

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

ON WEDNESDAY, 9TH DECEMBER, 2020

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

SUIT NO. FCT/HC/CV/337/2019

BETWEEN

1. HOPEUP INTEGRATED INDUSTRIES NIG. LTD. }
2. HARTAL NIG. LTD. } CLAIMANTS

AND

1. MIDMAC CONSTRUCTION NIG. LTD. }
2. HON. JUSTICE MARCELLUS I. } DEFENDANTS
AWOKULEHIN [RTD.] }

RULING/JUDGMENT

The claimants [plaintiffs], *Hopeup Integrated Industries Nig. Ltd.* and *Hartal Nig. Ltd.*, commenced this suit on 15/11/2019 by Originating Summons wherein they submitted these five questions for the Court's determination:

1. *Whether the provisions of section 7[4] of the Arbitration and Conciliation Act, 2004 is null and void having regard to its inconsistency with sections 36[2][b] and 240 of the 1999 Constitution of the Federal Republic of Nigeria [as amended].*

2. *Whether the decision of this Honourable Court per Hon. Justice U. P. Kekemeke with respect to its jurisdiction in Suit Nos. FCT/HC/CV/3097/17 and FCT/HC/CV/3098/17 is appealable.*
3. *Whether having regard to the provisions of sections 36[2][b] and 240 of the 1999 Constitution of the Federal Republic of Nigeria, the right of the plaintiffs to appeal against the judgment of the High Court of the Federal Capital Territory per Hon. Justice U. P. Kekemeke in Suit Nos. FCT/HC/CV/3097/17 and FCT/HC/CV/3098/17 can be limited by section 7[4] of the Arbitration and Conciliation Act, 2004.*
4. *Whether the 2nd defendant can continue with the arbitration proceeding having regard to the plaintiffs' respective appeals being entered in the Court of Appeal and their respective briefs having been settled, filed and served.*
5. *Whether the 2nd defendant's arbitration panel will not prejudice the plaintiffs if the defendants continue with the arbitration of the dispute already submitted to the Court of Appeal by the plaintiffs and if it will not amount to usurpation of the function of the Court of Appeal or contemptuous of the Court of Appeal.*

Upon the determination of the above questions, the claimants seek these four reliefs against the defendants jointly and severally:

1. *A declaration that the plaintiffs' right to appeal against the judgment of the High Court of the FCT in Suit Nos. FCT/HC/CV/3097/17 and FCT/HC/CV/3098/17 respectively cannot be limited by section 7[4] of the Arbitration and Conciliation Act, 2004.*
2. *A declaration that section 7[4] of the Arbitration and Conciliation Act does not apply to the plaintiffs' said appeal.*
3. *A declaration that the defendants cannot continue with the arbitration proceeding with respect to the dispute submitted to the Court of Appeal which appeal has been duly entered, and the briefs of argument duly filed and served.*
4. *General damages in the sum of N10,000,000.00[Ten Million Naira]only.*

Onuh Daniel Esq., a legal practitioner in the law firm of Igeh A. O. & Co., filed a 19-paragraph affidavit in support of the Originating Summons; attached therewith are Exhibits A1, A2, B1, B2, B3, C1, C2, D, E1, E2, F & G. A. O. IgehEsq. filed a written address with the Originating Summons.

Also in support of the Originating Summons, Onuh Daniel Esq. filed a further affidavit of 12 paragraphs on 2/3/2020; attached therewith are Exhibits AA1, AA2, AA3, AA4, BB1, BB2& BB3. A. O. IgehEsq. filed a reply on points of law along with the further affidavit.

Upon being served with the Originating Summons, IdrisSadiq, a litigation secretary in the law firm of Pinheiro LP, filed a 5-paragraph counter affidavit on 19/2/2020 on behalf of the 1st defendant. Attached to the counter affidavit are Exhibits A, B, C, D & E. OpeyemiAdeyemiEsq. filed a written address with the counter affidavit. The 1st defendant also filed a notice of preliminary objection on the same date.

On 7/10/2020, the 1st defendant's preliminary objection and the Originating Summons were heard together as directed by the Court. A. O. IgehEsq. adopted the claimants' processes while OpeyemiAdeyemiEsq. adopted the 1st defendant's processes. The Court will determine the preliminary objection first. If it fails, the Court will proceed to determine the Originating Summons.

RULING ON THE 1ST DEFENDANT'S PRELIMINARY OBJECTION

In the preliminary objection, the 1st defendant prays the Court for: [i] an order striking out and/or dismissing the claimants' suit for being an abuse of the process of the Court; and [ii] such further or other orders as the Court may deem fit to make in the circumstances of this case.

The grounds of the preliminary objection are:

1. In so far as this action remains a product of the fusion/merger of the individual causes of action of the 1st and 2nd plaintiffs which causes of action independently arose from judgment in *Suit*

FCT/HC/CV/3097/17[for the 1stplaintiff]and *Suit FCT/HC/CV/3098/17* [for the 2nd plaintiff], same is unpardonably incompetent for misjoinder of causes of action.

2. To the extent that the questions submitted for adjudication [questions 1-3] and the reliefs sought by the plaintiffs particularly reliefs [1] and [2] are substantially the same with the issues already submitted for adjudication in *Appeal Number CA/A/120/2019*[between the 1st plaintiff and the 1st defendant] and *Appeal Number CA/A/121/2019* [between the 2nd plaintiff and the 1st defendant], this suit amounts to an abuse of court process.
3. To the extent that relief 3 though disguised as directed only to the 1st and 2nd defendants but in actual effect would bind, restrain and limit the whole members of the arbitral panel, some of whom are currently not a party in this suit, from taking any step towards the arbitration proceedings, this suit is incurably and improperly constituted.
4. In the circumstances, this Honourable Court lacks the jurisdiction to entertain and determine this suit. This Honourable Court is by this objection urged to strike out and/or dismiss this suit for its abusive nature.

In support of the preliminary objection is the 5-paragraph affidavit of IdrisSadiq; attached therewith are Exhibits A1-A2, B1-B2 & C1-C4.

Mr. Opeyemi Adeyemi filed a written address in support. In opposition, Onuh Daniel Esq. filed a counter affidavit of 11 paragraphs; attached therewith are Exhibits 1, 2, 3, 4 & 5. A. O. Igeh Esq. filed a written address with the counter affidavit. On 17/6/2020, Opeyemi Adeyemi Esq. filed a reply on points of law.

I pause to remark that contrary to the argument of learned counsel for 1st defendant in his reply on points of law that the written address filed with the counter affidavit was not signed by an identifiable legal practitioner, it is evident on the face of the process that A. O. Igeh Esq. signed it. Although the names of A. O. Igeh Esq. and Onuh Daniel Esq. were listed on the process, the name of A. O. Igeh Esq. was ticked as the legal practitioner who signed the written address.

For proper understanding of the facts and issues in the preliminary objection, it is necessary to first refer to the facts that gave rise to this suit as set out in the affidavit of Onuh Daniel Esq. in support of the Originating Summons. The facts are that:

1. This Court [*Coram: Hon. Justice U. P. Kekemeke*], upon the application of 1st defendant in *Suit Nos. FCT/HC/CV/3097/17 and FCT/HC/CV/3098/17*, appointed Chief Karina Tunyan, SAN as arbitrator for the claimants. The Judgments of My Lord, *Hon. Justice U. P. Kekemeke* in the two suits were respectively delivered on 22/10/2018 and 21/11/2018.

2. The claimants filed their Notices of Appeal against the said decisions with *Appeal Nos. CA/A/120/2019* and *CA/A/121/2019*. The Notices of Appeal are Exhibits A1 and A2 respectively. The two appeals have been entered in the Court of Appeal. The Appellant's Briefs of Argument in the two appeals were filed on 21/3/2019. The Respondent's Brief of Argument in *Appeal No. CA/A/120/2019* was filed on 2/8/2019.
3. On 22/5/2019, the claimants filed motions on notice at the Court of Appeal [Exhibits E1 & E2] for an order staying or suspending the Orders of *Hon. Justice Kekemeke* appointing Chief Karina Tunyan, SAN as their Arbitrator pending the determination of the appeals.
4. The said applications and the appeals challenging the jurisdiction of this Court to appoint Chief Karina Tunyan, SAN as arbitrator are pending before the Court of Appeal.
5. The 2nd defendant served a letter dated 2/10/2019 [Exhibit C1] and a notice titled: *Notice and Agenda for Preliminary Meeting* [Exhibit C2] on the 1st claimant. Upon receipt of the said letter and notice, the claimants' counsel wrote a letter dated 7/10/2019 [Exhibit D] to the 2nd defendant informing him of the pending appeals and applications before the Court of Appeal.
6. The 1st defendant wrote a letter dated 21/10/2019 [Exhibit F] to the 2nd defendant urging him to proceed with the arbitration. The 1st defendant in its said letter relied on section 7 of the Arbitration and Conciliation

Act in urging the 2nd defendant to fix the preliminary meeting for the arbitration proceeding on 29/10/2019.

7. The 1st defendant's stand point is that the decisions of this Court appointing Chief Karina Tunyan, SAN as arbitrator for the claimants is not appealable.
8. The 2nd defendant wrote a letter dated 28/10/2019 [Exhibit G] fixing the preliminary meeting of the arbitration proceeding on 15/1/2020.
9. Defendants have decided to proceed with the arbitration in defiance of the claimants' appeals and the authority of the Court of Appeal. The defendants will conclude the arbitration proceeding before the determination of the claimants' pending appeals.

Now, in the affidavit in support of the preliminary objection, Idris Sadiq stated the following facts based on the information from Mohammed Adedeji Esq., which he verily believed:

1. By the reliefs contained in the Originating Summons, the claimants seek to protect their respective appeals in *Appeal Nos. CA/A/120/2019* and *CA/A/121/2019*.
2. The 1st claimant is the sole defendant in *Suit No. FCT/HC/CV/3097/17* and the only appellant in *Appeal No. CA/A/120/2019*; the Notice of Appeal in *Appeal No. CA/A/120/2019* is Exhibit A2.

3. The 2nd claimant is the sole defendant in *Suit No. FCT/HC/CV/3098/17* and the only appellant in *Appeal No. CA/A/121/2019*; the Notice of Appeal in *Appeal No. CA/A/121/2019* is Exhibit B2.
4. The questions submitted for adjudication and the reliefs sought by the claimants particularly reliefs [1] and [2] are substantially the same with the issues in *Appeal Nos. CA/A/120/2019* and *CA/A/121/2019*. The Briefs of Argument in *Appeal No. CA/A/120/2019* are Exhibits C1 & C2. The Briefs of Argument in *Appeal No. CA/A/121/2019* are Exhibits C3 & C4.
5. Relief 3 of claimants' Originating Summons will bind the entire arbitral panel. The arbitral panel constituted for the arbitral proceedings between the parties are *Hon. Justice Marcellus I. Awokulehin [Rtd.]*, *Karina Tunyan, SAN* and *Hon. Justice A. O. Ajakaiye [Rtd.]*.

In the claimants' counter affidavit, Onuh Daniel Esq. stated that:

1. In this suit, the claimants seek to put an end to the defendants' mischief and erroneous reliance on the provision of section 7[4] of Arbitration and Conciliation Act.
2. The defendants under the guise of section 7[4] of the Arbitration and Conciliation Act violated the claimants' rights of appeal. A copy of the 2nd defendant's letter dated 28/10/2019 is Exhibit 1.
3. The questions submitted for adjudication and the reliefs sought in the Originating Summons are not the same with the issues submitted to the

Court of Appeal for adjudication. The issues before the Court of Appeal in the appeals are on jurisdiction and abuse of court process. The claimants' respective Briefs of Argument are Exhibits 2 and 3.

4. It is only the 1st & 2nd defendants' action that brought about the instant suit. The other arbitrators are ready to wait for the outcome of the claimants' appeals and have not done anything against the claimants' rights of appeal.

In his written address in support of the preliminary objection, the learned counsel for the 1st defendant formulated three issues for determination, which were adopted by learned counsel for the claimants. These issues are:

1. Whether in view of the fact that the causes of action and/or right of action to institute this suit accrued to the claimants independently and individually, this suit is not bad for misjoinder of causes of action having been jointly instituted.
2. Whether considering the facts of this case vis-a-viz the issues submitted for adjudication in Appeals Nos. *CA/A/120/2019 and CA/A/121/2019*, this suit is not an abuse of court process.
3. Whether by the nature of the reliefs sought by the claimants in this suit, this suit is improperly constituted and/or whether this Honourable Court has the jurisdiction to make orders against parties not before it.

From the grounds of the preliminary objection, I agree that the above issues are the issues that call for determination. Let me first consider Issue No. 2, which is whether claimants' Originating Summons is an abuse of court process.

Learned counsel for the 1st defendant referred to **Sodipo v. Lemminkainen** **[1992] 8 NWLR [Pt. 258] 229** and other cases for the meaning of abuse of court process. He pointed out that the 1st defendant, in its Briefs of Argument in claimants' said appeals, incorporated a preliminary objection challenging the competence of the appeals; and argued that the decisions of the lower court appointing Chief Karina Tunyan, SAN as the Arbitrator for the claimants are not appealable. He stated that the preliminary objection and the arguments in support are at pages 3-9 of Respondent's Brief of Argument in *Appeal No. CA/A/120/2019* [Exhibit C2]; and at pages 4-14 of the Respondent's Brief of Argument in *Appeal No. CA/A/121/2019* [Exhibit C4].

Opeyemi Adeyemi Esq. contended that rather than await the decision of the Court of Appeal on the point raised in the preliminary objections in the two appeals, the claimants have "*hurriedly and in a bid to set this Honourable Court in a collusion cause against the Court of Appeal, abused the processes of this Honourable Court by submitting for adjudication same issues already before the Court of Appeal.*" It was submitted that the questions for determination in the instant suit and the issues argued in the preliminary objections at the Court of

Appeal are the same. The claimants cannot seek the determination by this Court of the same issues pending for determination at the Court of Appeal.

Mr. Adeyemi further referred to **Abubakar v. Begeji Oil and Allied Products Ltd. & Ors. [2007] LPELR-55 [SC]** to support the view that the circumstances in which abuse of court process can arise include where two similar processes are used in respect of the exercise of the same right. He emphasized that where two processes are aimed at achieving the same result or where both are for the determination of the same issues, the latter process is by law an abuse of court process. Learned counsel for the 1st defendant concluded that the present suit is an abuse of court process.

For his part, learned counsel for claimants posited that for a suit to constitute an abuse of court process, the subject matter, the reliefs and the parties must be the same with the earlier suit. He referred to the cases of **Nwosu v. PDP [2018] 14 NWLR [Pt. 1640] 532** and **Momoh v. Adedoyin [2018] 12 NWLR [Pt. 1633] 345**. He argued that the facts and issues for adjudication in the claimants' appeals are not the same with the facts and issues in this case. He noted that the issues for adjudication in the appeals are: [i] whether the lower court per *Hon. Justice U. P. Kekemeke* had jurisdiction to determine the Originating Motion of the 1st defendant having regard to fraud and other features on record; and [ii] whether having regard to the circumstances of this case and the affidavit evidence on record, the 1st defendant's Originating Motion constitutes an abuse of court process and liable to be dismissed.

The learned counsel for the claimants further stated that in this Originating Summons, this Court is invited to adjudicate and pronounce on the validity of section 7[4] of the Arbitration and Conciliation Act having regard to section 240 of the 1999 Constitution [as amended] as well as the claimants' right of appeal against the said judgment of this Court per *Hon. Justice U. P. Kekemeke*. A. O. Igeh Esq. stressed that the parties and reliefs in the appeals and in this suit are also not the same. He therefore concluded that the instant Originating Summons is not an abuse of court process.

Abuse of court process is a term applied to a proceeding that is wanting in *bonafides* and is frivolous, vexatious or oppressive. The employment of judicial process is generally regarded as an abuse when a party improperly uses the issue of judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. Abuse of court process may arise in various instances. It may arise in instituting multiplicity of actions on the same subject matter against the same opponent on the same issues. See the cases of *Arubo v. Aiyeleru (1993) 3 NWLR (Pt. 280) 126* and *C.B.N. v. Ahmed (2001) 11 NWLR (Pt. 724) 369*.

In the case of *Umeh v. Iwu [2008] LPELR-3363 [SC]*, it was held that the categories of situations and conditions that ground abuse of court process are not exhaustive. I agree with learned counsel for the 1st defendant that where two processes are aimed at achieving the same result or where both processes

are for the determination of the same issues, the latter process is an abuse of process of the court.

It is not in dispute that the 1st defendant incorporated a preliminary objection in its Brief of Argument in *Appeal No. CA/A/120/2019* filed by the 1st claimant and in *Appeal No. CA/A/121/2019* filed by the 2nd claimant. At pages 4-14 of the Respondent's Brief of Argument in *Appeal No. CA/A/121/2019*, i.e. Exhibit C4 attached to the affidavit in support of the preliminary objection, 1st defendant challenged the competence of the appeal filed by the 2nd claimant [*Hartal Nigeria Limited*] against the decision of *Hon. Justice U. P. Kekemeke* in *Suit No. FCT/HC/CV/3098/2017*. For clarity, the prayer in the preliminary objection is: *an order striking out or dismissing this Appeal for being grossly incompetent, owing to the absolute bar placed by section 7[4] of the Arbitration and Conciliation Act 2004 against the instant appeal.*

The three grounds upon which the preliminary objection was predicated are:

- i. The instant appeal is an appeal against the Judgment of the lower court appointing Chief Karina Tunyan, SAN as second arbitrator in the Arbitral Proceedings between the Appellant and Respondent.
- ii. By virtue of section 7[4] of the Arbitration and Conciliation Act, a decision of court appointing an arbitrator for a party who has failed to appoint one for himself, within thirty [30] days of receipt of request to do so by the other party, is not appealable.

iii. This court has no inherent appellate jurisdiction and cannot exercise jurisdiction outside its powers.

In a nutshell, the issue that will require the deliberation and decision by the Court of Appeal in the preliminary objection in the two appeals is whether the provision of section 7[4] of the Arbitration and Conciliation Act can constitute a bar to, or can take away, the claimants' rights to appeal against the decision of this Court [*Coram Hon. Justice U. P. Kekemeke*] appointing Chief Karina Tunyan, SAN as their arbitrator.

In the Questions and reliefs in the instant Originating Summons - especially Questions 1, 2 & 3 and reliefs 1 & 2 - the critical issue for determination is also whether the provision of section 7[4] of the Arbitration and Conciliation Act can constitute a bar to, or can take away, the rights of the claimants to appeal against the decision of *Hon. Justice U. P. Kekemeke* appointing Chief Karina Tunyan, SAN as their arbitrator in the light of sections 36[2] & 240 of the 1999 Constitution [as amended].

Clearly, in the 1st defendant's preliminary objection in the two appeals and in this Originating Summons, one fundamental issue to be determined by the Court of Appeal and by this Court respectively is whether the provision of section 7[4] of the Arbitration and Conciliation Act is inconsistent with the provisions of sections 36[2] and 240 of the 1999 Constitution [as amended]. Therefore, I hold the considered view that the issue for determination by the

Court of Appeal in the 1st defendant's preliminary objection in the claimants' appeals and the pivotal or critical issue for determination by this Court in the Originating Summons is the same.

In **Christian Outreach Ministries Inc. & Ors. v. Cobhan & Anor. [2005] LPELR-11406 [CA]**, it was held that if there are two courts which are faced with substantially the same question, it is desirable to be sure that that question is debated in only one of those courts if by that means justice can be done. I agree with the 1st defendant's counsel that the claimants ought to have awaited the decision of the Court of Appeal on the issue canvassed in the 1st defendant's preliminary objection. If this Court gives its decision on the effect of section 7[4] of the Arbitration and Conciliation Act on the claimants' rights of appeal, it may be different or inconsistent with the decision of the Court of Appeal on the same issue in the preliminary objection raised in the appeals.

As rightly submitted by Mr. Adeyemi Esq., a decision of this Court which may be different or inconsistent with the decision of the Court of Appeal on the same issue will "*set this Honourable Court in a collusion cause against the Court of Appeal*". This will certainly not be good for the efficient and effective administration of justice. For the reasons I have given, the decision of the Court is that this suit is an abuse of court process.

In arriving at this decision, I have taken into consideration the argument of Mr. A. O. Igeh in paragraphs 3.2.6 of his written address that from the letters

attached to claimants' counter affidavit as Exhibits 1, 4 & 5, the defendants are determined to proceed with the arbitration and usurp the powers of the Court of Appeal with respect to the claimants' appeals. He submitted that this suit is the consequence of the defendants' action as demonstrated in the letters, Exhibits 1, 4 & 5. This submission is in line with the deposition in paragraph 10 of the counter affidavit in opposition to the preliminary objection to the effect that the cause of action in this suit arose from the defendants' letters dated 2/10/2019, 21/10/2019 and 28/10/2019, which are respectively Exhibits 1, 4 & 5.

In his reply on points of law, OpeyemiAdeyemiEsq. stated that it is trite law that where an appeal has been entered at the Court of Appeal, all courts below must hands off on the determination of any issue arising from the judgment of the lower court; and all applications can only be made to the appellate court. The lower court from which the appeal emanated cease to have jurisdiction over any aspect of the case. See the cases of Ikpeazu v. Ogah&Ors. [2016] LPELR-40845 [CA] and Barigha v. PDP &Ors.[2012] LPELR-19712 [SC]. It was submitted that if the claimants felt so strongly that the defendants are taking any step to usurp the powers of the Court of Appeal, the proper forum to lay a complaint is the Court of Appeal and not this Court.

I totally agree with Mr.OpeyemiAdeyemi that the claimants ought to have complained to the Court of Appeal that the defendants are determined to

proceed with the arbitration and usurp its powers instead of filing a fresh suit. This is more so as the claimants stated in the affidavit in support of the Originating Summons that they have filed motions at the Court of Appeal seeking an order to stay or suspend the appointment of Chief Karina Tunyan, SAN as their arbitrator. In my respectful view, the claimants ought to have brought the facts of the letters dated 2/10/2019, 21/10/2019 and 28/10/2019, which are respectively attached to their counter affidavit as Exhibits 1, 4 & 5 to the attention of the Court of Appeal in their pending motions instead of filing this action.

The position of the law is that once the court comes to the conclusion that a suit or any other process is an abuse of court process, the proper order is that of dismissal of the suit or process. See **African Reinsurance Corporation v. JDP Construction.[Nig.]Ltd. [2003] 15 NWLR [Pt. 838] 609.** In the light of this decision, it will serve no useful purpose to determine Issue Nos. 1 & 3 for determination in the preliminary objection. Since the Originating Summons merits a dismissal, it will not serve any useful purpose to delve into the consideration of the claimants' Originating Summons.

In conclusion, the Originating Summons is dismissed. No order as to costs.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Counsel:

1. A. H. AondonguEsq.holding the brief of A. O. IgehEsq.
2. Francis AgunbiadeEsq. for the 1st defendant.