

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

BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS

COURT: 28

DATE: 4TH JULY, 2022

FCT/HC/CV/270/2022

BETWEEN:-

SCOA NIGERIA LIMITED-----

PLAINTIFF

AND

- 1. FEDERAL GOVERNMENT**
- 2. ATTORNEY GENERAL OF THE FEDERATION
AND MINISTER OF JUSTICE**
- 3. HONOURABLE MINISTER OF WORKS
AND HOUSING**

DEFENDANTS

RULING

The Defendant/Applicant filed a notice of preliminary objection No. M/4132/2022 dated and filed on the 4th April, 2022 praying for the following orders:-

1. An order of this Honourable Court dismissing/striking out this suit.
2. Alternatively an order of this Honourable Court staying proceedings for a recourse to arbitration.

The grounds of the application are as follows:-

1. The Plaintiff's perceived issues of breach of contract, raised in its pleadings are justiciable under the alternative Dispute Resolution mechanism by way of arbitration as contained in the Rehabilitation of

Kogi Road Agreement dated 13th January 2015 which forms the basis of this suit.

2. The combined effect of section 5 (1) of Arbitration Conciliation Act(ACA) and article 12 paragraph 12.1 of the Agreement has diverted the Honourable Court of the Requisite jurisdiction to hear this suit as presently constituted for recourse to arbitration.

Applicant attached to this notice a written address in which a sole issue was raised for determination, which is:-

“Whether this suit is competent vis – a –vis the Arbitral Clause in the contract Agreement of the Plaintiff and the Defendants.

Counsel argues that it is trite that a Defendant to an action brought in breach of an agreement to proceed to arbitration can apply to the Court to stay the action in order to enable the parties to have recourse to arbitration. See section 4 of the Arbitration and Conciliation Act.

Counsel also submits that the subject matter of this suit is to be determined by the Alternative dispute Resolution mechanism as encapsulated in articles 12 paragraph 12.1 of the agreement for the rehabilitation of the Okene- Itobo Road in Kogi State (contract No. 6241) and as such robs this Honourable Court of the jurisdiction to hear and determine this matter as presently constituted. Counsel then cites the case of ***INAKOJU V ADELEKE (2007) ALL FWLR (pt 353) p3 at 87*** where jurisdiction was said to be the bedrock of any judicial proceeding and whenever it is lacking the proceeding will amount to a waste of judicial breath.

See also ***MADUKOLA V NKEMIDILM (1962) 2 SCNLR P.342.***

Counsel further claims that the Parties had agreed for submission to arbitration in the event of breach, dispute or claim arising thereof as contained in the agreement in the execution of the Rehabilitation of Okene Road. Counsel urges the Court to take judicial notice of the said Arbitral Clauses encapsulated in article 12 paragraph 12.1 of the agreement.

Counsel then avers that where the operative words in a statute/instrument is “shall” its usage connotes mandatory compliance, and relies upon the

case of ***ABADAMASI V NIGERIA RALIWAY CORP (2007) 8 WRN 87 at 115 lines 10-15.***

Furthermore, Counsel submits the position of the law on words or provisions of a statute that are clear and unambiguous. It is that they should be given their plain, ordinary grammatical meaning without qualification. Counsel cites that cases of ***AMADI V NNPC (2000)LPELR – 445 (Sc), OYEGUN V NNPC (2010) 14 NWLR (pt 1236) 175 and AG FEDERATION V ABUBAKAR (2007) 20 WRN 1.***

In addition, Counsel submits that the laws is settled that where there is an arbitral clause in the contract agreement, the Court is enjoined to stay proceedings and refer parties to arbitration by virtue of section 5 (1) of the Arbitration and Conciliation Act. See ***OBI V OBEMBE V WEABOD ESTATES LTD (1977) NSCQR VOL 1977 (page 498), MAINSTREET BANK CAPITAL & ANOR V NIGERIA REINSURANCE CORPORATION PLC (2018) 75 NSCQR 922.***

Finally, Counsel avers that if a Court lacks jurisdiction, it automatically lacks the necessary competence to try the case at all, and cites the cases of ***OKOYEDE V FCDA (2005) 27 WRN 97, RATIO 31 AND ATTORNEY GENERAL LAGOS STATE V DOSUNMU(1989) 3 NWLR (PTIII) 552 RATIO 6*** Counsel urged the Court to decline the jurisdiction to entertain this suit and strike out same or in alternative, stay proceedings and refer parties to arbitration.

In opposition to this, Plaintiff's Counsel filed a written address and an affidavit dated the 11th of April, 2022, where a sole issue was raised for determination.

"Having regards to the peculiar facts and circumstances of this suit, have the 1st and 2nd Defendants/objectors made out a case for the grant of the prayers sought by the instant notice of preliminary objection."

Counsel submits that contrary to the position of the objectors, it is trite law that any agreement to submit a dispute to arbitration does not oust the jurisdiction of the Court to entertain any suit regarding the dispute. Therefore, any party may before a submission to arbitration or an award is made, commence legal proceedings in respect of any claim or, cause of

action subject of an arbitration clause. This is supported by the decision of the Supreme Court in the case of ***MESSRS BV SCHEEP V MV S ARAZ (2000) 12 SC (PT10)154 at 213. See also HARRIS V REYNOLDS (1845) 7 QB 71.***

Counsel also submits that contrary to the contention of the objectors, the Plaintiff had, prior to the institution of the instant suit issued a notice of dispute in form of letters communicating breach of the contract by the 1st and 3rd Defendants in a bid to settle the dispute amicably see exhibit A1,A2 and A3 to support affidavit.

Counsel further submits that it is settled law that a party who wishes to rely on an arbitration clause to set aside an action instituted before the Honourable Court must show by way of documentary evidence the steps taken in a bid to activate the clause, Counsel relies on ***UBA V TRIDENT CONSULTING LTD (2013) 4 CLRN 119 MV PANORMOS BAY V OLAM (NIG) PLC (2004)5 NWLR (pt865) page1.***

Counsel opines that the objectors intend to frustrate the Plaintiff's attempt at seeking redress for their breach of the agreement, seeing as the objectors have taken no steps upon being notified of the dispute.

See ***MEKWUNYE V LOTUS CAPITAL LTD section 5*** of the Arbitration and Conciliation Act and ***PGS TECHNICAL LIMITED & ANOR V OCEAN MARINE SOLUTIONS LIMITED .***

Furthermore, Counsel avers that only the Plaintiff and the 1st Defendant are parties to the arbitration clause and based on the rule of privity of contract, only parties to an agreement can be bound by it and take benefit from it. See ***AONDO V BENUE LINKS (NIG) LTD (2019) LPELR – 46876 and OSOKOYA V ONIGEMO (2017) LPELR – 42730.***

Counsel also relies on ***DANGOTE FARMS LTD V PLEXUX COTTON LTD (2018)LPELR -46581*** where it was held that " it is only a person who is a party to an arbitration agreement that can take either the benefit or bear the liability of an arbitration clause."

Finally, Counsel cites the case of ***MAGBAGEOLA V SANNI(2002) 4 NWLR (pt.756)P.193.***

Where it was held that it is better to go before a Court which has the jurisdiction to entertain all the issues raised and over all the parties in a suit rather than a Court that has jurisdiction over just some of the issues and parties.

Counsel urges the Court to resolve the solitary issue distilled for determination, dismiss the instant application with substantive cost as lacking in merit.

Subsequently, the 3rd Defendant/Applicant filed a motion on notice dated the 12th April, 2020praying the Court for:-

An order staying proceedings in this suit and referral to arbitration for want of jurisdiction and for being premature having failed to comply with the condition precedent for the institution of same in accordance with the contractual agreement between the parties.

The motion is supported by an affidavit and a written address both dated the 12th April, 2022.

The affidavit deposed to by Charles Adekunle, contains among others, the following facts:-

1. That the 3rd Defendant/Applicant awarded a contract to the Plaintiff for the rehabilitation of a road in Kogi State, Award letter marked and attached as exhibit A1.
2. That a formal agreement was executed between the parties for the contract embodying all the terms and conditions governing the contract and binding the parties. Copy of the agreement marked and attached as exhibit A2.
3. That article 12 of the agreement provides that any dispute, controversy difference or claim arising out of or on in relation to the contract or the breach, termination or invalidity thereof, which cannot be mutually settled shall be referred for arbitration in accordance with the provisions of the Arbitration and Conciliation Act, cap A18, LFN 2004.
4. That the Plaintiff failed to exhaust this remedy before approaching this Court.
5. That this action is premature and incompetent thereby robs the Court of the jurisdiction to entertain same.

In the written address, a sole issue was raised for determination:-

“Whether from the circumstances of this case, this Honourable Court can competently and validly exercise jurisdiction over the subject matter with respect to the existence of an arbitration clause in the contract agreement between the parties as a condition precedent for instituting this action.”

Counsel argues that in determining whether or not a court has jurisdiction to entertain a matter the Court should consider whether the Court is properly constituted as regards qualification of numbers, the subject matter of the case is within its jurisdiction; and the case is initiated by due process of law and upon fulfilling of every condition precedent to the exercise of jurisdiction. Counsel cited the case of ***NSL LTD V AG LAGOS STATE (2009) 11 NWLR (pt1152) page 304 ratio 2 at Page 306; MOKERONYE V IZUGBOKWA (2004) 1 NWLR (pt 855) PAGE 635 at 640 ratio 4.***

Counsel submits further that where there is an Arbitration Clause in an agreement, and an aggrieved party must first exhaust that remedy before approaching the Court for redress. See ***ENYELIKE VOGILOMA (2008) 14 NWLR (pt 1807) page 249 ratio 1. See also section 4 (1) Arbitration and Conciliation Act Cap A18 LFN 2004.***

Counsel finally urges the Court to stay proceedings in this action to ensure parties exhaust the remedies through Arbitration as mutually agreed by the parties.

In ***NEURAL PROPRIETARY LTD V UNIC INSURANCE PLC (2015) LPELR – 40998 (CA)***, it was held that “ the Arbitration Clause is very explicit. The parties ought to refer their dispute for arbitration before resorting to the law Courts. Where such an Arbitration Clause is included in a contract, the parties must submit to Arbitration concerning present and future disputes. The trial Court ought to respect the Arbitration clause, the parties voluntarily included in their contract. The trial judge was therefore right in granting an order for stay.”

See also owners of the ***M.V.LUPEX V NIGERIAN OVERSEA CHARTERING AND SHIPPING LTD (2003) LPELR -3195 (SC)***, and

POLARIS BANK V MAGIC SUPORT (NIG) LTD (2020) LPELR – 53106 (CA).

However, section 6 92) of the Arbitration and Conciliation Act provides that “---- A Court to which an application is made under subsection 91) of this section may, if it is satisfied:-

1. That there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and
2. That the Applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceeding.”

The Plaintiff /Respondent is of the opinion that the Applicant has not demonstrated readiness or willingness towards the conduct of the arbitration as it has ignored the numerous letters of breach of contract sent to it by the Plaintiff.

On one hand, it was held that willingness must be demonstrated by documentary evidence in the case of ***UBA V TRIDENT CONSULTING LTD (2013)4 CLRN 119 AND MR. PANORMOS BAY V OLAM (2004) 5 NWLR (PT 865) 1.*** While on the other hand, ***MEKWUNYE V LOTUS CAPITAL LIMITED & ORS (2018) LCN/11288 (CA)*** has shown that same can be demonstrated simple deposition in the Application seeking to stay proceedings pending arbitration, which the Applicant has done.

Having reproduced substantially the position of both side in this ruling it is my view that parties are bound by the terms of the agreement. Looking at the agreement critically the 3rd Defendant having acted on behalf of the 1st Defendant same is a necessary party to the suit. This is to enable the Court effectively and efficiently determined the matter on its merit.

Whatever does the 3rd Defendant in this suit affects the 1st Defendant, an arbitration clause in a written contract embodies the agreement of both parties that if any dispute should occur with regards to the obligation which the other party has undertaken to the other, such dispute should be settled by a tribunal of their own constitution and clause. See ***ROYAL***

EXCHANGE ASSURANCE VS BENTWARTI FINANCE NIG. LTD (1976) LPELR 2961 SC. It provides for compulsory arbitration in case of dispute as to rights and liabilities under such contract see **BCC TROPICAL NIG. LTD VS GOVT OF YOBE STATE OF NIG & ANOR(2011) LPELR 9230.** The purpose of the clause is to avoid having to litigate dispute that might arise see **M.V. LUPEX VS N.OC & SON LTD (2003) 15 NWLR (pt844) 469, , NB PLC VS KPCRUSH & ANOR (2019) LPELR 47267.** The 3rd Defendant been a representative of the 1st Defendant, the execution of the agreement by the same made the application proper consequently I have granted this application. The matter shall be referred to the Arbitration first, proceedings are hereby stayed.

HON. JUSTICE M.S IDRIS
(Presiding Judge)

Appearance

F. Agunbiade- For the Claimant.

Linda Okpara:- For the 1st and 2nd Defendant