IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT COURT 45 SITTING IN WUSE ZONE 2, ABUJA

BEFORE HIS LOARDSHIP: THE HON. JUSTICE ELEOJO ENENCHE

12th DAY OF DECEMBER, 2022

FCT/HC/CV/806/2022

M/10404/2022

BETWEEN

1. MA'ARUF SADIQ ABDULAHI
2. ADAM SALIM
3. COZMO PARK LTD
4. COZMO PARK CONSORTIUM LTD…….**CLAIMANTS**

(FOR THEMSELVES AND ON BEHALF OF OWNERS OF PLOTS 1783, 1787, 1788, 1790, 1791, 1793, 1794,1795, 1796 1797, 1798, 1799, 1801, 1802 AND 1979)

-AND-

1. KYC INTERPROJECT LIMITED
2. FEDERAL CAPITAL DEVELOPMENT AUTHORITY ……..**DEFENDANTS**
3. NIGERIA POLICE

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RULING

The Application for ruling is **M/10404/22**. It is a motion on notice initiated by the 1st Defendant in the substantive suit and who I shall subsequently refer to as the Applicant for the purpose of this ruling.

The Applicant prayed for the following:

1. **AN ORDER** of the honourable Court setting aside its ruling delivered in this suit on ***31st March, 2022, 8th April, 2022 and 15th July, 2022*** and all the proceedings conducted thus far in this suit as same is a gross abuse of the process of the honourableCourt.

2. **AN ORDER** of the honourableCourt declining jurisdiction over this suit and referring same to arbitration pursuant to ***Article 20 of the Memorandum of Understanding between the parties dated 7th of August, 2019*** which imposes the obligation on the parties to submit themselves to arbitration which the Claimants are yet to comply with.

3. **ANY OTHER ORDERS(S)** that this Honourable Court may deem fit to make in the circumstances of this suit.

The motion paper equally contained the grounds upon which the Application was brought. In all, 9 grounds were raised as follows;

1. The 1st Defendant/Applicant on 30th of September, 2021 filed a suit against the 4thClaimant vide ***suit No. CV/2528/21; KYC INTER PROJECT***

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LIMITED v. COZMO PARK CONSORTIUM LIMITED which suit was assigned to Hon. Jus. Bello Kawu of the F.C.T High Court No. 15 sitting at Kubwa District which matter is still pending and subsisting before the said Court.

2. The subject matter of the above said suit bothers on inter alia; ***the interpretation of the Memorandum of Understanding between the 1st Defendant/Applicant and the 4th Claimant/Respondent dated 7th of August, 2019.***

3. The 4th Defendant/Respondent was duly served with the processes in the above said suit and actively participated in the proceedings in the same and even filed processes in response to the 1st Defendant/Applicant's said suit.

4. Despite having been served with the processes of the above said suit and participated actively in the same, the 4th Claimant/Respondent in cohort with the other Claimants took out this suit against the 1st Defendant/Applicant on the ***10th of March, 2022*** seeking *inter alia;* ***a declaration bothering on the interpretation and construction of the Memorandum of Understanding between the 1st Defendant/Applicant and the 4th Claimant/Respondent dated 7th of August, 2019.***

5. ***The parties, subject matter*** and***reliefs***being sought in the suit currently pending at the High Court of the F.C.T No. 15, Kubwa*coram* Hon. Jus. Bello Kawu as aforesaid and this suit currently pending before this Hon. Court are the same.

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6. The suit pending at the High Court of the F.C.T No. 15, Kubwa*coram* Hon. Jus. Bello Kawu as aforesaid was the suit that was filed first in time i.e. it was filed on the ***30th of September, 2021***while the current suit pending before this Hon. Court was filed on the ***10th of March, 2022.***

7. The current suit pending before this Hon. Court is a gross abuse of the process of this Hon. Court and same ought to be dismissed by the Hon. Court without further *ado*.
8. There is an arbitration clause i.e. Article 20 in the Memorandum of Understanding between the 1st Defendant/Applicant and the 4th Claimant/Respondent dated 7th of August, 2019 which stipulates and imposes an obligation on the parties to submit themselves to arbitration which the Claimants are yet to comply with.

9. The Claimants having not complied with the said arbitration clause and consequently, this Hon. Court cannot exercise jurisdiction over the matter and ought to stay proceedings in same and refer same to arbitration and set aside all the Orders it has made in same and the proceedings so far conducted in the same as was made and exercised without jurisdiction.

Supporting the application is a 15 paragraph affidavit deposed to by MichealAyubaAuta, the Group Managing Director and alter ego of the 1st Applicant. The highpoint of the factsborne in the affidavit which supports the application in summary is that the Applicant on 30th of September 2021 filed a suit against the 4th Claimant who I shall respectively further refer to as the 4th

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Respondent to this Motion. The Suit is Suit **No. CV/2528/21: KYC PROJECT LTD. V. LTD. V. COZMO PARK CONSORTIUM LIMITED.** The Suit is pending before Hon. Justice Bello Kawu of this court. A copy of the process in that Suit was attached to the affidavit and marked as Exhibit 'A'. It was also averred that the stated Suit bothered on the interpretation of the Memorandum of Understanding between the Applicant herein and the 4TH Respondent dated 7TH August 2019. It was stated that the 4th Respondent actively participated in the proceedings and evenfiled processes which were annexed as Exhibit 'B' to this motion. It sought to be established by the affidavit that this Suit and the one before Hon . Justice Bello Kawu alluded to are one and the same as it relates to parties, subject matter and reliefs.

The 2nd point on which this application is anchored and which fact were further deposed to in the supporting affidavit is that Article 20 of the Memorandum of Understandingbetween the Applicant and the 4th Respondent embodiesan Arbitration clause by which the parties are bound to comply with before a resort to litigation. A copy of the Memorandum of Understandingis attached as Exhibit 'C'. The bottom line of the contention sought to be established on this point is that the Court ought to stay proceedings in view of the Arbitration Clause.

In opposition to the motion there is an 11 paragraphs counter affidavit bearing Vincent Sani as the deponent. The depositions therein which counteract the motion are essentiallythat the issues raised, reliefs sought and the parties in the present suit are not the same as those contained in suit **No.CV/2528/21** instituted by the Applicant and pending before Justice Bello Kawu. It was also averred that it was the Applicant who acted in breach of the arbitration clause by first filing the suit.

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In arguing the motion learned counsel for the Applicant as I earlier noted submitted that this action is an abuse of court process. The basis of this submission as can be garnered from counsel's written address is that there is a pending suitearlier filed by the Applicant wherein the 4th Respondent was sued. Counsel notes that in this present suit, the parties are still the same. citing a plethora of cases, I was urged to find and hold that this suit consequently constitutes an abuse of the judicial process.

It is trite that the abuse of court process comes in different shades however, as argued by the learned counsel for the Applicnat , the shade of concern here is that which depicts an abuse of court process as filing a multiplicity of actions. In ***CHIEF DENNIS EZEBUILO v. GOVERNOR OF ANAMBRA STATE & ORS(2021) LPELR-56268(CA)*** the Court of Appeal took a bite at this cherry where it held that the same court had in in ***MAINA V. EFCC (2020) 2 NWLR (PT. 1708) 230 at 261*** reiterated the common features that may constitute abuse of Court process in this light to include:

1. Filing of multiplicity of actions on the same subject matter against the same opponents on the same issues or numerous actions on the same subject matter between the same parties even where there is in existence a right to commence the action.
2. Instituting different actions between the same parties simultaneously in different Courts even though on different grounds.
3. Where two or more similar processes are used in respect of exercise of the same right; for instance, a cross-appeal and a Respondent's Notice.

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4. Where two actions are instituted in Court, the second one asking for relief which may be obtained in the first, the second action is, prima facie, vexatious and an abuse of Court process.

Furthermore, in ***UMEH & ANOR V. IWU & ORS (2008) LPELR-3363 (SC) pg 42*** the Supreme Court heldthat: "... ***for there to be an abuse of Court process, there must exist a multiplicity of suits between the same parties on the same subject matter and on the same issues which preconditions are mutually inclusive as they are conjunctive."***See also The Supreme Court per Mary Peter-Odili JSC in ***SOCIETY BIS S. A. V. CHARZIN IND. LTD (2014) 4 NWLR (PT. 1398) AT PAGE 547***where his lordship stated as follows: ***"... Assuming there was necessary authority for the Court to enter into the discourse of abuse of Court process due to multiplicity of Suits, what would amount to multiplicity of suits must be shown to exist and that the two suits or more are on the same subject matter and issues and the parties are the same. All these components must co-exist for the ingredients that would qualify the particular suit as an abuse of Court process based on multiplicity of suits."***

I have looked at both processes with a judicial telescope and it is glaring that while the suit before Hon. Jus. Kawu J. is between the Applicant and the 4th Respondent as Defendant andClaimant respectively, this present suit is between Ma'ArufSadiqAbdulahi and three others including the Defendant in the suit before Jus. Kawu J. it has not escaped my notice that the four claimants in this suit are equally suing forthemselves and on behalf of owners of plots 1783, 1787, 1788, 1790, 1791, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1801, 1802 and 1979. Further to this, in this present suit, the Federal Capital Development Authority is also sued as a Defendant. This suit, having marshalled an array of parties over and

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above the Applicant and the 4thRespondent who are the only parties before Kawu J, it would seem that this application has just received its first fatal blow as it has failed the test of parties as it is relevant to urging a court to hold that a suit constitutes an abuse on the grounds that multiple suits exist between the same parties. A simple look at the parties makes it impossible to hold that while there may be two similar suits, the parties in both are different in content and character.

Going further, while it may seem that the subject matter in both suits may be the same, a perusal of the claim leaves me in no doubt that the claims are different. As noted earlier, the claim in the suit before Hon.Jus. Bello Kawu emanates strictly from the Memorandum of Understandingentered between the Applicant and the 4ht Respondent strictly, while this instant action has introduced new dynamics as the claim includes an order for specific performance directing the 1stDefendant to pay the balance for the plots itemized above, claim for possession and a call for the hand over of original documents of the plots in question. At this point, having looked at the parties and the claim and havingdetermined that they are dissimilar, I will be turning justice on its head if I hold that this suit is an abuse of court process as what I will effectively be doing by that pronouncement is to deprive the new entrants who are not parties before jus, kawu J the opportunity of having their day in court and I so hold.

The 2nd plank of the argument is on the existence of an Arbitration Clause on the strength of which counsel has argued that by the provision of Section, 4 of the Arbitration and Conciliation Act what this court ought to do is to stay proceedings and refer the matter to arbitration.

Now, Article 20 of the Memorandum of understanding is clear in its desire that parties shall first submit any disputearising to arbitration however, I am of the view

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that referring the parties at this time to Arbitration will be contrary to law and established legal principles.

Having considered the various issues raised and addressed by both the Applicant and the Respondent , to my mind, the simple question for my determination herein is whether having made reference to the existence of an Arbitration clause that binds the Applicant and the 4th Respondent herein, it is conceivable that this court can order a stay of proceedings and direct that the matter be referred to arbitration even in the face of live claims that have been made by other persons who are not parties to the memorandum of understanding. In other words, is it possible for this court to bifurcate the instant action and refer the Applicant who is the 1st Defendant in the substantive suit and the 4th Claimant who is herein the 4th Respondent to Arbitration ?

This to me is the crux of the matter as the issues raised by both parties around the stay of proceedings pending arbitration and the enforcement of an arbitration clause against 3rd parties are trite and need no long restatement.

On this I hold the view as did the Court of Appeal in ***ALALADE V. PRESIDENT OF THE OTA GRADE 1 CUSTOMARY COURT & ORS (2021) LPELR-55656(CA)*** that jurisdiction is determined by the claim of the Claimant. It is what the claimant submits to the Court for adjudication, that is to say, the subject matter and claim, that determines whether the Court has jurisdiction to entertain the claim or not. Therefore, the process to be examined in determining if the Court has jurisdiction to hear and determine the matter submitted to it for adjudication is the writ, see also, ***ADETAYO V ADEMOLA (2010) LPELR-155(SC);. TUKUR V GONGOLA STATE (1989) LPELR-3272(SC)***.

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The relevance of this view to the case at hand is that while I will concede that a party cannot he forced into an arbitration agreement it has not signed, it will also be unconscionable to split the matter as presented by a claimant against different defendants where that will inflict undue hardship on such a claimant especially where he will not be able to proceed against other defendants if some are removed. In essence, if the claim is so intrinsically tied jointly to all the parties to such an extent that it will be impossible to run a successful action if any of the Defendants is removed then, the court may not grant the prayers as sought in referring the parties to Arbitration.

I am emboldened to consider this route as the provisions of Section 5 of the Arbitration Act referenced is not cast in stone but rather, it leaves the court with some room to maneuver albeit judicially and judiciously. While sec. 5 (1) provides that if any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

However, subsection (2) (a) is to the effect that a court to which an application is made under subsection (1) may, if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, refer the matter to arbitration. My understanding of this is that if there is a reason why a matter should not be referred to arbitration despite the existence of an arbitration clause, I may refuse to refer the matter to arbitration and proceed with the hearing. The question now remains, is there any reason why this matter should not be referred to Arbitration?

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Rightly as has been copiously submitted and without doubt, there is an arbitration clause but the contract embodying that clause was signed by only the Applicant and the 4th Respondent. Meanwhile, there are 3 other Claimants and 2 Defendantsin the substantive action and as it stands, if the matter is referred to Arbitration what becomes of the faith of the case of the other claimants not parties to the said memorandum of understanding?

Now, in view of all this, would it meet the ends of the justice if the reference to arbitration is allowed and the Applicant and 4thRespondent are referred to arbitration? In view of the nexus that clearly exists in the claim against all parties and how interwoven and interrelated the case of the claimant is relative to all the Defendants, I would rather align with the view that justice is better served if all the Claimants and Defendants are joined in one suit with the court having the benefit of wholistically considering the matter and making a determination one way or the other.

My view is borne out of the fact that the provision of Section 5 of the Arbitration Act does not automatically oust the jurisdiction of the Court, the very moment an arbitration clause comes in to issue. The Courts have had a cause in a plethora of authorities to reiterate the fundamental principle, that any agreement to submit a dispute to arbitration, does not automatically oust the jurisdiction of the Court. Therefore, either party to such an agreement may, prior to when submission to arbitration or award is made, commence legal proceedings regarding any claim or cause of action contained in the submission. See ***OBEMBE VS. WEMABOD ESTATES LTD (1977) LPELR-SC466/1975***.

In all, the prayer for a reference to arbitration can be declined if the dispute in question does not correlate to the existing arbitration agreement. The court is not

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expected to act mechanically merely to deliver a purported dispute to the doors of an arbitrator. Rather a court should apply its mind to the core basic issue of justice to all parties albeit within the framework of law. The duty of a court is not to usurp the jurisdiction of the arbitral tribunal but rather the court has a role to play in streamlining issues and ensuing that the resolution of such issues arrive at the justice of the case. In the instant case, and upon this preliminary objection, it is the determination of this court that even though an arbitration agreement exists, it does not prevent the court from decliningthe extant prayer for a stay of proceedings and a referral to arbitration as I find that the dispute in question does not correlate to the arbitration agreement as the entire transaction involves other parties and entities who are not privy to the arbitration agreement and without who the matter cannot be appropriately determined.

Secondly, counsel made light weather of Section 4 of the Arbitration and conciliation Act to argue in favor of a stay. That section I must say does not help the case of the Applicant.

Section 4 (1) provides that a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order or stay of proceedings and refer the parties to arbitration.

I take special note of the phrase "if any party so request not later than when submitting his first statement on the substance ofthe dispute …" as this draws me to consider whether or not the Applicant has made any submission on the substance of the dispute. From my records, I find thata memorandum of appearance was filed dated 5th April 2022 and also a statement of defense dated and filed on 11th April 2022 and further, a counter claim was filed.

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I call in aid, the case of ***MOBIL PRODUCING NIGERIA LTD VS SUFFOLK PETROLEUM SERVICES LTD 2017 LPELR 41734 (CA)*** where the Court in construing the provisions of Section 4 of the Arbitration and Conciliation Act held that where the records show that the Applicant being the requesting party had not submitted any statement on the substance of the dispute prior to filing its application for stay, the Court ought to obliged it with a stay of proceedings, where the Applicant was shown not to have taken any step in the dispute save to file the motion for stay. In ***THE OWNERS OF THE M. V. LUPEX v. NIGERIAN OVERSEAS CHARTERING AND SHIPPING LIMITED(2003) LPELR-3195(SC)***which leans towards the enforcement of the Arbitration Clause inserted in the agreement by the parties, the Apex Court stated on the point per Iguh JSC thus:- "The power of the Court to stay such proceedings is exercisable under and by virtue of Section 5 of the Arbitration and Conciliation Act and the Court is bound to stay the proceedings unless it is satisfied that there is sufficient reason to justify the refusal to refer the dispute to Arbitration." a careful analysis of the various decisions of the Court on the subject leaves me in no doubt that the taking of steps envisaged under Section 4 of the Arbitration Act ,which will entitle the lower Court to refuse the application for stay of proceedings is a step taken in furtherance of the prosecution of the defence like the filing of a statement of defence or an application for extension of time to file statement of defence. See ***THE OWNERS OF THE M. V. LUPEX v. NIGERIAN OVERSEAS CHARTERING AND SHIPPING LIMITED (supra)***.in the final analysis, having filed a statement of defence and counterclaim, the Applicant can no longer be heard to seek the invocation of Section 4 of the Arbitration and Conciliation Act to refer this matter to Arbitration as substantial steps have been taken by the Applicant in the substantive matter and I so hold.

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In view of all the forgoing, it is apparent that the application fails on all the grounds raised and consequently, I find no merit in it completely and I hereby order that same be and is hereby dismissed.

ELEOJO ENENCHE

JUDGE

COUNSEL

FOR CLAIMANTS / RESPONDENTS: OgucheAgbonika

FOR 1ST DEFENDANT/ APPLICANT: James Onoja

FOR 2ND& 3RD DEFENDANTS: Absent & not represented

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