PIN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA
ON FRIDAY19TH DAY OF FEBRUARY 2021
BEFORE HIS LORDSHIP:HON. JUSTICE O. A. ADENIYI
SITTING AT COURT NO. 12 MAITAMA – ABUJA

SUIT NO: FCT/HC/CV/2617/2020
MOTION NO: M/13269/2020

BETWEEN:

YUSUF BINTA FATIMA ... ... CLAIMANT

AND

FAMZHI INTERBIZ LIMITED ... ... DEFENDANT

JUDGMENT

The Claimant commenced the instant action under the Undefended List Procedure of this Court *vide* *Writ of Summons* supported by a sworn Affidavit, filed on 14/09/2020, wherein she claimed against the Defendant the reliefs set out as follows:

1. ***An order directing the Defendant to pay to the Plaintiff the sum of ₦5,162,256.00 (Five Million, One Hundred***

and Sixty-Two Thousand, Two Hundred and Fifty Six Naira) only, being the amount due to the Claimant from the Defendant as value of the Claimant's investment in the transaction between the Claimant and the Defendant.

2. ***Interest on the above stated sum calculated at 10% (ten percent) from the date of judgment until judgment sum is liquidated.***

Upon being served with the originating processes, the Defendant, on 30/12/2020, filed Notice of Intention to Defend the suit to which an Affidavit disclosing defence on the merit is attached. The Defendant filed, on the same date, motion on notice wherein she sought two principal reliefs set out as follows:

1. ***An order of this Honourable Court barring Aniete Unique J. Udoh, Esq. (Claimant/Respondent's Counsel) or any other counsel from law firm of the Essence Legal, Suite B4, Discovery Mall, Wuse 2, Abuja, from further appearing in this matter.***

2. ***An order of this Honourable Court striking out this suit for being incompetent.***

In opposition to the motion on notice, a Counter Affidavit was filed on behalf of the Claimant on 05/01/2021.

A further affidavit was also filed in response to the Claimant's Counter affidavit by the Defendant on 18/01/2021.

The Court took arguments of learned counsel on both sides with respect to the motion on notice together with the hearing of the substantive suit on 12/02/2021.

ON THE DEFENDANT'S MOTION ON NOTICE

With respect to the Defendant's application, the Court has considered the totality of the processes filed and the arguments canvassed by the respective learned counsel. By my understanding of the facts deposed in the affidavit filed in support of the application and

the Defendant's learned counsel's arguments, the basis for the prayer that the Claimant's learned counsel or any other counsel in his law firm be barred from appearing in this suit is that one **"Mary Warribo"** who deposed to the Affidavit in support of the *Writ of Summons* filed on behalf of the Claimant claimed to be a legal practitioner in the same law firm as the Claimant's counsel on record.

The Defendant's learned counsel's grouse is therefore that the act of the said **Mary Warribo**, who works as a legal practitioner in the same law firm as the Claimant's learned counsel, deposing to an affidavit in a matter she could be a potential witness, violated the provisions of **Rules 20(1)** and **(3)** of the **Rules of Professional Conduct for Legal Practitioners.** Learned counsel relied on the authorities of *Horn Vs. Richards or Rickard [1963] 2 All NLR 4 [or NNLR 67]; Okatta Vs. The Registered Trustees of the Onitsha*

Sports Club [2007] LPELR- 8347 (CA), *inter alia*, and urged the Court to hold that no lawyer in the law firm of Essence Legal, where the Claimant's learned counsel and the said **Mary Warribo**, are counsel, is entitled to appear for the Claimant in this suit.

I seem to agree with the contentions of the Claimant's learned counsel, who relied on the same authority of *Okatta Vs. The Registered Trustees of the Onitsha Sports Club* *(supra)*, for the contention that **Rule 20** of the **Rules of Professional Conduct for Legal Practitioners** applies where the legal practitioner in issue participated in the subject matter of the dispute, such that he will become a potential witness in the case.

In the instant case, **Mary Warribo**, the legal practitioner who deposed to the affidavit in support of the *Writ of Summons* did not take part in any way in the transactions between the two parties that led to

the filing of this suit. All that she did, as disclosed in the Affidavit she deposed to, was to depose to information she gathered from the Claimant.

Furthermore, **Rule 20** would apply, as correctly argued by the Claimant's learned counsel, where the counsel who deposed to the affidavit is the same counsel appearing in the case; and where there is the likelihood that such counsel may be called as a potential witness to explain the contents of the affidavit in the course of proceedings.

In the instant case, apart from the fact that the legal practitioner who deposed to the Affidavit in support of the Writ is not the same as the Claimant's learned counsel on record, it is to be further reckoned that in an action brought under the Undefended List Procedure, it is the belief of the Claimant that the Defendant has no defence to the action; as such the likelihood of any contentious proceedings that may

ensue to require such legal practitioner to give oral evidence is scarcely anticipated. In this regard, contrary to the argument of the Defendant's learned counsel, the exception provided in **Rule 20(2)** of the **Rules of Professional Conduct for Legal Practitioners** supports the circumstances in the instant case. I so hold.

It is equally important to note that the **Rules of Professional Conduct** is made purely for disciplinary purposes of legal practitioners; and as such, a breach of the **Rules** would not render incompetent an action, properly so filed; or affect the jurisdiction of the Court to entertain the same. I so hold. See *Okoronkwo Vs. Lawdee Intl Nig. Ltd. & Ors. [2012] LPELR-20813 (CA)*.

I therefore refuse the invitation and prayer by the Defendant's learned counsel for the Claimant's

learned counsel to be barred from further appearing as counsel for the Claimant in this action.

The second leg of the application seeks an order of the Court to strike out the suit for being incompetent. What seems to be the basis of this prayer is the depositions in *paragraphs 4 – 6* of the Affidavit in support of the Defendant's motion on notice, where the deponent, **Bashiru Suleiman Adomuha**, staff of the Defendant, states as follows:

> ***"4. That I informed the Claimant/Respondent before she invested in the Defendant/Objector that in the event of any dispute, she shall first resort to mediation, if it does not resolve the dispute, then to arbitration, before resorting to litigation and she agreed.***
>
> ***5. That I drew the Claimant/Respondent's attention to the said notice before she made investment with the Defendant/Objector. A copy of the said Notice***

that is clearly pasted on the Defendant/Objector's Notice Boards and of which potential investors' attention (including the Claimant/Respondent's attention) were drawn to the said Notice which she read and agreed to. Same is attached to and marked as Exhibit 'A' while a photograph of the said Notice that is pasted on Notice Boards of the Defendant/Objector and the certificate verifying computer generated document are jointly attached and marked as Exhibit 'B'.

6. That the Claimant/Respondent has not explored mediation and arbitration before filing this suit."

The Claimant, in turn denied the depositions in *paragraphs 4 – 6* of the Affidavit in support of the motion on notice (reproduced in the foregoing), in *paragraph 2(iii) – (vii)* of the Counter Affidavit filed on her behalf by **Abdulfatai Raji,** a litigation officer in her learned counsel's law firm. For their relevance

to the determination of the issue at hand, I also reproduce the depositions as follows:

> ***"2(iii) She has never met Bashiru Suleiman Adomuha before and does not know him to be a staff of the Defendant/Objector.***
>
> ***(iv) Neither Bashiru Suleiman Adomuha nor any other person whatsoever informed her at anytime at all of the existence of mediation and or arbitration in relation to her transaction with the Defendant/Objector or the need to resort to any such in the event of dispute.***
>
> ***(v) Neither Bashiru Suleiman Adomuha nor any other person for that matter drew her attention to any Notice or document communicating such mediation and or arbitration whether on the Defendant/Objector's Notice Board or anywhere at all, and at no time did she agree to such notice or resort to mediation or arbitration.***

(vi) She has never seen or been shown or served (whether personally or through any person acting on her behalf or instruction) any notice, letter or other document whatsoever by Bashiru Suleiman Adomuha or any person acting on his instruction or behalf, and whether for or on behalf of the Defendant/Objector or for any other purpose."

I had further examined and considered the facts contained in the Further Affidavit filed by the Defendant in further response to the Counter Affidavit filed by the Claimant to oppose the motion on notice. Of particular concern is that the Deponent of the Affidavits filed by the Defendant to support her application merely described himself as a staff of the Defendant. I consider this description, without more as rather vague and imprecise. The Defendant is a limited liability company. In order to appreciate the credibility and quality of the depositions in the Affidavits filed to support the Defendant's application

under consideration, the deponent ought, at least, to disclose the position he held in the Defendant company, whether or not he was a principal officer of the company and in what capacity he claimed to have dealt with the Claimant. This is more so when the Claimant, in her Counter Affidavit, maintained that she never met him before or knew him to be a staff of the Defendant.

Going further, the issue about the presence of a mediation or arbitration agreement between parties to a contract should ordinarily not be a matter for controversy. Such an agreement must be in writing and ought to be apparent in the face of the agreement. See *C. N. Onuselogu Ent. Ltd. Vs. Afribank (Nig) Plc [2005] LPELR-20356(CA)*.

In the instant case, what the Defendant relied on to constitute a mediation/arbitration agreement is a public notice which is not an agreement that is

deliberately entered into by both parties. As such, it is not difficult to hold that such a public notice cannot bind the specific contract the Claimant had with the Defendant.

I had examined the principal documents relied upon by the Claimant in her main claim as constituting the investment agreement she had with the Defendant, especially **Exhibit C1**, which is the Defendant's Form she filled to start off the investment contract with the Defendant. The Form did not contain any mediation or arbitration agreement. There is also nothing in the Form that refers to any public notice on the Defendant's notice board relating to mediation or arbitration.

Flowing from these findings and the basic understanding that an agreement to recourse to arbitration must be specifically contained in the contract document of the contracting parties, I must

hold that there was no mediation or arbitration agreement between the parties in this suit that requires them to engage mediation or arbitration in the event of a dispute arising from the investment contract between them.

I further hold that the purported mediation notice posted by the Defendant on her office notice board cannot bind the specific contract the Claimant had with her. I agree with the Claimant's learned counsel's contention that the said notice, at best, is an afterthought that carries no legal weight or credibility whatsoever.

Even if for purposes of academic discourse only, it is agreed that there a mediation or arbitration agreement between the parties which the Claimant failed to take advantage of before filing the instant action, it is the law that the presence of an arbitration agreement does not oust the jurisdiction of the Court. It

however, postpones the right of the parties to resort to litigation, until parties submit the dispute to arbitration. The Court seised with the matter would not in that instant strike out the suit but stay proceedings. See *Bill & Brothers Ltd. & Ors Vs. Dantata & Sawoe Construction Co. (Nig.) Ltd. [2015] LPELR-24770 (CA); Obembe Vs. Wemabod Estates Ltd. [1977] LPELR-2161 (SC).*

As such the contention of the Defendant's learned counsel that the instant suit is incompetent is untenable; and the prayer for striking out is inapplicable in the circumstances.

On the whole, I must agree with the Claimant's learned counsel's contention that the instant application is an abuse of Court process. It is not premised on any clear and cogent legal footing. The application is frivolous and vexatious. It must be and it is hereby accordingly dismissed.

DETERMINATION OF THE MAIN ACTION

I now proceed to the main claim. The summary of the Claimant's claim, as gathered from facts deposed in the Affidavit filed to support the *Writ of Summons* is that sometime in August, 2019, she began to invest in the Defendant, an investment company, with an initial sum of **₦500,000.00**, with an agreement that her profit be rolled over for a period of one year. The Claimant attached a copy of the Form she filled as a new investor and evidence of payment of the said sum to the Defendant's Bank Account as **Exhibit C1**. By October, 2019, the Claimant's investment rose to the sum of **₦660,000.00**, and this is evidenced by the Investment Certificate, **Exhibit C2**, issued by the Defendant to the Claimant. As shown on the Upgrade Form, **Exhibit C3**, as at 16/01/2020, the Claimant's capital and accrued interest was the sum of **₦910,000.00** and on the same date she upgraded her investment with the injection of an additional sum

of **₦3,600,000.00.** The Claimant also exhibited evidence of payment of the said **₦3,600,000.00** into the Defendant's account alongside **Exhibit C3**. As at 16/03/2020, the Claimant's investment has risen to the sum of **₦5,162,256.00,** according to the Investment Certificate issued to her by the Defendant and copy of which is annexed as **Exhibit C4**.

The Claimant thereon instructed that the accrued interest on the principal sum of **₦5,162,256.00** to be paid to her bank account but that the Defendant became inconsistent in paying the interests, only paying her the sum of **₦516,225.00** on 21/03/2020 and the sum of **₦258,112.00** on 04/07/2020.

In view of the Defendant's continued failure to pay monthly interests to the Claimant, she instructed her Solicitors to write a letter to the Defendant to demand payment of her outstanding principal investment sum of **₦5,162,256.00**. Copy of the letter, dated

10/08/2020, is attached as **Exhibit C6** to the Affidavit in support.

It was as a result of the Defendant's failure either to respond to the Claimant's Solicitor's letter or pay the due investment sum, that the Claimant commenced the instant action.

The law is well known that on the date fixed for hearing of a matter placed under the *Undefended List Procedure*, all that the Court is required to do, where a Defendant files Notice of Intention to defend the action to which an affidavit disclosing a defence on the merit is attached; is to consider whether indeed the affidavit discloses *prima facie* defence, and if so, to transfer the suit to the *General Cause List* to be heard by pleadings; and where the Court refuses to give the Defendant leave to defend the suit; or the Defendant neglects to deliver or file a Notice of Intention to Defend as required, the Court shall be

obliged to enter judgment in favour of the Claimant. See the provisions of **Order 35 Rules 3** and **4** of the **Rules** of this Court. See also *Joel Okunrinboye Export Co. Ltd. Vs. Skye Bank Plc. [2009] 6 NWLR (Pt. 1138) 518(SC); MC Investments Limited Vs. Core Investments & Capital Markets Limited [2012] LPELR-7801(SC).*

In the instant case, the Defendant filed a Notice of Intention to Defend on 30/12/2020, to which an Affidavit purporting to disclose defence on the merit is annexed. So, what is the nature of the defence put up by the Defendant?

I must again here note that the Deponent of the purported Affidavit disclosing a defence on the merit on behalf of the Defendant claims in *paragraphs 1 and 2* thereof that he is a staff of the Defendant and that he deposes to facts within his personal knowledge. My observation is that this deponent, **Bashiru Suleiman Adomuha**, failed to disclose the

position he holds in the employment of the Defendant company, which indeed casts serious doubts to the credibility of the facts to which he deposed. This apart, I note that none of the deponent's depositions concerning the conditions binding the Claimant's investment with the Defendant, especially facts deposed in *paragraphs 3, 4 and 5* are mere oral statements not backed by any written documents endorsed by both parties. The position of the law is that a party that relies on or alleges oral agreement must prove it to the hilt. See *Odutola Vs. Papersack (Nig.) Ltd. [2006] NWLR (Pt.1012) 470*.

Having said this, I again note that the deponent, even though did not deny that the Claimant invested sums of money with the Defendant at the material time, but that he informed the Claimant that the investment is "*non-refundable*." However, the Defendant failed to back up this deposition with any written agreement or

document disclosing that the Claimant's investment is "*non-refundable*" and that the Claimant agreed to such an arrangement. I also examined the totality of the documents annexed by the Claimant in support of her claim. It is nowhere stated in any of the documents that the Claimant's investment with the Defendant is non-refundable.

I must therefore, at first, hold that the Defendant's contention that the Claimant's investment is "*non-refundable*" is not only unsupported by any credible evidence, but strange, unreasonable, ridiculous and clearly not in tandem with the ordinary course of investment transactions.

Again, the Defendant, in *paragraph 9* of the Affidavit of **Bashiru Adomuha,** merely denied that the Claimant's investment as at 16/02/2020, was not the sum of **₦5,162,256.00** as stated in *paragraph 2(vii)* of the Affidavit in support of the Writ; yet failed to

state or disclose the value of her investment as at the said date. In my view, the deposition in paragraph 9 of the Affidavit of **Bashiru Adomuha** does not amount in law to a clear and proper denial or traverse of the deposition in *paragraph 2(vii)* of the Claimant's Affidavit in support of the Writ. I so hold. See *Flobby Enterprise Nig. Ltd. Vs. NDIC & Ors. [2019] LPELR-47273*.

Again, the Defendant annexed to the Affidavit of **Bashiru Adomuha**, a letter marked as **Exhibit D1**, dated 3rd August, 2020, purported to have been written to the Claimant, where it is contended, inter alia, that the Claimant agreed that her investment with the Defendant is "non-refundable." Apart from the fact that the Defendant failed to supply concrete documentary evidence of the facts stated in this letter; there is no evidence before the Court that the same was delivered to or received by the Claimant. As such,

the letter cannot be relied upon as a basis for credible defence to the instant action. I so hold.

In contrast, the Claimant's Solicitor's letter (referred to in the foregoing), written to demand for the payment of the sum of **₦5,162,256.00** being the Claimant's outstanding investment sum with the Defendant is shown in its face to have been acknowledged as received by the Defendant on 12/08/2020; but the Defendant failed to respond to the letter, which raises a presumption in favour of the Claimant that the Defendant admitted her indebtedness of the said sum to the Claimant. I so hold.

I have also noted the Defendant's attempt in the depositions in *paragraphs 6, 7 and 10* of the Affidavit of **Bashiru Adomuha**, to taint and cast doubt on the Investment Certificates, **Exhibits C2** and **C4** respectively, issued by the Defendant to confirm the value of the Claimant's investment as at 16/03/2020,

by stating that the documents do not contain the name and signature of the Defendant's staff that purportedly issued it.

However, the Defendant's contention overlooked that the Claimant indeed exhibited evidence of payment of sums in excess of **₦4,000,000.00** directly into the Defendant's account, as shown in **Exhibits C1** and **C3** respectively, to establish her case that she invested monies with the Defendant. The Defendant did not deny receiving the said sums for which **Exhibits C1** and **C3** were annexed to prove.

I therefore hold that the Defendant's attempt to deny issuing **Exhibits C2** and **C4** in favour of the Claimant is lame and unfounded.

The position of the law is that in an action filed under the Undefended List Procedure, where the Defendant seeks to contend the presence of a prima facie defence, unless the Defendant, in his affidavit,

deposes to adequate particulars of such defence, the Court would not transfer the matter to the general cause list. See *Nwankwo & Anor Vs. Ecumenical Dev. Co-operative Society [2007] LPELR-2108 (SC)*.

Again, in an action for recovery of liquidated debt placed under the Undefended List, the proposed defence of the Defendant must be predicated on substantial and bonafide grounds. Such defence must touch on the substance of the debt in its particulars, either by showing that the amount due has been paid partly or the amount due requires the taking of account. See again, *Durumugo Resources Ltd. Vs. Zenith Bank Plc. [2016] LPELR- 40487(CA)*.

From the depositions in the Defendant's affidavit, which I have thoroughly examined, the purported defence put up by the Defendant has not disclosed any triable issues or cast any doubt whatsoever on the Claimant's claim. The **Rules** guiding the procedure

under which this suit is filed are designed to relieve the Courts of the rigours of pleadings and burden of hearing tedious evidence on sham defences mounted by defendants who are just determined to dribble and cheat claimants out of reliefs they are normally entitled to because the case is patently, clear and unassailable.

In my view, this is one of such cases in which the Defendant's attempt at a defence can best be described as cosmetic, a contrivance and indeed a sham. I so hold.

In the final analysis, I hold that the Affidavit filed by the Defendant to support her Notice of Intention to Defend this action, purporting to disclose a defence on the merit, has failed to meet the requirements and standards of a *prima facie* defence in that it failed to clearly deny the existence of the debt claimed by the Claimant. Accordingly the Claimant's claim hereby

succeeds. I hereby enter judgment in favour of the Claimant in the sum of **₦5,162,256.00 (Five Million, One Hundred and Sixty Two Thousand, Two Hundred and Fifty Six Naira)** only, being the amount due to the Claimant from the Defendant as value of the Claimant's investment in the transaction between the Claimant and the Defendant.

The Defendant shall pay the said judgment sum of **₦5,162,256.00 (Five Million, One Hundred and Sixty Two Thousand, Two Hundred and Fifty Six Naira)** only, to the Claimant at a post-judgment interest rate of **10%** *per annum* from the date of this judgment up until the date the same is finally liquidated. I assess costs of the action, in the sum of **₦100,000.00 (One Hundred Thousand Naira)** only, to be paid by the Defendant to the Claimant.

OLUKAYODE A. ADENIYI

(*Presiding Judge*)
19/02/2021

***Legal representation*:**

A.U. J. Udoh, Esq. – *for the Claimant*

S. O. Abang, Esq. – *for the Defendant*