

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT MAITAMA – ABUJA**

BEFORE: HIS LORDSHIP HON. JUSTICE SAMIRAH UMAR BATURE

COURT CLERKS:	JAMILA OMEKE & ORS
COURT NUMBER:	HIGH COURT NO. 25
CASE NUMBER:	SUIT NO. FCT/HC/CV/3053/20
DATE:	15/7/2021

BETWEEN:

CYREX ENERGY LIMITEDPLAINTIFF
AND

(1). FEDERAL GOVERNEMENT OF NIGERIA	}	DEFENDANTS
(2). HON. ATTORNEY GENERAL OF THE FEDERATION		
(3). CENRAL BANK OF NIGERIA		
(4). NIGERIA ELECTROCITY REGULATORY COMMISSION		
(5). NIGERIA BULK ELECTRICITY TRADING COMPANY LIMITED		

APPEARANCES:

RULING

Before the Court is a Notice of Preliminary Objection dated 8th March 2021 and filed 10th March 2021 and brought under the inherent jurisdiction of this Honourable Court.

The Grounds upon which the Preliminary Objection is based are as follows:-

1. The Agreement of the parties upon which the suit of the Defendants/Respondents is formulated contains a mandatory arbitration clause.
2. That the Honourable Court is bound to enforce the Agreement of the parties.
3. The recourses to Court is not contemplated by the Agreement of the parties.
4. The Parties by their agreement voluntarily waived their right to recourse to Court over and in respect of their said agreement.
5. The only Jurisdiction which this Court can exercise at this time is the determination of whether the arbitration clause in the parties agreement is not binding on the parties and not enforceable against parties, the clause being part of the agreement of the parties.

The reliefs sought are as follows:-

An Order of this Honourable Court referring this suit to arbitration pursuant to Articles 23. 2, 23.35 23.3.1, 23.3.2 and 23.3.3 of the parties' Agreement upon which the Claimant/Respondent's suit is founded.

Filed in support of the Preliminary Objection is a 14 paragraphed Affidavit deposed to by one Chinwendu Onuoha, a Counsel in the law firm of Solicitors to the 5th Defendant/Applicant in this Suit. Equally filed in support is a written address dated 8th day of March, 2021.

In the said written address, the Learned Counsel formulated a lone issue for determination which is whether an arbitration Clause contained in a Contract agreement is not enforceable against parties to the said agreement the Arbitration Clause being part of the said agreement.

In arguing the issue, Learned Counsel stated that the law is well settled that parties have the freedom of Contract and are bound by the terms of their agreement. And that it is not the preoccupation of the Court to make a Contract for the parties or rewrite the one which they have made. Reliance was placed on the cases of **NWAKA V SPDC (2003) 3 MJSC 136 AT 146-**

147; JADESIMI V EGBE (2003) 36 WRN 79 AT 102; BAKER MARINE (NIG) LTD V CHEVRON (2006) 13 NWLR (PT. 997) 276 AT 287.

In his submission, Counsel stated that an arbitration clause contained in a contract agreement is enforceable against parties to the said agreement the arbitration clause being part of the said agreement.

In another submission, Counsel stated that parties are bound by their agreement and the Courts are bound to respect and enforce the agreement of parties upon which the suit of the Claimant/Respondent is founded made clear provisions for mandatory recourse to arbitration. Counsel referred the Court to Articles 23.2, 23.3, 23.3.1, 23.3.2 and 23.3.3 of the parties agreement upon which the Claimants/Respondents suit is founded.

The learned Counsel further submitted that provision for mandatory recourse to arbitration in an agreement does not violate the right to access to Court. It is only a temporary recourse to an alternative dispute resolution which parties are bound to exploit before recourse to Court.

In his final submission, Counsel referred the Court to the supporting Affidavit and the Exhibit and stated that the dispute between the parties is one which must be resolved by recourse to arbitration as contracted.

And that the 5th Defendant/Applicant has indicated in its supporting Affidavit their willingness and readiness to submit to amicable settlement or arbitration. Reference was made to Section 5 (1) & (2) of the Arbitration and conciliation Act. Cap. A18, LFN 2004 and the Case of ***USI ENTERPRISES LIMITED V KOGI STATE GOVERNMENT (2005) 1 NWLR (PT. 908) 494 at 516.***

Therefore, Counsel urged the Court to uphold their submissions and sustain the Preliminary Objection accordingly.

In opposing the Preliminary Objection, the Plaintiffs/Respondents filed a 17 paragraphed Counter Affidavit deposed to by one Queen Nduka, a legal Assistance in the firm of Obed O. Agu & Co. The Counsel representing the Claimant herein. Attached to the Counter Affidavit is an annexure marked as Exhibit CYPRES 1.

Equally filed in support of the Counter Affidavit is a written address dated 17th day of March, 2021.

In the said written address, the Learned Counsel to the Claimant formulated a lone issue for determination to wit:-

Whether having regard to the entire facts and circumstance of this suit, it is not in the interest of justice to refer this suit to arbitration.

The Learned Counsel urged the Court to resolve the sole issue for determination in affidavit and in their favour.

In arguing the issue, Counsel submitted that the 5th Defendant/Applicant has taken steps in the proceedings and therefore cannot invoke the Arbitral proceedings under the power purchase Agreement. That the law is settled that a party who makes any Application whatsoever to the Court, takes a steps in the proceeding.

Counsel submitted moreso that an Application for pleadings in Court constitutes a step in the proceedings within the meaning of the expression in Section 5 of the Arbitration law. Reliance was placed on the cases of ***FRAZIMEX (NIG) LTD & ANOR V DOATEE CONCEPTS (NIG) LTD (2010) LPELR 4173 (CA); OBEMBE V WEMABOD ESTATES LTD (1977) VOL. 11 NSCC 204 OR (1977) LPELR-2161 (SC).***

In another submission, Counsel stated that the prayers of the 5th Defendant/Applicant is unknown to our laws and that what this Honourable Court is permitted to do in exercise of its discretion is to grant stay of proceedings. He contended that the Court has no such power to transfer the case to Arbitration and therefore the prayers are incompetent. Reference was made to Section 5 of the Arbitration and conciliation Act. LFN 2004.

The Learned Counsel referred the Court to the depositions in the Counter Affidavit and Exhibit CYREX 1 and stated that there is no dispute under the PPA and the 5th Defendant purposely brought this Application to frustrate

the Claimants from recovering their money from the 3rd Defendant knowing fully well that there is no portion of the Claim herein that is capable of being referred to Arbitration.

It was further submitted by the Learned Counsel that the position of law is that an Arbitration clause in agreement does not oust the jurisdiction of Court or prevent parties from having recourse to the Court in respect of dispute arising therefrom. That a party to an agreement with an Arbitration clause has the option to either submit to arbitration or to have the dispute decided by the Court. Counsel cited the cases of **CITY ENGINEERING NIG LTD V FEDERAL HOUSING AUTHORITY (1997) 9 NWLR (PT. 520) 224; ONYEKULUJE & ANOR V BENUE STATE GOVERNMENT & ORS (2015) LPELR-2474 (SC).**

In that regard, Counsel submitted that on the face of the Originating processes filed before this Honourable Court and various annexures therein, there is absolutely nothing to submit before the Arbitration as the money due to the Plaintiff is in custody of the 3rd Defendant/Respondent who has continued to illegally detain the money without providing any explanation whatsoever.

Finally, Counsel urged this Honourable Court to dismiss the Preliminary Objection and enter Judgment in favour of the Claimants/Respondents and grant all the reliefs Contained in the writ of Summons herein.

On the other hand, the 5th Defendant/Applicant filed a reply Affidavit to the Counter Affidavit of the Claimant/Respondent. The said reply Affidavit is of 15 paragraphs deposed to by one Chinwedu Onuoha, a legal practitioner in the Law Firm of Jont Hears Chambers, Counsel to the 5th Defendant/Applicant. Also filed is a reply on points of law dated 23rd day of March, 2021.

In the said reply on points of law, Counsel submitted that the 5th Defendant/applicant has not taken any step in the proceedings and urged the Court to so hold. Reference was made to the case of **FASZ INTERNATIONAL LIMITED & ANOR V HNB TRUSTEES LIMITED (2010) ALL FWLR (PT. 659) P. 672, paras D-H.**

In his further reply on points of law, Counsel submitted that by the said power purchase Agreement, the parties are bound by their agreement to resolve their dispute exclusively by arbitration and no other way, Court action inclusive and urged the court to so hold and decline jurisdiction to entertain this suit. Reliance was placed on the case of **TEXACO OVERSEAS (NIGERIA) PETROLEUM COMPANY UNLIMITED V RANGK LIMITED (2009)ALL FWLR (PT. 494) P. 1520 at 1532, para A.**

Finally, Counsel urged the Court to grant the 5th Defendant/Applicant's prayers as contained in the Preliminary Objection.

Now, I have gone through the Notice of Preliminary Objection, the reliefs sought, the grounds upon which the Preliminary Objection is based, the supporting affidavit, the annexure and the Written Address in support. I have equally perused the Counter Affidavit in opposition to the Preliminary Objection, the Exhibit attached and the Written Address therewith. Also I have studied the Reply Affidavit and the Reply on points of law filed by the 5th Defendant/ Applicant in response to the Counter Affidavit. Therefore it is my humble view that the issue for determination is whether this Preliminary Objection is sustainable in law.

It is instructive to note that the gamut of the Preliminary Objection is that the Agreement of the parties i.e. Power Purchase Agreement contains an Arbitration Clause and the recourse to Court is not contemplated by the Agreement of the parties.

Having pointing out this, the law is settled that a Court of law is duty bound to act on agreement of parties to resort to arbitration. This position of law was reinstated in the case of **THE OWNERS OF THE M.V. LUPEX V**

NIGERIAN OVERSEAS CHATERING AND SHIPPING LTD (2003) LPELR-3195 (SC), P. 18, Para E – F where it was held that:

“Where parties have chosen to determine for themselves that they would refer any of their disputes to arbitration instead of resorting to regular Courts, a prima facie duty is cast upon the Courts to act upon their agreement.”

See also the cases of **OYO STATE GOVT & ORS V MOJOKE VENTURES (NIG) LTD (2015) LPELR-4173 (CA) 26; KURUBO V ZACHMOTISON (NIG) LTD (1992) 5 NWLR (Pt. 239) 102.**

In the instant case therefore, going by Clause 23.3.1 of the P.P.A. which for clarity and ease of reference I shall reproduce hereunder thus: -

ALL DISPUTES SHALL BE FINALLY SETTLED BY BINDING ARBITRATION UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE (THE “ICC RULES”) THEN IN EFFECT.”

This Clause means that parties have agreed to submit any dispute to arbitration. However, the Claimants/Respondents deposed in their Counter Affidavit particularly at paragraph 12(a) thus: -

“That the Defendant has taken a step in the proceedings by filing and delivering its Notice of Intention to Defend the matter under the Undefended List.”

Moreso, Claimants/Respondents submitted in their Written Address at paragraph 2.4 that the 5th Defendant/Applicant has taken steps in the proceedings and therefore cannot invoke the Arbitral proceedings under the Power Purchase Agreement.

Conversely, the 5th Defendant/Applicant in its Reply Affidavit at paragraphs 11,12, and 13 stated inter alia that the 5th Defendant/Applicant has not taking any step and is entitled to invoke the Arbitration Clause under the Power Purchase Agreement entered by the parties.

Now, at this juncture. It should be noted that the law is settled that a party to an agreement that contains an Arbitration Clause to successful invoke the Arbitration Clause must have taken no step in the Court proceedings. In this respect, I refer to Section 5(1) of the Arbitration and Conciliation Act, LFN 2004 which provides thus:

“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 pleading or taking any other steps in the proceedings, apply to the Court to stay the proceedings.”

See also the case of ***ENYELIKE V OGOLOMA (2006) 14 NWLR (Pt. 1107) 247 at 258 -259, Para G – A per Saulawa JCA*** where it was held thus:

“What’s more, it is also a trite law that where a party jumps the gun (of arbitration, as it were) and files an action in Court of law, the Defendant has the right to stay the proceedings. The Court shall stay proceedings if its satisfied that there is no cogent reason why the matter should not be referred to arbitration in accordance with the provisions of Section 4(1) and 5(1) of Arbitration and Conciliation Act (supra). See also Kuburo V. Zach-Motison (Nig) Ltd (supra) at 117, paragraphs G – H per Niki Tobi, JCA (as he then was).

Thus, where a party as in the instant case; takes any step beyond the formal appearance, he would be deemed to have waived his right to go to arbitration. He has by implication also waived his right to challenge the competence or jurisdiction of the Court...”

From the above position, it is clear that the right to invoke the Arbitration Clause must be asserted before a party takes any other step in the proceedings.

The question that comes to mind therefore is, what amounts to taking a step within the contemplation of Section 5(1) of the Arbitration and Conciliation Act?

Now, the Supreme Court held in the case of ***OBEMBE V WEMABOND ESTATE LTD (1977) VOL. 11 NSCC at page 264*** thus:

“In order to get a stay a party to a submission must have taken no step in the proceedings. A party who makes any application whatsoever to the Court even though it be merely an application for extension of time, takes a step in the proceedings...”

See also that case of ***KANO STATE URBAN DEV. BOARD V FAUZ CONSTRUCTION CO. LTD (1990) 4 NWLR (Pt. 142) page 1 at page 27, Para D*** where it was held thus: -

“A party who makes any application whatsoever to the Court, even though it be merely an application for time, takes a step in the proceedings...”

In the instant case therefore, from the record of the Court, it is clear and unambiguous that the 5th Defendant/Applicant has filed a Motion for extension of time dated 8th day of March 2021 and the said Motion was moved and granted on 25th day of March, 2021. In this respect, relying on the authority of ***OBEMBE V WEMABOND ESTATE LTD (supra)***, it is my considered opinion that the 5th Defendant/Applicant has indeed taken a step within the contemplation of the law. I so hold.

Furthermore, it is settled law that an application for stay of proceeding pending arbitration is not granted as a matter of course this is because each case is to be treated on its peculiar facts. In other words, the law is that the grant of such kind of application when made is not automatic. See the case of ***OGUN STATE HOUSING CORPORATION (O.S.H.C) V OGUNSOLA (2000) 14 NWLR (Pt. 687) 431.***

In the same vein, Section 5(2) of the Arbitration and Conciliation Act, Cap A18 LFN, 2004 provides thus:

***“Section 5(2) A Court to which an application is made under subsection (1) of this Section may, if it is satisfied-
(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, and (b) 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”***

Also in the case of ***MV PANORMOS BAY V OLAM (NIG) PLC (2004)5 NWLR (Pt. 865) page 1 at page 15, paras F – H, per Galadima J.C.A. (as he then was)*** held thus:

“By virtue of Section 5 of the Arbitration and Conciliation Act a party applying for stay of proceedings of an action pending reference to arbitration in order to succeed must show in his affidavit evidence in support of the application by means of documentary evidence the steps he took or intends to take for the proper conduct of the arbitration. It is not enough for him to merely depose that he is ready and willing to do all things necessary for causing the said matter to be decided by arbitration and for proper conduct of such arbitration.

In the instant case a careful perusal of both the supporting affidavit to the Preliminary Objection and the Reply Affidavit will show that the 5th Defendant/Applicant did not depose in any of the paragraphs the steps it took or intends to take for the proper conduct of the arbitration. Let alone annexing any documentary evidence to that effect.

In that respect, the 5th Defendant/Applicant has not comply with the requirement of Section 5(2)(b) of the Arbitration and Conciliation Act (supra) to warrant the Court to grant its prayers as contained in the Preliminary Objection. I so hold.

In view of the foregoing, it is my considered opinion that the 5th Defendant/Applicant has not made out a case for the Preliminary Objection to be sustained. Consequently and without much ado, I hereby resolve the issue for determination in favour of the Claimants/Respondents against the 5th Defendant/Applicant and hold very strongly that this Preliminary Objection is not sustainable.

To this end, and for the reasons given above, this Preliminary Objection lacks in merit and is hereby dismissed in its entirety.

Signed:

***Hon. Justice Samirah Umar Bature
15/7/2021***