

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA

BEFORE HIS LORDSHIP : HON. JUSTICE Y. HALILU
COURT CLERKS : JANET O. ODAH & ORS
COURT NUMBER : HIGH COURT NO. 14
CASE NUMBER : SUIT NO: CV/1495/2024
DATE: : THURSDAY 11TH JULY, 2024

BETWEEN:

**ESCO ENERGY VISION NIGERIA LTD. } CLAIMANT/
RESPONDENT**

AND

MPS TECHNOLOGIES
LIMITED.....DEFENDANT/APPLICANT

RULING

By a Master Service Agreement executed between the Claimant/ Respondent (the "Respondent") and the Applicant on March 25th, 2021 (the "Master Service Agreement" or "Agreement"), the Applicant engaged the services of the Respondent for the supply of reliable - 48Volt DC ESCO Services to power telecommunication equipment and to maintain power supply to the Applicant's Six Hundred and Ninety-Six (696) Sites and any additional/new site handed over to the Applicant and/or built by the Applicant within the Federal Republic of Nigeria (the "Sites") (the "Place of Contract") (the "ESCO Services" or "Services").

In the Agreement dated March 25th, 2021, Clause 19.2 titled, "Dispute Resolution/Choice of Venue/Governing Law," a clear process for resolving disputes related to the Agreement is unequivocally outlined. This clause specifies:

"This MSA and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by or construed in accordance with the laws of England. In the

event of any dispute relating to or resulting from this Agreement, the parties shall first make an agreement to amicably resolve such a dispute by discussions of their respective management teams. If the management teams of both parties are unable to resolve the disputes within ten (10) days of submission, then the dispute shall be resolved by the relevant courts of the city of London, United Kingdom, and the relevant court of England shall have full and exclusive jurisdiction over such."

By Clause 19.2 of the Master Service Agreement, both the Defendant/Applicant and the Claimant/Respondent mutually agreed to resolve any dispute relating to or connected to the Agreement by the relevant Courts of the city of London, United Kingdom, England governed by the laws of England and therefore, vested jurisdiction over any of such disputes to the relevant Courts of the city of London, United Kingdom, England governed by the laws of England.

Following the execution of the Agreement, the Defendant/Applicant caused multiple sets of power-generating sets of equipment (the "Equipment") to be installed in the Applicant/Defendant's sites (all within the territory of the Federal Republic

of Nigeria) in furtherance of its obligations under the Agreement which is to supply energy services to the Defendant/Applicant's sites.

Claimant/Respondent alleges that Defendant/Applicant in breach of its financial obligation under the Agreement (i) failed, refused, and/or neglected to pay the Respondent for services rendered, (ii) continued to enjoy the services because the said installed sets of Equipment are within the Applicant's custody and control, and (iii) refused to allow the Respondent access to the Equipment and unlawfully converted the Equipment for its use, hence the action of the Claimant/Respondent vide an originating process dated the 4th day of March, 2024.

Claimant's claim against the Defendant are as follows:

1. A Declaration that the Defendant's failure and/or refusal to pay the agreed fee due to the Claimant under the Master Service Agreement dated March 25th, 2021 (the "Agreement"), constitutes a fundamental breach of the Agreement.
2. A Declaration that following the Defendant's material breach of the Agreement and the Claimant's release from its obligations under the Agreement, the Claimant is entitled, and

the Defendant is obligated to deliver undisturbed possession of all the Claimant's property/equipment in the Defendant's possession and/or installed at the Defendant's sites, to the Claimant, in line with Clauses 2.4 and 7.11 of the Agreement.

3. An Order directing the Defendant to deliver possession of all and/or any pending property/equipment belonging to the Claimant still in the Defendant's possession and/or installed in the Defendant's sites, to the Claimant in line with Clause 2.4 of the Agreement.
4. An Order directing the Defendant to pay the sum of **One Billion, Six Hundred and Forty-Nine Million, Two Hundred and Six Thousand, Three Naira, and One Kobo (N1,649,206,003.01)** to the Claimant being the unpaid monthly fees due and payable to the Claimant for services rendered from January 2022 to January 2024, in line with Annexure "E" (the amended Pricing Matrix) to the Agreement.
5. An Order directing the Defendant to pay to the Claimant the sum of **Forty-Two Million, Four Hundred and Forty Thousand, Six Hundred and Forty-Two Naira**

(N42,440,642.00) only, in accordance with the provision of Clause 7.4 of the Agreement.

6. An Order directing the Defendant to pay to the Claimant the sum of **Three Hundred and Forty-Eight Million, One Hundred and Forty-Eight Thousand, Three Hundred and Twenty Naira, Thirty-Seven Kobo (N348,148,320.37)** being the accumulated interest (at the rate equal to the NIBOR plus five percent (5%) from the due date of such payments and until the date of actual payment by the Defendant) on the unpaid monthly fees due and payable to the Claimant, in accordance with the provision of Clause 7.11 of the Agreement.
7. An Order directing the Defendant to pay the sum of **Fifty Million Naira (N50,000,000.00)** as damages for breach of contract, to the Claimant.
8. Post-judgment interest at the rate of twenty percent (20%) per month on the judgment sum till final liquidation.
9. Cost of this Suit assessed at **Twenty Million Naira (N20,000,000,00)** only.

Upon service of the Originating Summons on the Defendant, the jurisdiction of this Court was therefrom challenged by the Defendant/Applicant vide a Notice of Preliminary Objection dated the 24th April, 2024. The Preliminary Objection seeks the following Orders;-

1. An Order of this Honourable Court striking out or dismissing this suit in limine for want of Jurisdiction.
2. And for such Order(s) as this Honourable Court may deem fit to make in the circumstances of this case.

The grounds upon which the Applicant seeks the above reliefs are as follows:

1. This Honourable Court lacks jurisdiction to entertain this suit due to the explicit provision outlined in Clause 19.2 (Dispute Resolution/Choice of Venue/Governing Law) of the Master Service Agreement, dated March 25th, 2021, which specifically excludes this Court from adjudicating any disputes arising from or related to the Agreement.
2. The Master Service Agreement, as executed by both parties, vests exclusive jurisdiction over any disputes or claims arising out of or in connection with the Agreement to the relevant

courts in the city of London, United Kingdom. It unequivocally vests full and exclusive jurisdiction in such courts to adjudicate any disputes or claims arising from or related to the Agreement.

3. The cause of action, averments, and reliefs sought in the Claimant's Originating Processes dated March 4th, 2024, all directly relate to and stem from the Master Service Agreement executed by the Claimant and Defendant on March 25th, 2021.
4. The relief sought by the Claimant cannot be granted by this Honorable Court, as the Master Service Agreement expressly removes jurisdiction from all other courts and vests full and exclusive jurisdiction solely in the relevant courts in the city of London, United Kingdom, in accordance with the laws of England.
5. The lack of jurisdiction of this Honourable Court to entertain the suit for the aforementioned grounds, renders this suit grossly incompetent and liable to be struck out or dismissed.

Written address was filed in support of the Preliminary Objection wherein a lone issue was formulated for determination to-wit;

The issue is; ***"whether this Honorable Court has jurisdiction to entertain the present suit, considering the provisions of the Master Service Agreement executed by both parties, which vests exclusive jurisdiction in the courts of London, United Kingdom, and designates English law as the governing law, thereby excluding the jurisdiction of Nigerian courts?"***

Arguing on the lone issue afore-formulated, learned counsel for the Defendant/Applicant contended the fact that the law allows parties to freely enter into contract and that the principle of freedom of contract states that the parties retain the commercial freedom to determine their own terms, and once they are ad idem and have reduced their intentions into writing, such terms will be binding and enforced by the Court.

Relatively, the principle of the parties' freedom to contract also extends to the choice of a judicial forum to adjudicate their dispute. Where parties have elected freely to choose a judicial forum and law for the resolution of their dispute, only such judicial forum can adjudicate on the dispute. ***NSO VS. SEACOR MARINE (BAHAMAS INC.) & ANOR (2008) LPELR-8320(CA);***

SONNAR (NIG) LTD & ANOR VS. PARTENREEDERI M.S. NORDWIND & ANOR (1985) LPELR-21280(CA) were cited.

Learned counsel contends, that Clause 19.2 of the Master Service Agreement relied on by the Claimant expressly vests the Courts in England with the "exclusive" jurisdiction to hear and decide on any dispute relating to the parties. The agreement voluntarily entered into by the parties serves to govern their entire transaction, and deviating from any part or clause of the agreement would render the entire contract ineffective and devoid of purpose.

Learned counsel emphasized that the provision of the Master Service Agreement, freely entered into by both parties, does not obstruct the Claimant's/Respondent's right to initiate this action, but rather, serves as a guideline for the appropriate legal framework and jurisdiction, namely the courts in London, England.

To conclude, learned counsel submits that the Defendant/Applicant via their written address has sufficiently established the fact that;

- i. Parties have the liberty to mutually determine the applicable law and jurisdiction governing contracts they enter into, and the court is obligated to uphold such decisions.
- ii. Parties to an agreement are legally bound by the terms of the agreement they willingly and freely consented to, without any form of duress or coercion.
- iii. The court is obligated to respect and honor the intentions of the parties regarding their choice of law, provided that such choice is not against public policy.
- iv. The present legal action falls beyond the jurisdictional purview of this honorable court, as the parties have explicitly consented to the application of English law and the resolution of disputes by the courts in England through their agreement.

Learned counsel on the whole, urged the Court to hold that parties are bound by the terms of their Contract.

On their part, Claimant/Respondent filed Reply Address wherein sole issue was formulated for determination to-wit;

"Whether considering the jurisdiction of this Court vested by the Constitution of the Federal Republic of

Nigeria, 1999, as amended, the Applicant is entitled to the reliefs sought?”

It is the submission of learned counsel, that it is trite that the jurisdiction of this Court on issues relating to forum convenience depends on a number of factors personal to the parties involved, their property and the place where any legal act in question was performed. The English doctrine of effectiveness provides for the Court a reasonable and adequate theory to the exercise of jurisdiction. The provision of the Rules of this Honourable Court requires that actions for breach of contract should be commenced either in the judicial division where such contract ought to be performed or in the judicial division where the Defendant resides. Order 3 Rule 3 of the Rules was cited.

Learned Counsel further submits, that it is apparent from the consideration of all facts in this matter, that hearing this case in any other Court outside Nigeria will result in forum non-convenience for the parties. ***MBADINUJU VS. I.C.N. LTD. (2007) 15 NWLR (Pt. 1058) 524*** was cited.

Learned counsel also submits, that the connecting factors, including the alleged cause of action (in this present suit) which arose in the Federal Capital Territory, Abuja, show and require

that this matter be heard and determined in Nigeria. Furthermore, the two transacting parties under the Agreement are both Nigerian entities, duly registered under Nigerian laws and are both resident in Nigeria. ***GEORGE V. S.B.N. PLC. (2009) 5 NWLR (PT. 1134) 302***, was cited.

Learned counsel contends, that the Applicant resides and carries on its business in Nigeria, therefore, subjecting the parties, particularly the Respondent to attending the proceedings and/or pursuing its claims outside the Federal Capital Territory or Nigeria (the venue) where the contract ought to have been performed (at avoidable travel costs and travel risks), will be in breach of the Respondent's rights to be fairly heard on this matter, especially since both parties are physically present in Nigeria.

It is the submission of learned counsel, that an agreement between parties cannot be made to oust the Jurisdiction of this Honourable Court, as same was vested by the Constitution of the Federal Republic of Nigeria (1999) as amended (the "CFRN"). It is trite that parties make their contracts and that the Courts will only give effect to their intention as expressed in and by the contract. However, this should be understood to mean and imply

a contract which does not rob the Court of its jurisdiction in favour of another foreign forum.

It is also trite law, that no person or group of persons by their own making can agree or decide to remove the Court of its constitutionally vested jurisdiction. The Court of Appeal also gave credence to this in the case of ***AHMADU BELLO UNIVERSITY VS. VTLS INC. (2021) 10 NWLR (PT. 1783) 33.***

Learned Counsel contends, that the provision of Clause 19.2 of the Agreement, cannot override the supreme provisions of the Constitution of the Federal Republic of Nigeria. To that extent, the referenced provision of the Agreement will be null and void, and to the extent of its inconsistency and/or possibility to mitigate fairness in the instant case.

Learned counsel submits, that it will be in the interest of justice, fairness and convenience of all parties involved in this suit, that this suit is heard in the Federal Capital Territory in Nigeria, particularly by this Honourable Court.

In conclusion, learned counsel concludes by summarizing his submissions as follows:

- a. The constitutional jurisdiction bestowed upon this Honorable Court cannot be ousted vide an agreement, as erroneously claimed by the Applicant; and
- b. All connecting factors relating to this suit, indicate that Nigeria is the proper forum for the hearing and determination of this suit.

Learned counsel in conclusion, urged the Court to dismiss the Preliminary Objection with cost.

COURT:-

I have read the arguments for and against the Preliminary Objection filed by the Defendant/Applicant which challenges the jurisdiction of the FCT High Court to hear and determine the suit of the Claimant/Respondent.

As could be gleaned from the arguments which have been captured in the preceding part of this ruling, both Claimant and Defendant have signed a contract document (hereinafter referred to as Master Service Agreement) with Energy Vision Limited (EVM) a Limited Liability Company registered under the Laws of Mauritius with its registered offices at Edit Carell Street, Les Cascades Building, Port-Louis, Mauritius.

The said Energy Vision Limited specializes in providing reliable cost effective power to mobile network Operators and Tower Management Companies including renewable and Hybrid environmentally friendly solutions and other forms of energy by installing, supplying, operating and managing the energy solution.

Now, Energy Vision Limited, otherwise referred to as "EVM" has established an entity in Nigeria as local subsidiary for the purpose of providing the services in the Territory.

It is instructive to state, that a concession for a term of 30 years was granted Energy Vision Limited (EVM by the Federal Government of Nigeria, Mobile Ltd. and MPS Technologies Limited in an agreement to manage and operate at least 696 Telecom Sites for the Federal Government of Nigeria for the Security Force in Nigeria, including the Police Force, Army, the Air Force and other Security Forces in the Territory and to purchase, install and roll-out additional sites and Telecom infrastructure for the Security Forces and additional users in the Territory.

In the body of the said Agreement, the laws applicable to the Agreement shall be;

"All applicable laws, statutes, regulations and codes in force and effect as of the date hereof and which

may be enacted or brought into force and effect hereinafter in Nigeria, including statutes, rules, regulations, directions, bye-laws, notifications, ordinances and judgments having force of law, or any final interpretation by a Court of Law having jurisdiction over the matter in question as may be in force and effect during the subsistence of this Agreement."

Curiously, in the same agreement, the following provision was made with respect to Dispute Resolution/Governing Law/Choice of Venue, as follows;-

"This MSA and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the laws of England. In the event of a dispute relating to or resulting from this Agreement, the Parties shall first make an effort to amicably resolve such a dispute by discussions of their respective Management Teams. If the Management Teams of both parties are unable to resolve the dispute within

ten (10) days of submission, then the dispute shall be resolved by the relevant Courts of the city of London, United Kingdom, and the relevant Courts of London, shall have full and exclusive jurisdiction over such.”

It is for above reason that Defendant/Applicant contests the jurisdiction of this Court to determine the claims of the Claimant.

It is already settled in the annals of our jurisprudence that parties are indeed bound by the terms of contract freely entered into, as no Court will read-into contract terms that are different from the wishes of the parties.

See ***ARTRA INDUSTRIES NIGERIA LTD. VS. THE NIGERIAN BANK OF COMMERCE AND INDUSTRY (1998)4 NWLR (Pt.546) 357;***

BABATUNDE & ANOR VS. BANK OF THE NORTH LTD. & ORS (2011) LPELR 8249 (SC).

I now proceed to the issue of jurisdiction.

Sowemino, JSC (as he then was) in the case of ***YONWUREN VS. MODERN SIGNS (NIG) LTD. (1989) LPELR (3529)1 at 34 – 36*** stated, that to understand the nature of the inherent jurisdiction of Court, it is always important to distinguish it from

the general jurisdiction of the Court and next from its statutory jurisdiction.

The FCT High Court is established Pursuant to Section 255 of the 1999 Constitution with its jurisdiction clearly therein stated under Section 278 of the same Constitution.

The general jurisdiction of the FCT High Court and other High Courts broadly speaking is unrestricted and unlimited in all matters of substantive law, except taken away expressly by law.

The jurisdiction of Court can be challenged on grounds of subject matter, parties or Territorially.

See ***NEPA VS. ADEGBENRO (2002)18 NWLR (Pt. 798) 79 at 98;***

CECILIA GRACE JACK VS. FED. UNIVERSITY OF AGRIC MAKURDI (2004) 1 (SC) (Pt.11) 100;

DALHATU VS. TURAKI & ORS (2003) LPELR – 917 (SC).

I wish to similarly note, that where parties agree in an Agreement to submit to arbitration in the event of any misunderstanding arising from the performance of any term/terms of contract, they are indeed precluded from coming to Court before conclusion of

arbitration, except there is such provision to come to Court or Arbitration, thereby making it a thing of choice.

On the other hand, where parties in an agreement decide to oust the jurisdiction of any Court in a Contract document, as in this case, it is for the Court approached to determine the veracity and sustainability of such provision.

The jurisdiction of the FCT High Court is as provided under Section 257 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Nigeria, as it were, is a sovereign Nation with clearly defined Territory. It is therefore true that as it pertains the jurisdiction of Court within the locality of Nigeria, it is where the cause of action arose.

The jurisdiction of Nigeria and Nigerian Courts therefore, cannot be determined by parties in an Agreement, as done by the Claimant and Defendant in this case.

This nature of Agreement audaciously entered-into by the Claimant and Defendant albeit in error, to oust the jurisdiction of Court is laced with illegality hence unenforceable.

It is clearly an exception to the general rule in Sanctity of Contract.

The Contract between the parties is being performed in Nigeria and that is where the cause of action arose, and Nigerian Court i.e FCT High Court is, and shall be the proper Court to hear the claim of the Claimant.

The Preliminary Objection of Defendant/Applicant is refused and dismissed.

***Justice Y. Halilu
Hon. Judge
11th July, 2024***

APPEARANCES

John O., Esq., with Chinelo O., Esq. – for the Defendant/Applicant.

Claimant/Respondent not in Court nor represented.