

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE NYANYA JUDICIAL DIVISION
HOLDEN AT NYANYA ON THE 22ND DAY OF JANUARY, 2019
BEFORE HIS LORDSHIP, HON. JUSTICE U. P. KEKEMEKE
SUIT NO.FCT/HC/CV/0198/17

COURT CLERK: JOSEPH ISHAKU BALAMI & ORS.

BETWEEN:

REGD. TRUSTEES OF FAMILY HEALTH INTERNATIONAL.....PLAINTIFF

AND

QUICKENING INTEGRATED SERVICES LIMITED.....DEFENDANT

JUDGMENT

This originating motion brought pursuant to Order 1 Rule 3 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004 and Section 48 of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria is for the following:

1. An Order setting aside the Final Arbitral Award dated 6th November 2017 made in favour of the Respondent by Emeka Obegolu, the sole Arbitrator in the arbitration proceedings that was conducted while the challenge to the sole Arbitration by the High Court of the Federal Capital Territory was still pending.
2. And for such further or other orders as the Honourable Court may deem fit to make in the circumstances.

The grounds upon which the application is brought, as relied by Applicant's Counsel are:

1. The Final Award dated 6/11/17 is a nullity, same having been made by the sole Arbitrator while a challenge to the validity of his appointment by the Court was still pending and subject of an appeal in Appeal No. CA/A/682/17.
2. The appointment of the sole Arbitrator was done in flagrant violation of the Arbitration and Conciliation Act and in breach of the principles of fair hearing as enshrined in Section 36 of the 1999 Constitution.
3. The appointment of the sole Arbitrator by the High Court of the Federal Capital Territory was in breach of the provisions of Section 7(2)(6) and Section 44(1), (2) (3) and 4 of the Arbitration and Conciliation Act and Article 6 of the Arbitration Rules (First Schedule) of the Act.
4. Contrary to the provisions of Article 12 of the Arbitration Rules, the sole Arbitrator completely disregarded the challenge to his appointment by the Court and went ahead to conduct and render the Final Award while the challenge to his appointment was still pending.
5. The sole Arbitrator misconducted himself in proceeding with the conduct of the arbitral proceedings and rendering the Final Award while the challenge to his appointment was still pending before the Court.
6. That the sole arbitrator misconducted himself in pronouncing on Motion on Notice dated 26/07/17 which was filed in Suit No. CV/1214/2017 before the High Court of the FCT for stay of the arbitral proceedings pending the challenge to the appointment of the sole Arbitrator.
7. The conduct of the arbitration proceedings by the sole Arbitrator was also in violation of the Arbitration Rules, subsidiary legislation to the Arbitration and Conciliation Act and pursuant to which his appointment was made albeit wrongly.
8. The arbitral proceedings are deeply flawed and the Final Award was preconceived, contrived and rendered in violation of the Arbitration and Conciliation Act.

Learned Counsel to the Applicant relied on the 24 paragraph Affidavit and 16 Exhibits attached thereon. I have accordingly read the Affidavit evidence and the attached Exhibits.

In opposition, the Respondent filed a Counter Affidavit of 24 paragraphs sworn to on 29/11/17 by Ezenwa Okoh of Counsel, attached therewith Exhibits A & B.

Learned Counsel to the Respondent relied on the said Counter Affidavit and Exhibits in opposing the Originating Motion. I have also read the Affidavit and Exhibits. Both Counsel adopted their Final Written Addresses filed in this matter. The Respondent's Written Address is dated 7/02/18. He raised only two issues for determination.

1. Whether this application amounts to an abuse of Court processes.
2. Whether the Applicant has put sufficient materials before this Court to be entitled to the relief sought.

Learned Counsel argues that an abuse of Court process arises when the machinery of the Court is wrongfully used to irritate and annoy litigants with the aim of gaining an undue advantage. That a Court of Coordinate Jurisdiction cannot sit to review a decision of another Court of Coordinate jurisdiction. That an appeal can only lie in respect of such decisions to the Court of Appeal. That even if the Court assumes jurisdiction, the Applicant has failed to provide sufficient materials to enable the Court grant the reliefs sought.

On issue two, Learned Counsel to the Respondent argued that the grounds upon which a party to an arbitration agreement can seek to set aside an award are clearly spelt out in Section 48 of the Arbitration and Conciliation Act Cap A18, LFN 2004.

Learned Counsel argues that the grounds which the Applicant predicated this application seeking to set aside the Arbitral Award are:

1. Misconduct and inadequate notices.

That the above grounds were not proved.

He further contended that:

1. There is no pending application seeking to challenge the appointment of the sole Arbitrator in the High Court of the FCT which made the appointment.
2. That Exhibits FHI 6A, FHI 9 and FHI 11 exhibited by Applicant show clearly that Applicant was given notice and time to participate in the Arbitral Proceedings but failed to do so.
3. That the ruling of the Arbitrator on Preliminary issue of jurisdiction does not amount to misconduct.
4. That Applicant has failed to disclose proof of any or all the allegations contained on the grounds upon which the application is premised.

He finally urges the Court to dismiss or strike out the Motion.

The Applicant's Counsel on the other hand raised one issue for determination in his Written Address. It is whether the sole Arbitrator did not misconduct himself in proceeding to render an award while the challenge to his appointment was subject of an appeal and thereby acted in breach of the relevant provisions of the Arbitration and Conciliation Act.

Learned Counsel refer to Section 30 & 48 of the Arbitration and Conciliation Act. That the composition of the Arbitral tribunal and the entire proceedings were in breach of the Act. That there was no order for reference to Arbitration. That Applicant was not given notice of hearing. The sole arbitrator completely disregarded the challenge to his appointment. That the arbitrator did not act fairly.

I have read and considered the Written Addresses of Counsel as summarised above. The issues raised by the Applicant's Counsel were adequately responded to by the Respondent's Counsel. The Applicant's issue 2 is the same as the sole issue raised by the Respondent's

Counsel. I shall therefore determine this case based on the issues raised by the Applicant's Counsel.

On issue 1, whether this application amounts to an abuse of Court Process. I have earlier reproduced the Affidavit evidence of parties. The Respondent in this matter filed a suit before my Learned brother HON. JUSTICE ADEPOJU seeking for as per Exhibit F H1 & 2 attached to Applicant's Originating application. They are:

1. A declaration that the purported termination of the contract dated August 26, 2016 and renewed on November 10, 2016 by the 2nd and 3rd Defendants without observing clause 3 and 1 respectively thereof is illegal, null and void.
2. That 2nd and 3rd Defendants are in breach of clause 3 of the contract agreement dated August 26, 2016 and renewed on 10th November 2016.
3. An order directing the Defendants to pay the Plaintiff the sum of N13,015,738.25 being the amount accruable to the Plaintiff as per the invoices issued and covering milestones 1 – 3 of the contract already executed etc.

The 2nd Defendant in the above process is the Applicant in this application. Exhibit FHI 3 is the 2nd Applicants memorandum of conditional appearance. Exhibit FHI 4 is a Notice of Preliminary Objection filed by the Applicant in that case. It is for an order striking out the entire suit for lack of jurisdiction.

Amongst other grounds relied on by Applicant in his application are:

1. That the suit constitutes a gross abuse of the process of Court, as the Plaintiff has issued a Notice of Arbitration in respect of the subject matter.
2. That contract NO FHI/SIDHAS/02/AUG/2016 is subject of Arbitration etc.

The Notice of Preliminary Objection of the Applicant in this case who was also the 2nd Defendant/Applicant in Exhibit FHI 3 stated copiously in the Affidavit in support of the Preliminary Objection that under Clause 14 of the contract Reference Number FH1/SIDHAS/02/AUG/2016, the parties chose arbitration as the only means of resolving ANY dispute or disagreement as may arise from the contract.

That by the letter dated 07/03/17 titled “*Notice of Impending LITIGATION/ARBITRATION..*” the Plaintiff wrote and stated as follows. “*please note that we have commenced arbitration proceedings against FHI 360, pursuant to the arbitration clause in the contract to challenge the illegal and wrongful termination of the contract....*”. amongst other paragraphs. Exhibit FHI 5 is the Counter Affidavit of the Respondent in this case who was the Plaintiff in the other case. Exhibit FHI 6 is a preservative order restraining the 1st Defendant from refunding the 2nd Defendant advance payment guarantee sum of N37,123,727.58 or any other sum pending the Determination of the Arbitration Proceedings. Exhibit FHI 6(a) is a Notice of arbitration by Claimant’s Counsel in the other Court & Respondent which was served on the Applicant herein.

I have also perused Exhibit FHI 9 which is a letter by the sole Arbitrator dated 20/07/17 responding to Applicant’s letter. Exhibit FHI 11 is the record of proceedings in the other Court. It shows that the Applicant in this application was represented. It also shows that the Preservative Order made was an order made by consent of parties.

It is clear from the said records that the matter was adjourned for the application seeking to appoint a sole arbitrator. All parties were represented when the said application was adjourned, however on the date of adjournment, when the application was to be moved, the Applicant in this extant case was absent and not represented despite service of the process. The application was granted. Exhibit FHI 12 attached to this application is a Notice of

Appeal against the decision of the other Court appointing the sole arbitrator. Exhibit FHI 14 is the Record of Arbitration of 26th July, 2017 while Exhibit FHI 16 is the Final Award.

The reliefs sought in the appeal before the Court of Appeal are:

1. An order allowing the appeal and setting aside the entire decision of the High Court of the Federal Capital Territory delivered by Adepoju J. on the 4th of July, 2017.
2. An order granting all the reliefs in the Notice of Preliminary Objection dated 2nd May 2017 and accordingly strike out the suit for want of jurisdiction.

What Applicant's Counsel is seeking in this application is for the Court to set aside the Final Arbitral Award dated 6th November, 2017 made in favour of the Respondent by Emeka Obegolu, the sole Arbitrator in the arbitral proceedings that was conducted while the challenge to the appointment of the sole Arbitrator by the High Court of the Federal Capital Territory was still pending.

(2) And for such other order or further orders as the Court may deem fit to make in the circumstances.

It is clear from the above that the appeal against the ruling of my Learned Brother Hon. (Mr) Justice Adepoju is still pending.

The Court of Appeal is already seised of this matter. The ruling challenged is from a Court of coordinate jurisdiction. Whatever decision I take may one way or the other conflict with the decision of the Court of Appeal. The present application ordinarily ought to be in the Court seised of the matter. The Court has a duty to protect itself from abuse and will not allow a litigant to abuse its process.

See *UGESE VS. SIKI (2007) 8 NWLR (PT. 1037) 452.*

The concept is abuse of judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. The common feature of it is the improper use of the judicial process by a party in litigation to interfere with the administration of justice such as instituting different actions between the same parties simultaneously in different Courts even though on different grounds, where two similar processes are used in respect of the exercise of the same right it is an abuse.

See *OGOEJEFOR VS. OGOEJEFOR (2006) 3 NWLR (PT. 966) 205 SC.*

The right claimed by the Applicant in this case and the grounds of appeal are based on fair hearing. The circumstances that will give rise to abuse of Court process includes:

- a. Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action as in this case or
- b. Instituting different actions between the same parties simultaneously in different Courts even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right.

It is an abuse of Court process for an Appellant as in this case to file an application such as the one in issue in respect of a matter which is already the subject of an appeal in the Court of Appeal between the same parties particularly because this application has the effect of overreacting the appeal.

See *ABUBAKAR VS. UNIPETROL PLC (2002) 8 NWLR (PT. 769) 242 SC.*

It is also an abuse of Court process to file an application in a Court of coordinate jurisdiction seeking a relief touching on a ruling earlier given in respect of the same subject matter. The award sought to be set aside has its root in the appointment of the sole arbitrator by the other Court. The challenge to the appointment of the sole arbitrator was still pending before my

Learned Brother. There was also an application for stay of arbitral proceeding before the same Court. Filing this application in this Court is an abuse as it could have been conveniently filed in the other Court.

From the records, Applicant was served with hearing notices. It stood by and did nothing only to file this application. The origin of this case is the Court of my learned brother. Instituting this case in this Court therefore in my humble view is another variety of abuse of judicial process and I so hold.

The 2nd issue is whether the Applicant has put sufficient materials before this Court to be entitled to the reliefs sought. I have already held that this application instituted before me is an abuse of Court process however assuming but not conceding that I am wrong. I shall consider the 2nd issue.

The grounds for setting aside an Arbitral Award are contained in Section 48 of the Arbitration and Conciliation Act. It states.

“The Court may set aside an arbitral award

- a. If the party making the application furnishes proof.
 - i. That a party to the arbitration agreement was under some incapacity.
 - ii. That the arbitration agreement is not valid under the law which the parties have indicated should be applied or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria.
 - iii. That he was not given notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case.
 - iv. That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

- v. That the award contains decisions on matters which are beyond the scope of the submissions to arbitration so howsoever that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters submitted to arbitration may be set aside or
 - vi. That the composition of the tribunal or the arbitral procedures was not in accordance with the agreement of the parties unless such agreement was in conflict with the provision of this Act from which the parties cannot derogate.
 - vii. Where there is no agreement between the parties, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Act.
1. Where the Court finds that the matter in dispute is not capable of settlement by arbitration under the laws of Nigeria.
 2. Where the award is against public policy in Nigeria.

By Section 30 of the Arbitration and Conciliation Act. Where an arbitrator has misconducted himself, or where the arbitral proceedings or award has been improperly procured, the Court may on an application of a party set it aside. The Applicant's contention in this case, is that the appointment of the arbitrator breached the Applicant's right to fair hearing. That the appointment procedure also breached Section 7(2)(b) and 44 of the ACA. That the challenge to the appointment which was made by the Court is required to be made by the party affected, to the same Court under Article 12. The sole arbitrator denied the Applicant the opportunity of having its challenge fairly and lawfully heard as required.

Applicant's Counsel further contends that misconduct has been held by the Courts to be:

1. Where the arbitrator or umpire has breached the rules of natural justice.
2. If the arbitrator or umpire fails to act fairly towards both parties.

He canvasses that in this case the arbitrator has breached the rules of natural justice.

The Respondent's Counsel on the other hand contended that the entire allegations of the Applicant are without proof. He argues that there is still no pending application seeking to challenge the appointment of the sole arbitrator by the Court that appointed him. That Exhibit FHI 6a, FHI 9, FHI 11 which are documents attached to Applicant's Motion clearly show that they were given adequate notice and time to participate in the arbitral proceedings. That the preliminary issues of jurisdiction raised and ruled upon by the Arbitrator when the motion dated 26/07/17 was pending does not amount to a misconduct. That Applicant has failed to disclose proof of any or all the allegations contained as grounds upon which the application is premised.

Upon a careful perusal of the Affidavit evidence and all relevant Exhibits, I find the following Exhibits germane:

Exhibit FHI 4 is a copy of the 2nd & 3rd Defendants' Preliminary Objection attached to his application.

In paragraph 6 of the said Affidavit in support, the Applicant referred to a letter written by the Respondent herein dated 7/03/17 titled "*Notice of Impending Litigation/Arbitration*" stating that arbitration proceedings has commenced pursuant to the arbitration clause in the contract to challenge the illegal and wrongful termination of contract. The above Exhibit gave notice of arbitration to the Applicant herein.

Exhibit FHI 6(a) is an acknowledged copy of a letter by Respondent's Solicitor (Spring Field Solicitors) dated 22/05/17 to the Country Director of the Applicant titled "*Notice of arbitration*". It states:

“... Pursuant to the order of Court made on 9th May 2017..... we hereby give you Notice that (1) That the dispute be referred to arbitration pursuant to article 14 of the agreement...”.

Exhibit FHI 7 is a motion on notice seeking for the appointment of a sole arbitrator. By the record of proceedings attached to the Respondent’s Counter Affidavit herein, the Applicant was served.

Exhibit FHI 8 is a letter from Applicant’s Counsel referring to the Hearing Notice served on him by the sole Arbitrator. He contended in the said Exhibit that he finds it difficult to accept that he could be served with a hearing notice on 18/07/17 and be required to appear before a judicial forum less than 48 hours of the service of the hearing notice. There is proof of service/acknowledgment.

In Exhibit FHI 9, the document of the Applicant herein dated 20/7/17, the sole Arbitrator Emeka J. P. Obegolu replied Applicant’s letter stating that on 12/07/17 a notice & agenda for a preliminary meeting of the arbitral tribunal was served on the Applicant, setting down the matter for 17/07/17. The Applicant acknowledged service. The Respondent also exhibited similar documents. The above Exhibits in my humble view show that the Applicant was given all opportunities to present its case. He was fully aware of the pendency of the proceedings but choose to stand by. The Respondent in our view has not breached any principle of natural justice by not dealing with the issue fairly and I so hold.

I have also read Exhibit FHI 8 which is the record of proceedings of 26/07/17 in the arbitral tribunal pages 1 & 2. The tribunal drew the attention of the parties to a motion for injunction pending appeal by the Applicant herein. Applicant’s Counsel stated that no such application was served on him but that while he was in the tribunal, his Secretary informed him that a

process was served on his chambers. The arbitrator passed a copy to Respondent's Counsel herein. The Claimant's Counsel stated that by virtue of Section 7 (4) of the Arbitration and Conciliation Act, a decision of the Court under subsection 2 & 3 of the above section shall not be subject to appeal and he so submitted.

The Tribunal agreed pointing out that there is no Court Order revoking his appointment. It therefore proceeded with the business of the day.

I cannot with due respect to Learned Counsel to the Applicant find anything in the above proceeding that amount to a misconduct. Aside the above, the matter is already on appeal in the Court of Appeal.

Why the Applicant is in this Court is what I cannot decipher. The Applicant has not by evidence and Exhibit proved any allegation of misconduct to enable this Court set aside the award.

The originating application therefore fails and it is dismissed.

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HON. JUSTICE U.P. KEKEMEKE
(HOH. JUDGE)
22/01/19