

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT 20, GUDU-ABUJA
ON WEDNESDAY THE 16TH DAY OF FEBRUARY 2022
BEFORE HIS LORDSHIP: HON. JUSTICE MODUPE R. OSHO- ADEBIYI

SUIT NO:CV/2959/2021

BETWEEN:

ABUJA CHAMBER OF COMMERCE & INDUSTRY (ACCI)=====APPLICANT

AND

NAIRANET TECHNOLOGIES LIMITED=====RESPONDENT

RULING

By an Originating Motion brought pursuant to Order 43 (1) of the High Court (Civil Procedures) Rules, 2018, Article 6 (2) (3) & Article 8 of the Arbitration Rules and under the inherent jurisdiction of the honourable court, the Applicant is praying the Court for the following:-

1. AN ORDER of this honourable court appointing a sole arbitrator in the dispute involving the parties pursuant to the Arbitration Rules and the Ware Housing Development Lease agreement dated 8th December, 2020.
2. AN ORDER OF INTERLOCUTORY INJUNCTION mandating the respondent to forthwith vacate the premises of the Applicant located at KM8, Umaru Musa Yar'Adua Express Way, Lugbe, Abuja pending the outcome of the arbitral proceedings.
3. AND FOR SUCH FURTHER ORDER(S) as the Honourable court may deem fit to make in the circumstances.

The grounds upon which the reliefs are sought are:

1. That the Applicant and respondent entered a warehousing development lease agreement in respect of 12,000sqm at KM8, Umaru MusaYar'Adua Expressway, Lugbe, Abuja belonging to the Applicant.
2. That a dispute has arisen as envisaged under Article 14 of the lease agreement.
3. That the Applicant in a Notice of Arbitration dated 10th September 2021 and served on the same day on the respondent; proposed 3 arbitrators and asked the respondent to choose one (1).
4. That the respondent has failed, refused to nominate any arbitrator, hence the reason for this application.
5. That the said 30-day period as provided under Article 6(2) of the Arbitration Rules has elapsed and no arbitrator has been appointed by the parties.
6. That the court has powers to grant the reliefs of the Applicant.
7. That the Respondent deliberately fenced a total of 13,690sqm land instead of 12,000sqm as agreed by the parties thereby exceeding the agreed area by 1,690 sqm.
8. That the respondent needs to vacate the premises pending the outcome of the Arbitral proceedings in order to mitigate the effect of their continuous stay on the land.

Filed along with the application is an affidavit of 21 paragraphs deposed to by Chidinma Onyiaorah, a staff of the Applicant, with four (4) exhibits Marked as Exhibit A, B, C and D. Also filed is a written address as argument in support of the application. The Applicant's Counsel in the written address formulated two (2) issues for determination to wit:

1. Whether the applicant has disclosed sufficient grounds to warrant the court to appoint a sole Arbitrator.
2. Whether the court can grant an interlocutory injunction pending arbitration based on the facts disclosed.

Counsel arguing both issues submitted that going by Article 6 (2) (3) of the Arbitration Rules where there is prima facie dispute and the parties have failed in appointing an Arbitrator to settle the dispute, the court will come in to help the parties out of the deadlock.

Submitted further that the applicant has shown from the facts deposed in the affidavit that there is need for the court to direct the Respondent to vacate the said land pending the outcome of the arbitral proceedings, failure of which will occasion hardship on the applicant. Counsel therefore urged the Court to grant the reliefs as prayed. Counsel relied on the following authorities:-

1. TRANSCORP v. ANKOR POINTE INTEGRATED LTD (2021) LPELR-54548(CA)
2. KANO STATE URBAN DEVELOPMENT BOARD VS. FANZ CONSTRUCTION CO. LTD. (1990) 4 NWLR (Pt. 142) PG. 1
3. GEORGE & ANOR v. HAJAIG & ANOR (2017) LPELR-46234(CA)

In opposing the application, the Respondent filed a counter affidavit of 24 paragraphs deposed to by Isaac Ibrahim a staff of the Respondent attached with four (4) exhibits marked as NN1, NN2, NN3 and NN4. Also filed is a written address and in the address filed, Respondent's Counsel adopted the issues for determination in the Applicant's address and submitted that the instant application is premature as there is no valid and competent Notice of Arbitration.

Submitted that in view of the provision of Article 8 (2) & (3) of the Rules of Professional Conduct (RPC), the Notice of Arbitration is invalid and null and cannot be relied on to initiate an arbitral proceeding or as the basis for the instant originating motion and the Respondent is not bound to respond to such an invalid and null Notice of Arbitration.

Counsel submitted on the issue of mandatory injunction that there is no basis for the Court to grant the 2nd relief sought as that the Applicant has not shown special and exceptional circumstances to be entitled to the grant of the said relief. Counsel relied on the following cases;

1. ADEFULU V. OKULAJA (1996) LPELR-90 (SC), (1995-1996) ALL NLR 318,
2. KAYODE ADELEYE & ORS v. THE EXECUTIVE GOVERNOR OF OGUN STATE (2012) LPELR-9584(CA) pages 29-30, para. E
3. SHINNING STAR NIGERIA LIMITED & ANOR v. ASK STEEL NIGERIA, LIMITED & ORS (2011) LPELR-3053(SC)
4. THE ATTORNEY-GENERAL AND COMMISSIONER FOR JUSTICE, ANAMBRA STATE & ORS v. ROBERT C. OKAFOR & ORS (1992) LPELR-3156(SC)
5. GEORGE & ANOR V. HJAIG & ANOR (2017) LOELR -46234 (CA)

In response, Applicant's Counsel submitted that the Counter affidavit is incompetent as same was filed out of time. Submitted further that the Notice of Arbitration complied with the Arbitration and Conciliation Act and urged the Court to discountenance the argument of the Respondent and grant the prayers as stated in the Application.

I have considered the Applicant's motion alongside the affidavit, exhibits and written address as well as the response of the Applicant's Counsel. I have also read and considered the counter affidavit of the Respondent, the exhibits attached and the written address and the issue to be determined is "**whether the Applicant has made out a case to enable the Court to grant the reliefs**

sought.”Before delving into the issue for determination, this Court will first determine the competence of the Counter affidavit as raised by the Applicant’s Counsel and the competency of the Notice of Arbitration raised by Respondent’s Counsel.

The Applicant’s Counsel replying orally on points of law contended that the Respondent’s counter affidavit was filed out of time and ought to be struck out. I have looked at the processes before me. The Respondent was served with the Applicant’s application on the 21st day of January 2022. By Order 43 Rule 3 of the Rules of this Court, where a party intends to oppose, the application, it shall be done within 7 days of the service of the processes on him. Looking at the date the Respondent filed its counter affidavit, being the 27th day of January 2022, it falls within the period as prescribe by the rules of this Court. The argument of the Applicant is therefore discountenance as the counter affidavit filed within the prescribed time is competent and I so hold.

The Respondent’s Counsel is urging on this Court to hold that by the provisions of Article 8 (2) and (3) of the Rules of Professional Conduct, it prohibits the Applicant’s lead Counsel by virtue of his position in the Applicant from appearing as a Counsel in a Court or filing processes in any matter which the Applicant is a party and as such, the Applicant’s Counsel cannot represent Applicant in this matter or even in the arbitral proceeding. In response, the Applicant’s Counsel is contending that the Notice of Arbitration is compliance with Section 17 and Article 3 of the Arbitration and Conciliation Act.

I have considered both arguments thoroughly. Looking at the Notice of Arbitration that is Exhibit D, I agree with the Applicant’s Counsel that said

Exhibit D is in compliance with Article 3 of the ACA, which prescribes the mode of initiating an arbitral proceeding. However, the contention of the Respondent is that the Notice of Arbitration being signed by a former 1st Deputy President and a current Deputy President, and a member of the Executive Committee of the Applicant is in flagrant disregard to Rule 8 (2) and (3) of the Rules of Professional Conduct. The said rule provides thus;

8(2) A lawyer, whilst a servant or in a salaried employment, shall not prepare, sign, or frank pleadings, applications, instruments, agreements, contracts, deeds, letters, memoranda, reports, legal opinion or similar instruments or processes or file any such document for his employer.

8(3) A director of a registered company shall not appear as an advocate in court or judicial tribunal for his company.

Going by this provision, the lead Counsel being an Executive of the Applicant ought not to have initiated the Arbitration proceedings nor this instant application. Be that as it may, this is arbitration proceedings or even the Notice of arbitration served by the Respondent is guided by the Arbitration and Conciliation Act 2004 and this application filed by the application is brought pursuant to the Arbitration Rules. Article I of the Arbitration and Conciliation Rules provides the scope of the application and it provides thus;

These Rules shall govern any arbitration proceedings except that where any of these Rules is in conflict with a provision of this Act, the provision of this Act shall prevail.

Hence, this rule supersedes any other rules as it relates to the initiation of arbitral proceedings and this instant suit, and I hold that the Notice of Arbitration is competent.

Now dealing with the issue for determination which is **“whether the Applicant has made out a case to enable the Court to grant the reliefs sought”**

The Applicant to urge this Court to grant this application attached Exhibit A which is copy of the Lease agreement between the parties and Article 14 of the Lease Exhibit A, it provides for dispute resolution thus;

“Each of the parties hereto irrevocably agrees that any claims, demands or disputes, which may arise out of or in connection with this Agreement, shall be first determined by negotiation and mutual agreement by parties. and where it fails, the dispute shall be finally determined by Arbitration. The number of Arbitrators shall be one and the legal place of arbitration shall be in Abuja, Nigeria under the Abuja Chamber of Commerce Dispute Resolution Centre but the parties or the Arbitrator shall be free to choose any convenient venue for Arbitration hearings. The language to be used in the Arbitral proceedings shall be English.”

The Applicant’s grouse as contained in the Affidavit particularly paragraphs 10 is that after 30 days upon service of the Notice of Petition, the Respondent has failed , refused to nominate any Arbitrator and that Arbitration and Conciliation Act provides for 30 days within which the parties will appoint a sole arbitrator. The Respondent on the other hand is contending

that the Applicant deliberately contrived the dispute to find the basis to terminate the agreement. That Respondent's failure to choose an arbitrator is due to the fact that the Notice of Arbitration did not give sufficient details of knowledge and expertise in matters relating to lands surveys, or who are members of the body of registered surveyors, builders or engineers who have the requisite knowledge relating to the said dispute between the parties.

Whether or not the Applicant contrived the dispute in order to terminate the agreement is not the issue in this instant application as both parties are in agreement that there is a dispute between parties. Nowhere in the counter affidavit is the Respondent opposed to the Court appointing a sole arbitrator and Article 6 (2) of the Arbitration and Conciliation Act empowers the Court to appoint a sole arbitrator upon application by one of the parties. The said provision provides as follows;

"If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the court."

Subsection 3 of Article 6 provides for the procedure the Court shall follow in the appointment of the sole arbitrator as follows;

(a) at the request of one of the parties the court shall communicate to both parties an identical list containing at least three names;

(b) within fifteen days after the receipt of this list, each party may return the list to the court after having deleted the name or names

to which he objects and numbered the remaining names on the list in the order of preference;

(c) after the expiration of the above period of time the court shall appoint the sole arbitrator from among the names approved on the lists return to it and in accordance with the order of preference indicated by the parties;

(d) if for any reason the appointment cannot be made according to this procedure, the court may exercise its discretion in appointing the sole arbitrator.

Consequently, this Court will grant the prayer one of the Applicants reliefs in line with Article 6(3) of the Arbitration and Conciliation Act.

With respect to the relief seeking for an order of interlocutory injunction mandating the respondent to forthwith vacate the premises of the Applicant located at KM8, Umaru Musa Yar'Adua Express Way, Lugbe, Abuja pending the outcome of the arbitral proceedings. Determining this prayer at this point would be wading into the substantive issue which would be part of the subject matter or dispute to be determined in the arbitration. This prayer is therefore refused.

Although the Arbitration and Conciliation Act make provisions for the manner in which the Court can appoint an arbitrator as listed above, it also gives the Court discretionary powers in the appointment process and this Court would exercise its discretion to appoint an arbitrator to prevent further delay in the determination of the arbitral proceeding.

Consequently, it is hereby ordered as follows;

1. JEPH C. NJIKONYE, SAN, FCARB of No. 1 Abagana Close, Garki, Abuja is hereby appointed as the sole arbitrator in the dispute involving the parties pursuant to the Arbitration Rules and the Warehousing Development Lease Agreement dated 8th December 2020.

Parties: Parties absent.

Appearances: Itoha Frabor, Esq., for the Applicant. T. K. Ieiohia, Esq., for the Respondent.

HON. JUSTICE MODUPE R. OSHO-ADEBIYI
JUDGE
16/02/2022