive or affirmative and not to the person who asserts the negative or denies the existence of a thing. He added that the law requires the person who asserts the affirmative to prove same, but, that, it does not require a person to prove the negative. Learned Counsel to the Defendant cited the cases of ***Anyaka v. Anyaka (2015) All FWLR (Pt 799) 1150 at 1175 para H*** and ***Egesimba v. Onuzuruike (2002) 15 NWLR (Pt 791) 466 paras C-D at Page 535***.

Learned Counsel further submitted that based on the principle enunciated in ***Anyaka v. Anyaka***, the Defendant who asserts the negative does not bear any burden to prove the negative, that the burden of proof is on he who asserts that the Claimants authorised the institution of this suit to produce the resolutions made by the respective Claimants' board of directors to that effect. He further submitted that in the instant case, the Claimants' Counsel failed to adduce the relevant proof such as resolution of the meeting of board of directors/shareholders of the Claimants duly convened for that purpose showing that the Claimants authorised the institution of this suit.

He noted that though learned Counsel for the Claimants cited the case of ***Owena Mass Transportation Co Ltd v Okonogbo (2018) LPELR 45221 (CA)*** in support of his position in paragraph 3.4 of his written address, however, in line with the cases of ***Onyenge v Ebere (2004) 13 NWLR (Pt 889) 20*** and ***Egesimba v Onuzuruike (2002) 15 NWLR (Pt 791) 466,*** the Claimants have the first duty to prove the affirmative (the authorization of filing of the suit) which they have failed to prove. He added that in this instant case, no such authorization was made and if such was made the Claimants failed to

prove such positive action by furnishing the relevant proof. He concluded that the reasons for not adducing the relevant evidence in the Claimants' custody is because it will be unfavourable to the Claimants who are more or less moribund shell companies with no traceable addresses.

Learned Counsel to the Defendant further pointed out that companies act by way of resolution, and only the board of directors of the company or a company in a general meeting may authorize the institution of an action on behalf of the company. He relied on the case of ***Ejekam v. Devon Ind. Ltd (1998) 1 NWLR (Pt 534) 417***.

He then went ahead and stated that one of the presumptions of law which the Court is required to apply is the presumption of the natural course of events and human conduct, and that this presumption is contained in section 167 of the Evidence Act 2011. He then further pointed out that the natural thing is that where a person claims to have a thing, he should produce it to refute any assertion made to the contrary; adding that in the instant case where the Defendant has asserted that the Claimants did not authorise the institution of this suit, the natural thing for the Counsel who instituted this suit should do is to produce evidence of such authorization by way of resolution made by the Claimants. He maintained that where there is none, the Court should presume that no such authorisation exists and that is why none was produced.

Learned Counsel then went ahead and stated that the Claimants in paragraph 3.5 of their written address stated that section 341 of the Companies and Allied Matters Act 2020 does not apply to this instant case and only applies to cases of minority. Responding to this particular contention, Counsel for the Defendant submitted that such view is erroneous and misleading as section 341 of CAMA 2020 provides the general procedure to be followed where a

wrong has been done to a company, and that thereafter the subsequent provisions provide for exceptions wherein a member as opposed to the company can file an action to remedy a wrong where minority protection is in issue.

In the instant suit, Counsel for the Defendant maintained, it was alleged that a wrong has been done to the Claimants and by the provisions of section 341 of CAMA 2020, only the company can sue to remedy that wrong; and, therefore, without the proof of the authorisation of the Claimants to institute this suit, the suit must be deemed to have been instituted without such authorisation.

Learned Counsel for the Defendant stated that in paragraph 3.10 of the Claimants' written address, the Claimants argued that the Defendant cannot rely on order 5 Rule 2 because the Defendant's application was not filed within a reasonable time. Counsel relied on the cases of ***Pam v. Mohammed (2008) 16 NWLR (Pt 1112) 1 per Tobi, JSC at pages 67 paras F-G*** and ***R.I.T.T.C.T. & C.S v. Adindu (2012) 2 NWLR (Pt 1284) 312.*** He further submitted that in the instant case, upon due briefing by the Defendant, He filed a Memorandum of Conditional Appearance on the 23rd of March 2021 and could not file the Notice of Preliminary Objection owing to the JUSUN strike which commenced on 6th April 2021 and was only able to file the said Notice of Preliminary Objection after the strike was called off on the 14th of June 2021. He added that he had to mobilize the Court Bailiff to effect service of the processes; adding that undue delay by the Court Bailiff in serving the Notice of Preliminary Objection on the Claimants cannot be ascribed to the Defendant as constituting undue delay.

Counsel then went on to respond to paragraphs 4.0 to 4.4 of the Claimants' written address and stated that it was argued that the Defendant's Preliminary

Objection is a demurrer on the ground that he did not first file his Statement of Defence in the substantive suit before raising the objection as provided for by Order 23 Rule 2(1) of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018. Counsel responded to this by stating that it is settled law that a Preliminary Objection on the ground of absence of jurisdiction of Court to entertain an action is not a demurrer and therefore can be taken before the Defendant files his defence or without filing his defence. Counsel relied on the Supreme Court case of ***Arjay Ltd v. A.M.S. Ltd (2003) 7 NWLR (Pt 820) 577 at 601 paras C-H*** and the Court of Appeal case of ***PDP v. Adeyemi (2002) 10 NWLR (Pt 776) 524-550, paras H-C.***

According to learned Counsel, the Supreme Court, while considering the effect of the provisions of Order 23 Rules 2 and 3 of the Lagos State High Court Rules 1994 which is *in pari materia* with Order 23 Rule 2(1) of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018, in the case of ***Elabanjo v. Dawodu (2006) 15 NWLR (Pt 1001) 76 at 115 paras C-H*** held that the issue of jurisdiction of a Court is not an ordinary point of law as envisaged under the Rules of Court requiring a Defendant to first file his defence before raising same where the Defendant perceives that the Court lacks jurisdiction to entertain a matter; and that this is because jurisdiction is a threshold issue which must first be determined when raised before the Court can take any step in the proceedings. Counsel relied on the Supreme Court case of ***CBN v. Rahamaniyya G.R. Ltd (2020) 8 NWLR (Pt 1726)314***. He also cited the cases of ***Madukolu v Nkemdilim (1962) 2 SCNLR 341*** and ***Skenconsult (Nig) Ltd v Ukey (1981) 1 SC 6.***

Finally, Learned Counsel to the Defendant pointed out that, as it has been shown in the preceding paragraph 2.13 of his Reply, the Preliminary Objection is not a demurrer and does not offend the provisions of Order 23 Rule 2(1) of

the High Court of the Federal Capital Territory Abuja (Civil procedure) Rules 2018. Based on the foregoing, therefore, learned Counsel urged the Court to uphold the Notice of the Preliminary Objection.

The above is the extensive summary of the arguments of both parties to this suit. After due consideration of the grounds upon which the Notice of Preliminary Objection is founded and all the issues raised and canvassed in the arguments, it is my considered view that the objection revolves round the competency of the suit of the Claimants. Accordingly, I have formulated these two irreducible issues to enable the Court resolve the bone of contention. These issues are:

(1) Whether the authorisation of the Board of Directors or members of the respective Claimants in the meeting duly convened for that purpose was not required before the institution of the present suit?

(2) Whether the failure of the Claimants to produce a sufficient affidavit in verification of the endorsement was not fatal to the suit of the Claimants?

RESOLUTION OF ISSUE ONE

There is no question that a company is a juristic person, vested with the powers to sue and be sued in its own name. Though a juristic person, it is a non-natural entity and, therefore, requires human agents through which to drive its actions and activities. See ***MTN Nigeria Communications Ltd v. Mr Akinyemi Aluko & Anor (2013) LPELR-20473(CA)*** where the Court of Appeal held *inter alia* that "***…a company is recognized as a corporate body that can sue or be sued. Admittedly, it is a legal fiction that exists only in the eyes of the law. This is due to the fact that a company has no brain, eyes or hands of its own. It acts through human beings/natural persons***

such as its Directors or Shareholders whose actions are invariably binding on it. See Ladejobi v. Odutola Holdings Ltd. (2002) 3 NWLR (Pt.753) 121." See also the case of ***Saleh v. B. O. N. Ltd (2006) NWLR (Pt.976) 316 at 326 – 327*** where the Supreme Court held thus: "***A company is a juristic person and can only act through its agents or servants***."

The Defendant has challenged the competency of this suit on the grounds *inter alia* that there was no resolution of the board of directors or the members in a general meeting authorising the institution of the suit. He has cited and relied on a number of provisions of the Companies and Allied Matters Act 2020. The relevant sections are sections 341, 87, 89 and 90. I have reproduced the sections below:

Section 381:

> "***Subject to the provisions of this Act, where an irregularity is made in the course of a company's affairs or any wrong is done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.***"

Section 87:

> ***(1) A company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived from, the members in general meeting or the board of directors.***
>
> ***(2) Subject to the provisions of this Act, the respective powers of the members in general meeting and the board***

of directors shall be determined by the company's articles.

(3) Except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Act or the articles required to be exercised by the members in general meeting.

(4) Unless the articles otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, is not bound to obey the directions or instructions of the members in general meeting provided that the directors acted in good faith and with due diligence.

(5) Notwithstanding the provisions of subsection (3), the members in general meeting may—

(a) act in any matter if the members of the board of directors are disqualified or unable to act because of a deadlock on the board or otherwise;

(b) institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or neglect to do so;

(c) ratify or confirm any action taken by the board of directors; or

(d) make recommendations to the board of directors

regarding action to be taken by the board.

(6) ***No alteration of the articles invalidates any prior act of the board of directors which would have been valid if that alteration had not been made***.

Section 89

Any act of the members in general meeting, the board of directors, or a managing director while carrying on in the usual way the business of the company, shall be treated as the act of the company itself and the company is criminally and civilly liable to the same extent as if it were a natural person:

Provided that—

(a) the company shall not incur civil liability to any person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of directors, or managing director, as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with or relationship to the company, he ought to have known of the absence of such power or of their irregularity; and

if in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in

question was not among the business authorised by the company's memorandum.

The above provisions have been construed and given effect to in a number of judicial authorities such as: ***Bank PHB V. CBN & Ors (2019) LPELR-47383(CA); Odutola Holdings Ltd Vs Ladejobi 2006 12 NWLR Pt 994 pt. 321; Adegbenro Vs Akintilo (2010) 3 NWLR Pt 1182 p.541 at 562; Plateau State Government v. Crest Hotel & Garden Ltd (2012) LPELR-9794(CA); African Continental Bank Plc v. Haston Nigeria Limited (1997) LPELR-5218(CA); United Investments Limited v. The Registrar Of Titles, Lagos State & Ors (2016) LPELR-41406(CA); The Attorney General Of Lagos State v. Eko Hotels Limited & Anor (2006) LPELR-3161(SC) and Citec International Estates Limited & Ors v. Josiah Oluwole Francis & Ors (2021) LPELR-53083(SC)***.

It is the contention of the Defendant that the persons who instituted this action in the name of the Claimants do not have authorisation in the form of a resolution of the boards of directors of the Claimants or the resolution of the members in a general meeting to so act. It concluded that the absence of such authorisation divests this suit of the requisite competency pursuant to the rule in the *locus classicus* of ***Madukolu v. Nkemdilim (1962) 2 SCNLR 341***. In their response, the Claimants referred this Court to the deposition in the Counter-Affidavit where the deponent swore that he had the consent and authority of the Claimants to depose to the said Counter-Affidavit. The question then becomes: on whom lies the evidential burden of proof in this regard?

Section 133 (1) provides that "***In civil cases, the burden of first proving existence or non-existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on***

either side, regard being had to any presumption that may arise on the pleadings." The issue of authorisation or its absence in this suit was first raised by the Defendant in its Notice of Preliminary Objection. Learned Counsel has contended that the Defendant is not under a legal obligation to prove the negative of any fact, adding that it is the Claimants who claim that they have the requisite authorisation that must prove the existence of such authorisation.

I do not agree with learned Counsel to the Defendant that his explication represents the position of the law. If that were the case, a party to a suit will deny the existence of a fact and simply go to sleep. Section 133(1) of the Evidence Act places ***the burden of first proving existence or non-existence of a fact…" "…on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings."*** In this case, it is the Defendant that is asserting the non-existence of a meeting of the members or Board of Directors of the companies who are the Claimants herein authorising the initiation of this suit in the names of the Claimants that is saddled with the evidential burden of proving the non-existence of that fact. In other words, the burden is therefore on the Defendant to prove that no meeting was held or that the Claimants were not authorised by the board of directors or the members to institute this suit. It is only when it has discharged that burden of proof that the burden of proving the existence of authority to institute this suit will shift to the Claimants. See ***Okoye & Ors v. Nwankwo (2014) LPELR-23172 (SC) per Mary Ukaego peter-Odili, JSC at page 25 -26 paras F – E.*** See also ***Allasure v. Odezeh (2021) LPELR-53531 (CA)*** where the Court of Appeal ***per Jamilu Yammama Tukur, JCA held at page 12, paras C – E*** that ***"…once a Plaintiff (or, as in this case, the Defendant) has discharged the***

legal burden of proof upon him to the required standard, the evidential burden of proof arises, which behoves upon the Defendant to prove, moreso where there are particular facts the Defendant is relying upon." The Defendant in the instant case has not discharged the legal burden of proof upon him to the required standard; so, the burden of proof cannot shift to the Claimants. I so hold.

It is important to note that the same subsection provides that "***regard being had to any presumption that may arise on the pleadings***." Two of the presumptions relevant here is the presumption that the common course of business has been followed in particular cases and also the presumption of regularity of judicial and official actions.

Section 167(c) of the Evidence Act, 2011 provides that the Court may presume that "***the common course of business has been followed in particular cases***." Since this is a rebuttable presumption of fact, it is for the Defendant, who is alleging that the proper course has not been followed by the Claimants in bringing this action, to prove that the common corporate practice prior to the commencement of legal action by corporate bodies has not been followed in this case. See ***Right Choice Electronics Ltd v. Kelvin Festus Int'l Ltd (2012) LPELR-19726 (CA); Chemiron (Int'l) Ltd v. Stabilini Visinoni Ltd (2018) LPELR-44353 (SC); Kate Enterprises Ltd v. Daewoo Nigeria Ltd (1985) 2 NWLR (Pt. 5) 116; Saleh v. B.O.N. Ltd (2006) NWLR (Pt. 976) 316 at 326 – 327; Onwuka & Ors v. Onwuka (2017) LPELR-42281 (CA)***.

Section 168(1) of the Evidence Act, 2011 provides that "***When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with***." It is my considered view, and I so hold, that the Defendant has failed to established the absence of authorisation on the part of the Claimants. What is

more? The Defendant has failed to challenge the assertion of the Deponent of the Claimants' Counter-Affidavit that he has the authority of the Claimants to so act. I hereby resolve this issue against the Defendant.

RESOLUTION OF ISSUE TWO

Learned Counsel for the Defendant has challenged the competency of this suit on the ground that the Writ of Summons through which this suit was commenced do not have an endorsement verifying the Writ of Summons which, according to him, is a condition precedent to the sealing and issuance of the Writ of Summons. According to him, "*…the General Form of Writ of Summons contained in the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules, 2018 as Form 1 is contained at pages 137 to 139 of the said Rules and has its last provision as "A sufficient affidavit in verification of the endorsement on this Writ to authorize the sealing produced to me this ….. day of ….. 20….. (Signature of Registrar)"…*"

I have studied the Rules of this Honourable Court and the said Form 1. I agree with learned Counsel for the Defendant that the general form of the Writ of Summons has a provision for the said verifying endorsement. But, is the absence of the verifying endorsement a mere irregularity or a fundamental defect of such magnitude as to render the Writ of Summons and the entire suit incompetent?

To answer this question, I shall address my mind to the provisions of Order 2 Rule 5. The said Rule provides that "***Except in the cases in which different forms are provided in these rules, the Writ of Summons shall be as in Form 1 with such modifications or variations as circumstances may require as in Form 33 (Fast Track).*** " What, then, is the consequence that must attend a non-compliance with this express provision of the Rules?

Order 5 Rules 1 and 2 provide that,

1. ***“Where in beginning or purporting to begin any proceedings there has by reason of anything done or left undone, been a failure to comply with the requirements of these rules, such failure shall not nullify the proceedings.***

2. ***Where at any stage in the course of or in connection with any proceedings there has by reason of anything done or left undone been a failure to comply with the requirements as to time, place, manner, or form such failure may be treated as an irregularity. The Court may give any direction as he thinks fit to regularise such steps.”***

It is instructive to note that the second arm of the Defendant’s Notice of Preliminary Objection is anchored on non-compliance with the form of the Writ of Summons in this suit. Order 5 Rule 1 states that such non-compliance with the Rules shall not nullify the proceedings. Order 5 Rule 2 specifically provides that non-compliance with the requirements as to form among other things shall be treated as an irregularity. In this case, the Court may give any direction as he thinks fit to regularise such steps. This is particularly so where the non-compliance has not occasioned any miscarriage of justice to the other party. I have carefully perused the processes filed in respect of this Notice of Preliminary Objection, particularly, the affidavit in support of the Notice of Preliminary Objection, and there is nowhere the Defendant states that the non-compliance as to form, specifically the absence of the verifying endorsement has occasioned a miscarriage of justice to it.

Besides, that endorsement imposes a duty on the Registrar to confirm that there is a sufficient affidavit in verification of the endorsement on the Writ of Summons authorising him to seal same. If the Registrar failed or neglected or

refused to perform this duty, his failure, negligence or refusal should not be visited on the litigants. This position has been settled by the Courts in a plethora of cases. See, for instance, ***Duke v. Akpabuyo Local Government (2005) LPELR-963 (SC); Nwaogu & Anor v. INEC & Ors (2015) LPELR-41576 (CA); Jalo & Anor v. Gambo & Ors (2019) LPELR-49208 (CA); Ede & Anor v. Mba & Ors (2011) LPELR-8234 (SC); In Re Otuedon (1995) LPELR-1506 (SC)*.**

In ***Mr Boniface Ufoegbunam v. Barr. Jideofor Okongwu (2018) LPELR-45086(CA)*** the Court of Appeal, in construing the provisions of Order 5 Rules 1 and 2 of the High Court of Anambra State (Civil Procedure) Rules 2006 (which is *in pari materia* with Order 5 Rules 1 and 2 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018) held, while discountenancing the objection of the Defendant (Appellant in the appeal) at **pages 10 – 18, paras E – E per Helen Moronkeji Ogunwumiju ,JCA** (as he then was) that "***…the spirit of the law has changed for the better and that irregularity even if we concede that it exists here for the sake of argument must not be confused with total lack of jurisdiction…***". The Court further held that "***…mandatory words or provisions in rules of Court as that contained in Order 4 Rule 1(1) of the Anambra State Rules are generally treated as permissive or directory and allow for discretionary enforcement…***"

On when the Court can set aside a process for non-compliance with the Rules of the Court, the Court of Appeal in **Alh. Bala Usman v. Tamadena & Company Ltd & Ors (2015) LPELR-40376(CA)** held ***per Uwani Musa Abba Aji, JCA (as he then was) at Pp. 16-18, paras. D-B*** that,

> "***…Depending on the circumstance of each particular case, where the non-compliance has occasioned miscarriage of***

justice or where the right of the adverse party will be affected, the Court shall not treat the non-compliance as a mere irregularity and as such mandate the rules to be followed or nullify the proceedings as the case may be. But in a situation where it has not occasioned miscarriage of justice it shall be treated as a mere irregularity and should not vitiate the proceedings. This is because all rules of Court are made in aid of justice and that being so, the interest of justice will have to be given priority over any rule, compliance of which will lead to outright injustice. The Rules are not **sine quo non** ***in the determination of a case and therefore not immutable.***"

In ***Abubakar v. Yar'Adua (2008) 4 NWLR (PT. 1078) P. 465 AT 510 paras G - H***, the Supreme Court held *inter alia* that:

"***It is not every non-compliance with rules of court that vitiate the proceedings or do harm to the party in default. As a matter of our adjectival law, and by the state of the non-compliance rules, the Courts will regard certain acts or conduct of non-compliance as mere irregularity which could be waived in the interest of justice. Again, as a matter of our adjectival law, non-compliance rules in their aggregate content point more to this trend than the reverse position of a punitive nature against the non-complying party. The state of the law is more in favour of forgiving non-compliance with rules of Court, particularly where such noncompliance, if waived, will be in the interest of justice***."

In ***Okoye & Ors v. Nigerian Construction & Furniture Co. Ltd & Ors (1991) 7 SC (PT. 111) 33*****,** the Supreme Court held that,

"***Any non-compliance with any rules of Court is* prima facie *an irregularity and not a ground for nullity. If they are mere irregularity, they may be either a ground for setting aside the proceedings if taken up timeously before the person aggrieved thereby has taken any steps upon becoming aware of the irregularity or may be waived.***"

Learned Counsel for the Claimants has invited this Court to discountenance the Preliminary Objection on the ground, *inter alia*, that it was not brought timeously. Counsel for the Defendant has laid the culpability for this delay at the doorstep of the Registry of this Court. I find it amusing that learned Counsel could conveniently cherry-pick when to blame the Registry and when to blame the Claimants for non-compliance with the Rules of this Court. In his Notice of Preliminary Objection, he blamed the non-compliance with Form 1 on the Claimants. When his Notice of Preliminary Objection was challenged on the ground that it was not brought timeously, he blamed his tardiness on the Court Registry.

The law is settled that the sin of inadvertence of the Court Registry shall not be visited on the innocent litigant. I have pointed out above that Form 1 places a duty on the Registrar to confirm that a Writ of Summons that is being filed has a sufficient affidavit verifying the endorsement on the Writ of Summons before sealing and issuing same. His failure to carry out his official duties should not be visited on the Claimants herein. I so hold. The same way the failure of the Registry of this Court to ensure that processes filed in respect of this Notice of Preliminary Objection were served on the parties punctually has not stopped this Court from hearing the application of the Defendant. See ***Hon. Okechukwu Akara Nwaogu & Anor v. Independent National Electoral Commission (INEC) & Ors (2015) LPELR-41576(CA); Idris Abdullahi Jalo***

& Anor v. Hon. Maikudi Gambo & Ors (2019) LPELR-49208(CA); Chukwuma Ogwe & Anor v. IGP & Ors (2015) 15 SCM 226 at 238 per M. D. Muhammad, JSC; CCB (NIC) PLC VS A.G. Anambra State & Anor (1992) 81 NWLR (PT. 261) 528 this Court per Olatawura, JSC; Chukwuma Ogwe & Anor v. Inspector General of Police & Ors (2015) LPELR-24322(SC); Dominic Ede & Anor. v. Nwagbara Nwodo Mba & Ors (2011) LPELR-8234(SC) and In Re: Osibakoro D. Otuedon (1995) LPELR-1506(SC)**.**

I must not fail, at this juncture, to cite the dictum of the erudite Chukwudifu Akunne Oputa JSC in ***Nosiru Bello v. AG Oyo State (1986) 5 NWLR Pt. 45 Pg. 828***, where the Supreme Court, speaking through the eminent Jurist, held as follows:

> "***The picture of law and its technical rules triumphant, and justice prostrate may no doubt have its admirers. But the spirit of Justice does not reside in forms and formalities, nor in technicalities, nor is the triumph of the administration of justice to be found in successfully picking one's way between pitfalls of technicalities. Law and all its technical rules ought to be but a hand maid of justice and legal inflexibility (which may be becoming of law) may, if strictly followed, only serves to render Justice grotesque or even lead to outright injustice. The Court will not endure that mere form or fiction of law, introduced for the sake of Justice, should work a wrong, contrary to the real truth and substance of the case before it.***"

I must state, for the records, that Counsel for the Claimants has also urged this Court to dismiss the Notice of Preliminary Objection on the ground that it is a demurrer contrary to the provisions of Order 23 of the Rules of this Court. While I am inclined to agree with him, I am also aware, having perused

through the contents of the case file, that the Defendant has filed a Statement of Defence; though, I must also state that the Statement of Defence was filed as an after-thought, considering that it was filed after the Claimants had challenged the competency of the Notice of Preliminary Objection. This is clearly an attempt to overreach the Claimants. The Courts have consistently denounced lawyers and litigants who engage in litigation by ambush. This Court would be right to treat the Notice of Preliminary Objection as a demurrer. In the interest of justice, however, this Court will discountenance the issue of demurrer raised by the Claimants in their response to the Notice of Preliminary Objection and hear this suit on the merits.

For all the reasons stated above, I find the Notice of Preliminary Objection unmeritorious and same is accordingly dismissed. I make no order as to costs.

This is the Ruling of this Court delivered today, the 25th of January, 2022.

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HON. JUSTICE A. H. MUSA
JUDGE
25/01/2022