

**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/0175/2017**

**BETWEEN:**

**ZIPLON CONCEPT LIMITED.....CLAIMANT/RESPONDENT**

**VS**

- 1. GOVERNMENT OF ABIA STATE**
- 2. ATTORNEY GENERAL OF ABIA STATE)**
- 3. HON. MINISTER OF FINANCE.....)DEFENDANTS/APPLICANTS**

**RULING**

By a Notice of Preliminary Objection dated 13/10/2021 but filed on 18/10/2021, brought pursuant to Order 61 of FCT High Court (Civil Procedure) Rules 2018, Section 5 (1) of the Arbitration And Conciliation Act, LFN Cap 118 LFN 2004 And under the inherent power of this Hon. Court, the 1<sup>st</sup>/2<sup>nd</sup> Defendants/Applicants pray the court for the following:-

- (1) An Order striking out this Suit for want of jurisdiction.

In the alternative

- (2) An Order staying proceedings in this Suit.

The grounds for the objection are:

- (1) That this Suit is premature and was filed ante litem Omnia, in violation of the contract Agreement between the Plaintiff/Respondent and the 1<sup>st</sup> to 2<sup>nd</sup> Defendants/Applicants.
- (2) That the condition precedent to the institution of this Suit was not met by the Plaintiff/Respondent.

In support of the Notice of Preliminary Objection is an 8 Paragraphs affidavit sworn to by Mary Okpara (Mrs) with two (2) Exhibits annexed and marked "A" and "B". Also filed a Written Address, adopts it in urging the court to grant the relief sought. Also filed a Reply on point of law on 17/10/2022 and adopts same, in urging the court to grant the Notice of Preliminary Objection.

In response, the Claimant filed a Counter-Affidavit of 7 Paragraphs on 25/10/2021 sworn to by Patrick Mokogwu with Exhibits attached. Also filed a Written Address dated 21/10/2021 but filed on 25/10/2021, adopts the Address, in urging the court to dismiss the application.

In the Written Address of Defendants/Applicants settled by P.U. Ogubunka Esq. of counsel for Defendants/Applicants, a sole issue was formulated for determination and that is:

"Whether the non-compliance with the Arbitration Clause in the Contract Agreement between the parties does not render this Suit incompetent and liable to be struck out".

Arguing this lone issue, Counsel submitted that all disputes between parties arising from the contract shall failing mutual settlement be referred to and

settled in accordance with the Provision of the Arbitration Act. He referred to the Arbitration Clause in the Exhibit "A" and "B" of Defendants/Applicants annexed to the supporting affidavit to Notice of Preliminary Objection. That parties having voluntarily entered into Agreement to refer any dispute from the contract to Arbitration, failing mutual settlement, the condition precedent to the institution of this Suit hasnot been fulfilled by Claimant. That if parties by their Agreement provided to resort to Arbitration first, any aggrieved party mustfirst seek the remedy available in the Arbitration. He cited Kurubo Vs Zach-Motison Nig Ltd (1992) 5 NWLR PT 239, 102 at 116 – 117, Rivers State Govt. Vs Specialist Consult (2005) 21 NSCQR, 612 at 643, NNPC Sele (2013) Vol. 219 LRCN PT 1, 23 and Madukolu Vs Nkemdilim (1962) 2 SCNLR, 341.

He also submitted that the issued raised bothers on the competence of this Suit and commended the court to Drexel Energy & Natural Resources Ltd Vs Trans Int'l Bank Ltd (2009) Vol. 173, LRCN, 133. That Defendants/Applicants in the alternative seeks an Order of Stay of Proceedings in the matter in accordance with Provisions of Section 5 (1) of Arbitration And Conciliation Act. And also relied on Enyehke Vs Ogoloma (2004) 14 NWLR PT 1107, 258, and Onward Enterprises Ltd Vs M.V. Matrix (2010) 2 NWLR PT 1179, 531.

In the Written Address of Claimant/Respondent Learned Silk for Claimant/Respondent, J.C. Njikonye, SAN also submitted a lone issue for determination;

“Whether the Applicants are entitled to an Order of Court striking out the Plaintiff’s case or staying proceedings thereto when they have taken several steps in the proceedings for more than five years after becoming aware of it”.

Arguing this sole issue, he submitted that the Claimant had legal right to commence this Suit despite the Arbitration Clause in its contract with Applicants and the court has jurisdiction to entertain the Suit. He referred to Section 5 of Arbitration And Conciliation Act and cited K.S.U.D.B Vs Fanz Construction Co Ltd 91986) 5 NWLR PT 39, 74 and Obembe Vs Wemabod Estate (1977) 5 SC, 115.

He submitted further that in this case, it does not avail Applicant to seek stay of proceedings having submitted to the jurisdiction Court by taking several steps in the proceedings and having done so have waived any right to seek an order for stay of proceedings pending Arbitration. He commended the court to Ariori Vs Elemo (1983) 1 SCNLR, 1, Carlen (Nig) Ltd Vs Unijos (1994) 1 NWLR PT 323, 63 and K.S.U.D.B Vs Fanz Const. Co Ltd (1990) 4 NWLR PT 142, 1.

In his Reply on point of law, counsel for Defendants/Applicants submitted that the position of Claimant/Respondent is misconceived. That the Terms of Arbitration Clause in the Agreement Rules out any other means of settling the dispute that has arisen and is of the type known as “Scott Vs Avery Clause”. In other words, cause of action against Defendant shall not accrue till their liability is found by an Arbitral award. He cited African

Insurance Development Corporation Vs LNG Ltd (2000) 4 NWLR PT 653, 494.

I have given due consideration to the respective submission of both learned counsel the judicial authorities cited for and against the grant of the instant application and find that only one (1) issue calls for determination in the application and that is;

“Whether this court has the jurisdiction to entertain and determine this suit”.

First, there is need to give consideration to the issue raised by the Claimant on the Reply of the Defendant filed on 17/1/2020 out of time, that it is incompetent having been filed out of time and without leave of court. It is indeed true that the Defendant filed their Reply out of time and without leave of court. However, this failure on the part of the Defendant can be treated as an irregularity by virtue of the provisions of Order 5 of the Rules of Court. Besides, the court now tilts towards doing substantial justice rather than dwelling on technicalities. See Adeyemi & Ors Vs Haruna & Ors (2018) LPELR – 44538 (CA). It is on this basis the said Reply is considered.

The crux of the application by Applicants is that this instant suit is premature because the condition precedent to the institution of this suit was not fulfilled by the Claimant because the parties by their Agreement agreed to refer any dispute from the contract to Arbitration, failing mutual settlement and Claimant having not fulfilled this condition, the suit is premature and this court lacks jurisdiction to hear and determine this suit.

The Claimant on the other hand contend that the Claimant had legal right to commence this Suit inspite of the Arbitration Clause in the contract andthat this court has jurisdiction to hear this suit. Further contend that their prayer for stay of proceedings does not avail them having taken several steps in the matter and that they have waived their right.

In considering these contending issues of the parties, the court will have to look at the records and this its entitled to do. See the case of Agbareh Vs Mimira (2008) ALL FWLR PT 409, 559. I have looked at the Agreement and the Memorandum of Understanding entered into between the parties, that is the Exhibit "A" and "B" of Applicant's which are the basis for this instant application and find that indeed they contain an Arbitration Clause to settle any dispute that may arise from the contract by referring same to Arbitration. See Clause 11 of the Agreement that is the Exhibit "A" of Applicants and Clause 11 of Memorandum of Understanding, Exhibit "B".

Now, Section 5 (1) of the Arbitration And Conciliation Act provides:

"If any party to an Arbitration Agreement commences any action in any court with respect to any matter which isthe subject of an Arbitration Agreement, any party to the Arbitration Agreement and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings".

The question that would of necessity of followsis; whether the Applicants herein has taken any steps in this matter that would prevent the court to consider and exercise its discretion in relation to the contract between the parties and in view of the Provision of Section 5 (1) of Arbitration And

Conciliation Act reproduced above. A careful perusal of the records of court, in line with Section 5 (1) of Arbitration And Conciliation Act, reveals that the 1<sup>st</sup>/2<sup>nd</sup> Defendants/Applicants long after being duly served the Originating processes in this suit filed a Memorandum of Conditional Appearance on 29/1/2018 with leave of court. They further filed series of applications and processes, the last being their Counter-Affidavit in response to the Claimant's Motion dated 26/10/2020 but filed on 27/10/2020, that is the Exhibit 5, annexed to the Claimant's Counter-Affidavit in opposition to the 1<sup>st</sup>/2<sup>nd</sup> Defendants/Applicants Notice of Preliminary Objection. The question is; does the filing of application and processes by the 1<sup>st</sup>/2<sup>nd</sup> Defendants/Applicants amount to a breach of the said Section 5 (1) of Arbitration And Conciliation Act and therefore a waiver of right? My answer is a clear Yes. The wordings of Section 5 (1) of Arbitration And Conciliation Act are clear and unambiguous. The 1<sup>st</sup>/2<sup>nd</sup> Defendants/Applicants having taken several steps in the matter cannot now turn around to raise the issue of arbitration and seek the court to take benefit of the Provisions of Section 5 (1) of Arbitration And Conciliation Act. It does not avail the Applicants as they are deemed to have waived their rights under the said Section 5 (1) of Arbitration And Conciliation Act and this court has the jurisdiction to entertain this Suit.

In any event, talking about the jurisdiction of court as it relates to Arbitration Clause in an Agreement between parties, learned counsel to 1<sup>st</sup>/2<sup>nd</sup> Defendants/Applicants argued heavily that this court ceases to have jurisdiction in this suit in the face of the Arbitration Clause in the Agreement between the parties. This contention by counsel is a clear misconception

of the Provisions of Section 5 (1) of Arbitration And Conciliation Act and the law. The fact that there is an inclusion in an Agreement to submit a dispute to arbitration does not generate the heat of ouster of jurisdiction of the court. It merely postpones the right of either of the contracting parties to resort to litigation in court whenever the other contracting party elects to submit the dispute under their contract to arbitration. See the case of Onward Fishers Ltd Vs M.V. (2008) LPELR-4789 (CA). Therefore, Arbitration Clause in an Agreement does not divest the court of jurisdiction.

It does not also avail the Applicants to pray for stay of proceedings having taken various steps in the proceedings and the application not being brought timeously.

In the light of all of these, it is the firm view of the court that this Notice of Preliminary Objection by the 1<sup>st</sup>/2<sup>nd</sup> Defendants/Applicants is baseless, unmeritorious and should fail. It is hereby dismissed.

**HON. JUSTICE O. C. AGBAZA**

Presiding Judge

16/6/2022

C.I. ANAMAMBA WITH N.A. IVORI – FOR 1<sup>ST</sup>/2<sup>ND</sup> DEFENDANTS/  
APPLICANTS

ISAAC ITA WITH L.O. SAMUEL – FOR THE CLAIMANT/RESPONDENT







