

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

ON WEDNESDAY, 23RD DAY OF JUNE, 2021

BEFORE HON. JUSTICE SYLVANUS C. ORIJ

SUIT NO. FCT/HC/CV/2568/2018

MOTION NO. M/8552/2018

BETWEEN

1. YAKUBU M. MBAYA
 2. MOHAMMED IBRAHIM
 3. C. M. AMADI
 4. ADESINA BANKOLE KOLAWOLE
- [For themselves and on behalf of the
Allottees and Residents of Pose-Service
Housing Estate, Phase 5, Kurudu II, Abuja]*

**PLAINTIFFS/
RESPONDENTS**

AND

1. POST-SERVICE HOUSING DEVELOPMENT LTD.
 2. NIGERIAN ARMY PROEPRTY LTD.
 3. STONE-WALL PROPERTIES LTD.
 4. CHIEF OR ARMY STAFF
 5. THE NIGERIAN ARMY
 6. BRIGADIER-GENERAL A. T. HAMMAN
- [PROVOST MARSHAL OF THE NIGERIAN ARMY**

**DEFENDANTS/
APPLICANTS**

RULING

The claimants [plaintiffs] commenced this suit vide Originating Summons on 14/8/2018 during the Annual Vacation of the Court. On the same date, they

filed *Motion Exparte No. M/8403/2018* and *Motion on Notice No. M/8402/2018*. In the *Motion Exparte*, the plaintiffs sought these prayers:

1. An order of interim injunction restraining the defendants whether by themselves, agents, servants, officers, employees, privies or contractors, howsoever and whomsoever from further interfering with plaintiffs' management of Post Service Housing Estate, Kurudu II, Phase 5, Abuja, by forcefully imposing and collecting service charges or any other monies from the plaintiffs, or using the 3rd defendant as a facility manager in the Post Service Housing Estate, Kurudu II, Phase 5, Abuja and/or from further interfering in any form or manner whatsoever in the management of the Estate by the plaintiffs, pending the hearing and determination of the motion on notice already filed before this Court.

OR IN THE ALTERNATIVE:

2. An order of this Honourable Court directing parties in this suit to maintain the *status quo ante bellum* that existed on the 30th of July, 2018 prior to the forceful interference of the defendants in the plaintiffs' management of Post Service Housing Estate, Kurudu II, Phase 5, Abuja, pending the hearing and determination of the motion on notice.

On 20/8/2018, I, sitting as Vacation Judge, granted an Order for the parties to maintain *status quo ante bellum* that existed on 30/7/2018 in terms of the alternative prayer, pending the determination of the Motion on Notice. The Motion on Notice was fixed for hearing on 4/9/2018. However, the Motion on

Notice was not heard before the end of the Annual Vacation of 2018. By a Transfer Order dated 5/8/2020, the matter was transferred to me by His Lordship, the Honourable Chief Judge.

This Ruling is on the defendants/applicants' *Motion on Notice No. M/8552/2018* filed on 3/9/2020 praying the Court for the following orders:

1. An order setting aside the order made by this Honourable Court on the 20th day of August, 2018.
2. An order of Court staying proceedings in this case and referring this case to arbitration.
3. And for such further or other orders as this Honourable Court may make in the circumstances of this case.

The grounds for the application are that:

1. The plaintiffs/respondents in paragraphs 11, 12, 13 of the affidavit of AdesinaBankoleKolawole in support of the Originating Summons stated that:

their allocation letters stated that they comply with the Rules and Regulations of the Nigerian Army Housing Scheme, 1996.
2. The Nigerian Army Housing Scheme [Guiding] Rules, 1996 is annexed to the Originating Summons as Exhibit 2 and constitutes the fulcrum of the plaintiffs' case.

3. Clause 91 of the said Nigerian Army Housing Scheme [Guiding] Rules, 1996 [i.e. Exhibit 2 in support of the Originating Summons] contains arbitration clause.
4. This Honourable Court lacks jurisdiction to entertain this suit as presently constituted.
5. Arbitration is a condition precedent for a valid suit.

Paul Edeh, a lawyer and company secretary of the 1st& 2nd defendants/applicants, deposed to an affidavit of 8 paragraphs in support of the Motion. Dr. D. Y. Musa, SAN filed a written address with the Motion. In opposition, the 4th plaintiff/respondent filed a 36-paragraph counter affidavit on 1/3/2021; attached therewith are Exhibits 1-6. NkemOkoroEsq. filed a written address with the counter affidavit. At the hearing of the motion on 29/3/2021, learned counsel for the parties adopted their respective processes.

In the affidavit in support of the application, Paul Edeh deposed that: [i] in the affidavit filed along with the Originating Summons, the plaintiffs stated that the allottees were to comply with the Rules and Regulations of the Nigerian Army Housing Scheme, 1996;and same was attached as Exhibit 2; [ii] Clause 91 of Exhibit 2 contains an arbitration clause; and [iii] the plaintiffs have not gone for arbitration before bringing this action.

In his counter affidavit, the 4th plaintiff/respondent stated that:

- i. By the arbitration clause, the Chief of Army Staff, who is the 4th defendant in this case, is to be the arbitrator. The Chief of Army Staff cannot be a judge in his own case. The majority of the questions for determination in the Originating Summons revolve around the Chief of Army Staff.
- ii. In the allocation letters issued to the plaintiffs by the 1st& 2nd defendants, it was stated that the allottees were to comply with the Rules and Regulations of the Nigerian Army Housing Scheme, 1996.
- iii. In line with Clause 76 of the said Rules 1996, plaintiffs constituted themselves into a Residents' Association known as Nigerian Army Housing Estate Residents' Association [NAHERA], Phase 5, Kurudu II, Abuja to manage their affairs in the Estate; and the plaintiffs have diligently managed their affairs without any problem.
- iv. In January 2018, the plaintiffs through the Residents' Association received a letter from the 1st defendant dated 8/1/2018 [Exhibit 1] intimating them of a new Rule called the Estate Governance Rules 2017. The said Rule of 2017 seeks to take over the management of the Estate and forcefully foist the 3rd defendant [Stone-Wall Properties Ltd.] on the plaintiffs as the new facility manager for the Estate.
- v. Plaintiffs were informed that the 6th defendant [Brigadier-General A. T. Hamman, Provost Marshal of the Nigerian Army] would be

- deployed to enforce the 2017 Rules unilaterally made by the 1st defendant under the instructions of the 4th defendant [Chief of Army Staff] in breach of the existing contract between the 1st & 2nd defendants and the plaintiffs.
- vi. The plaintiffs through their Residents' Association were also served with a letter from the 1st defendant dated 18/1/2018 [Exhibit 2] which informed them of the directives of the 4th defendant instructing the 5th defendant to enforce the takeover of the management of the Estate from the plaintiffs.
 - vii. The plaintiffs through their Residents' Association responded to the letters of the 1st defendant vide a letter dated 30/1/2018 [Exhibit 3] and rejected the Estate Governance Rules 2017 and the imposition of the 3rd defendant. The 1st defendant refused to respond to the letters but started reeling out letters [Exhibit 5] informing the plaintiffs of the takeover of the management of the Estate.
 - viii. The plaintiffs retained the services of Dynamic Option Chambers, which wrote a letter dated 30/7/2018 [Exhibit 6] to the 1st defendant rejecting the imposition of the 3rd defendant.
 - ix. Notwithstanding Exhibit 6, the defendants deployed the men and officers of the 5th defendant and forcefully imposed the services of the 3rd defendant as a facility manager of the Estate. The 1st & 2nd

defendants, with the participation of the 4th defendant, are in breach of the terms of the agreement reached with the plaintiffs.

Learned senior counsel for the defendants/applicants formulated one issue for determination, which was adopted by learned counsel for the plaintiffs/respondents. The issue is:

Whether the plaintiffs/respondents can institute this action without first utilizing the arbitration clause contained in Clause 91 of the Nigerian Army Housing Scheme [Guiding] Rules, 1996 and whether this Court has jurisdiction to entertain this suit as presently constituted.

The Court is of the view that there are two issues for determination, to wit:

1. Whether the arbitration clause in Clause 91 of the Nigerian Army Housing Scheme [Guiding] Rules, 1996 is applicable to the dispute which gave rise to this action to warrant the grant of the order for stay of proceedings in this suit pending reference to arbitration.
2. Whether this Court has jurisdiction to entertain this suit as presently constituted; and if the answer is in the affirmative, whether the defendants/applicants have established any ground for setting aside the Order made on 20/8/2018.

ISSUE 1

Whether the arbitration clause in Clause 91 of the Nigerian Army Housing Scheme [Guiding] Rules, 1996 is applicable to the dispute which gave rise to this action to warrant the grant of the order for stay of proceedings in this suit pending reference to arbitration.

It is not in dispute that the allocation letters issued to the plaintiffs by the 1st& 2nd defendants stated that the allottees are to comply with the Rules and Regulations of the Nigerian Army Housing Scheme 1996. The defendants/applicants' application for stay of proceedings is predicated on the arbitration clause in Clause 91 of the said Rules and Regulations of 1996, which provides:

ARBITRATION

All disputes, differences or questions which at any time arise between the applicant, contributor or allottee, on one hand, and PHD[A] or any of the Scheme's administrative/technical agencies, on the other hand, or between the representatives or assigns of both parties touching or arising out or in respect of the administration of the Scheme or related matters shall be referred to the Chief of Army Staff.

Dr. J. Y. Musa, SAN, learned senior counsel for the defendants/applicants, relied on the above clause and argued that where a document which a party relies on contains an arbitration clause, it becomes obligatory for the parties to resort to arbitration before thinking of instituting a court action. This is because submitting the dispute to arbitration is a

condition precedent to the exercise of jurisdiction by the Court. He referred to the cases of M.V. Lupex v. N.O.C. & S. Ltd. [2003] 15 NWLR [Pt. 844] 469 and Nissan [Nig.] Ltd. v. Yoganathan [2010] 4 NWLR [Pt. 1183] 135. The learned senior counsel urged the Court to grant the order for stay of proceedings.

For his part, learned counsel for the plaintiffs/respondents pointed out that the dispute that led to this action arose from the letter from the 1st defendant dated 8/1/2018 [Exhibit 1] intimating the plaintiffs of the new Rule called the Estate Governance Rules 2017, which seeks to take over the management of the Estate and forcefully foist the 3rd defendant on them as the new facility manager for the Estate.

NkemOkoroEsq. submitted that the arbitration clause relied upon can only avail the defendants if the plaintiffs' suit was just against 1st& 2nd defendants with whom they had a contract. He stressed that the suit involves the Chief of Army Staff [as the 4th defendant] and the 3rd, 5th& 6th defendants who were not parties to the agreement between 1st& 2nd defendants and the plaintiffs. He referred to the case of Chevron U.S.A. Inc.&Anor. v. Britannia -U [Nig.] Ltd. &Ors. [2018] LPELR-43519 [CA] for the conditions under which a party can resort to arbitration, one of which is that the parties before the court must be parties to the agreement or the transaction which compels arbitration.

The plaintiffs' counsel also relied on the doctrine of privity of contract which is to the effect that contractual agreements bind only parties to it and cannot

be binding on persons who are not parties. He relied on Gamji Fertilizer Co. Ltd. &Anor. v. France Appro S.A.S &Ors. [2016] LPELR-41245 [CA] to support the view that an arbitral clause can only bind the parties to the contract or agreement entered into and not third parties. NkemOkoroEsq. urged the Court to refuse the application for stay of proceedings.

Now, section 5[1] of the Arbitration and Conciliation Act, Cap. A18 Laws of the Federation of Nigeria, 2004 provides:

If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

In Chevron U.S.A. Inc. &Anor. v. Brittanica -U [Nig.] Ltd. &Ors. [supra], it was held that before the question of ordering an arbitration will arise, the following must exist: [i] there must be an agreement between the parties thereto or a statutory provision which compels arbitration in such matters; [ii] the parties before the court must be parties to the agreement or the transaction which compels arbitration; [3] the arbitration sought must be within the contemplation of the arbitration agreement or circumstances calling for it; and [iv] the application for arbitration and stay of proceedings must be made in time as envisaged under section 5 of the Arbitration Act. See

also the case of **African Insurance Development Corp. v. Nigeria Liquified Natural Gas Ltd. [2000] 4 NWLR [Pt. 653] 494.**

In the instant case, it is evident from the facts stated in paragraphs 8-12 of the affidavit in support of the Originating Summons that the 1st& 2nd defendants, which are limited liability companies, allotted lands and/or houses in the Post-Service Housing Estate, Kurudu II, Phase 5, Abuja to the plaintiffs upon payment of sums of money for same. Clearly, the 3rd-6th defendants are not parties to the contract that gave rise to this suit. For emphasis, the contract is between the 1st& 2nd defendants and plaintiffs as contained in the respective letters of allocation issued to the plaintiffs.

The Court agrees with the plaintiffs' counsel that since the 3rd-6th defendants are not parties to the agreement, the arbitration clause in Clause 91 of the Nigerian Army Housing Scheme [Guiding] Rules, 1996 cannot avail the defendants. The case of **Gamji Fertilizer Co. Ltd. & Anor. v. France Appro S.A.S & Ors. [supra]** is also authority for the principle that an arbitral clause can only bind the parties to the agreement and not third parties.

The second fundamental factor to consider in granting an order for stay of proceedings on the basis of an arbitration clause is that the arbitration sought must be within the contemplation of the arbitration agreement. See **NB Plc. v. Akperashi & Anor. [2019] LPELR-47267 [CA]**. Clause 91 of Nigerian Army Housing Scheme [Guiding] Rules, 1996 relates to all disputes or questions

that may arise “between the applicant, contributor or allottee, on one hand, and PHD[A] or any of the Scheme’s administrative/technical agencies, on the other hand, or between the representatives or assigns of both parties touching or arising out or in respect of the administration of the Scheme or related matters”.

As rightly pointed out by NkemOkoroEsq., the dispute that led to this action arose from the letter from the 1st defendant dated 8/1/2018 [i.e. Exhibit 1] intimating the plaintiffs of the new Rule called the Estate Governance Rules 2017, which seeks to take over the management of the Estate and to appoint 3rd defendant as the new facility manager for the Estate. The case of the plaintiffs is that the said Estate Governance Rule 2017 was made under the instruction of the Chief of Army Staff [the 4th defendant].

It is necessary to refer to the letter dated 8/1/2018 [i.e. Exhibit 1] and the letter dated 18/1/2018 [i.e. Exhibit 2] to show the involvement of the Chief of Army Staff in the complaints of the plaintiffs in this suit. These letters were signed by Brig. Gen. M. Bashir [the MD/CEO of the 1st defendant] and addressed to plaintiffs and others in the Distribution List. Paragraph 1 of Exhibit 1 reads:

“The Chief of Army Staff [COAS] approved the review of the Nigerian Army Housing Scheme Rules and Regulations 2006 towards the effective implementation of the mandate of Post-Service Housing Development Limited [PHD]. After a painstaking review process under the direction of the COAS, PHD Information Handbook and Estate Governance Rules [IEGR] 2017 was approved by the COAS effective 6 December 2017. This implies that all

activities of PHD are now to be regulated and governed by the IEGR 2017 including the management of all its estates across the country."

In Exhibit 2, Brig. Gen. M. Bashir referred to the letter of 8/1/2018 and stated: "... I am to draw your attention to Chief of Army Staff's directives to the Provost Marshal [Army] to enforce compliance and sanction all defaulters to the provisions of the PHD Information and Estate Governance Rules [IEGR] 2017."

From the above letters, the questions for determination in the Originating Summons, the reliefs sought and the facts in support of the reliefs, there is no doubt that the issues in this case touch and concern the Chief of Army Staff [the 4th defendant] who is named as the arbitrator in the said Clause 91.

Flowing from the foregoing, I hold the considered opinion that the issues or questions presented to the Court for adjudication are not issues or questions contemplated in Clause 91 of the Nigerian Army Housing Scheme [Guiding] Rules, 1996. If the said arbitration clause contemplated a dispute or question involving the Chief of Army Staff, it would not have made the Chief of Army Staff the arbitrator. The decision of the Court is that the arbitration clause in the said Clause 91 is not applicable in this case. Therefore, Issue 1 is resolved against the defendants.

ISSUE 2

Whether this Court has jurisdiction to entertain this suit as presently constituted; and if the answer is in the affirmative, whether the

defendants/applicants have established any ground for setting aside the Order made on 20/8/2018.

The submission of learned SAN on behalf of the defendants/applicants is that the Court was misled into making the said order on 20/8/2018 because the plaintiffs' counsel did not draw the Court's attention to the arbitration clause contained in Exhibit 2 attached to the Originating Summons. Dr. J. Y. Musa, SAN urged the Court to set aside the *ex parte* order made on 20/8/2018 and refer the matter for arbitration in compliance with Clause 91 of the Nigerian Army Housing Scheme [Guiding] Rules, 1996.

The viewpoint of learned counsel for the plaintiffs/respondents is that the Court has jurisdiction to entertain this suit and therefore the order made on 20/8/2018 was validly made. He relied on SPDC &Ors. v. Agbara&Ors. [2015] LPELR-25987 [SC] and Madukolu v. Nkemdilim [1962] 2 SCNLR 341 for the factors that determine the jurisdiction of a court to entertain a suit. Counsel relied on SCOA [Nig.] Plc. v. Sterling Bank Plc. [2016] LPELR-40566 [CA] and argued that an agreement by parties to submit their dispute to an arbitrator does not in any way oust the jurisdiction of the court to entertain the action. Mr. NkemOKoro submitted that the arbitration clause in the said Clause 91 did not bar the plaintiffs from instituting this action.

The factors that determine the jurisdiction of a court have long been stated in Madukolu v. Nkemdilim [supra] as follows: [i] that the subject matter of the

case is within the court's jurisdiction; [ii] that there is no feature in the case which prevents the court from exercising its jurisdiction; and [iii] that the case comes before the court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction. In this case, the subject matter of this suit is within the jurisdiction of this Court; there is no feature in the case which prevents the court from exercising its jurisdiction; and there is no condition to be fulfilled for the exercise of the Court's jurisdiction.

I have already held under Issue 1 that the arbitration clause in the said Clause 91 relied upon by the learned SAN for his submission is not applicable in this case. Let me however state the position of the law that an agreement by parties to submit a dispute to arbitration does not oust the jurisdiction of a court in a matter or prevent parties from having recourse to the court in respect of dispute arising from the agreement.

InCity Engineering Nigeria Ltd. v. Federal Housing Authority [1997] LPELR-868 [SC], the principle was restated that any agreement to submit a dispute to arbitration does not oust the jurisdiction of the court. Therefore, either party to such agreement may, before submission to arbitration, commence legal proceedings in respect of any claim or cause of action included in the submission. See also **Transocean Shipping Ventures Private Ltd. v. MT Sea Sterling [2018] LPELR-45108 [CA]** and **Obembe v. Wemabod Estate [1977] LPELR [SC]**.

It is important to add that while parties cannot by contract oust the jurisdiction of the courts, they can agree that no right of action shall accrue in respect of any dispute which may arise between them until such dispute has been adjudicated upon by an arbitrator. In that situation, the parties by their agreement make arbitration a condition precedent before an action can be instituted in court. Such a provision is popularly known as the *Scott v. Avery Clause*, which was enunciated in the case of **Scott v. Avery [1856] H.L.Cas.811; [1856] 10 ER 1121.**

In this instant case, there is no *Scott v. Avery Clause* in the arbitration clause in the said Clause 91. The decision of the Court is that it has jurisdiction to entertain this suit and the defendants failed to establish any ground or basis to warrant the setting aside of the *ex parte* Order made on 20/8/2018.

CONCLUSION

From all that I have said, the defendants/applicants' application lack merit and is dismissed. I award cost of N50,000.00 to the plaintiffs/respondents payable by the defendants/applicants.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Counsel:

1. N. T. ObiezeEsq. for the claimants/respondents; holding the brief of NkemOkoroEsq.
2. UbongUdosenEsq. for the defendants/applicantnts.