

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI, ABUJA**

BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS

COURT:28

DATE: 29th March, 2023

BETWEEN:

FCT/HC/CV/2714/2022

B. KWEN ENERGY LIMITED-----

CLAIMANT

AND

**1. BLESSING OBOROKUMO }
2. UNITED BANK OF AFRICA }**

DEFENDANTS

RULING

This notice of preliminary objection was filed by the 2nd Defendant/Applicant on 16th November,2022, praying the court to dismiss this suit against the 2nd Defendant as Claimant's right of action against it has become extinguished (i.e. statute barred) thereby robbing this court of jurisdiction to entertain this suit.

The grounds of the Applicant's Preliminary Objection is that the Claimant took a writ of summons making claims against the 2nd Defendant on August 17th , 2022, more than three years after the cause of action arose. It is the contention of the Applicant that the cause of action in this suit arose on June 28, 2017, when the Claimant wrote the 2nd Defendant on the allegedly fraudulent acts of the 1st Defendant and

alleged negligence by the 2nd Defendants, or May 17th, 2019 when the Claimant wrote to the Bank and EFCC, and that by virtue of section 8 of the Limitation Act, this action which is founded on contract and tort cannot be maintained against the 2nd Defendant after the expiration of three (3) years from the date on which the cause of action arose.

In its written address, the Applicant through its counsel, citing section 8 (2) and (4) of the Limitation Act, argued that this court lacks the requisite jurisdiction to entertain the Claimant's suit as constituted taking into consideration the fact that the cause of action is statute barred, as this suit was instituted more than three (3) years of the accrued of the cause of action. Counsel made copious references to paragraphs in the Claimant's statement of claim in an attempt to establish that the Claimant had knowledge of the cause of action as at June 28, 2017, when it wrote to the 2nd Defendant to stop all transactions on the account.

Counsel submitted that in determining whether an action is statute barred, the court has to consider three factors, viz: (i) the date the cause of action arose; (ii) the date of commencement of action, and (iii) the period of time prescribed for the commencement of the said action by the relevant piece of legislation.

Relying on the decision in **MERCANTILE BANK NIG. LTD V. FETECO LTD (1998) 3 NWLR (PT. 540) 142 AT 156-157**, counsel submitted that once an action is found not to have commenced within the time or period stipulated by a statute of limitation, the court would have no other option

than to decline jurisdiction, as the statute of limitation removes the right of action, the right of enforcement and the right of judicial relief in a Plaintiff and leaves him with a bare and empty cause of action which he cannot enforce if the alleged cause of action is statute barred.

Counsel pointed out that the issue of limitation of action is statutory and not merely procedural, in other words that it is a matter of substantive law and not technicality.

Citing the celebrated case of **MADUKOLU V. NKEMDILIM (1962) 2 SCNLR 341**, counsel on behalf of the Applicant urged the court to dismiss the Claimant's suit as it failed to meet the three conditions for the court's exercise of jurisdiction.

Reacting to the 2nd Defendant's notice of Preliminary Objection, the Claimant filed a Reply on Points of Law on 22nd November, 2022.

Learned Counsel to the Claimant arguing on behalf of the Claimant, raised some preliminary issues in opposition to the Applicant's Notice of Preliminary Objection. Counsel argued that it is trite law that where a notice of preliminary objection as in this case is based on facts, it is imperative that the Applicant relying on the Notice of Preliminary Objection must accompany the Notice of Preliminary Objection with an affidavit. **A.G FEDERATION V. ANPP (2004) VOL 5 WRN.** Counsel submitted that since the Applicant failed to file an affidavit in support of the Notice of Preliminary Objection in view of grounds 1, 2, 3, 4 and 5 of the Notice of Preliminary Objection, the application is incompetent.

Counsel further contended on behalf of the Claimant that the 2nd Defendant's Notice of Preliminary Objection being an objection on points of law was filed in contravention of Order 23 Rule 1 and 2 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018. According to counsel, by virtue of the above provision, the 2nd Defendant ought to have raised the issues in contention in its pleading, and must have pleaded facts in support of it.

Relying on the case of **KETU V. ONIKORO (1984) 10 SC 265**, counsel maintained that limitation law or statute bar is a special defence and if available to defendant at the time of action, it must be specifically pleaded before it can be raised in the matter either by way of motion or otherwise.

Citing Order 15 Rule 7 (1) (2) of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018, counsel further submitted that issues predicated on limitation law must be specifically pleaded. In view of the above, it was submitted on behalf of the Claimant/Respondent that the 2nd Defendant's notice of preliminary objection is incompetent since the 2nd Defendant failed to specifically plead the issue of limitation in its statement of defence before filing the notice of preliminary objection.

Arguing further on the preliminary issues, counsel observed that from grounds 2, 3, 4 and 5 of the Notice of Preliminary Objection, the 2nd defendant is not sure of the date the cause of action accrued. Counsel maintained that the law is settled that where a party is ambivalent or speculative on the date of accrual of a cause of action such application or preliminary objection must be rejected. Counsel referred

the court to the decision in the case of **JOEL OMAJALE V. OKALAEDIBO (Unreported Appeal CA/A/1441 2019)**.

On the main issue of whether the Claimant's suit is statute barred, counsel submitted on behalf of the Claimant that a cause of action is constituted by bundle of facts which the law will recognize as giving the plaintiff a right of action, and that in consideration of limitation period for an action, time begins to run when the cause of action arose. All the facts must have happened which are material to be proved to entitle the plaintiff to succeed before the cause of action will accrue and time begin to run for the purpose of accrual of cause of action.

Counsel argued that the claimant's cause of action had not fully accrued on the 28th of June 2017 and or May 17th , 2019 as alleged by the 2nd Defendant in the Notice of Preliminary Objection. He referred the court to paragraphs 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33 of the Statement of Claim, in support of his position. Moreover, the 2nd defendant is not sure of the date of accrual of the claimant cause of action.

Furthering his argument, counsel maintained that the relationship between the Bank and a customer is a contractual one, and by virtue of section 7 (1) of the Limitation Act, the prescribed period of limitation in respect of simple contract is six years. Therefore, the 2nd Defendant's contention that the limitation period is three years is misconceived.

Counsel with the aid of judicial authorities, highlighted some of the exceptions applicable to the law in respect of

limitation such as fraud, deliberate concealment by the Defendant or mistake or where there is a continuing injury or fresh damage arising from the same injury. Counsel submitted that the Claimant having raised of fraud in its statement of claim, the statute of limitation does not apply to the Claimant's case. Also, the damaged and injury complained of by the Claimant against the 2nd Defendant, is a continuous one, as such, the statute of limitation does not apply to the Claimant suit.

The 2nd Defendant filed a reply on points of law to the Claimant's Response, wherein they maintained that this is not a case of fraud or breach of contract against the 2nd Defendant, but rather that of negligence and being a case of alleged negligence, the Claimant ought to have brought an action within three (3) years.

The 2nd Defendant through its Counsel also responded to the preliminary issues raised by the Claimant/Respondent, by arguing that their preliminary issues which bothered on the issue of jurisdiction does not amount to demurrer as the law allows a party to raise a preliminary objection to jurisdiction.

Also, the 2nd Defendant maintained that their notice of preliminary objection need not be accompanied with an affidavit, as their objection was on points of law and not facts.

Before proceeding to determine the main issue in contention in this application, I will like to address the preliminary issues raised by the Claimant/ Respondent in its

reply to the 2nd Defendants/Applicant's Notice of Preliminary Objection.

On the preliminary issue raised by the Claimant's Counsel on the failure to file an affidavit in support of the preliminary objection, the argument of the Claimant in opposition on this point holds no water as where a preliminary objection is raised on a point and the relevant facts upon which the objection is based are before the Court, there is no need for additional affidavit evidence to be adduced. See the case of **NABARUMA VS. OFFODILE (2004) 13 NWLR (PT.891) 599**. Looking at the point of objection, it is not only clear that it is one on Limitation of Statute, it is also clear that it is one which goes to the jurisdiction of the case and a matter of law.

The elementary adjectival principle of law is that an Objector is not required to file an affidavit in support of a Notice of Preliminary Objection because, he is deemed to have accepted the facts in the Claimant's pleadings, but insist that nevertheless, the Claimant's suit is not legally sustainable for reasons and grounds that can be found in law.

The Claimant also contended that the 2nd Defendant's Notice of Preliminary Objection being an objection on points of law was filed in contravention of Order 23 Rule 1 and 2 and Order 15 Rule 7 (1) (2) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018.

Order 23 Rule 1 and 2 of the Rules of this Honourable Court abolishes the practice of demurrer and further provides that any party may by his pleading raise any point of law

and the court may dispose of the point so raised before, at or after the trial.

Order 15 Rule 7(1) and (2) provides that “all grounds of defence or reply which makes an action unmaintainable or if not raised will take the opposing party by surprise or will raise issues of facts not arising out of the preceding pleadings shall be specifically pleaded. Sub rule 2 provides that where a party raises any ground which makes a transaction void or voidable or such matters as fraud, limitation law, release, payment, performance, facts showing insufficiency in contract or illegality either by any enactment or by common law, he shall specifically plead it.”

I have critically considered the relevance of the provisions of these rules.

No doubt, demurrer proceedings have been abolished in Civil Procedure. I must however emphasize that the issue of jurisdiction is quite distinct from the issue of demurrer. See **NDIC V. CBN (2002) 7 NWLR (PT. 766) 272**, where the Supreme Court per Uwaifo, JSC, clarified the distinction as follows:-

"The tendency to equate demurrer with objection to jurisdiction could be misleading. It is a standing principle that in demurrer, the Plaintiff must plead and it is upon that pleading that the Defendant will contend that accepting all the facts pleaded to be true, the Plaintiff has no cause of action, or where appropriate, no locus standi: ... But, as already

shown, the issue of jurisdiction is not a matter for demurrer proceedings. It is much more fundamental than that and does not, entirely depend as such on what a Plaintiff may plead as facts to prove the relief he seeks... It does not always follow that he must plead first in order to raise the issue of jurisdiction. In this case, the lower Court was wrong to have held that the Appellant's preliminary objection as to the Respondent's locus to initiate the suit can only be taken after a Statement of Claim is filed."

Issue of jurisdiction being a threshold matter, can be raised at any stage of the proceedings. It can be raised on appeal and the Court can even raise it suo motu. A Defendant does not need to file statement of defence before raising the Issue. Where a party believes that there is anything inhibiting the competency of a Court to try any matter, it should be brought to the attention of the Court at the earliest opportunity before any fresh steps are taken.

An objection whether based on law or on fact, which touches on the jurisdiction of the court, constitutes an exception to the principle of law on demurrer.

Learned counsel to the Claimant misconstrued the provision of Order 15 Rule 7 (1) and (2). The said provision applies to situation where the defendant predicates his defence on any of the grounds mentioned therein. What the rule implies is that where a Defendant predicates his defence on limitation law, such limitation law must be specifically

pleaded in the Defendant's Statement of Defence. The said rule does not restrict the right of a Defendant to file a notice of preliminary objection on points of law challenging the jurisdiction of the court to entertain a suit for being in breach of a limitation of law.

What is before this court is a notice of preliminary objection, not a defence to the Claimant's suit. I therefore do not see the relevance of Order 15 Rule 7 (1) and (2) to this application. The Defendant has an option of either raising a preliminary objection to the jurisdiction of this court to entertain this suit on grounds of limitation law or raising same as a defence in its pleading, wherein he would be required to specifically plead same. The defendant chose to bring his objection by way of a preliminary objection. I am of the opinion that the defendant is still within the ambit of the law in so doing. Hence, the defendant's preliminary objection should be considered and determined on the merit.

Now, moving to the main issue which is whether the Claimant's suit is statute barred, I must state that the essence of a limitation law is that the legal right to enforce an action is not a perpetual right but a right generally limited by statute. Where a statute of limitation prescribes a period within which an action should be brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period.

Also the purpose of limitation law is designed to promote justice by preventing surprises through the revival of stale claims and to obviate the inconvenience and

embarrassment to defendants who may have been led to change their status due to inordinate delay in filing the action.

Therefore a cause of action is statute-barred if legal proceedings cannot be commenced in respect of same because the period laid down by the limitation law had lapsed. An action which is not brought within the prescribed period, offends the provisions of the law and not give rise to a cause of action.

However, just as was declared by the court In *Lawal & Ors V. The Executive Governor of Lagos State (2017) LPELR - 43047 (CA)*, "Principles of law are not always in absolute terms, most times there are exceptions to the general rules.

The Court in the case of **MR. TEKOBOLORA v. ELDER SAMUEL ADEGBITE (2012), LPELR-7937 (CA)** gave a list of exceptions to the statute of limitation thus:

"It is important to state that the law of limitation admits of certain exceptions. Section 3 of the Limitation Law provides: The provision of this Part of the law shall have effect subject to the provisions of part 3 of this law which provides for the extension of the periods of limitation in the case of disability, acknowledgment, part-payment, fraud and mistake. Section 21 of the law provides: 'If on the date when any right /of action accrued for which a period of limitation is prescribed by this law, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date the person

ceased to be under a disability or died, whichever, event first occurred, notwithstanding that the period of limitation had expired". See also **AREMO V. ADEKANYE (2004) 13 NWLR (PT. 891), 572.**

I therefore agree with the Claimant that there are exceptions to the applicability of a limitation law such as in the case of fraud as decided in the case of **ALFA AROWOSAYE V. FELIX OLUWASEUN OGEDENGBE & ANOR (2008) LPELR-3701 (CA)** thus:-

*"It has long been established that it is only in cases of concealed fraud that the statute of limitation becomes inoperative. This, the true position is that the statute of limitation does not apply in cases of concealed fraud so long as the party defrauded remains in ignorance of the fraud without any fault of his own". See also **AROWOLO V. IFABIYI (2002) 4 NWLR (PT. 757) 356.***

The fraud applicable here is one that was described in **ADMINISTRATOR OF ESTATE/EXECUTORS OF ESTATE OF GENERAL, SANI ABACHA (DECEASED) V. EKE SPIFF & ORS (2003) 1 NWLR (Pt. 800) 114** in the context of not necessarily involving moral turpitude nor is it used in the common law sense but in the equitable sense to denote a conduct that would-be against conscience for the defendant to avail itself of the defence of limitation of time, See **ADIMORA V. AJUFO (1988) 3 NWLR (PT. 80) 1.**

From the legal or equitable point of view or the common law sense, fraud can suspend the operation of limitation law. Fraud generally makes limitation law to be inoperative.

However, where should the particulars of fraud be found or identified? I can safely state that the relevant particulars should be in the statement of claim since that is also where all materials relevant to the determination of limitation are taken.

Is there any allegation of fraud in the pleadings of the Claimant that can make limitation law inoperative?

I have gone through the statement of claim and I can find several averments of fraud therein. In fact, fraud is specifically pleaded in paragraphs 43 to 45 of the Statement of Claim.

On whether the Claimant's case bothers on negligence or contract, that to me is irrelevant at this point, as it is clear from the pleadings of the claimant that fraud is being alleged against the Defendants in this suit. This alone is enough reason to remove the clog of limitation statute on the path of the claimant's suit.

In view of the foregoing, I am convinced that the 2nd Defendant/ Applicant's notice of Preliminary Objection is unmeritorious and unfounded. The Preliminary Objection of the 2nd Defendant/ Applicant is hereby dismissed.

**HON. JUSTICE M.S IDRIS
(PRESIDING JUDGE)**

APPEARANCE

Ugbede Idachaba:- For the Claimant.

Hannatu Bahago:- For the 2nd Defendant