

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

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONUKALU&GODSPOWEREBAHOR

COURT NO: 11

SUIT NO: FCT/HC/CV/40/2017

BETWEEN:

- 1. ZICOZEENNIG LTD**
- 2. PACDNORM NIGERIA LTD**
- 3. EDWIN O. OMAKWU**
- 4. PRINCE IYKENWEZE.....PLAINTIFFS/RESPONDENTS**

VS

- 1. BAILEY INVESTMENT NIGERIA PLC**
- 2. BAILEY INDUSTRIAL COMPANY LTD**
- 3. MRS. M. O BOLOGUN.....DEFENDANTS/APPLICANTS**

RULING

By Notice of Preliminary Objection dated 25/9/17 but filed on 10/10/17,
Defendants/Applicants pray the court for the following reliefs;

1. A Declaration of the Honourable Court that the court lacks jurisdiction to entertain the case and/or try the Defendants/Applicants.
2. A Declaration of the Honourable Court that the suit of Plaintiffs are statute barred.

3. An Order of the Honourable Court dismissing the suit in its entirety.
4. Omnibus relief.

The grounds of objection;

1. The Suit as it is presently constituted before the Honourable Court is incompetent.
2. The court lacks the jurisdiction to entertain and/or hear the Suit.
3. The Honourable Court lacks the prerequisite power to adjudicate over this Suit as same is statute barred.

In support of the Preliminary Objection filed a Written Address on point of law, adopts it as their oral argument, in urging the court to grant all the reliefs of Applicants and dismiss Respondents claim.

In reaction, Respondents filed a reply on point of law on 17/5/18, adopts same as their oral submission, and urge the court to refuse the reliefs being sought.

In the Written Address of Applicants, S.O Ojo of Counsel formulated three (3) issues for determination;

1. Whether the Suits of the Plaintiffs is and/or are competent as is and/or presently constituted having failed to first and foremost refer the matter to an arbitral panel as enshrined in the various contracts and Construction Agreement between the Plaintiffs and the 1st and 2nd Defendants/Applicants?

2. Whether the Honourable Court has territorial jurisdiction to hear, entertain and/or determine the suit, the Plaintiffs having failed to institute their suit and/or action at the proper venue being Gwagwalada Judicial Division of the High Court of Justice of the FCT where not only the purported contracts were awarded to the various Plaintiffs/Claimants by the Defendants/Applicants but essentially where the Defendants/Applicants resides and/or carry out her business?
3. Whether the entire suit of the Plaintiffs is still litigable having being caught up by the Provisions of Section 7 of the Limitation Act Cap 522 LFN 1990?

On issue 1, submits this court lacks jurisdiction to hear and determine this suit as there exist some features in the case which prevents the court from exercising jurisdiction. That from the various documentary contract and construction agreement pleaded by Plaintiffs in Para 4 of their Joint Statement of Claim and with particular reference to clause 2 of the said Agreement its mandatory for either parties to the said Agreement in the event of any dispute, controversy or claim arising out of the subject matter of the suit before the court, if such dispute could not be settled by parties by negotiations, such dispute, controversy or claim shall first and foremost be referred to and finally determine by Arbitration. Submit in all matters like in the instant where the court is faced with the question of determining a Preliminary Objection to jurisdiction, the court consider only the Writ of Summons, Statement of Claim and any other material evidence placed before it by parties. That in the instant, Plaintiffs failed to comply with the

above referred fundamental terms of their contractual engagement with Defendants/Applicants and its fatal to this Suit as its trite law that parties are bound by their Terms of Engagement. That failure of Plaintiffs to submit their dispute to Arbitration before approaching this court renders this suit incompetent. In all, commend the court to cases of Governor of Kwara State VsLafiagi (2005) 5 NWLR PT. 917, 139 @ 151, Sken Consult VsUkey (1981) 1 SC, 6 KotoyeVsSaraki (1994) 7 NWLR PT. 317, 414, EgbuonuVsB.R.T.C (1997) 12NWLR PT. 531, 29, IshenoVs Julius Berger NigPlc (2008) 6 NWLR PT. 1084, 582 @ 588.

On issue 2, submits from all the processes filed and served by Plaintiffs, the award of the purported contracts to all Plaintiffs by Defendants as well as place of business of Defendants is Gwagwalada which is Divisional Headquarters of Gwagwalada Judicial Division and no element of the cause of action happened outside the jurisdiction and that by the Provision of Order 9 Rules 3 and 4 of Rules of Court 2004 (now Order 3 Rule 3 and 4 under the new Rules), the proper venue to institute this Suit is Gwagwalada Judicial Division and not Bwari Judicial Division as done by Plaintiffs.

On issue 3, submits the suit of Plaintiffs is statue barred by the legal effect of Section 7 of the Limitation Act, refer the court to Paras 8 – 45 of Plaintiffs Joint Statement of Claim and submit cause of action of the various Plaintiffs arose at various times between 2002 and 2005 at which time the various purported claims of Plaintiffs has become due, that by the combined implication of the Paras 8 – 45, its clear cause of action of Plaintiff accrued since between 2002 and 2005. Submit the applicable law

in our jurisdiction is the Limitation Act and the position of the court on effect of Limitation statute is that when it prescribes a period when an action must be commenced, legal proceedings cannot validly be commenced after the expiration and any action commenced after the expiration is not maintainable, refer to Mr. Mukaila Musa Vs Nigeria Institute of Medical Research & 1 Or. (2010) 11 NWLR PT. 1205 @ 273. Submit since the accrual of cause of action is beyond period of Six years permitted by Limitation Act within which to bring this action, the Suit must suffer a fatal fate of dismissal.

Submit where Defence of Statutory Limitation is raised as in the instant, the duty in determining period of limitation is on the court and the court can only discharge that duty by resort to the Writ of Summons and/or Statement of Claim. Further that a defence founded on Statute of Limitation as in the instant is one that Plaintiffs, in the instant case, has no right of action. Commend the court to several judicial authorities; Hassan VsAliyu. (2010) 17 NWLR PT. 1223, 547, Savage VsRoati 10 WACA, 264, Isiak .O. MoyosoreVs Gov. Kwara State&Ors (2012) NWLR PT. 1293 – 255, EgbeVsAdefarasin (1987) NWLR PT. 47, Ethiopian Airlines VsAfribankNigPlc& 1 Or (2006) NWLR PT. 1008 245 @ 248, Fred EgbeVsAlhajiAbubakarAlhaji (1990) 1 NWLR PT. 128, 54.

Submit, that where an action is statute barred, a Plaintiff who otherwise have had right of action loses the right to enforce it by judicial process. That statute of Limitation removes right of action, right of enforcement, right to judicial relief and leaves a person with bare, barren and empty cause of action which cannot be enforced or protected through judicial

process, refer to *HajiyaIyyaAlhassanDuzu & 1 Or VsAlhajiJibrilYinusa & 2 Ors* (2010) 10 NWLR PT. 1201 80 @ 85 – 92, *Mr. TuoyoVsAyonronmiVsNNPC* (2010) 8 NWLR PT. 1197 @ 623.

In the Plaintiffs/Respondents reply on point of law settled by A.C Ezendu, Respondents Counsel also formulated three (3) issues for determination;

1. Whether the suit of the Plaintiffs/Respondents as presently constituted is incompetent having not first referred the matter to Arbitration as contained in the Contract/Construction Agreement between the parties?
2. Whether filing this suit within the Bwari Judicial Division impugns on the jurisdiction of this Honourable Court?
3. Whether this suit has been caught up by the principle of limitation?

On issue 1, submit that not first referring the matter to Arbitration has not affected the jurisdiction of court. That the condition precedent to referring the matter is after 14 days of commencement of negotiations and such dispute has not been settled. That negotiation was never commenced between parties before instituting this action. That assuming without conceding it ever commenced, the court will at best order stay of proceedings and sue moto refer the matter to Arbitration, refer the court to Section 5 (1) and (2) of Arbitration and Conciliation Act and case of *Nissan Nig Ltd VsYaganathan* (2010) 4 NWLR PT. 1183 135 @ 156, *Onuselogu Enterprise Ltd VsAfribankNig Ltd* (2005) 1 NWLR PT. 940 577.

On issue 2, answered the question in the negative and refer the court to Order 3 Rule 3, 6, 4 (2), 5 Rule 1 (1), (2) and submit that a community reading of the Provisions of these Rules would show that Order 3 Rule 4(2) is germane to the present circumstance as 1st, 3rd Defendants carry on business at Block 10 Lafia Close, off Ilorin Street, Area 8, Garki, Abuja while 2nd Defendant at Plot N0.2 Cadastral Zone G04, Kaduna – Lokoja Express Road Gwagwalada, Abuja. That this court has every power to determine this suit.

On issue 3, submits the onus is on Defendants who relies on defence of limitation of action to establish when cause of action accrued to Plaintiffs. That it is not enough to plead a particular date in Statement of Defence as the date the cause of action arose because if the date is not admitted by any reply of Plaintiffs to Defendants Statement of Defence, it will be impossible and indeed wrong for a court to compute time from the date pleaded. In arriving and when cause of action arose, refer the court to page 4 Paras 1 (a),(b) and (c) of the Contract and Construction Agreement and submit, that time would not begin to court until the aggrieved party had written a complaint to Defendant of their breach. That cause of action in this suit arose between 15/11/16 and 20/1/17 when Plaintiffs jointly wrote two sets of letters complaining of the breaches on the parts of Defendants. That any computation of time from 15/11/16 would show that Plaintiffs are within time and not caught up by the Limitation Act.

I have carefully considered the submission of both learned counsel, the statutory authorities relied upon and the judicial authorities cited and find that two (2) issues can be distilled for determination;

1. Whether by the Provision of Section 7 of the Limitation Act Cap 522 LFN 1990, this suit of Plaintiffs/Respondents is statute barred.
2. Whether this Honourable Court has this jurisdiction to entertain and determine the Plaintiffs/Respondents suit.

On issue 1, the contention of Applicants, in the main, is that this suit of Plaintiffs/Respondents is statute barred in view of the Provision of Section 7 of the Limitation Act, that flowing from the Paras 8 – 45 of the Statement of Claim of Plaintiffs, cause of action in this suit arose between 2002 and 2005 at which period various purported claims of Plaintiffs has become due and not instituting this action within the period, the suit is statute barred. Plaintiffs/Respondents, on the other hand, contend cause of action in this suit arose between 15/11/16 and 20/1/17 when Plaintiffs jointly wrote two (2) sets of letter to Defendants complaining of breaches on the part of Defendants.

The said Section 7 of the Limitation Act states;

- (1) “The following actions shall not be brought after the expiration of six years from the date on which cause of action accrued:
 - (a) Actions founded on simple contract.
 - (b) Actions founded on quasi – contract.
- (a)

Cause of action is the fact or combination of facts which give rise to a right to sue. And in determining when cause of action is said to have accrued,

the court is enjoined to have regard and indeed restrict itself to the Statement of Claim of the Plaintiff. See the case of FabunmiVs University of Ibadan (2018) All FWLR PT. 943 637 @ 645 – 647. See also Victor VsFUTA&Anor (2013) LPELR – 22887 (CA) and Yare Vs National Salaries, Income and Wages Commission (2005)LPELR – 7479 (CA).

In line with the law in the determination of when cause of action can be said to arisen or accrued, I have looked critically into the Plaintiffs Joint Statement of Claim, in particular the Paras 9 – 53 and find that cause of action in this suit arose between 15/11/16 and 20/1/17 when Defendants/Applicants herein breached the contract they had with Plaintiffs when they brought in a new developer to the site of the property in deviant to their subsisting contracts with Plaintiffs and with Plaintiffs out standings unpaid and Plaintiffs had to write letters to Defendants/Applicants complaining of the breaches. I do not agree with the argument of Applicants that cause of action in this suit arose between 2002 and 2005 at which period the purported claims of Plaintiffs has become due. Granted that the contract award letters and the Contract and Construction Agreement as well as the bill of quantities divided the contract into three (3) stages and assigned the sum payable at the close of each stage and the Plaintiffs performed and fulfilled the requirements which ordinarily entitled them to payments at the 1st stage to which the Defendants/Applicants defaulted in their obligations to pay in line with their agreements and notwithstanding same of the Plaintiffs, in particular, 2nd 4th Plaintiffs took steps and moved into the 2nd stage as represented in Paras 16 – 32 of Plaintiffs Statement of Claim and the fact that all these events

took place between 2002 and 2005 does not, in the view of court, mean cause of action arose between 2002 and 2005. Cause of action in this suit arose between 15/11/16 and 20/1/17 when the Defendants/Applicants breached the Plaintiffs contracts when they introduced a new developer to the site in breach of the contracts of Plaintiff and with Plaintiffs outstanding's for work done unpaid. What's more, the Clause 1 (a) of the Contract and Construction Agreement states that a breach of the Agreement shall be deemed to arise where either parties commits a breach or default of any of the fundamental terms or covenants of the Agreement. The Agreements are supposed to be continuous until executed. The Plaintiffs/Respondents appeared to have understood this and that perhaps may have informed Plaintiffs, in particular, the 2nd, 4th Plaintiffs moving from the 1st stage of the contract even when they were not paid to the 2nd stage before Defendants/Applicants breached the contract.

A computation between 15/11/16 and 20/1/17 when cause of action arose and accrued to Plaintiffs shows that this suit of Plaintiffs is not caught up by the Section 7 of the Limitation Act and therefore not statute barred as it is less than Six years from the date on which cause of action accrued to Plaintiffs. I therefore resolved the issue 1 for determination in the negative that this suit of Plaintiffs is not statute barred by the Provision of Section 7 of the Limitation Act.

On issue 2, whether this Hon. Court has jurisdiction to entertain and determine the Plaintiffs/Respondents suit, the contention of Applicants is that this court lacks jurisdiction to hear and determine this suit because of failure of Plaintiffs to submits their dispute to Arbitration in line with Clause

2 of the Contract and Construction Agreement. Plaintiff/Respondent on the other hand contends that not first referring the matter to Arbitration cannot affect the jurisdiction of the court. The position of the law on Arbitration Clause in an Agreement, as in the instant, is clear and this has overtime be repleted in an Plethora of judicial authorities. An Agreement to submit a dispute to Arbitration does not oust the jurisdiction of the court as either party to such an Agreement may before submission to Arbitration commence legal proceedings in respect of any claim or cause of action. See the case Guthrie (Nig) Ltd VsKwara State Govt (2018) All FWLR PT. 964 2041 @ 2043 – 2044. In Sino Afri Agriculture & Ind. Co. Ltd &OrsVs Ministry of Finance Incorporation&Anor (2013) LPELR – 22370 (CA) Per Orji – AbaduaJCA @ Pg. 36, Paras B – E had this to say;

“It should be noted that the 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 also L.A.CVsA.A.N Ltd (2006) 2 NWLR PT. 963 @ 73 (CA). The argument of counsel for Applicants on the point, therefore, is misconceived and I am in agreement with the submission of learned counsel for Plaintiffs/Respondents.

However, where there is an Arbitration Clause in an Agreement between parties as in the instant, the court will stay hearing the case pending

resolution of the case on Arbitration as agreed upon by the parties. See Guthrie (Nig) Ltd VsKwara State Govt. (Supra) @ Pg. 2044 as the court has a duty to give effect to Agreement between parties. See the case of S.E Co. Ltd VsN.B.C.I (2006) 7 NWLR PT. 978 198 @ 201 (SC).

On the issue of territorial jurisdiction raised by Applicants, that the award of the purported contracts to all Plaintiffs by Defendants as well as place of business is Gwagwalada Judicial Division which is Divisional Headquarter of Gwagwalada Judicial Division and no element of cause of action happened outside the jurisdiction and that by Order 3 Rule 3 and 4 of Rules of Court, the proper venue to institute this action is Gwagwalada Judicial Division and not Bwari Judicial Division. I am also not in Agreement with the submission of Counsel on this issue. The fact that this instant was instituted in the Bwari Judicial Division and not Gwagwalada Judicial Division does not affect the jurisdiction of court or nullify the proceedings. Such issues are treated as irregularity by same Rules of Court relied on by Applicant in his argument. See Order 5 Rule 1 (1) of Rules of Court. In any event, by the Provision of Order 3 Rule 6 of the Rules of Court, if any suit is commenced in the wrong judicial division, such suit may be tried in that division unless the Chief Judge otherwise directs.

In all of these, it is the firm view of court that this instant suit of the Plaintiffs/Respondents is not caught up by the Limitation Act as canvassed by Counsel for the Defendants/Applicants. In view of the Arbitration Clause in the Contract and Construction Agreement of the parties, I hereby refer the parties to Arbitration in line with the Clause 1 (a) of the Contract and

Construction Agreement and order stay of proceedings in this matter. I so hold.

This is the Ruling of the Court.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

8/11/2019

S.OOJO – FOR THE DEFENDANTS/APPLICANTS

E.UONUOHA WITH HIM H.N UCHE – UBAH FOR THE
PLAINTIFFS/RESPONDENTS.