

**IN THE HIGH COURT OF THE FEDERAL  
CAPITAL TERRITORY, ABUJA  
HOLDEN AT ABUJA**

**ON MONDAY, 8<sup>TH</sup> DAY OF APRIL, 2019**

**BEFORE HON. JUSTICE SYLVANUS C. ORIJ**

**SUIT NO. FCT/HC/CV/156/2018**

**BETWEEN**

**BOSCAR BDC NIG. LIMITED                    ---                    CLAIMANT**

**AND**

**1. QUALITY ENTERPRISES LIMITED  
2. DR. G. ADEWUMI                    }                    DEFENDANTS**

**RULING AND JUDGMENT**

The claimant filed this suit on 8/11/2018 vide writ of summons. The main relief of the claimant against the defendants is N34,666,666.66; a liquidated sum. The writ was accompanied by an affidavit stating the facts upon which the reliefs are based. I entered the suit for hearing in the undefended list.

On 5/2/2019, the 2<sup>nd</sup> defendant filed a notice of preliminary objection against the hearing of the suit. By Order of the Court, the preliminary objection was heard on 18/2/2019 together with the claimant's suit in the undefended list. The Court will first deliver its ruling on the preliminary objection followed by the judgment in the substantive suit.

## **RULING ON THE 2<sup>ND</sup> DEFENDANT'S PRELIMINARY OBJECTION**

The grounds of the preliminary objection are:

1. That the 2<sup>nd</sup> defendant is not a proper party to the action.
2. That the suit does not disclose any cause of action against the 2<sup>nd</sup> defendant.
3. That 2<sup>nd</sup> defendant had no contractual relationship with the claimant capable of giving rise to an action in contract.

Adekola Mustapha Esq. filed a written address in support of the preliminary objection. At the hearing on 18/2/2019, learned claimant's counsel [AbangOdokOgarEsq.] said he was served with the notice of preliminary objection that morning. He sought and obtained the leave of the Court to reply orally to the preliminary objection.

Learned counsel for the objector argued that 2<sup>nd</sup> defendant is not a necessary or desirable party in the suit. He cited the case of **B. B. Apugo & Sons Ltd. v. O.H.M.B. [2016] 13 NWLR [Pt. 1529] 206** to support the principle that a necessary party to a suit is one who is not only interested in the dispute but one whose presence is essential for the effective and complete determination of the claim before the Court. Adekola Mustapha Esq. stated that the claimant described the 2<sup>nd</sup> defendant as the Chairman/CEO of the 1<sup>st</sup> defendant. In all the paragraphs of the claimant's affidavit and additional affidavit, there is

nowhere the 2<sup>nd</sup> defendant was said to have played any role to warrant his being joined as a party to share in the liability said to have been incurred by the 1<sup>st</sup> defendant in the subject matter of the suit. Counsel stressed that the 2<sup>nd</sup> defendant was not a party to the contract that allegedly gave rise to the suit.

The 2<sup>nd</sup> defendant's counsel further submitted that only parties to a contract can sue and be sued on it; and a stranger to a contract can neither sue nor be sued on it even if the contract is made for his benefit. The case of **Basinco Motors Ltd. v. Woermann Line [2009] 13 NWLR [Pt. 1157] 149** was referred to. The 1<sup>st</sup> defendant, as a limited liability company, has legal personality distinct from its managing director, directors, CEO [chief executive officer], chairman or owners. A company is a juristic person and acts through its agents or servants. He urged the Court to decline jurisdiction to entertain the suit against the 2<sup>nd</sup> defendant and strike out his name.

In his oral reply, learned counsel for the claimant stated that the preliminary objection is not tenable in law and in fact. He submitted that by the exhibits attached to the additional affidavit filed on 9/1/2019, the 2<sup>nd</sup> defendant signed all the letters written to the claimant. He also relied on **B. B. Apugo & Sons Ltd. v. O.H.M.B. [supra]**. Abang Odok Ogar Esq. urged the Court to dismiss the preliminary objection.

In paragraph 5 of the affidavit accompanying the writ of summons, Mr. Awoyungbo Babasola stated that 2<sup>nd</sup> defendant is the Chairman/CEO of

the 1<sup>st</sup> defendant. The claimant's cause of action is the alleged breach of contract awarded to it by 1<sup>st</sup> defendant sometime in August 2016 to supply fabricated metal sheet for air conditioning unit for the Abuja International Airport. As counsel for the objector rightly stated, it is trite law that a limited liability company has juristic or legal personality different from its officers and agents. A limited liability company acts through its officers, employees and agents. See **M.M.A. Associates Inc. v. National Maritime Authority [2012] 18 NWLR [Pt. 1333] 506.**

The claimant's counsel is correct that the letter of award of contract dated 9/8/2016 [i.e. Exhibit A1 attached to the claimant's affidavit] and the three letters attached to the additional affidavit as Exhibits AB1, AB2 & AB3 were signed by the 2<sup>nd</sup> defendant [as the Chairman/CEO] of the 1<sup>st</sup> defendant; the 2<sup>nd</sup> defendant signed these letters for and on behalf of the 1<sup>st</sup> defendant. In the case of **Okolo v. Union Bank of Nigeria Ltd. [2004] 3 NWLR [Pt. 859] 87,** it was held that a director of a company is, in the eyes of the law, an agent of the company for which he acts and the general principle of law of principal and agent would apply. Consequently, where a director enters into a contract in the name of or purporting to bind the company, it is the company, the principal, which is liable on it, not the director. I hold the opinion that this principle is applicable to the instant case.

I agree with Mr. Mustapha that the 2<sup>nd</sup> defendant cannot sue or be sued for the contract entered into by the 1<sup>st</sup> defendant. In the case of **Basinco Motors Ltd.**

v. WoermannLine [supra], it was held that by the doctrine of privity of contract, a contract affects only the parties thereto and cannot be enforced by or against a person who is not a party to it. See also the case of United Bank for Africa v. Jargaba [2007] 11 NWLR [Pt. 1045] 247.

The decision of the Court is that the 2<sup>nd</sup> defendant is not a necessary party in this suit as the claimant has no cause of action against him. The preliminary objection has merit and is upheld. The name of the 2<sup>nd</sup> defendant, Dr. G. Adewumi, is struck out of the suit.

### *JUDGMENT IN THE SUBSTANTIVE SUIT*

The claimant's claims against the defendant, Quality Enterprises Ltd., are:

1. A declaration by this Honourable Court that the defendants are in breach of an agreement between the claimant and the defendant.
2. An order of this Honourable Court directing the defendant to pay to the claimant the sum of N34,666,666.66 being the principal sum of N25,000,000.00 plus the interest of 20% after the delivery of the items in October, 2018.
3. An order of this Honourable Court directing the defendants to pay 10% interest on the judgment sum from the day of judgment until the liquidation of the entire judgment sum.
4. The sum of N2,000,000.00 cost of this action.

5. And for such order or further orders this Honourable Court may deem fit to make in the circumstance.

AwoyungboBabasola, the claimant's managing director, filed a 20-paragraph affidavit in support of the claims; attached to the affidavit are Exhibits A1 & A2. On 27/12/2018, the defendant filed its notice of intention to defend the suit together with the 6-paragraph affidavit in support filed by Habila A. Akwanga; attached to the affidavit is Exhibit A. On 9/1/2019, AwoyungboBabasola filed a 6-paragraph additional affidavit in support of the writ of summons; attached thereto are Exhibits AB1, AB2 & AB3. On 5/2/2019, Habila A. Akwanga filed a 6-paragraph counter affidavit to the additional affidavit.

At the hearing of the suit in the undefended list, learned claimant's counsel applied to withdraw relief 1, which is a declaration that the defendant is in breach of an agreement between the claimant and defendant. This declaratory relief is struck out.

Now, in a suit under the undefended list, the duty of the Court is to examine the facts in the affidavits of the parties in order to determine if the defendant's affidavit has raised a triable issue to warrant the transfer of the suit to the general cause list. Where the Court finds that the defendant has raised a triable issue, it will grant leave to the defendant to defend the suit.

However, where the Court finds that the defendant has not raised any triable issue, it may proceed to enter judgment for the claimant.

In his affidavit in support of the writ of summons, Awoyungbo Babasolade deposed to the following facts:

1. Sometime in August 2016, the defendant awarded a contract to the claimant to supply fabricated metal sheet for air-conditioning unit for Abuja International Airport at the contract value of N25,000,000.00 with an allowance for margin and other logistics, being 20% of the contract sum for every 2 months after 8 weeks of the delivery of the items. The award letter dated 9/8/2016 is Exhibit A1.
2. The defendant was required to pay the contract sum along with the accrued interest of 20% of the contract sum to the claimant after 8 weeks of delivery of the items. 20% interest on the said principal sum for 2 years and 4 months amounts to N11,666,666.66.
3. The claimant delivered the fabricated metal sheet for air-conditioning unit as specified and in accordance with the terms of the contract within the time agreed.
4. Having fulfilled its part of the contract, the claimant demanded for the payment of the contract sum and the accrued interest but the defendant neglected and/or refused to pay. It is over 2 years since the delivery of the items were made to the defendant.

5. Sometime in May 2017, the defendant paid N2,000,000.00 to claimant as part of the accrued interest leaving the sum of N9,666,666.66 as the outstanding interest plus the principal sum of N25,000,000.00. The defendant has not paid any other money to the claimant till date.
6. The defendant owes the claimant the sum of N25,000,000.00 being the contract sum as well as N9,666,666.66 being the accrued interest to cover the 20% allowance for margin and other logistics for a total of 2 years and 4 months; making a total of N34,666,666.66.
7. On 29/10/2018, the claimant through its solicitors served the defendant with a demand notice for the payment of the total outstanding debt. The letter is Exhibit A2. The defendant did not respond to the letter.
8. The defendant has no defence to this suit.

In his affidavit in support of the defendant's notice of intention to defend the suit, Habila A. Akwangastated the following facts based on the information he received from defendant's company secretary, Ms. Daniel, on 24/12/2018, which he verily believed to be true:

1. The defendant has fully paid the claimant for the contract awarded on 9/8/2016. The contract awarded on 27/12/2016 on the same terms and particulars as the one awarded on 9/8/2016 is the one which the defendant may not have fully paid up. A copy of the letter of award dated 27/12/2016 is Exhibit A.



2. Although the contract was awarded for N25,000,000.00, the record they have is that the claimant did not fully deliver on the contract.
3. As a result of the controversy arising on the quantities of deliveries actually made to the site vis-a-vis what the claimant claimed to have delivered, which has not been resolved; the parties could not agree on the actual sum due to be paid to the claimant on the award.
4. Notwithstanding the disagreement, the defendant has paid up to the sum of N5,000,000.00 to the claimant between January to May 2017 pending when the total sum due is ascertained and mutually agreed upon by the parties.
5. At no time did the defendant agree to pay interest to the claimant as alleged and same was never part of the contract terms.
6. The defendant is not indebted to the claimant on the amount claimed as the amount claimed is a figment of imagination.

In his additional affidavit, Awoyungbo Babasola stated that:

1. The defendant never made payment to him for the contract awarded on the 9/8/2016.
2. The inability of the defendant to make payment for the contract of 9/8/2016 after completion gave rise to the re-issuance of award letters dated 15/10/2016, 27/12/2016 & 27/2/2017 by the defendant to the claimant bearing the same terms and conditions. The award letters

dated 15/10/2016, 27/12/2016 and 27/2/2017 are respectively Exhibit AB1, AB2 & AB3.

3. He never had any controversy with the defendant concerning the performance of the contract. He executed the contract in accordance with specifications. If there was any controversy, the defendant would have mentioned it upon receipt of his lawyer's demand letter for payment.
4. There was never a time the defendant paid the sum of N5,000,000.00 to him. The only money paid was N2,000,000.00 cash. There is no evidence of payment of the sum of N5,000,000.00, which the defendant claimed to have paid to him.

In the counter affidavit to the additional affidavit, Habila A. Akwanga stated the following facts based on the information he received from Ms. Daniel on 4/2/2019, which he verily believed to be true:

1. The defendant did not contract to pay interest to the claimant.
2. At different times at the instance and instruction of the claimant, the defendant caused to be paid the sums of N2,000,000.00, N1,000,000.00 and N2,500,000.00 into account number 0022744257 in GTB, which the defendant later discovered to belong to Awoyungbo Babasola.

3. The above payments were acknowledged by the claimant in partial fulfillment of the defendant's obligation pending the resolution and agreement on balance due.
4. Both parties have always understood the differences and they have been talking with a view to resolving it. Therefore, the defendant did not see the need to join issues with the claimant's counsel on the letter.

At the hearing, learned counsel for the claimant submitted that the defendant has no defence to this action. There is nothing to show that the defendant paid the sums of N2,000,000.0, N1,000,000.00 and N2,500,000.00 to the account of Awoyungbo Babasola as claimed. Mr. Abang Odok Ogar urged the Court to enter judgment for the claimant.

On the other hand, learned counsel for the defendant submitted that there is no agreement between the parties for payment of interest of 20%. He referred to the claim for interest of 20% as the figment of the claimant's imagination. Mr. Abdulateef Agoro urged me to transfer the case from the undefended list to the general cause list.

Now, claimant stated that it executed the contract awarded by the defendant vide the letter of award dated 9/8/2016 but the defendant has not paid the contract sum. On the other hand, defendant stated that it paid the claimant for the contract awarded on 9/8/2016 but the contract it awarded to the claimant vide letter dated 27/12/2016 on the same terms as the one awarded

on 9/8/2016 “*may not have been paid up.*” In the additional affidavit, claimant explained that the inability of the defendant to make payment for the contract it awarded on 9/8/2016 after completion gave rise to the issuance of award letters dated 15/10/2016, 27/12/2016 and 27/2/2017, which are attached thereto as exhibits. The important point from the foregoing is that the parties agree that the defendant awarded a contract to the claimant and all the letters of award have the same terms to wit:

*AWARD OF CONTRACT FOR THE SUPPLY OF FABRICATED METAL SHEET FOR AIR-CONDITION UNIT FOR ABUJA INTERNATIONAL AIRPORT*

*We are pleased to award to you the contract for the supply of fabricated metal sheet for air-conditioning unit for Abuja international airport at the sum of N25,00,00 [Twenty-Five Million Naira Only]. VAT exclusive.*

*Allowance for Margin & other logistic will be 20% of the contract sum.*

*Please note that payments shall be made Eight [8] weeks after delivery.*

*Please confirm acceptance within 1 day and liaise with the management for execution of material delivery.*

*I congratulate and wish you successful execution of the contract.*

The first issue raised by the defendant in paragraph 4[c] & [d] of the affidavit in support of the notice of intention to defend the suit is that “*although the contract was awarded for N25,000,000, the record they have is that the claimant did not fully deliver on the contract*”; and “*as a result of the controversy arising on the*

*quantities of deliveries actually made to the site vis a vis what the claimant claimed to have delivered which has not been resolved; the parties could not agree on the actual sum due to be paid to the Claimant on the award.”*

In **United Bank for Africa v. Jargaba [supra]**, it was held that under the undefended list procedure, the defendant’s affidavit must condescend upon particulars and should, as far as possible, deal specifically with the plaintiff’s claim and affidavit and state clearly and concisely what the defence is and what facts and documents are relied on to support it. The affidavit in support of the notice of intention to defend must of necessity disclose facts which will, at least, throw some doubt on plaintiff’s case. A mere denial of the plaintiff’s claim or of liability of indebtedness to the plaintiff, or a vague allegation of fraud against the plaintiff without more, is devoid of evidential value and does not suffice as facts which will, at least, throw doubt on plaintiff’s claim.

It was also held that for an action to be transferred from the undefended list to the general cause list, there must be a defence on the merit and details and particulars of the defence must be set out. Furthermore, the defence must not be a half-hearted defence. In other words, a case is not transferred from the undefended list to the general cause list as a matter of course or routine but on proper scrutiny of the averments in the affidavit in support of the notice of intention to defend to confirm that the defence raised is a real defence on the merits, and not a flimsy, fanciful, frivolous or caricature defence raised to prolong the case or play for time. The defendant’s affidavit must show or disclose enough facts to satisfy a reasonable tribunal that the defendant has a

defence to the action. The defendant's defence must not be a sham, vague or designed to delay the trial of the action.

In respect of the first issue raised by the defendant, it did not state the items delivered or supplied by the claimant; or the items not delivered or supplied by the claimant; or the nature of the controversy or disagreement arising from the "*quantities of deliveries actually made to the site*". The defendant did not produce or provide the record which shows that the claimant "*did not fully deliver on the contract.*" Also, there is no correspondence from the defendant to the claimant since the execution of the contract to indicate that the claimant did not fully deliver the items specified in the contract.

The defendant did not deny that it received the claimant's solicitor's letter of demand for payment of the contract sum dated 29/10/2018 [Exhibit A2] which is a business letter. If truly the defendant had any complaint or grouse with the quantity of the fabricated metal sheet for air-conditioning unit delivered by the claimant, the said letter would have, in the ordinary or natural course of events, necessitated or stimulated a response by the defendant to at least state that claimant did not deliver all the items or that there is a controversy or disagreement on the quantity of the items delivered.

In the light of the foregoing and the principles in the above case, I hold the considered view that the defendant did not state any particulars in support of the allegation that claimant did not fully supply the quantity of the fabricated

metal sheet for air-conditioning unit. To my mind, this defence is a sham, vague, flimsy and fanciful defence put forward by the defendant to prolong the trial of the action.

The second issue raised by the defendant in paragraph 4[e] of the affidavit in support of the notice of intention to defend the suit is that it *“has paid up to N5,000,000 to the claimant between January to May 2017 ...”* The claimant stated that defendant paid only the sum of N2,000,000.00 in cash. In the defendant’s counter affidavit to the claimant’s additional affidavit, it stated that it paid the sums of N2,000,000.00, N1,000,000.00 and N2,500,000.00 to GTB account number 0022744257 of AwoyungboBabasola.

It must be noted that the total of these sums is N5,500,000.00, which is inconsistent with the sum of N5,000,00.00 stated in the affidavit in support of the notice of intention to defend. Moreover, there is nothing before the Court to show that the sums were paid to the claimant. At least the defendant ought to have provided evidence of these payments; for instance, a bank deposit teller or the defendant’s statement of account if the monies were paid via electronic transfer. I am of the respectful view that the bare assertion that *“the defendant caused to be paid the sums of N2,00,000, N1,000,000, N2,500,000”* into the said account is not sufficient to throw some doubt on the claimant’s case.

It is worthy of note that the claimant’s solicitor’s letter dated 29/10/2018 [Exhibit A2] stated that in May, 2017, the defendant paid the claimant the sum of N2,000,000.00 and since then, the defendant neglected or refused to

make any further payment. The defendant did not respond to this letter to dispute the fact that it had only paid N2,000,000.00 to the claimant. I take the view that the defence put forward by the defendant that it has paid the sum of N5,000,000.00[or N5,500,000.0]to the claimant is a sham, vague, flimsy and fanciful defence, which will not warrant the transfer of the matter to the general cause list.

The third issue raised by the defendant in paragraph 4[f] of the affidavit in support of the notice of intention to defend the suit is that at no time did the defendant agree to pay interest to the claimant and same was never part of the contract terms. The claimant's claim of N34,666,666.66 is made up of N25,000,000.00 being the contract sum and N9,666,666.66 "*being the accrued interest to cover the 20% allowance for margin and other logistics for a total of two years and four months.*"

The terms of the contract include "*Allowance for Margin & other logistic will be 20% of the contract sum*" and "*that payments shall be made Eight [8] weeks after delivery.*" I agree with the defendant that there is no term in the contract for payment of interest to the claimant and there is no term for payment of 20% of the contract sum for every two months after eight weeks of delivery of the items. From the said terms of the contract, I hold that apart from the contract sum of N25,000,000.00, the claimant is entitled to 20% of the contract sum being "*Allowance for Margin & other logistics*". By simple calculation, 20% of N25,000,000.00 is N5,000,000.00. Therefore, the claimant is entitled to a total



of N30,000,000.00 under the contract. The claimant admitted that it received N2,000,000.00 from the defendant. The decision of the Court is that the claimant is entitled to the sum of N28,000,000.00 under relief 2.

The claimant's relief 3 is interest of 10% on the judgment sum from the day of judgment until the judgment sum is paid. This is a claim for post-judgment interest. In **Berende v. Usman [2005] 14 NWLR [Pt. 944] 1**, it was held that post-action [or post-judgment] interest is grounded in the rules of court. By Order 39 rule 4 of the Rules of this Court, 2018, the Court has power to grant post-judgment interest at a rate not exceeding 10% per annum commencing from the date of the judgment or afterwards. I grant this claim at the rate of 10% per annum.

### **CONCLUSION**

I enter judgment for the claimant [Boscar BDC Nig. Ltd.] against the defendant [Quality Enterprises Ltd.] as follows:

1. The sum of N28,000,000.00.
2. Interest on the judgment sum of N28,000,000.00 at the rate of 10% per annum from today [8/4/2019] until the judgment sum is paid.
3. Cost of N100,000.00.

HON. JUSTICE S. C. ORIJI  
(JUDGE)

*Appearance of Counsel:*

1. AbangOdokOgar Esq. for the claimant.
2. AbdulateefAgoro Esq. for the defendants.