

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

**BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN**

**SUIT NO: CV/1406/2020**

**BETWEEN:**

**ADO BAKO UMAR.....CLAIMANT  
AND**

**1. AVASTONE GLOBAL SERVICE LTD  
2. REGISTERED TRUSTEES OF PORSCHE ESTATE  
LANDLORDS AND TENANTS ASSOCIATION WUYE 1** } **.....DEFENDANTS**

**RULING**

By the Motion on Notice dated the 3<sup>rd</sup> day of November, 2022, the applicant seeks for the following orders:

1. An order setting aside the order of this Court delivered on the 31<sup>st</sup> day of October, 2022 for breach of applicant's constitutional right of fair hearing.
2. An order directing the claimant and all the parties to comply with the Order of this Court made on the 4<sup>th</sup> October, 2021 directing the parties to this suit to resolve the matter by arbitration, when taking any step thereto.
3. And for such order(s) as this Honourable Court may deem fit to make in the circumstances.

The grounds upon which the application is filed brought are contained in page 2 of the motion papers. It is supported by an affidavit and a written address of counsel.

The claimant/respondent filed a counter affidavit in opposition to the motion and attached to the affidavit is a document, which is a joint venture agreement.

The 2<sup>nd</sup> defendant/applicant filed a reply on points of law.

It is stated in the affidavit in support that the applicant is a registered incorporated trustee which is an association of all

the bonafide purchasers and lawful owners, who subscribed and purchased units of houses on plot 1155, Cadastral Zone B03, Wuye District, Abuja pursuant to a joint venture agreement between the defendant and the claimant. That all the members of the association own the units of houses purchased from the defendant without knowledge of the debt owed the claimant by the defendant, which interest they seek to protect, both in the conventional court or before the Arbitral panel. The list of the person who are individual house owners in the estate and also the members of the applicant association was stated in the affidavit, and the claimant excluded them as parties to his application, to the court to appoint an arbitrator for the parties and has also sold his remaining two houses in the estate. That the claimant's interest in the estate at the moment is regarding two houses out of the 20 units of houses in the estate and there is a disagreement with the 1<sup>st</sup> defendant on how much should be remitted to the claimant as proceeds of the two units that the claimant still has interest in.

It is stated that the applicant who is a party to this suit, with substantial interest in the subject matter of the arbitration, was denied her constitutional right of fair hearing of the application, as she was not served with both the application and hearing notice to give her opportunity to respond to the application and that all the parties were not made parties in the application filed by the claimant.

It was stated that the application was brought by the Claimant in disobedience to the order of this court made on the 14th day of October, 2022, which ordered that the parties should resolve the matter via arbitration and the exclusion of the applicant, who is a necessary party to the claimant's application is capable of misleading the court.

The deponent stated further that the applicants have derived rights and benefits and made commitments and performed obligations pursuant to the agreement containing

arbitration clause and the application borders on appointing an arbitrator that will determine the rights and interest in the properties and houses owned by the members of the applicant.

In his written address, the counsel to the applicant formulated three issues for determination, thus:

- 1. Whether the Claimant's failure to serve the Motion and Hearing Notice of the date of the hearing of the Application on the applicant does not amount to breach of the Applicant's Rights of Fair Hearing as guaranteed by the Constitution of the Federal Republic of Nigeria, 1999, as amended?**
- 2. Whether the removal of the applicant's name by the Claimant, in the application that culminated to the order is wrongful and in defiance of the order of 14th day of October, 2021 of this court, does not amount to suppression of material facts?**
- 3. Whether the applicant is not entitled to have the order of 31st October, 2022, set aside by this court having been obtained in breach of the applicant's Right of fair hearing?**

On the issue No. 1, the counsel submitted that the applicant has substantial interest in the application and will definitely be affected by any decision there from and therefore the applicant is entitled to be served with the motion and hearing notice to afford her the opportunity to be heard before the decision to appoint an arbitrator that will decide on the destiny and interest of the applicant, and it does not lie in the mouth of the counsel to the claimant to say that the applicant does not have anything to say regarding the application, and this right was denied Applicant by the Claimant, and the court proceeded to determine the motion without service of same and hearing notice to the applicant, and he urged the Court to hold that the Applicant is entitled to be served both the motion and the Hearing Notice for the

date of hearing of the motion, and he cited the case of **Akingbola and Ors. (2019) 3, SCM, p. 15, paras H-I.**

The counsel submitted that failure to serve Motion and Hearing Notice and subsequent hearing and determination of the application by the court without affording the applicant the opportunity to be heard was a breach of the applicant's right of fair hearing as guaranteed by the constitution of the Federal Republic of Nigeria, 1999 (as amended and as such, the order is bound to be set aside, and he cited the case of **F.R.N V. Maishanu & Ors. (2019) 9, SCM, p. 87, paras D-I.**

The counsel submitted that the failure to serve hearing notice on the applicant renders null and void the order of 31st October, 2022, which was made by this Court, and he cited the case of **A.G Rivers State V. Ude & 12 Ors. (2006) SC 83** and also the case of **Iloputaife V. Orji (2021) (pt. 19) MWLR p. 1794, paras. E-H** to the effect that once it is established that the right of fair hearing is breached, the decision has to be set aside.

On the issue No. 2, counsel submitted that parties can only be altered in a suit only on the order of the court as the Claimant has no power to alter, remove or add a name of a party to a suit in any application which decision on same will affect the interest of that party, and therefore, to the counsel, the removal of the name of the Applicant by the Claimant in the motion that gave birth to the order of 31<sup>st</sup> October, 2022, was wrongful and unlawful and amounts to suppression of vital material facts aimed at misleading the court. It is contended by the counsel that argument of the claimant that the applicant was not a party to the Real Estate Joint Venture Agreement which contains the arbitration clause is not tenable because it is trite that what determines a party to an application is whether the outcome of the application before the proceeding will affect the interest of the party, and he also submitted that both the outcome of the Claimant's application and the Arbitral proceedings will grossly affect the interest of the Applicant as such, the applicant is a necessary

party to the Claimant's application and the arbitral proceedings. The counsel submitted that the alteration of the names of the parties on the motion made it incompetent and ought not to be heard in the first place.

On the issue No. 3, the counsel to the applicant adopted his earlier arguments on issue No. 1 and urged the court to set aside the said ruling in the interest of justice.

The claimant/respondent in his counter-affidavit deposed to the fact that the defendant/applicant had through motion on notice dated the 22<sup>nd</sup> February, 2021 sought to be joined in the substantive suit which the Court in its ruling delivered on the 9<sup>th</sup> March, 2021 granted, and the case was then adjourned for hearing, and by motion dated the 13<sup>th</sup> September, 2021, the 1<sup>st</sup> defendant/respondent filed a preliminary objection on the ground that a joint venture agreement allegedly executed between the claimant/respondent and the 1<sup>st</sup> defendant/respondent ought to be subject to arbitration as there was an arbitration clause in the agreement, and that the court ordered that the parties to Joint Venture Agreement should proceed to arbitration.

It is stated that the 2<sup>nd</sup> defendant/applicant is not a party to the alleged Joint Venture Agreement which was between the claimant/respondent and the 1<sup>st</sup> defendant/respondent.

It is stated that the said Joint Venture Agreement was purportedly for the development of the plot of land in issue and not its sale and also that the agreement is one of the contentions of the claimant/respondent to the substantive suit before this Court which is now the subject of arbitration.

It is also stated that the subject of the claimant/respondent's claim against the 1<sup>st</sup> defendant/respondent to which the 2<sup>nd</sup> defendant/applicant applied to join was never debt, rather it is for trespass by the 1<sup>st</sup> defendant/respondent and the unilateral sale and transfer of

claimant/respondent's interest in his plot of land which is the subject of the substantive suit.

The deponent stated that the court did not order parties to resolve the matter via arbitration and the right to fair hearing of the 2<sup>nd</sup> defendant/applicant was never denied, and that the court does not have the jurisdiction to order a person who is not a party to an arbitration agreement to be a party to an arbitration proceeding.

It is also stated that the court in its ruling gave the 2<sup>nd</sup> defendant/applicant the opportunity to approach the arbitration panel if it is interested in the arbitration.

In his written address, the counsel to the claimant/respondent raised three issues for determination, thus:

- 1. Whether this Honourable Court order of 14<sup>th</sup> October, 2021 that parties should enter into arbitral proceeding includes the 2<sup>nd</sup> defendant/applicant who is not a party to the arbitration agreement?**
- 2. Whether the motion on notice dated 16<sup>th</sup> May, 2022 filed by the claimant/respondent is separate, distinct and pertains to and concerns parties in exhibit AA (Joint Venture Agreement)?**
- 3. Whether the 2<sup>nd</sup> defendant/applicant's right of fair hearing was denied by the claimant/respondent's motion dated 16<sup>th</sup> May, 2022?**

On the issue No. 1, counsel to the claimant/respondent submitted that the 2<sup>nd</sup> Defendant/Applicant is not a party to the joint venture agreement because they did not sign same, and that arbitration is a procedure for the settlement of dispute under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties, and he referred to a **Book Law and Practice of Arbitration and Conciliation in Nigeria by J. Olakunle Orojo at P. 3**, and he also cited section 1 (1) (a)-(c) of the Arbitration and Conciliation Act, and submitted that the

2<sup>nd</sup> defendant/applicant is not a party to the Joint Venture Agreement as no signature of his is in the agreement, and he cited the case of **Vessel M/V Naval Gent V. A.C.I Ltd (2015) WRN at pp. 114-115.**

The counsel argued that the court did not give an order that parties should proceed to arbitration to resolve the matter, rather parties to arbitration to proceed and resolve the matter, and the 2<sup>nd</sup> defendant is not a party to the agreement.

On the issue No. 2, the counsel to the claimant/respondent conceded that 2<sup>nd</sup> Defendant/Applicant is a party to the extent that he is a party to the substantive suit before this Honourable Court but not arbitration proceedings, and argued that the provision of Section 7 (2) (a)(i) and (ii) of the Arbitration and Conciliation Act is clear that the appointment of arbitrator shall be made by the court on the application of any party to the arbitration agreement and it is upon this reason that the claimant/respondent filed the motion on notice as one of the two parties to the arbitration and not as a party to the substantive suit, and he cited the cases of **Ozonma (Barr.) Chidi Nobisi-Elendu V. INEC & Ors SC 160/2014 WRN; (2015) LPELR-25127 SC; Bamisile V. Osasuyi (2008) 5 WRN 212.**

On the issue No. 3, the counsel to the claimant/respondent asked this question:

**What right does the 2<sup>nd</sup> Defendant/Applicant has on an arbitration proceeding relating to an arbitration agreement it was never a party to?**

The counsel submitted that there is none. He argued that to have an interest in the subject matter is separate and distinct from parties who are bound by their contractual agreement between them and subjected themselves to same, argued further that no right of the 2<sup>nd</sup> defendant/applicant was infringed, and cited the cases of **Ojabor V. The Hon. Minister of Communication & 4 Ors (2018)**

**35 WRN(72-74) and Fidelity Bank Plc V. Jimmy Rose Co. Ltd (2016) 6 CLRN 82 CA**, and he urged the court to dismiss the application with substantial cost.

In the reply on points of law of the 2<sup>nd</sup> defendant/applicant, the counsel raised this issue for determination, thus:

**Whether the 2<sup>nd</sup> defendant/applicant being a necessary party to this suit is not entitled to be a party to the claimant; motion and be duely served with both the motion and Hearing Notice for the hearing of the said motion?**

The counsel submitted that substantive suit has not been dismissed and all the parties, including the 2<sup>nd</sup> defendant/applicant are still parties to the matter and as such, until the matter is dismissed or judgment given by the court, the suit is still very much alive; and being a party to the suit, the 2<sup>nd</sup> defendant/applicant is entitled to be served with all the processes filed in this suit including motion filed y the claimant and as such, the motion of the claimant concerns all the parties to this suit, and he urged the court to grant the application.

Let me observe that from the record of this court the claimant originally filed this suit against the 1<sup>st</sup> defendant, and the 2<sup>nd</sup> defendant was joined in the suit on the 9<sup>th</sup> day of March, 2021 via an application made when there was no objection on the part of the claimant and the 1<sup>st</sup> defendant. In a motion with No. M/5829/2021 filed by the 1<sup>st</sup> defendant dated the 13<sup>th</sup> September, 2021 the court ordered for the stay of proceedings, and referred the parties to arbitration to determine all the issues and that would have been neater and better. In the motion with No. M/5687/2022 the claimant/applicant sought for an order of this court appointing a second arbitrator for the parties, however, in naming the parties in the heading, the claimant/applicant



omitted to name the 2<sup>nd</sup> defendant, even though the court granted the application.

Now, the 2<sup>nd</sup> defendant/applicant challenged that order granted to the claimant dated the 31<sup>st</sup> day of October, 2022 be set aside for breach of constitutional right to fair hearing, and also to direct the claimant and all the parties to comply with order of this court made on the 4<sup>th</sup> October, 2021 directing the parties to resolve the matter by arbitration.

Now, the issues for determination as captured by the counsel to the 2<sup>nd</sup> defendant/applicant which should be adopted by this court are:

- 1. Whether the applicant has interest in th application and whether any decision reached pursuant to the application with No. M/5687/2022 will not affect the interest of the applicant?**
- 2. Whether or not the applicant is entitled to be served a copy of the motion and hearing notice of the date of the hearing of the motion with No. M/5687/2022 to afford opportunity to be heard?**

It is the contention of the 2<sup>nd</sup> defendant/applicant that its members own and purchased their respective house units for value without the knowledge of the debt owed the claimant by the defendant, which interest they seek to protect, both on the conventional court or before the arbitral panel, and that the claimant in his application with No. M/5687/20222 excluded the 2<sup>nd</sup> defendant that there are twenty units of houses in the estate owned by the members of the 2<sup>nd</sup> defendant/applicant and therefore has interest in only 20 units of the house, while the claimant has interest in two units, and that the 2<sup>nd</sup> defendant/applicant has interest in the subject matter of the arbitration, that the applicant has denied rights and benefits and has made commitments and performed obligation pursuant to the agreement containing the

arbitration clause, and that the decision of the court on the application with No. M/5687/2022 would affect the interest of the applicant, while it is the contention of the claimant/respondent that the 2<sup>nd</sup> defendant/applicant is not a party to the alleged Joint Venture Agreement which was between the claimant/respondent and the 1<sup>st</sup> defendant/respondent and the agreement was for the development and was never for sale of the plot of land and the said Joint Venture Agreement is one of the contentions of the claimant/respondent to the substantive suit before this court which is the subject of the arbitration. that the subject of the claimant/respondent's claims against the 1<sup>st</sup> defendant/respondent to which the 2<sup>nd</sup> defendant/applicant was joined was never about debut, rather, it is for trespass by the 1<sup>st</sup> defendant/respondent and the unilateral sale and transfer of claimant/respondent's interest in his plot of land which is the subject of the substantive suit and that the 2<sup>nd</sup> defendant/applicant's interest relates to the substantive suit to which this Honourable court has rightly joined but does not relate to the appointment of arbitrator and the entire arbitral proceedings.

Thus, its worthy of note that the proceedings of the 31<sup>st</sup> October, 2022 was not an arbitral proceedings but the proceedings of this court which the 2<sup>nd</sup> defendant is a party, however, in the heading of the motion filed by the claimant/respondent, the name of the 2<sup>nd</sup> defendant was omitted.

By the affidavit in support of his application and more particularly paragraphs 5, 7, 8, 9, 10 (f) (g) and (h) 11, 12, 13, and 14, the applicant deposed to the facts that it derives rights and benefit and has made commitments and performed obligations pursuant to the agreement containing the arbitration clause, that the members of the 2<sup>nd</sup> defendant/applicant have purchased the houses from the 1<sup>st</sup> defendant on the basis of the Joint Venture Agreement

between the defendant and the claimant and that all the members of the applicant have finished paying the 1<sup>st</sup> defendant the agreed price for their respective houses in the estate and have been issued with final allocation letters and clearance documents by the 1<sup>st</sup> defendant. The claimant/respondent in paragraph 3(h) of the counter affidavit in opposition to their application stated that the subject of the claimant/respondent's claim against the 1<sup>st</sup> defendant/respondent to which the 2<sup>nd</sup> defendant/applicant was joined was never about debt, rather it is for trespass by the 1<sup>st</sup> defendant/respondent and the unilateral sale and transfer of claimant/respondent's interest in his plot of land which is the subject of the substantive suit. By the above depositions of both the 2<sup>nd</sup> defendant/applicant and the claimant/respondent in this application, it can be gleaned that the 2<sup>nd</sup> defendant/applicant is an interested party in the development of the plot of land to which the Joint Venture Agreement was created which contains an arbitration clause, this is because at the end of the trial if it turns out that the 1<sup>st</sup> defendant from whom the 2<sup>nd</sup> defendant acquired interest in the subject of the dispute, then in law has acquired making and the acquisition is being set aside by the court, what happens to the interest of the 2<sup>nd</sup> defendant then? See the case of **Ayorinde V. Ayorinde (2003) FWLR (pt 169) p. 1171 at 1179, paras. C-D** where the Court of Appeal, Ilorin Division held that whereas his making on acquiring an interest in a property subject of pending action, that does not make the person an incompetent party to the action if he had been made a party to same. It only makes the interest so acquired in the property involved in the land suit subject to the outcome of that suit. In the instant case, the 2<sup>nd</sup> defendant/applicant's interest is subject to the outcome of the arbitration proceedings; and therefore, the 2<sup>nd</sup> defendant is an interested party in the outcome of the arbitral proceedings, and I therefore so hold.

On the issue No. 2, the law is that the right to fair hearing is a fundamental constitutional right guaranteed by section 36(1) of the constitution of the Federal Republic of Nigeria, 1999 (as amended) and a breach of it in trials vitiates such proceedings, rendering same null and void. A hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard. So it is the contention of the 2<sup>nd</sup> defendant/applicant in the instant application that the claimant/respondent excluded the 2<sup>nd</sup> defendant/applicant as party to the application with No. M/5687/2022, having already being made as a party, while it is the contention of the claimant/respondent that the 2<sup>nd</sup> defendant/applicant is not a party to the Joint Venture Agreement therefore he needs not to be assumed as a party in the motion seeking for appointment of an arbitrator. As I said earlier that the proceedings of 31<sup>st</sup> October, 2022 made pursuant to the motion with No. M/5687/2022 was not an arbitral proceedings, rather it was a proceeding of this court, and to my mind, the exclusion of the name of the 2<sup>nd</sup> defendant/applicant as a party in the motion is misleading and is a breach of the fundamental right to fair hearing. See the case of R.T.P.C.N. V. Eyim (2017) All FWLR (pt 879) p. 606, at 639, paras. D-F to the effect that fair hearing within the meaning of the constitution, means a trial conducted according to all legal rules formulated to ensure that justice is done to the parties. In the instant case failure or omission to name the 2<sup>nd</sup> defendant/applicant does not serve the justice the matter required and I therefore so hold.

It is the contention of the 2<sup>nd</sup> defendant/applicant that it was not served with the hearing to be informed of the date of hearing the motion with No. M/5687/2022 and therefore a fundamental breach to fair hearing, while the claimant maintained his stand that because the 2<sup>nd</sup> defendant/applicant is not a party to the arbitration

agreement, that was why he was not served with a Hearing Notice.

It is on record that the 2<sup>nd</sup> defendant/applicant was made a party to this suit and therefore serving him with the hearing notice to be informed of the date of hearing the motion with No. M/5687/2022 is sacrosanct and fundamental. See the case of **U.B.A. Plc V. Effiong (2012) All FWLR (pt 634) p. 179 at pp. 187-188, paras. F-A** where the Court of Appeal, Calabar Division held that after a court becomes seised of a matter, it has the burden duty of notifying the parties and more particularly, the adverse party of any date fixed for hearing of the matter and subsequent adjournments dates in respect thereof. If the court glosses over or fails to perform such duty then it is committing an unpardonable blunder which will be reversed *ex debito justitiae* by an appellate court. It must be absolutely sure or duty satisfied that the adverse party has been properly served with relevant court processes, showing that the matter is scheduled for hearing on the stated day before proceeding with or forging ahead to forage into the matter. See also the case of **Guinness (Nig.) Plc V. Ufot (2008) All FWLR (pt 412) p. 1118 at 1138, paras. F-G** to the effect that the principle of *audi alteram partem* is intricately connected with the service of judicial processes.

The principle of fair hearing is so fundamental that a breach of it would declare a proceeding a nullity and it does not matter whether the decision reached the proceeding would have been the same if the principle had been observed. See **Guinness Plc V. Ufot (supra) at 1138, paras. F-G**. In the instant application, the claimant having failed to name the 2<sup>nd</sup> defendant/applicant in the motion No. M/5687/2022 and failure to serve hearing notice on the 2<sup>nd</sup> defendant/applicant informing it of the breach of fundamental right to fair hearing against the 2<sup>nd</sup> defendant/applicant, and therefore the decision of this court

dated the 31<sup>st</sup> October, 2022 is declared a nullity and the 2<sup>nd</sup> defendant is entitled to set it to set aside ex debito justitiae. This court has the inherent power to overrule itself or set aside the order given on the 31<sup>st</sup> day of October, 2022 which is a nullity. See the case of **Agiri V. Ogundele (2005) All FWLR (pt 250) p. 86 at 102, paras. B-D**. In the inherent application, I set aside the order made on the 31<sup>st</sup> day of October, 2022.

Hon. Judge  
Signed  
8/2/2024

Appearances:

Ibrahim Idaiye Esq appeared with K.K. Gold Esq for the claimant/respondent.

CT: The matter is adjourned to 23<sup>rd</sup> day of April, 2024 for hearing.

The defendants should be served with Hearing Notices.

Hon. Judge  
Signed  
8/2/2024