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/1731/2021

DATE: : THURSDAY 2ND MAY, 2024

BETWEEN

BUILDOPTIONS LIMITED ..... APPLICANT

AND

PROF. ADAM ABBA AJI ..... RESPONDENTS

RULING

Buildoption Limited and Prof, Adam Abba Aji were the award Debtor and Creditor pursuant to an Arbitral Award Coram Mrs. J.O Adesina, SAN, FCARB published on the 7th December, 2020 not satisfied with the outcome, award Debtor (Buildoption Ltd.) filed the originations Motion No: **M/1731/2021**.

The following reliefs were sought, in the said motion paper, as follows:-

1. An Order of this Honourable Court setting aside the Arbitral Award published on 7th December, 2020 by the Sole Arbitrator, Mrs. J.O Adesina, SAN, FCARB.

2. An Order of this Honorable Court directing the Case file to be returned to the Chief Judge of the FCT, High Court for reassignment to another Sole Arbitrator, for the fair hearing and determination of the matter.

3. And for such other or further Order(s) as this Honourable Court may deem fit to make in the circumstances of this suit.

The grounds upon which this application is brought are as follows:-

1. The Arbitral Award was published on 7th December, 2020 by the sole Arbitrator, Mrs. J.O. Adesina, SAN, FCARB.

2. The Arbitrator refused to rely on the expressed admission of the Respondent both in his claim and his evidence that the Applicant has the financial capacity to develop the Respondent's land.

3. The Arbitrator refused to apply the literal interpretation of the terms of the Agreement duly signed by the parties.

4. That the Award published did not fall within the terms of the submission made by the parties to the Arbitration.

5. The Award contains some decisions beyond the scope of the submission made to the Arbitrator by the parties.

6. That the Arbitrator unilaterally canvassed arguments for the Respondent and denied the Applicant fair hearing.

7. The Arbitrator misconducted herself in granting the award.

In support of the motion are 36 paragraphs affidavit deposed to by one Grace Agwu, a Litigation Secretary in the law firm of counsel to the Applicant.

It is the deposition of the Applicant that the Applicant and Respondent entered into a contract for the Development of Plot 2867, Asokoro District, Abuja. A copy of the said Agreement, Memorandum of Understanding is hereby attached as Exhibit "A".

That dispute arose in the performance of the Agreement and the parties resorted to arbitration presided over by a Sole Arbitrator, Mrs. JO Adesina, SAN, FCArb.

That the Parties also agreed that the proceedings should be conducted on pleadings to be filed by parties and dates were apportioned to each party to file his/its pleadings.

That the Respondent filed his claim on 26th November, 2020. A Copy is attached as Exhibit "B".

That the Applicant filed its Defense on 12th December, 2020. A copy is attached as Exhibit "C".

That the Respondent did not file any reply to the Applicant's Defense.

That both parties called witnesses and tendered documents in support of their respective positions.

That at the close of hearing, the Applicant filed its Final Written Address on 16th October, 2020. A Copy is attached as Exhibit "D".

That the Respondent filed his Final Written Address on 28th October, 2020. A copy is attached as Exhibit "E".

That the Applicant filed a Reply on Points of Law on 2nd November, 2020. A copy is attached as Exhibit "F".

That the Sole Arbitrator published the Award on 7th December, 2020. A copy is attached as Exhibit "G".

That the Sole Arbitrator erroneously found in the Award that the delay by the Applicant in completing the project within the sixteen (16) months stipulated and contemplated time as agreed under the Memorandum of Understanding is due to lack of funds.

That the Sole Arbitrator erroneously found in the Award that the Respondent/Applicant is bound by the provision of Clause 4 (d) of Exhibit 2 which provides that were the delay is due to lack of funds, the developer will pay to the landowner 2% of the total value of the Landowner's units of houses for every month the developer remains in default.

That the Respondent in his relief 1 before the Arbitrator only sought for an order of specific performance for the completion of his units in line with the Agreement between the Parties.

That throughout the proceedings, the Arbitrator did not visit the locus in quo to ascertain the stage of work at the site.

That the Arbitrator did not give the parties' opportunity to address her on the length of time required to complete the construction of the site, yet she made an award suo moto albeit erroneously that the Applicant is hereby ordered to ensure full completion of the entire units belonging to the Respondent and handing over of same to the Respondent within three months which will start a week from the date the award is published and where it fails to complete the Respondent's units within the three (3) months herein ordered, it shall be liable to pay to the Claimant the sum of N10,000,000.00 (Ten Million Naira only) for every month it is in default.

That the Award of the sum of N10,000,000.00 (Ten Million Naira only) for every month in the event the Applicant defaults in delivering the units within three months is outrageous, unreasonable and not supported by the pleadings or the Agreement of the Parties.

That the Arbitrator did not give the parties opportunity to address her on the issue of 10% post Judgment interest.

That the arbitrator decided solely on issues that were never submitted to her and neither of the Parties made presentation on the issues during the arbitral proceedings

That the Arbitrator refused to rely on the expressed admission of the Respondent both in his claim and his evidence that the Applicant has the financial capacity to develop the Respondent's land.

That the Tribunal refused to recognize that the Applicant and the Respondent agreed in the Memorandum of Understanding that the Respondent shall execute a Power of Attorney in favour of the Defendant and shall authorize same to be registered with Abuja Geographical Information Systems (AGIS) and any other relevant authority for the purpose of giving the Power of Attorney full effect including signing an authority letter to register it along with a means of identification of the Claimant.

That the Respondent is yet to fulfill the said obligation till date.

That the Arbitrator refused to apply the literal interpretation of the terms of the Agreement duly signed by the parties.

That the Award did not fall within the terms of the submission made by the parties to the Arbitration.

That the Arbitrator denied the Applicant fair hearing as the Award published did not fall within the terms of the submission made by the parties to the Arbitration.

That the Arbitrator misconducted herself in granting the award.

In line with law and procedure, a written address was filed wherein sole issue was formulated for determination to wit:-

Whether the conduct of the Arbitrator in acting beyond her powers and outside the scope of the submission before the Arbitration does not amount to misconduct in the arbitral proceedings and the Award published?

It is the submission of learned counsel that, the above question is in the affirmative. Section 30 Arbitration and Conciliation Act Cap. A18 Vol. 1 LFN 2004 provides that an arbitral award can be set aside if the arbitrator misconducted himself. However, what constitutes misconduct is not defined in the Act. Over time courts have attempted to explain what misconduct is. In the case of ***ARBICO NIGERIA LTD. VS. NIGERIA MACHINE TOOLS LTD. (2002) LPELR-10982(CA)*** the Court of Appeal explained

what misconduct is by citing the Supreme Court case of ***TAYLOR WOODROW (NIG.) LTD. VS. SUDDEUTSEHE ETNA - WERK GMBH (1993) 4 NWLR (Pt. 286) 127.***

Learned counsel argued that an arbitrator must act within the scope of submission made to him. Section 29 (2) Arbitration and Conciliation Act Cap. A18 Vol. 1 LFN 2004 empowers the court to set aside an award if it is shown that the award contains some decision on matters which are beyond the scope of the Arbitration. ***BAKER MARINE NIG LTD VS. CHEVRON NIG. LTD. (2006) LPELR-715 (SC) was cited.***

Learned counsel further submits that a Court or Tribunal will not order specific performance and award damages in respect of the same breach as this would amount to double compensation. The Court is urge to so hold and set aside this act of the Arbitrator which is tantamount to Father Christmas. The case of ***UNIVERSAL INSURANCE CO. LTD VS. T.A. HAMMOND NIG. LTD. (1998) NWLR (Pt. 565) Page 340 at 366 Paragraphs F – G was cited.***

Learned Counsel submits further that, the refusal of the Arbitrator to invite the Applicant to address her on issues of the duration of the time of completion, **N10,000,000.00 (Ten Million Naira)**

as cost of default of enforcement and 10% post judgment interest amounts to denying the Applicant's right to fair hearing. It is trite law that the denial of fair hearing to a party in arbitration amounts to a misconduct on the part of the Arbitrator and an arbitral award founded on misconduct should be set aside in line with Section 30 (1) Arbitration and Conciliation Act Cap. A18 Vol. 1 LFN 2004. The Court is urge to hold that the Arbitrator has misconducted herself and as such set aside the Arbitral Award in line with Section 48 (a)(v)(vi) Arbitration and Conciliation Act Cap. A18 Vol. 1 LFN 2004.

Learned counsel submits that, the Arbitrator was bias and unfair to the Applicant in the award when it went beyond the scope of submission made to her and embarked on a voyage of discovery to make arguments for the Respondent just in an effort to ensure it arrived at the conclusion that the delay in completing the units of houses of the Respondent by the Applicant is due to lack of fund. It is the submission of the learned Counsel that this conclusion is not supported by the evidence before the Arbitration. As if that is not enough, the Arbitrator ordered that the default fee should apply to the Landowner's units of houses, and also held that the Units the Landowner is entitled to is 6 Units.

Learned counsel therefore urge the court to set aside the award and grant the instant application in the interest of justice.

On the part of the Respondent, 26 paragraphs counter - affidavit in opposition to the Applicant's Motion on Notice, duly deposed to by one Ibrahim Lange, a litigation secretary, in the law firm of counsel representing the Respondent in this case.

It is the deposition of the Respondent that, contrary to the deposition in paragraph 19 of the Applicant's affidavit in support, that he knows that there is nothing erroneous about the finding of the Sole Arbitrator as same was backed up by credible evidence.

That in response to paragraph 19 of the affidavit in support, the mail dated 26th April, 2017 sent by the Applicant to the Respondent clearly stated the fact that the Applicant is battling with financial challenges which could not be overlooked.

That the printout of the mail dated 26th April, 2017 as admitted during the arbitral proceedings is hereby marked as **Exhibit "R1".**

That paragraph 20 of affidavit in support is hereby denied and in response to it, he knows that the Sole Arbitrator was right when

he held that the Applicant is bound by the 2% of the total value of the Landowner's units of houses for every month the developer remains in default as credible evidence and importantly Exhibit "R" led credence to it.

That Paragraph 21 of affidavit in support is false and is hereby denied.

That in response to deposition in paragraph 21 of the Applicant's affidavit the Arbitrator did not grant any relief in excess of the scope of submission at the Arbitration.

That these paragraphs 22 and 23 of the affidavit in support are false and hereby denied.

That in response to those paragraphs 22 and 23 mentioned above, the completion period was placed before the Court vide the mail dated 26th April, 2017 (**Exhibit "R1"**), wherein the Applicant pleaded with the Respondent for an extension of 5 Months to complete and deliver the projects.

That Paragraph 24 is denied and in response to same, the award of N10.000.000.00 (Ten Million Naira) was an award made to give effect to the order of specific performance.

That as a fact the award is reasonable and modest after considering all facts, evidence and circumstances of the case at the Arbitration.

That paragraphs 25 and 26 of the affidavit are denied and in response, the 10% Post judgment interest when granted or otherwise is at the discretion of the Court and as regulated by statute or rule of court.

That paragraph 27 is denied and in response, the Sole Arbitrator was fair and unbiased in her dealing with all parties involved in the Arbitral Tribunal.

That paragraph 28 is denied, the Arbitrator decided solely on issues submitted to her and within the scope of the arbitration agreement.

That paragraph 29 is denied, there was no express or implied admission by the Respondent as to the financial capability of the Applicant during the performance of the Contract.

That the facts contained in these paragraphs 30 and 31 of the affidavits in support are irrelevant to this proceedings as the facts deposed therein were not submitted at the Arbitration Tribunal.

That facts contained in Paragraph 32 of the affidavit in support are false, literal interpretation was read into the terms of agreement executed by the parties.

That Paragraph 33 is denied and in response, the award granted by the Tribunal fall within the terms of submission made by parties to the Arbitration.

That Paragraphs 34 and 35 are false and hereby denied, in response, the Arbitrator did justice and there was no time right of fair hearing was denied, nor did she misconduct herself during the proceeding.

That the application of the Applicant is not backed by facts upon which this Court can arrive at a decision.

That the application is not supported by necessary documents.

That this application is an abuse of court process.

That this application lacks merit.

That this Court lacks the jurisdiction to hear and determine this application.

Written Address was filed, wherein sole issue was formulated for determination to wit;

Considering the fact and circumstance of the Applicant's Application, whether the Applicant has shown any reasonable ground for this Court to set aside the Arbitration Award as published?

It is the argument of the learned counsel that the poser contained in the sole issue for determination is answered in the negative. The law is that if parties choose to have their disputes settled by arbitration, then subject to certain limited exceptions, the attitude of the Court has been that the parties should take arbitration for better or worse. He cited ***GOUNTER HENCK VS. ANDRE & CIE S.A. (1970)1 LLOYD'S REPPORT 26 at Page 238.***

Learned counsel argued further in response to paragraph 3.11 of the Applicant's written address where they canvassed that the arbitrator did not visit to locus inquo, learned counsel argued that visit to locus incus is in most cases relevant. It is embarked upon where the identity of the land is not clear, such as where such visit will clear a doubt as to the accuracy of evidence of the identity of land which is in conflict with another piece of evidence which is equally plausible. The visit is thus undertaken to clear any doubt as to the accuracy of one piece of evidence in conflict

with another. The case of ***JACIB ADAMU VS. GEORGE IGWEST (2014) LPELR-24000 (CA)*** was cited.

Learned counsel further submits that locus inquo will only be necessary where there is a special reason to do so.

Learned counsel argues that a statement, oral or written made by a party to civil proceedings and which statement is adverse to his/her case is admissible in the proceedings as evidence against him of the truth of the facts asserted in the statement. He cited ***SEISMOGRAPH SERVICE (NIGERIA) LTD. VS. CHIEF KEKE OGBENEKWE EYUAFE (1976) 9-10 S.C. 15 at 146.***

Learned counsel further argues that 3 months completion and handover period is reasonable as granted by the Arbitrator. The Respondent herself through the Exhibit under reference made claim for 5 months and the arbitration clause of the contract was only invoked almost 2 years after the 5 months had lapsed, one would not have expected the completion and handover to be 5 months again, 2 years after the Respondent had given such promise. Learned counsel urge the court to hold that the issue around completion and handover period was not raised suo motu by the Sole Arbitrator and there was no denial of fair hearing as regards the reliefs granted in the final award.

It is further the argument of the learned counsel that the order of N10,000,000.00 (Ten Million Naira Only) granted as default fee and in addition to the order of specific performance contingent upon the failure of the Applicant to comply with the order of specific performance is in order and provided in law. The case of ***UNIVERSAL VULCANIZING (NIG) LTD VS. IJESHA UNITED TRADING & TRANSPORT COMPANY LTD. & ORS (1992) 9 NWLR (Pt. 266) Page 388 at 411 Paragraph H was cited.***

Learned counsel submits that it behooves on the Applicant to show that the respondent has been fully compensated by the grant of specific performance for the irreparable loss suffered by the respondent for the fundamental breach of contract committed by the Applicant. It is evident from the attitude of the Applicant that all what they want is for the tribunal and the respondent to labour in vain without allowing the respondent to enjoy the fruit of his labour in good time.

On the issue of post-judgment interest, learned counsel submits that the award of post-judgment interest is substantially statutory and mostly derived its source in the Rules of court and in the instant case the applicable Rule of court is the High Court of the federal capital Territory, (Civil Procedure) Rules 2018. The award

of pos-judgment interest lies entirely at the discretion of the trial court upon delivery of Judgment and maximum percentage of interest that could be awarded on the Judgment debt is as prescribed in the Rules of the court concerned. He cited ***HIMMA MERCHANTS LTD VS. ALIYU (1994) 5 NWLR (Pt. 347), 667.***

Learned counsel submits further that neither did the Arbitrator misconducted herself nor was she bias during the Arbitral proceeding. The argument that the default fee should not apply to the additional unit purchase by the respondent is misplaced.

Learned counsel submits that the contract executed between the parties in respect of the additional unit bought by the respondent had its life drawn from MOU, it is only logical that all default fees and consequential reliefs as it applies to the original 5 units applies to the additional unit bought by the Respondent as offered by the Applicant.

It is further the submission of the learned counsel that failure of the Applicant to furnish the vital and necessary documents in support of her application, vitiates this proceedings. He cited ***NWOSU VS. NWOSU (1992)2 NWLR (Pt.428) 64.***

Learned counsel submits that the nature of Arbitration Award is that parties choose their own Judge and a party is not entitled to object to the final decision reached simply because the award is not in his favor. He cited ***TAYLOUR WOODROW VS. GMBH (1991) 2 NWLR (Pt. 175) 602 at 611.***

The court is urge to refuse the application of the Applicant for lacking in merit.

COURT:

The grounds upon which an Arbitral Award could be set aside have been formally established through a long line of decided authorities, as follows:-

1. The Arbitrator acted beyond the scope of the matter referred to him or them by the parties.

2. The Arbitrator misconducted himself/themselves or that

3. The Arbitral proceedings or award was improperly procured.

Applicant has to prove above facts.. The following cases and statute are apt on above position:-

ADAMEN PUBLISHERS (NIG.) LTD. VS. ABHULIMEN (2015) LPELR – 25777 (CA);

Section 29(2) and 30 of the Arbitration and Conciliation Act Cap. A 18 LFN 2004;

SAVOLA LTD. VS. SONUBI (2000) LPELR – 7 (SC).

I have read through the affidavits of the Applicant and Respondent, on the one hand, and their respective legal arguments contained in the written address, on the other hand.

Award Debtor/Applicant challenges the said award on the grounds as reproduced in the earlier part of this ruling, needless therefore, to produce same again.

The issues predominately dovetail to the issue of fair hearing and that the Award Published did not fall within the term of the submission made by parties and that the award also contain deeming beyond the scope of the submission made by parties.

It is instructive to note, that the bone of contention between the award debtor and Award Creditor has to do with that contract for the Development of Plot 2867, Asokoro District, Abuja vide memorandum of undertaking annexed as exhibit "A".

I have read the statement of claim and statement of defence filed by the respective parties as shown in Exhibits "B" and "C".

I have similarly read the final Award Published as captured in Exhibit "G".

The issues submitted before the Arbitral Tribunal has to do with Exhibit "A" i.e the memorandum of understanding for the contraction of the agreed houses in Asokoro, Abuja.

Parties are generally bound by agreement freely entered into, Not even the court can add or reduce such terms.

Above underscores the principle of sanctity of contract. See ***MAKWE VS. NWUKOR & ANOR (2001) LPELR – 1830 (SC).***

It is similarly clear from Exhibits "B" and "C" i.e the pleading filed by parties that the issues therein raised pertains to the issue of Exhibit "A", i.e Memorandum of Understanding on the building of those houses in Asokoro Abuja.

The decision reached by the sole Arbitrator, were borne out of the fact that the Award Debtor breached Exhibit "A" i.e the contract between the Award Creditor and Award Debtor who both agreed to submit themselves to Arbitration in the event of such breach.

The best form of evidence is documentary evidence.

See ***AKINBISADE VS. STATE (2006) LPELR – 342 (SC).***

The argument by the Award Debtor/Applicant that the Arbitrator misconducted himself in granting the Award; the award contains some decision beyond their submission; that the award did not fall with the submission made, are not of any moment.

The Award Debtor/Applicant is behaving like that fisherman who is making every effort to avoid being drowned in a crocodile infested river.

Similarly, the argument by learned counsel for the Award Debtor/Applicant on the issue of Post Judgment Interest has no stand at all in law in view of the fact that a Plaintiff or Applicant in this case, need not show any basis for the claim or lead any evidence as the judge is empowered under the Rules of Court to award Post Judgment Interest. ***SEE ADEBIYI & ORS. VS. NATIONAL INSTITUTE OF PUBLIC INFORMATION & ORS. (2013) LPELR – 22628 (CA).***

On the other hand, evidence has to be established on the award of pre-judgment interest.

See ***NG METRO RETAIL (NIG.) LTD. VS. TRADEX S.R.L & ANOR (2017) LPELR – 42329 (CA).***

It is clear from the available facts that the Award Debtor/Applicant has failed to establish either of the grounds aforementioned for the instant application to be granted.

I shall therefore refuse on the whole, to grant the application, same being not just being unmeritoriously argued, but a clear ploy to dribble and deprive the Award Creditor from enjoying the fruit of its labour.

Both facts and law are clearly against the Award Debtor/Applicant.

There is no amount of yelling that can come to his aid.

An Order shall therefore be made, dismissing the originating motion.

Accordingly, **Motion No. M/1731/2021 is hereby dismissed**.

Justice Y. Halilu
Hon. Judge
2nd May, 2024