

**IN THE HIGH COURT OF JUSTICE OF THE
CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 6

SUIT NO: FCT/HC/CV/2759/2018

BETWEEN:

1. PHARM DEHINSILU ADEKUNLE

2. CHIGOZIE OGBONNAYA NNATE.....CLAIMANTS

(2nd Defendant suing for himself and on behalf of the occupants of the residence of Pharm. Adekunle)

VS

ABUJA ELECTRICITY DISTRIBUTION COMPANY PLC.....DEFENDANT

RULING

By a Notice of Preliminary Objection dated 22/6/2021 and filed same day brought pursuant to Section 6 (b) (a) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended) and the inherent jurisdiction of the Honourable Court, the Defendant/Objector seek the following prayers;

- (1) An Order dismissing this suit or in the alternative. An Order striking out the suit.
- (2) And the Omnibus reliefs.

The grounds upon which the objection is predicated are;

- (1) This suit as constituted is premature and no reasonable cause of action exist in the Claimant's favour to the suit.
- (2) The Honourable Court lacks jurisdiction and competence to entertain and/or determine the suit.
- (3) It is the interest of justice to uphold this objection and grant the reliefs sought.

In support of the Preliminary Objection is a four (4) Paragraph affidavit deposed to by Abdulfatai Raji a litigation officer in law firm of Defendant/Objector's Counsel. Also filed a Written Address and adopts same in urging the court to grant the prayers. Defendant objector filed a reply on point of law dated 6/9/2021 and adopt same as their further argument in urging the court to uphold the objector. By way of adumbration Defendant/Objector, commended the court to the cases of Comag Steel and Construction Company Ltd Vs Enugu Electricity Distribution Company unreported (2020) Para 2.19 and 2.35, Dalhatu Vs Turaki (2003) 15 NWLR (PT. 843) 310 @ 350 and Eguawenise Vs Amaghuizemwen (1993) 9 NWLR (PT. 315) 1 Para 2.5 of their reply.

Responding, Claimant/Respondent filed their Written Address dated 17/8/2021 and filed same day and adopt the address, in urging the court to dismiss the Defendant's objection as lacking in merit having been caught by the doctrine of Estoppel and Waiver.

In the Written Address of the Defendant/Objector, a sole issue was formulated for determination that is;

“Whether the present suit is incompetent and consequently deprives this Honourable Court of the jurisdiction to entertain same”

Replying on the case of *Madukolu Vs Nkemdilim* (1962) 2 SCNLR 341 and *Bakori Vs Chief of Naval Staff* (2004) 15 NWLR (PT. 890) 268, 290, submits that there is features in the present suit that render it incompetent and should prevent the court from assuming jurisdiction to hear and determine the suit. Refer to *Madukolu Vs Nkemdilim* (1962) 2 SCNR 341 and *Bakori Vs Chief of Naval Staff* (2004) 15 NWLR.

Submits that the suit is premature as the Claimant have not fulfilled conditions precedent to filing this suit. Complainant have a complaint against what they alleged to be unlawful acts of the Defendant that are in breach of relevant provisions of the law for the time being in force, applicable legislations have however provided a special procedure or line of action for resolving such complaints. Refer to Section 96 (1) and (2) (j) of the Electricity Power Sector Reform Act 2005, Article 2 (5) and (6), Article 3 (5) (9) (10) and Article 11 (1) of the NERC Regulation.

Submits further that, where a special procedure is prescribed for the enforcement of a particular right or remedy, non compliance with or departure from such a procedure. Refer to *Abia State Transport Corporation and 2 Ors Vs Quntum Consortium Ltd* (2004) 1 NWLR (PT. 855) 631 G – H, *Abu & Ors Vs Odugbo & 3 Ors* (2001) 10 SCM *Equammense Vs Annaghizemwen* (1993) 3 NWLR (PT. 315) 215. *Akintokun Vs Legal Practitioners Disciplinary Committee* (2014) LPELR – 22941 and *Aribisala & Anor Vs Ogunyemi & Ors* (2005) 6 NWLR (PT. 921) 212.

Submits that the Claimant's failure to exhaust the statutory remedy or line of action in Electricity Power Sector Perform Act 2005 the NERC Customer Complaints Handling's Standards and Procedures 2006 is fatal to their case. Refer to Max Ogar Vs Abuja Electricity Distribution Company Unreported suit No. FCT/HC/CV/1261/2015, Gabriel Oluruniyi Modeyin Vs Abuja Electricity Distribution Company, Unreported Suit No. FHC/LKJ/CS/3/2015, Mr. Yusuf Shuiabu Ahmed Vs Abuja Electricity Distribution Company Plc Unreported Suit No. FCT/HC/CV/227/2019 delivered on 2/7/2019 Inakojun & 17 Ors VS Adeleke & 3 Ors (2007) 4 NWLR (PT. 1025) 427. 661 D – E and Ojukwu Vs Kaine & Ors (2000) 15 NWLR (PT. 691) 516, 523 F – H.

Submits that the Claimant's suit amounts to abuse of court process as same is unsupported by any law, that the suit is also reckless as manifested by the fact that the Claimant have failed, refused and or neglected to exhaust the statutory remedy available to them before dragging their adversary to court in an exercise that is sure to oppress and harass the Defendant in subversion of the clear intent of the law refers to Mr. Scheeps & Anor Vs Mrs. Araz's & Anor (2000) 15 NWLR (PT. 691) 622. 664 A – D, Ntuks & 9 Ors Vs Nigeria Port Authority (2007) 13 NWLR (PT. 105) 392, 419 – 420 H, Ojo & 3 Ors Vs Attorney General of Oyo State & 3 Ors (2008) 15 NWLR (PT. 1110) 309. 322 E – H. Mr. Yusuf Shuaibu Ahmed Vs Abuja Electricity Distribution Company Plc (Supra).

Submits finally that the proper order for court to make upon a successful Preliminary Objection challenging the jurisdiction of the court is an order striking out the suit and not an order of dismissal. Refer to Okoye & 7 Ors

Vs Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR (PT. 199) 501, 534 C – D. however same may not apply as in the instant suit which disclosed no reasonable cause or action or where the suit constitutes an abuse of court process, the proper order for the court to make is an order dismissing this suit, referred to Agwarangbo Vs Union Bank of Nigeria (2001) 4 NWLR (PT. 702) 1:16 – 17 H – A, Thomas & 5 Ors Vs Olofusoye (1986) 1 NWLR (PT. 18) 699 Arubo & Ors Vs Aiyeleru & Ors (1993) 3 NWLR (PT. 280) 126. 142 A – B and Onyeabuchi Vs Independent National Electoral Commission & 4 Ors (2002) 8 NWLR (PT. 769) 41/4477. Urge court to resolve the sole issue in the affirmative and uphold the objection as prayed.

In the same vein, Claimant/Respondent's Counsel formulated a sole issue for determination that is;

“Whether the Defendant's Objection has merit and is not caught by the doctrine of Waiver and estoppel by conduct capable of affecting the substantive jurisdiction of this Honourable Court”

Submits that the application is in breach of Order 5 Rule 2 (1) (2) of the Rules of Court. The objection is also in breach of Order 23 Rule 2 (1) of the Rules of Court by not raising his point of Law vide pleadings, referred to Federal College of Education Vs Akinyemi (2009) All FWLR (PT. 465) 1785 @ 1806 Paragraph B. submits that Rules of Court are meant to be obeyed referred to FBN Plc Vs Abraham (2009) All FWLR (PT. 461) 863 @ 876 G – H FBN Vs T.S.A Industries Ltd (2010) All FWLR (PT. 537) 633 @ 665 F – H

and Ojukwu Vs Yar'adua (2009) All FWLR (PT. 482) 1062 @ 1117 Paragraph A – B.

Submits that the Defendant's Conduct in this case as can be seen through the record of proceedings would not allow the Defendant to approbate and reprobate. The objection is not based on the substantive jurisdiction but on the procedural jurisdiction which can be waived. Referred to Samuel Akpa Nsubong Vs The Federal Road Safety Commission suit No. FCT/HC/CV/3152/2017 unreported, delivered on 17/6/2021 where the court held that the right to demand for service of pre-action notice is private right which a party in whose benefit it ensures can waive and on the instant case, the procedure referred to in the regulations (subsidiary legislation) has no strength like pre-action notice which is prescribed by statute to apply in this case, would have been caught by the doctrines of estoppels ad waiver refer to Anyanwoke Vs Okoye (2010) All FWLR (PT. 515) 214 @ 232 A – E, UBN Vs Sanni (2009) All FWLR (PT. 983) 82 @ 115F.

Submits further that the law is settled that objection to procedural jurisdiction if not raised timorously should not be accommodated as it amount to a waiver, referred to BPE Vs Dangote Cement Plc (2020) 5 NWLR (PT. 1717) 322 @ 348 A – B and Heritage Bank Ltd Vs Bent worth Finance Nig Ltd (2019) All LWLR (PT. 997) 1 @ 23 E – F.

Submits that there is nothing in the regulations that deprives this court of its original jurisdiction under Section 257 of the constitution of the Federal Republic of Nigeria 1999 (As Amended). In the same vein there is nothing

in the regulations that deprives this court from its original jurisdiction as the word “may” is used to convey the right to the customer who is aggrieved in Article 30 (10) of the Nigerian Electricity Distribution Commission (NERC). And what is not expressly is allowed referred to *Mumini Vs FRN* (2019) All FWLR (PT. 986) 698 & 703 G – E. what is contained in the regulation is a private right of Claimants not an obligation or a duty. Failure to follow the procedure cannot affect the court’s proceedings. Jurisdiction of court is not ousted by mere speculations or by conjectures referred to *G.E.C Ltd Vs Duke* (2007) All FWLR (PT. 387) 78 @ 801 E – F.

Submits that the cases cited by the Applicant were reached per incuriam and not based on the facts of this case and at best only have persuasive effect and not binding on this court. Refer to *Ado Vs State* (2017) All FWLR (PT. 897) 1938 @ 1958 D – E urge court to discountenance all the authorities cited by the Defendants.

Also submits that it is the claim of the Claimant that would determine jurisdiction and not the affidavit or objection of the Defendant. Refer to *Ikpekpe Vs Warri Refinery* (2020) All FWLR (PT. 1024) 299 @ 317 D. The suit of the Claimant is the interpretation and application of a statutory provision and this function is the exercise preserve of the judiciary, referred to *AG Federation Vs Abuja Kar* (2007) All FWLR (PT. 375) 405 @ 545 – 546 F – A. submits further that it would be null and void if it is contained in the NERC Regulation that the procedures and remedies must be exhausted before resort to court of law. Refer to Section 6 (6) (b) of the constitution

of the Federal Republic of Nigeria 1999 (As Amended) and the case of Asheik Vs Yale (2012) All FWLR (PT. 625) 279 @ 308 E – F.

Submits that the decision in Owoseni Vs Faloye (2005) All FWLR (PT. 284) 220 demonstrates that the decision of this court and the Federal High Court were reached per incuriam.

Finally urge court to dismiss the Defendant's Objection as lacking in merit and being caught by the doctrines of waiver and estoppel by conduct incapable of affecting the substantive jurisdiction of the Honourable Court.

In their reply on points of law filed on 6/9/21, Defendant/Applicant replying on a Plethora of authorities submits that the jurisdiction of the court and its judicial powers under the constitutions is not ousted by the NERC Regulations, but can only be validly invoked after the procedure in the statute has been exhausted, referred to Equamwense Vs Amaghic zemwen (1993) 9 NWLR (PT. 315).

Submits that the case of Owoseni Vs Faloye (2005) 14 NWLR (PT. 946) 719 relied upon by the Claimant/Respondent cannot avail him as the case was not decided on the basis of procedural defect as stated by the Claimant/Respondent.

Submits further that the Claimant confuses the issue of failure to exhaust domestic or statutory procedure/remedy with such aspects of condition precedent like pre-action notice and non-compliance with the procedure in the Rules of Court for the Commencement of an action, which concern only private right of the Defendant, while it is true that the issues relating to Pre-action Notice and non-compliance with Rules of Court can be waived,

the failure to exhaust domestic or statutory procedures cannot be waived referred to CBN Vs Interstellar Communications Ltd (2018) 7 NWLR (PT. 1618) 294, Comag Steel and Construction Company Ltd Vs Enugu Electricity Distribution Company Appeal No. CA/E/100/2020 unreported delivered on 4/11/2020.

Submits finally that the issue of jurisdiction can be raised at any stage of the proceeding and in any manner, a challenge to jurisdiction transcends the Rules of Court, which cannot dictate how it can be raised. Refer to Petrojessica Enterprises Ltd & Anor Vs Leventis Technical Company Ltd (1992) 5 NWLR (PT. 244) 675, 693 F Arjay Limited & 2 Ors Vs Airline Management Support Ltd (2003) 7 NWLR (PT. 820) 577, 601 – 622 G – A Ajayi Vs Adebisi (2012) LPELR 7811 48 – 50 Nasir Vs Civil Service Commission, Kano State & 2 Ors (2007) 5 NWLR (PT. 1190) 253 @ 276 Para C – D. Urge court to uphold their objection to the suit.

Having given an insightful consideration to the affidavit evidence, submission of Counsel as well as the judicial authorities cited, the court finds that the sole issue for determination is;

“Whether the Applicant has made out a case to warrant the grant of the relief sought”

The gravamen of this application by the Defendant/Applicant is that the Claimant did not exhaust the line of action and remedies available to him under Section 96 (1) (2) (1) of the Electricity Power Sector Reform Act 2005 and Article 2 (5) (6) of the NERC Regulation which requires the Claimant to lodge complaints with the customer complaints unit of the

distributions company and where the Claimant is dissatisfied with the handling of his complaint may seek appeal via Article 11 (1) of the NERC Regulation, only where he is not satisfied with the appeal before he is allowed to file his action in court. On the other hand, Claimant Counsel contends that having not filed this objection, within reasonable time, Defendant is deemed to have waived the issues of procedural jurisdiction that a regulation cannot deprive the original jurisdiction of court under the constitution of Federal Republic of Nigeria contend further that the Claimant's suit bothers on interpretation and application of statutory provisions and same cannot be a matter for a forum but to be decided by a court of law.

It is the fundamental principle of law that before any court of law assumes jurisdiction to determine or adjudicate on the matter before it, the court must be competent and shall be competent when the subject matter of the suit is within jurisdiction and there is no feature in the matter which prevents it from exercising its jurisdiction and the matter before it is initiated by due process of law upon fulfillment of any condition precedent to the exercise of jurisdiction. See the case of *Madukolu Vs Nkemdilim* (1962) 2 SCNLR 341. See also *First Bank Plc Vs Akiri* (2014) All FWLR (PT. 1130) @ 1143 Para F – A. The Supreme Court stressed the fundamental nature of the issue of jurisdiction in the case of *Elenu Habeeb Vs A – G Federation* (2012) All FWLR (PT. 629) 1011 @ 1079 Paras G – A when it held.

“The issue of jurisdiction at the foundation of adjudication by a court of law. It is fundamental and it is the center pin which the entire litigation hinges on”

And in the determination of whether a court has jurisdiction to hear a matter brought it is the Plaintiff’s claim that the court will consider. See the case of Anyanwu Vs Ogunewe (2014) All FWLR (PT. 738) 1012 @ 1036 Paras B – C. see also P.C.H.S Co. Ltd Vs Migfo (Nig) Ltd 1615 @ 1634 Paras E – F.

In the determination of this application, it is therefore necessary for court to consider its record and this the court is empowered to do. See Agbareh Vs Mimra (2008) All FWLR (PT. 409) 559 @ 585 Para D – F. I have take a look at the Statement of Claim of the Claimant/Respondent and I find the facts pleaded which resulted in the cause of action related to the dissatisfaction of the Clamant; a consumer of the service offered by the Defendants thus being a matter which bothers on customer and service provider relations, this matter therefore fails among matter covered by the Provision of the Articles 2 (5) (6) 3 of the NERC Regulation made pursuant to Section 96 (1) (2) of the Electricity Power Sector Reform Act 2005 which requires a consumer of electricity to exhaust the procedures for. Setting of dispute between customers and the Electricity Distribution Licenses. Although the Claimant pleaded in Paragraphs 24 and 27 letters containing the grievances to the Defendants however such letters in my opinion is insufficient as compliance to the said procedure for domestic settling of disputes as prescribed by Articles 2 (5) (6) 3 of the NERC Regulation. It is trite law that where a statute has stipulated a condition precedent as in

this case, it beholds on the person involved to follow the procedure prescribed and fulfills the condition precedent. See the case of Emenke Vs Peoples Democratic Party & Ors (2012) 5 NWLR (PT. 1294) 55 – 590 Para B – D. Thus having not initiated this case by due process of law and upon the fulfillment of the said condition precedent to the exercise of jurisdiction, this court is robbed of the requisite jurisdiction to hear and entertain this suit.

The contention of the Claimant/Respondent that the requirement that consumers or customers of electricity exhaust the prescribed procedures for domestic settling of disputes before commencing action in court in contrary to the Provisions of Section 6 (6) of the Constitution of the Federal Republic of Nigeria cannot avail them as same pre conditioned have been held by the court not to have the effect of ousting the jurisdiction of court. The cases cited by the Defendant/Applicant; Aribisala Vs Ogunyemi & Ors (2005) 6 NWLR (PT. 921) 212 and Owoseni Vs Faloye (2005) All FWLR (PT. 284) 220 on this score is instructive and the court will go by them.

On the contention of the Claimant/Respondent that the delay in filing this objection within reasonable time amounts to a waiver. Granted that the Defendant/Applicant failed to bring this objection within reasonable time the question; is does the conduct of the Defendant amounts to a waiver thus conferring jurisdiction on this court? It is trite law that jurisdiction of every court is statutory. It is conferred by the statute which creates it and may be expanded or extended by specific legislation and neither the court nor any of the parties can confer jurisdiction on the court by conduct or inference and cannot be enlarged by estoppel or waiver, and parties

cannot therefore confer jurisdiction on the court by waiver see Standard Cleaning Services Company Vs Council of Obafemi Awolowo University, Ile-Ife (2019) LPELR – 47050 (CA).

From all of these, having found that the Claimant/Respondent failed to exhaust the domestic procedures for settling disputes prescribed by law, before commencing the action, a condition precedent to the exercise of jurisdiction I must now come to the conclusion that this application succeeds. It is on that note that the substantive suit is accordingly struck out. As the court have held that the proper order to give where a court finds that it lack jurisdiction is a striking out order. See Abu Vs Kuyaba (2002) All FWLR (PT. 997) 1041.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

26/5/2022

APPEARANCE:

CHIEF S.T. YONGE FOR THE CLAIMANTS/RESPONDENTS

A.U.J. UDOH FOR THE DEFENDANT/APPLICANT