**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**
**IN THE ABUJA JUDICIAL DIVISION**
**HOLDEN AT GUDU ABUJA**
**THIS TUESDAY, THE 5TH DAY OF FEBRUARY, 2019**
**BEFORE HIS LORDSHIP HON. JUSTICE A. B. MOHAMMED**

**SUIT NO: FCT/HC/CV/1088/18**

**BETWEEN:**

INDORAMA ELEME PETROCHEMCIALS LIMITED - APPLICANT

**AND**

CUTRA INTERNATIONAL LIMITED - RESPONDENT

**JUDGMENT**
**DELIVERED BY HON. JUSTICE A. B. MOHAMMED**

By an Originating Motion on Notice dated and filed on 1st March, 2018, and brought pursuant to Order 43 Rules 5(1) and (4), and Section 29(1) and 30 of the Arbitration and Conciliation Act. Cap. A18 LFN 2004, the Applicant prayed for the following reliefs:

1. AN ORDER of this Honourable Court setting aside the Award dated 20th day of December, 2016 rendered by Enewa Mrs. Rita Chris Garuba, FCIArb in the Arbitral proceeding between Cutra International Limited and Indorama Eleme Petrochemicals Limited and attached herewith as Exhibit P5.

2. AND FOR SUCH further order or other orders as this Honourable Court may deem fit to make in the circumstances.

The grounds upon which the application was brought by the Applicant were as follows:

i. The Arbitrator misconducted herself when she entertained the arbitral proceeding between the Applicant and the Respondent without the fulfillment of condition precedent by the Respondent in giving Notice of Arbitration before initiating recourse to arbitration.

ii. The Arbitral proceedings and the Award rendered were in total disregard to the terms of the Arbitral Agreement of the parties, the Arbitration and Conciliation Act, Cap. A18 LFN 2004 and Article 3 of the Rules of Arbitration made pursuant to the Act, and thus constituted an arbitral misconduct under Section 30 of the Arbitration and Conciliation Act aforesaid.

iii. The non-fulfillment of the condition precedent by issuance of Notice of Arbitration pursuant to Article 3 of the Rules of Arbitration by the Respondent before the commencement of the Arbitral proceedings deprived the Arbitrator the jurisdiction to entertain the Arbitral proceeding between the Respondent and the Applicant and thus rendered the Award null and void.

iv. The continued hearing and determination of Arbitral proceeding between the Respondent and the Applicant without the participation of the Applicant by the Arbitrator who was a party in Suit No. FCT/HC/CV/148/2016 from 9/11/2016 to 10/1/2017 before the determination of Motions on Notice No. M/751/2016 and M/517/2016 respectively tantamounts to breach of the Applicant's right of fair hearing and constitutes a misconduct of the part of the Arbitrator.

In support of the Originating Motion was a nineteen (19) paragraph affidavit deposed to by Emmanuel Ukaegbu Esq, a legal practitioner in the Law Firm of Chief Solo Akuma SAN & Associates, the law firm representing the Applicant. Attached to the affidavit were seven documents labeled Exhibits P1 to P7. Also in support of the application, the learned Senior Counsel for the Applicant, Chief Solo Akuma SAN, filed and adopted a Written Address dated 1st March, 2018. The learned Senior Counsel also filed a Reply on Points of Law dated 31st May, 2018 in response to the Respondent's submission.

In opposition to the Originating Motion on Notice, the Respondent filed a 27 paragraph Counter Affidavit deposed to by one Akindele Wasiu, a staff (Accountant) with the Respondent Company. Attached to the Counter Affidavit were documents marked Exhibits A, A1, C and D. A Written Address dated 23rd April, 2018 was also filed and adopted in opposition to the application by the learned Counsel for the Respondent, Osahon Idemudia Esq.

In his adopted Written Address, learned Senior Counsel for the Applicant, Chief Solo Akuma, SAN raised the following two issues for determination:

1. Whether the Award rendered by the Arbitrator in the Arbitral proceedings between the Respondent and the Applicant in total disregard to the terms of the Arbitral Agreement of the Parties, the Arbitration and Conciliation Act, LFN, 2004 and Article 3 of the Rules of Arbitration made pursuant to the Act, tantamounts to a misconduct that would justify the setting aside of the Award of 20th December, 2016, Exhibit P5.

2. Whether the continued hearing and determination of Arbitral proceedings between the Applicant and the Respondent by the Arbitrator from 9/11/2016 to 20/12/2016 before the Respondent's Motion on Notice No. M/751/2016 for striking out Suit No. FCT/HC/CV/148/2016 or stay of proceeidngs was determined is tantamount to breach of the Applicant's right to fair hearing and constitutes a misconduct on the part of the Arbitrator.

On his part, the learned Counsel for the Respondent, Osahon Idemudia Esq, raised the following sole issue for determination:

Whether the Applicants have made out a credible case for the setting aside of the Award dated 20th December, and rendered by Enewa Mrs. Rita Chris Garuba.

From the above issues raised by the parties, I am of the view that the resolution of the sole issue raised by the learned Counsel for the Respondent can effectively determine this case. I shall therefore adopt same in determining this matter, i.e.:

> Whether the Applicant has made out a credible case for the setting aside of the Arbitral Award dated 20th December, 2016, rendered by Enewa Mrs. Rita Chris Garuba.

Learned Senior Counsel for the Applicant had submitted that by the virtue of paragraphs 6:3 of Exhibit P1 (The Consultancy Agreement of the Parties dated 1st April, 2014), the Applicant and Respondent incorporated by reference the 41 Articles of Rules of Arbitration in the First Schedule to the Arbitration and Conciliation Act, Cap. A18, LFN, 2004 and made it part of Exhibit P1. He cited **TEXACO (NIG.) PLC v KEHINDE (2001) 6 NWLR (Pt. 708) 224 at 240(CA); and IWUOHA v N.R.C. (1997) 14 NWLR (Pt. 500) 419 at 430.**

Learned Senior counsel also submitted that at the Arbitration proceedings, the Applicant had filed a Notice of Preliminary Objection to the assumption of jurisdiction by the Sole Arbitrator and contended that the pre-condition for commencement of arbitration as set out in Article 3 of the Rules to the Arbitration and Conciliation Act, 2004 had not been complied with, that is that the Respondent who initiated the arbitration did not issue and serve on the Applicant the Notice of Arbitration as required by Article 3(1) of the Rules to the Act particularly Article 3(3) of the Rules of the Act. Senior Counsel pointed out that even the Arbitrator in her Ruling had found as a fact that the Respondent did

not issue Notice of Arbitration as provided by Article 3(1) and (2) of the Rules to the Act, yet the Arbitrator wrongly refused to terminate the proceedings.

Consequently, learned Senior Counsel submitted that the Arbitrator wrongly construed clause 6 of Exhibit P1 when she stated that the parties may have decided to dispense with giving a formal notice, hence it was not included as a necessary step in clause 6 of Exhibit P1. He added that the parties having incorporated by reference that the arbitration shall be conducted in accordance with the Rules of Arbitration and conciliation Act, then they do no need to expressly include all the 41 Articles of the Rules. Counsel added that the Respondents by virtue of clause 63 is deemed to have had actual notice of the requirement to serve notice of arbitration in accordance with Article 3 of the Rules.

Learned Senior Counsel further submitted that the emails sent by the Respondent to the Applicant did not satisfy the requirement of Notice of Arbitration under Article 3 of the Rules of Arbitration and Conciliation Act, 2004. Learned Senior Counsel also submitted that the failure by the Arbitrator to comply with the expenses or implied terms of the Arbitration agreement would amount to a misconduct. He cited section 30 of the Arbitration and conciliation Act and **ARBICO (NIG.) LTD. v N.M.T. LTD. (2002) 15 NWLR (Pt. 789) 1 at 24; and TAYLOR WOODROW OF NIG. LTD. v S.E. GMBH (1993) 4 NWLR (Pt. 286) 1 27 at 142 – 144.**

Learned Senior Counsel submitted in the instance case, it was the misconduct of the Arbitrator to construe clause 6:3 of Exhibit P1 wrongly and thereby failed to comply with the express and implied terms of exhibit P1. He added that even section 15 of the Act makes the Rules applicable to all arbitral proceedings unless where parties expressly exclude the application of the Rules. He added that in the instant case not only were the Rules not excluded, but are expressly incorporated by Exhibit P1, however the Arbitrator strangely and suspiciously excluded the Rules.

Counsel submitted that service of Notice of Arbitration is a condition precedent to the commencement of arbitral proceedings and that Notice of arbitration must be strictly issued in prescribed form and must contain all the items set out in Article 3 (3) of the Rules of to the Act. Counsel also relies on Article 3 (1) (2) where the word "shall" is used. He further submitted that where ever the word "shall" is used in a statute, it connotes a command of a mandatory act that cannot be derogated from. He cited **NLWG v AFRICA DEVELOPMENT INSURANCE CO. LTD. (1995) 8 NWLR (Pt. 416) 677; and COL. KAL (RTD.) v ALAHAJI ALURO (1999) 4 NWLR (Pt. 597) 139.** He submitted that the Notice of Arbitration can be likened to a pre-action notice and cited **AMADI V. NNPC (2000) 10 NWLR (pt. 64 at 76.** He argued that where Notice of arbitration is not issued, it would be deemed that the arbitration had not commenced and the so-called arbitration embarked upon is incompetent. He relied on **MADUKOLU v NKEMDILUM (supra),** and submitted that since no Notice of Arbitration as strictly required by law was issued by the Respondent in the instant case, no valid or competent arbitration was commenced, a fortiori, the arbitrator lacked competence to entertain the arbitral

proceedings and consequently the award rendered by the Arbitrator is a nullity. He urged this Court to hold that the Arbitrator misconducted herself in the Arbitral proceedings and to set aside the award.

It was also the submission of the learned Senior Counsel that for the Arbitrator to hurriedly determine the arbitral proceeding, during the pendency of the above two motions it amounts to an abuse of Court process which is tantamount to a misconduct. He urged this Court to set aside the arbitral proceedings that culminated in the award rendered on the 20th of December, 2016. He explained that the suit in Exhibit 4 was instituted on 9th November, 2016 wherein the Applicant sought among other reliefs for "an Order of this Court removing the Arbitrator as the Arbitrator in the arbitral proceedings between the Respondent and the Applicant. He added that the Applicant also on the same dated 9th November, 2016 filed a Motion on Notice No. M/517/2016, Exhibit P7 and prayed this Court for "An Order staying further proceedings in the arbitral proceedings between the 2nd Respondent and the Applicant pending the hearing and determination of this suit before this Honourable Court". He further stated that even the Respondent on her part filed Motion on Notice No. M/751/2016 on the 15th November, 2016 and sought to strike out the suit or stay further proceedings of the suit, pending the final determination of the arbitral proceedings.

Counsel further stated that both the Arbitrator and the Respondent were properly served with both the suit and the Motion, and that while the two motions were pending before the Court, the Applicant ceased to participate in the arbitral proceeding, pending the outcome of the two applications. However, both

the Arbitrator and the Respondent continued and concluded the proceedings in a hurry and even rendered award on the 20th December, 2016 long before this Court could deliver its ruling in Motion No. M/751/2016 on 10th January, 2017.

Learned Senior Counsel insisted and submitted that what the Arbitrator and the Respondent did is tantamount to a party in a proceeding taking laws into his hands while legal proceedings is pending against him. He added that the Arbitrator had foisted on this Court a state of helplessness and insisted that this is an affront and condemnable. Learned Senior Counsel cited plethora of unbroken judicial authorities to the effect that a party acts in his/her peril with knowledge of pendency of action against him in Court. He relied on the cases of **OJUKWU v MILITARY GOVERNOR OF LAGOS (1985) 2 NWLR (Pt. 10) 806; VASWANI TRADING COMPANY v SAVALAK & COMPANY (1972) 7 NSCC 692; DANIEL v FERGUSON (1981) 2 CH 27 at 30; A.G. v TIMES NEWSPAPER LTD. (1974) AC 273 at 309; and ADESANYA v PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA & ANOR (1981) 5 SC 112 at 187.**

Learned Senior Counsel also submitted that the Applicant was denied fair hearing and relied on Section 36(1) of the 1999 Constitution (as amended) and the cases of **DAWODU v OLOGUNDUDU (1986) 4 NWLR (Pt. 33) 104 at 115- 116; and NWOKORO v ONUMA 91990) 3 NWLR (Pt. 136) 22.** He added that the Applicant's right to fair hearing was breached when the Arbitrator and the Respondent continued and concluded the arbitral proceedings in the absence of the Applicant. He cited **OYEYEMI v COMMISSIONER FOR LOCAL GOVERNMENT KWARA STATE (Pt. 1197) 486; and ARBICO NIG. LTD. v N.M.T. LTD (supra),** and urged the Court

to invalidate and nullify the arbitral proceedings and set aside the award rendered on 20th December, 2016 and grant the Applicant all the reliefs sought in the Motion paper.

Arguing per contra, learned Counsel for the Respondent, Osahon Idemudia Esq, submitted that agreement forms a contract between the parties and that such contract where validly entered into dictates the way and manner both parties have agreed to regulate their relationship. He argued that a duly constituted judicial authority must endeavour not to re-write the terms of the agreement but give effect to the wishes of the parties as expressed in their agreement. He cited **ODUYE v NIGERIA AIRWAYS LTD. (1987) 2 NWLR (Pt. 55) 126; M.V LUPEX v NIGERIA OVERSEAS CHATTERING AND SHIPPING LTD. (2003) 15 NWLR (Pt. 844) 469 at 487; and BAKER MARITIME LTD. v CHEVRON NIG. LTD. (2000) 12 NWLR (Pt. 681) 393.**

Counsel further submitted that the parties in this case should be taken to have trusted their fate for good or bad on the Arbitrator and having submitted to the jurisdiction of the Arbitrator, the Court is bound to honor same by refusing to interfere with the contract of arbitration and the decision reached by the Arbitrator. He referred to Section 12 of the Arbitration Act and the case of **NNPC v CLIFCO NIGERIA LTD (2011) 2 CLRN 101 (SC) 112;** as well as the Ruling of this Court in **Suit No. FCT/HC/CV/146/16: Motion No. HC/M/751/16** [Exhibits P2 and B herein] which was a case between the parties herein, in which the Applicant had put forward the same arguments as in the present application, arguing that the Arbitral Tribunal misconducted itself by refusing to decline jurisdiction at the

instance of the Applicant. Counsel submitted that given the finding of fact made by this Court in that Ruling, the Applicant is estopped from again raisingthis issue before this Court or any other Court as the said finding was never appealed against. The learned Counsel added that the finding of this Court was that it can never amount to a misconduct when an Arbitrator pursuant to a statutory power and consequent upon a request by the parties to determine whether or not she had jurisdiction to entertain a reference and holding that she had, proceeded with the hearing of the arbitration which the objector fully acquiesced to and participated in, even submitting a counter claim for adjudication by the Arbitrator. Counsel argued that the Applicant is estopped from raising this issue again and from even contending that the act complained of amounts to a misconduct.

Learned Counsel submitted that regard must be had to the fact that both the ruling of the Arbitral Tribunal and that of this Court are binding on the Applicant, and that the Ruling of the Tribunal is final and binding and deals conclusively with the issue of jurisdiction and is not subject to appeal or review, while that of this Court is final and binding until set aside by an Appellate Court.

On the bindingness of an agreement, learned Counsel for the Respondent relied on **UBN LTD. v FAJEBE FOODS LTD (1998) 6 NWLR (Pt. 554) 380 at 406**, and argued that the parties are not only bound by their agreement to refer their disputes to arbitration, but also bound by the outcome no matter how unpalatable it might seem. Counsel observed that the actions of the Applicant had been in trying to frustrate the arbitration process at every step as evident from

the various applications filed in the Courts and the obstacles placed on the path of the Arbitral Tribunal with the aim of bringing the arbitral process into disrepute. He argued that it is an established fact that the Applicant owed the Respondent and that the Applicant is clinging to every conceivable technicality to defeat the ends of justice and deny the Respondent what is owed to it.

Learned Counsel for the Respondent submitted that subsequent to the determination of jurisdiction by the Arbitrator, the Applicant had filed its Points of Defence to the Claimant's Points of Claim and also filed a counter claim against the Respondent and proceeded to set out and agree to the issues for determination before the Arbitrator, and as such the Applicant cannot resile from same by coming to this Court to argue that the Arbitrator had no jurisdiction nor that the adjudication went beyond the Agreement since parties had agreed to the issues for determination and submitted same to the Arbitrator. Learned Counsel posited that the submission of issues for determination by the parties for adjudication by the Arbitral Tribunal is akin to a submission agreement which further cements the jurisdiction of the Arbitral Tribunal. He added that the Applicant cannot be allowed to resile from this obligation when Exhibit D (the Record of Proceedings) show that after the settlement of issues, the Applicant went ahead to fully participate in the proceedings of the Arbitral Tribunal.

Learned Counsel referred to Section 2 of the Arbitration and Conciliation Act, LFN, 2004 and urged the Court to dismiss this application seeking to set aside the Award of the Honourable Arbitrator.

On the argument of the Applicant lack of notice of irregularity in commencing the Arbitral reference, learned Counsel for the Respondent submitted that the Applicant is also precluded from raising this point, since in its Ruling on the Applicant's Preliminary Objection to its jurisdiction dated 31st August, 2016 (Exhibit D), the Arbitral Tribunal dealt with that point at pages 9 – 10 therein. Learned Counsel further argued that by proceedings to fully participate in the Arbitral Proceedings, the Applicant is deemed to have waived the irregularity complained of. He referred to **LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND by Sir Mustill and Stewart Boyd (1982) at page 523.** Counsel argued that even if it is assumed that the Arbitrator did not settle the issue with finality, Exhibit F is glaring evidence that the Respondent had waived the irregularity complained of by proceeding to file a Counter Claim at the Reference and participating in the proceedings as borne out by Exhibit F. Counsel urged the Court to dismiss the application seeking to set aside the Award.

Learned Counsel drew the attention of the Court to the fact that beyond the binding nature of the Ruling of the Arbitral Tribunal which precludes the Applicant from revisiting it as they sought to do in this application, the Applicant had not sought to set that Ruling or particular Interim Award aside. He argued that what the Applicant had done was to neglect or ignore the Award that disposed of the issue now sought to be addressed, which issue was resolved by the Arbitral Tribunal on the 31st of August, 2016 as in Exhibit D, and is now seeking to raise same and challenge that Ruling/Interim Award by an application seeking to set aside the Final Award (Exhibit F) dated 20th December, 2016. He submitted that the Applicant cannot seek to set aside an Interim Award by initiating an

Originating Motion challenging the Final Award. He pointed out that it was after the rendition of that Award that parties submitted their pleadings, agreed on issues for determination, paid Arbitrator's fees and proceeded to trial. He argued that the issues cannot be reopened and the actions of the Arbitral Tribunal cannot be termed a misconduct. He urged the Court to dismiss this application for lack of merit.

In his Reply on Points of Law, learned Counsel for the Applicant submitted that the case of **BAKER MARITIME LTD. v CHEVRON NIGERIA LTD (supra)**, relied upon by the Respondent is not applicable to this case as the Applicant in this case has not questioned the arbitration clause in the Agreement, but the way and manner the arbitral proceedings was procured which robbed the Arbitral Panel of its jurisdiction and by extension the Arbitral Award.

Learned Senior Counsel referred to Section 12 of the Arbitration and Conciliation Act and submitted that it only talks about competence of an Arbitral Tribunal to rule on issue of its jurisdiction, which it can do as a preliminary question, as was done in the instant case, or decide same at the final stage of the arbitration and thus incorporate same in the Award. Counsel submitted that the Ruling of the Arbitral Tribunal on issue of jurisdiction is only final to the extent that the Arbitral Tribunal has the competence to make a ruling on issue of jurisdiction. He cited **ATOJU v TRIUMPH BANK PLC (2016) 5 NWLR (Pt. 1505) 252 at 311-312.**

Learned Silk submitted that the Supreme Court authority of **NNPC v KLIFCO NIG. LTD (supra)**, cited by the Respondent is inapplicable to this case, as in that case,

the Appellant participated in the arbitral proceedings without raising the issue of jurisdiction and hence was deemed to have submitted to the jurisdiction of the Tribunal.

On the Respondent's argument over the Ruling of this Court in relation to the Motion for Stay of the Arbitral Proceedings in Motion No. M/517/2016 brought during the pendency of Suit No. FCT/HC/CV/148/2016, which was a suit brought by way of Originating Summons to set aside the Arbitral Award, learned Silk submitted that part of the Ruling of Hon. Justice A. B. Mohammed referred to by the Respondent was on the issue of stay of the arbitration proceedings and not on setting aside the Award. He argued that for plea of estoppel per rem judicatam to operate, the parties must be the same, the subject matter must be the same and the issues must also be the same. He relied on **OKPURUWU v OKPOKAM (1988) 4 NWLR (Pt. 90) 554 at 558.**

On the submission of the Respondent that the Applicant participated in the Arbitral Proceedings and indeed submitted to the jurisdiction of the Arbitral Panel, Counsel submitted that the appearance of the Applicant was made under protest and that the Applicant had filed a preliminary objection challenging the Arbitrator's jurisdiction. He submitted that when an appearance is under protest, it is deemed that the party has not submitted or yielded to the jurisdiction of the court or the arbitral tribunal. He relied on **HOLMAN BROS NIG LTD. v KIGO NIG LTD & ANOR (1980) LPELR-1370(SC).**

Learned Senior Counsel for the Applicant contended that the non-service of Notice of Arbitration to the Applicant was not just a mere irregularity that can be waived by a party but one that goes to the competence of the arbitral proceedings and the jurisdiction of the Arbitrator. He urged the Court to discountenance all the arguments of the Respondent and set aside the Arbitral Award as same was procured without jurisdiction.

I have considered the submissions of the parties. Section 29(2) of the Arbitration and Conciliation Act provides:

> The Court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of submission to arbitration, so however 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 not submitted may be set aside.

Section 30(1) of the Arbitration and Conciliation Act also provides that an arbitral award may be set aside by the Court where an arbitrator has misconducted himself, or where the arbitral proceedings or award has been improperly procured. Under subsection (2) of that Section, an arbitrator who has misconducted himself may on the application of any party be removed by the Court.

The combined effect of Sections 29(2) and 30 of the Arbitration and Conciliation Act quoted above is that an arbitral award may be set aside by the Court upon application where it is proved that the arbitrator acted beyond the scope of the reference made to him by the parties, or the arbitrator misconducted himself or the arbitration was improperly procured. See: **KANO STATE URBAN DEVELOPMENT BOARD v FANZ CONSTRUCTION COMPANY LTD (1990) LPELR-1659(SC), per Agbaje, JSC at pages 67 – 69, paras. F – E; TAILOR WOODROW NIGERIA LTD v SUDDEUTSCHE ETNA-WERK GMBH (1993) LPELR-3139(SC), per Ogundare, JSC at page 14, para. D- F; and ADAMEN PUBLISHERS NIG LTD v ABHULIMEN (2015) LPELR-25777(CA), per Ogunwumiju, JCA at pages 9 – 10, paras. F – C.**

In bringing this application, the Applicant had relied on four grounds which were reproduced in the beginning of this judgment. Suffice it for me to observe that in grounds (i), (ii) and (iii) the Applicant essentially posits that a condition precedent has not been fulfilled by the Respondent, in that no Notice of Arbitration was given to or served on the Applicant before recourse to arbitration, and as such the Arbitrator misconducted herself when she entertained the arbitral proceedings. In ground (iv), the Applicant complains about breach of fair hearing in that the Arbitrator continued to hear and determine the arbitral proceedings between the Respondent and the Applicant without the participation of the Applicant and therefore the Arbitrator had misconducted herself by so doing.

With regards to grounds (i), (ii) and (iii) stated above, the contention of the Applicant was that when the Respondent commenced arbitral proceedings

against the Applicant, the Applicant had in response to the Points of Claim submitted by the Respondent, submitted its Reply alongside a Preliminary Objection challenging the competence of the arbitral proceedings on the grounds that no dispute had arisen to invoke the arbitration clause and that no notice of any dispute or reference to arbitration was given to the Applicant by the Respondent. The Applicant had argued that the Arbitrator had misconducted herself when after hearing the parties on the preliminary objection of the Applicant (Exhibit P2 attached to the Applicant's supporting affidavit to this Originating Motion), she (the Arbitrator) ruled in favour of the Respondent vide Exhibit P3 attached to the Applicant's supporting affidavit to this application.

I observe that, as rightly argued by the learned Counsel for the Respondent in paragraphs 3.13 – 3.15 of his opposing Written Address to this application, the Applicant had earlier filed Suit No. FCT/HC/CV/146/16 in which the Applicant, Indorama Eleme Petrochemicals Limited dragged the Arbitrator Enewa (Mrs) Rita Chris Garuba, FCIArb and the Respondent herein before this Court praying that this Court should intervene and set aside the Ruling of the Arbitrator on the Applicant's preliminary objection on jurisdiction and remove the Arbitrator on the ground that the said Ruling of the Arbitrator to the effect that she had jurisdiction amounted to a misconduct. (See CTC of the Originating Summons which was attached to the Applicant's supporting affidavit to this application as Exhibit P4). In a preliminary objection to that suit brought vide Motion No. M/751/16 by the 2nd Defendant/Applicant (who is the Respondent herein), the Applicant herein had advanced this same argument in urging the Court to dismiss that objection.

In the ruling of this Court on that preliminary objection which was delivered on 10th January, 2017, this Court held as follows:

> From the established facts contained in the supporting affidavit, especially paragraphs 3 – 22 which I have quoted above, it is evident that the parties have not only agreed that disputes between them should be resolved through arbitration, they have actually commenced arbitral proceedings. Exhibits A – E clearly evidence this fact. Indeed, there is not controversy between the parties as to that fact even in their respective submissions…
>
> Thus, the only factual evidence upon which this application can be decided is that contained in the unchallenged and uncontroverted supporting affidavit of the 2nd Defendant/Applicant which I have regarded as established. From those facts, it is evident that when the dispute between the parties arose, an arbitrator was appointed by the appointing authority and at a preliminary meeting, the Plaintiff/Respondent had intimated the Arbitrator (the 1st Defendant) of its intention to contest the jurisdiction of the Tribunal. That parties eventually joined issues on the objection and filed written submissions which are Exhibits B & C attached to the supporting affidavit. That after considering the written submissions, the arbitrator ruled and dismissed the objection as in Exhibit D attached to the supporting affidavit. That after the Arbitrator ordered parties to file pleadings, the 2nd Defendant/Applicant filed his Points of Claim and the Plaintiff/Respondent filed a Points of Defence and a Counter Claim as in Exhibit E attached to the supporting affidavit. That trial opened and the 2nd Defendant/Applicant

called its first witness who was vigorously cross-examined and called two other witnesses who testified in chief and were to be cross examined on 11th November, 2016 when the Plaintiff/Respondent sought to abandon the proceedings even though an award is yet to be reached.

Section 12(1), (3) & (4) of the Arbitration and Conciliation Act provides:

12(1) An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.

(3) In any arbitral proceeding a plea that the arbitral tribunal –

(a) does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising the plea by reason that he has appointed or participated in the appointment of an arbitrator.

(b) is exceeding the scope of its authority may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings, and the arbitral tribunal may, in either case admit a later plea if it considers that the delay was justified.

(4) The arbitral tribunal may, rule on any plea referred to it under subsection (3) of this Section, either as a preliminary question or in an award on the merits and such a ruling shall be final and binding. (underlining mine).

By this suit, the Plaintiff/Respondent appears to be asking the Court to intervene and stop the on-going arbitral proceeding which it is participating in on the ground that the ruling of the Arbitrator to the effect that she has jurisdiction to entertain the reference amounts to misconduct. This, the Plaintiff/Respondent has clearly stated in the question which he formulated to be determined in the Originating Summons commencing this suit, as well as paragraph 1.13 of his Written Address in opposition to this application. By Section 12(1) and (4) of the Arbitration and Conciliation Act which have quoted above an arbitral tribunal is competent to rule on its jurisdiction and such a ruling once made is final and binding upon the parties…

In the instant case, the Plaintiff/Respondent had sought for a ruling of the tribunal to its objection on jurisdiction, which the tribunal gave vide Exhibit D attached to the supporting affidavit to this application. Even after the ruling, the Plaintiff/Respondent has proceeded to participate in the arbitral proceedings and even cross examined the 2nd Defendant/Applicant's witness. The 2nd Defendant/Applicant has even led two other witnesses in evidence and are to be cross examined by the Plaintiff/Respondent when it suddenly filed this suit seeking a determination that by her ruling on jurisdiction in Exhibit D, the Arbitrator ahd misconducted herself and an order of this Court setting aside the ruling and removing the Arbitrator.

By the express provisions of Section 12(4) of the Arbitration and Conciliation Act that rulin on jurisdiction by the Arbitrator (Exhibit D)

> is final and binding on the Plaintiff/Respondent and on the 2nd Defendant/Applicant. The reliance by the learned Counsel for the Plaintiff/Respondent on Section 34 of the Act in seeking that this Court should interfere with the on-going arbitral proceedings on the ground of misconduct is misplaced….
>
> Clearly even Section 30 of the Arbitration and Conciliation Act which deals with setting aside of arbitral award on ground of misconduct of the Arbitrator refers to an award and not a ruling on jurisdiction which was what the Arbitrator did in the instant case vide Exhibit D attached to the supporting affidavit. There is therefore no award made in the instant case which can be set aside on ground of misconduct. The Arbitrator's ruling on jurisdiction in the on-going arbitral proceeding is by Section 12(4) of the Act final and binding on the parties to the arbitration.

In that Ruling therefore, this Court had essentially held that the Applicant herein cannot seek that the Court should stop the then on-going arbitral proceedings on the ground of misconduct because the Arbitrator had delivered preliminary ruling on her jurisdiction, which by Section 12(4) of the Arbitration and Conciliation Act is final and binding on the parties.

In the instant case, Exhibit P3 attached to the supporting affidavit to this application, which has also been attached to the Counter Affidavit of the Respondent as Exhibit B, shows that the Arbitrator had decided on the issue of

jurisdiction, which decision is by Section 12(4) of the Act final and binding upon the parties.

As rightly observed by the learned Counsel for the Respondent, Exhibit P3 attached to the supporting affidavit of the Applicant, which is Exhibit B attached to the Counter Affidavit of the Respondent, was delivered by the Arbitrator as a preliminary point. Even after the Arbitrator's ruling on the preliminary point on jurisdiction, the Applicant not only proceeded to file its Points of Defence and Counter Claim but also set out and agreed to the issues for determination before the Arbitrator. [See paragraphs 6 and 7 on page 4 of the Award attached to the supporting affidavit to this application as Exhibit P5].

Not only that, the Respondent actually proceeded to participate in the arbitral proceedings and only ceased to appear before the Arbitrator at a later stage of the proceedings after cross examining the Claimant's first witness and was to cross examine the Claimant's two other witnesses. [See Exhibit D, the record of arbitral proceedings attached to the Respondent's Counter Affidavit).

As stated by J. OLAKUNLE OROJO and M. AYODELE AJOMO, the learned authors of LAW AND PRACTICE OF ARBITRATION AND CONCILIATION IN NIGERIA (1999) at page 145, "a person who objects to the jurisdiction of the arbitral tribunal may either refuse to participate in the arbitration proceedings, and then later challenge the award when made, or seek a ruling from the arbitral tribunal on the question of jurisdiction which ruling may be interim or part of the final award."

In the instant case where after the Arbitrator's ruling on jurisdiction was delivered as a preliminary point, the Applicant had proceeded to file Points of Defence and Counter Claim, settle issues for the determination of the Arbitrator and participated in the arbitral proceedings, the Applicant had by those subsequent actions reinforced its submission to the jurisdiction of the Arbitrator and cannot therefore be heard to resile and argue otherwise. As argued in paragraph 4.3 of the Respondent's written address, SIR MUSTILL and STEWART BOYD, in their book LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND (1982) at page 523, had clearly highlighted that this amounts to a waiver of whatever irregularity may have existed. In their words at page 523 the learned authors stated:

> Waiver can, of course, occur as a result of an express statement by one party that he will not rely on an irregularity in later proceedings to challenge the award: and where both parties wish to cure an irregularity which has come to light, particularly if it goes beyond a mere irregularity of procedure and affects the tribunal's jurisdiction they may well be advised to do so by an agreement in writing.
>
> But generally the problem is not how to bring about the waiver of an irregularity but how to avoid it. Many of the cases in which it has been held that a party has waived an irregularity have arisen because the party has continued to take part in the arbitration after the irregularity has come to light.

In ODU'A INVESTMENT CO. LTD. v TALABI (1997)10 NWLR (Pt.523) 1; (1997) 7 SCNJ. 600, Idigbe, JSC defined "waiver" at page 22 as follows:

> By way of a general definition, waiver is the intentional and voluntary surrender or relinquishment of a known privilege and a right, it therefore, implies a dispensation or abandonment by a party waiving of a right or privilege which at his option, he could have insisted upon.

See also: **AUTO IMPORT EXPORT v ADEBAYO (2005) LPELR-642(SC),** Per Ogbuagu, JSC at page 84, paras. C – F.

In the instant case, the Applicant, who had raised objection to the jurisdiction of the tribunal as a preliminary point, had after the ruling by the Arbitrator to the effect that the Tribunal had jurisdiction, knowingly proceeded to file defence and counter claim, settle issues for the determination of the Arbitrator and went ahead to participate in the Arbitral proceedings. [See: Exhibits D and F attached to the Respondent's Counter Affidavit]. By so doing, the Applicant is deemed to have waived whatever irregularity relating to jurisdiction he is now trying to canvass in this Application. I so find and accordingly hold that grounds (i), (ii) and (iii) of this application have failed.

As regards ground (iv) relating to breach of fair hearing, the main contention of the Applicant was that the continued hearing and determination of the Arbitral proceedings without the participation of the Applicant by the Arbitrator who was a party in Suit No. FCT/HC/CV/148/2016 from 9/11/16 to 10/1/16 before the

determination of Motions on Notice Nos. M/751/2016 and M/517/2016 amounts to breach of the Applicant's right to fair hearing and constitutes a misconduct on the part of the Arbitrator.

There is no doubt that the right to fair hearing is a fundamental right guaranteed under Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and its breach by any court or tribunal renders the proceedings before that court or tribunal a nullity. See: **CHITRA KNITTING & WEAVING MANUFACTURING CO. LTD v AKINGBADE (2016) LPELR-40437(SC) Per Onnoghen, JSC at pages 21 – 22, paras. D – A; EGBUCHU v CONTINENTAL MERCHANT BANK PLC & ORS (2016) LPELR-40053(SC), per Onnoghen, JSC at page 19, para. D; and MILITARY GOVERNOR OF IMO STATE & ANOR V. NWAUWA (1997) LPELR-1876(SC), per Iguh, JSC at page 48, paras. A – B.**

Although fair hearing is a fundamental right that is guaranteed under Section 36(1) of the 1999 Constitution as aforesaid, it must be added that the court or tribunal is required to only grant opportunities to parties to exercise such right. Hence, where a party fails to exercise such a right after having been given to opportunity to do so, he cannot be heard to complain. See: **NWOKOCHA v AG OF IMO STATE (2016) LPELR-40077(SC), per Kekere-Ekun, JSC at page 65, paras. D – F; DARMA v ECO BANK (2017) LPELR-41663(SC), per Sanusi, JSC at pages 18 – 19, paras. A – D; and EZECHUKWU & ANOR v I. O. C. ONWUKA Suit No: SC.190/2005, Judgment delivered by per Muhammad, JSC. on Friday, the 22nd day of January, 2016 (See pages 21-22, paras. C-B).**

In the instant case, the Final Award, Exhibit P5 attached to the Applicant's supporting affidavit shows that the Applicant was duly granted every opportunity to participate in the arbitral proceedings by the Applicant chose to withdraw from same. Specifically, the Arbitrator held in the said Exhibit P5 as follows:

8. The Hearing and Counsel's Submissions:

   a. The hearing took four days. Three witnesses gave their evidence-in-chief and counsel for the Respondent exhaustively cross-examined one of the Claimant's witnesses.

   b. However, after the matter was adjourned for cross examination of the remaining two of the Claimant's witnesses, Counsel for the Respondent wrote to the Tribunal notifying it that the Respondent had decided to discontinue participation in the reference. The Respondent subsequently filed an action by way of Originating Summons in the High Court of the Federak Capital Territory, Abuja where it raised a preliminary issue on Notice, challenged my Ruling of 31st August, 2016 and sought for my removal as Arbitrator from this referebce,

   c. Before notifying the Tribunal of tis intention to discontinue proceedings in the reference, the Respondent had, aside from taking active part in the hearing, already filed a reply and a further reply to the claims of the Claimant.

d. On the 15th November, 2016, whereon the matter was adjourned to enable the Respondent to open its case by calling witnesses if any, neither the Respondent not its counsel was present. The Claimant's counsel and C.W 2, Mr Wasiu Akinyele were present. The Respondent gave no reason for its absence.

e. The Claimant's Counsel informed the Tribunal that the absence of the Respondent was indication that they were withdrawing from further participation in the proceedings. He urged the Tribunal to note that the Respondent had submitted its documentary evidence in this matter, cross examined the Claimant's principal witness and utilized documents submitted by Claimant to the Tribunal in establishing its case and its defence to the Claimant's case. Claimant's counsel also brought to the Tribunal's attention the fact that the Respondent's counsel had before then informed the Tribunal that he did not yet know whether they would call any witness and that their absence was an indication that they did not intend to call any witness and/or produce any further evidence in defence of the Defence or in support of its Counter Claim. He therefore urged the Tribunal to close hearing.

f. In considering the application of the Claimant's Counsel, I recalled that the Respondent had already filed a Reply to the Claimant's Points of Claim together with a Counter Claim dated

19th September, 2016. It had filed a second response to the Claimant's Claims titled 'Respondent's Reply/Counter Claim dated the 29th of September, 2016. Besides, the Respondent had actively participated in the hearing of this matter, tendered its documentary evidence and exhaustively cross-examined the first Claimant's witness, relying on documents tendered by the Claimant and those it had also tendered.

g. I further considered S. 2 of the Arbitration and Conciliation Act (ACA) 2004 which states that an arbitration agreement is irrevocable. I looked at S. 27 of the ACA which enumerates the grounds upon which arbitral proceedings can be terminated and found that none of those grounds applied to this matter. S 21 of the ACA provides for what the arbitrator should do where Respondent decides to resile from arbitral proceedings without sufficient cause. For the avoidance of doubt, S. 21 of ACA provides in relevant subsections as follows:

"Unless otherwise agreed by the parties, it without showing sufficient cause –

(a) ……

(b) the respondent fails to state his defence as reauired under Section 19(1) of the Act, the arbitral tribunal shall continue the proceedings without treating such failure in itself as admission of the Claimant's allegations; or

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award."

(h) Moreover, S 34 of the ACA boldly states that "A court shall not interfere in any matter governed by this Act except where so provided in this Act." This provision was corroborated by the learned authors J. O. Orojo and M. Ayodele Ojomo in their Law and Practice of Arbitration and Conciliation in Nigeria at page 313. The learned authors are of the view that it would negate the arbitral process if the Court can intervene freely in the arbitral process. Considering the steps already taken by the Respondent in this matter, I considered it inappropriate for them to resile from the proceedings. With respect to the Originating Summons which apparently questioned my decision of their Preliminary Objection, I found solace in S. 12(1) of the ACA which states that the arbitral tribunal shall be competent to rule on jurisdiction, and S 12(4) which states that its Ruling shall be final. Considering the totality of the above authorities and the Claimant's Counsel's submissions, I was convinced that the proper cause was to continue the arbitral proceedings. I granted the application of the Claimant's Counsel and directed the trial phase of the reference be closed and that parties should file and serve their final submissions after which the award would be published. The Respondent

was, at every point appropriately notified of the status of the matter.

Even from the above quoted portion of Exhibit P5 attached to the Applicant's supporting affidavit to this application it is crystal clear that the Applicant had been given every opportunity to make out its case before the Arbitral Tribunal and it had not only filed its Points of Defence and Counter claim, it had settled the issues to be determined by the Tribunal and proceeded to participate in the arbitral proceedings, only to later communicate its withdrawal from the proceedings. As highlighted by the Arbitrator in Exhibit P5 quoted above, Section 21(c) of the Arbitration and Conciliation Act is categorically to the effect that where "any party fails to appear at a hearing or produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award."

In the instant case where the Applicant had willingly proceeded to submit to the jurisdiction of the Arbitral Tribunal even after the preliminary ruling to its objection to jurisdiction had been rendered by the Arbitrator by submitting its Points of Defence and Counter Claim, settling issues for determination by the Tribunal, and participating in the hearing of the proceedings, wherein the Applicant was given all opportunities to present its case, the Applicant cannot voluntarily withdraw midway and claim a breach of its right to fair hearing. As stated in **NWOKOCHA v AG OF IMO STATE (supra), DARMA v ECO BANK (supra),** and **EZECHUKWU & ANOR v I. O. C. ONWUKA (supra)**, the fundamental right to fair hearing as guaranteed by Section 36(1) of the 1999 Constitution only demands that a party be granted the opportunity to exescise such right. Where a

party so granted voluntarily chooses not to exercise the such a right, he cannot turn around to complain. It is for this reason and upon those authorities that I also find and hold that ground (iv) relied upon by the Applicant in bringing this application has failed.

Since all the grounds relied upon by the Applicant in bringing this application have failed, I hereby resolev the sole issue determination in this application in the negative and hold that the Applicant herein had not made out a case for the setting aside of the Award dated 20th Decmber, and rendered by Enewa Mrs Rita Chris Garuba. Accordingly, I hereby dismiss this suit for lack of merit.

**HON. JUSTICE A. B. MOHAMMED**
JUDGE
5TH FEBRUARY, 2019

**Appearances:**

Chief Solo U. Akuma, MON, SAN, with Emman N. Ukaegbu Esq, M. C. Nwoye Esq, and Emmanuel U Akuma Esq, for the Applicant.

Osahon Idemudia Esq, with Patrick Etim Esq, and Kuyik Usoro Esq, for the Respondent.