

IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)

HOLDEN AT MAITAMA – ABUJA.

BEFORE THEIR LORDSHIP: HON. JUSTICE Y. HALILU – PRESIDING JUDGE,

HON. JUSTICE ELEOJO ENENCHE – HON. JUDGE

THIS 28TH DAY OF FEBRUARY, 2024.

APPEAL NO. CVA/23/2022

SUIT NO. FCT/CV/DUT/318/2021

BETWEEN:

EITECH ENERGY LIMITED & 1 OR. ----- APPELLANTS

AND

MR. CHARLES C. A. UTOM ----- RESPONDENT

J U D G M E N T

This is an appeal against the judgment of His Worship Hon. Kejeh Nnaka Lesley, sitting at the Senior District Court Kubwa, delivered on the 31st January 2023, wherein the court held that it had no jurisdiction to entertain the suit on the ground that the Appellants herein lacks the capacity to institute the action.

The Appellants, who were Plaintiffs at the trial court, had, by a Plaint, sued the Respondent as Defendant, claiming the following:

1. Special damages in the sum of ₦1,059,000.00.
2. 10% interest on the ₦1,059,000.00 from 1/11/2020 until judgment is delivered in this case and 10% interest from the date of the judgment until the debt is liquidated.
3. General damages in the sum of ₦100,000.00.
4. Exemplary damages in the sum of ₦100,000.00.
5. The sum of ₦200,000.00 being cost of filing and prosecuting the suit.

The Appellants' case, as can be gathered in the statement of claim, is that the Defendant entered into a contract for the purchase of a used 3.5 KVA Inverter, 8 CCTV Cameras and 13 other items from the Appellants. The Appellants were further to remove the Defendant's 3.5 KVA Inverter from his house at Karu, Abuja and install it with the CCTV Cameras at the Defendant's home at Afikpo in Ebonyi State. The total contract sum amounted to ₦1,739,000.00. The Respondent made a part payment of N800,000.00, promising to pay the balance after the installation at his country home at Afikpo in Ebonyi State. However, after the installation, the Defendant refused to pay the outstanding.

The Respondent filed a Statement of Defence and counterclaim on his own part. In his Statement of Defence, Defendant maintained that the CCTV Cameras were not working well and that the inverter was shutting down every two hours. He claimed that the 2nd Plaintiff breached the contract and counterclaimed for the part payment already made.

The Appellants called only one witness, the 2nd Appellant, while the Respondent called four witnesses. The Respondent testified for himself and subpoenaed three other witnesses who testified for him. At the end of the trial, parties filed their final written addresses. At the end of the trial, the learned trial Senior Magistrate held that he had no jurisdiction to entertain the suit on the ground that the 1st and 2nd Appellants lacked the competence to institute the suit and accordingly struck out same.

Dissatisfied with the judgment, the Appellants, by a Notice of Appeal containing a single ground of appeal, appealed the judgment.

Learned Appellant's counsel filed an appellant's brief of argument dated 26/7/2023 and on 1/8/2023 wherein counsel distilled a singular issue for determination, thus:

“Whether having regard to the fact that the 2nd Appellant is a human being and the Respondent admitted contracting with him, the learned trial Senior Magistrate was right to strike out the Appellants’ suit for lack of jurisdiction on the ground that the Appellants did not establish the 1st Appellant’s juristic personality and so the Appellant lacks the competence to institute the suit.”

On this sole issue, it is the submission that in one breath, the trial court held that the Plaintiffs lacked the competence to institute the suit; in another breath, he held that the Defendant had not proved his case against the Plaintiffs. In

holding that the Plaintiffs lacked the competence to institute the suit, the learned trial Senior Magistrate hinged his reasoning on the ground that the capacity of the 1st Plaintiff to institute the action was not established as he held in Page 234 of the Record. The trial court reasoned that the failure or refusal of the Plaintiffs to produce the Certificate of Incorporation of the 1st Plaintiff is detrimental to the case of the Plaintiffs and that the 2nd Plaintiff having introduced himself as the Managing Director and alter ego of the 1st Plaintiff, derived his locus in the instant suit from the 1st Plaintiff and therefore cannot be said to be properly before the court as you cannot put something on nothing. In the same judgment therefore, the trial court held in one breath that there were no Respondents before the court and in another breath he held that there were Plaintiffs before the court.

It is submitted that the 2nd Plaintiff/Appellant is a natural person and the alter ego of the 1st Plaintiff/Appellant. On the definition of alter ego reference was made to the case of **AMINU OYEBANJI v THE STATE (2015) 14 NWLR (Pt 1479) 271.**

It is further submitted that the learned trial Senior Magistrate was wrong to have held that the existence or non-existence of the 1st Appellant determined the legal capacity of the 2nd Appellant. Even if it is agreed that the 1st Appellant is a non-juristic person, then by the definition of alter ego, it can, therefore, be concluded that the 2nd Appellant used the name of the 1st Appellant to conduct

his personal business. The Court was referred to the pleadings of the Respondent.

It is also the contention that the learned trial magistrate did not thoroughly consider paragraph 1 of the Respondent's Statement of Defence and properly analysed it before concluding that the Respondent challenged the 1st Appellant's juristic personality. It is the submission of learned counsel for the Appellants that the legal personality of the 1st Appellant was never an issue before the trial court and that paragraph 1 of the Respondent's Statement of Defence was a general traverse of facts. See **TAIWO v ADEGBERO (2011) 11 NWLR (Pt 1269) 562.**

It is the submission that assuming that it was established that the 1st Appellant is not a juristic person, the option open to the trial court was to strike out its name from the suit and proceed with the 2nd Appellant, who is a natural person. See the case of **FAM-LAB NIGERIA LTD & ANOR v JAHNARCO NIG. LTD & ANOR (2018) LPELR – 44730 (CA).** We were urged to resolve the issue in favour of the Appellants by setting aside the trial court's judgment.

In response to this appeal, the Respondent's counsel filed the Respondent's Brief of Argument dated 31/10/2023 but filed on 1/11/2023 wherein counsel distilled an issue for determination to wit:

“Whether the court was right to have in dismissing the suit of the Appellants held as follows:

“However, the failure or refusal of the Plaintiffs to produce the Certificate of Incorporation of the 1st Plaintiff is detrimental to the case of the Plaintiffs and the 2nd Plaintiff having introduced himself as the Managing Director and the alter ego of the 1st Plaintiff means that he derived his locus in the instant suit from the 1st Plaintiff and cannot be said to be properly before this court as you cannot put something on nothing...”

On this sole issue, it is the submission that the holding of the trial court that the Plaintiffs lack the competence to institute the suit is the correct position of the law when the pleadings of the parties are given a dispassionate view.

It is the contention of the Respondent that it was wrong for Appellants to argue that the pleadings of the Respondent did not challenge the juristic personality of the 1st Appellant and that there was therefore no onus on the Appellants to establish the juristic personality of the 1st Appellant. It is submitted that that paragraph 1 of the Statement of Defence specifically denied that 1st Plaintiff is a Limited Liability Company. On this note, it was argued that that a Plaintiff whose legal personality is challenged, as was done in the present case at the lower court, has the onus to establish the status of the name by which he sues. See **ENEYO v NGERE (2022) 10 NWLR (Pt 1838) 263 at 300.**

In the instant appeal, the Respondent argued that he joined issues with the 1st Appellant on its registration status; despite this, they failed to produce the Certificate of Incorporation in proof. On this score counsel contends that the

lower court was right to hold that the 1st Appellant lacked the competence to maintain the suit. See **DAIRO v R.T.A.O. LAGOS (2017) 6 SC (Pt 11) 53.**

It is the contention of the Respondent that on the averment that the 2nd Appellant is the Managing Director and alter ego of the 1st Appellant, the law is trite that a Director of a company, in the eyes of the law, is an agent of the company, and the proper person that can be sued is the company and not the agent. See the case of **VASSILER v PASS (2001) 12 NWLR (Pt 681) 34.**

Counsel submitted that the trial court was right to hold that the Appellants lacked the competence to institute the suit and struck out same. We were urged to sustain the judgment of the trial court and dismiss the appeal with cost.

We have carefully considered the processes filed and the submission of learned counsel on both sides. We are of the firm view that the issue that is nominated for determination is whether the learned trial Senior Magistrate was right to strike out the Appellants' suit for lack of jurisdiction on the ground that the Appellants did not establish the 1st Appellants juristic personality and so the Appellants lack the competence to institute the suit.

It is not in doubt that the issue of the legal personality of the 1st Appellant was properly joined by pleadings at the trial court as per Paragraph 1 of the Statement of Defence.

It is settled law that a Plaintiff whose legal personality is challenged has the onus to establish the status of the name by which he sues. It is also the law that

the juristic personality of a corporate body is evidenced only by tendering the Certificate of Incorporation of the company. This, the 1st Appellant failed to do at the trial court. Accordingly, we hold that the trial court was correct to hold that the 1st Appellant lacks the competence to maintain the suit in its name.

Now, regarding the 2nd Appellant, it was the contention of the Appellant's counsel that assuming that the legal capacity of the 1st Appellant was not proved, the 2nd Appellant is a natural person who has the legal capacity to sue and be sued and that the Respondent dealt only with the 2nd Appellant and therefore the 2nd Appellant could have sustained the claim in the absence of the 1st Appellant.

In respect of the above position, we must emphasize here that the duty of the court is to do substantial justice to all parties before it in accordance with the law.

It is not in doubt, going by the pleadings, that the 2nd Appellant is a natural person and the Managing Director and alter ego of the 1st Appellant.

In **AMINU OYEBANJI v THE STATE (2015) 14 NWLR (Pt 1479) 271**, the Apex Court defined alter ego as "Second self" and on the operation of the doctrine of "alter ego", it held that under the doctrine of ***"alter ego a court merely disregard the corporate entity and holds individuals responsible for acts knowingly and intentionally done in the name of the corporation. To establish this doctrine, it must be shown that the individual disregarded***

the corporation's entity and made it a mere conduit for the transaction of his own private business. The doctrine simply fastens liability on the individual who uses the corporation merely as an instrumentality in conducting his own personal business. In the instant case, the Appellant was the directing mind and/or arrowhead of Baminco Nigeria Limited when the role carried out by him was properly considered; the 2nd Appellant was the human personality behind the activity of the company”.

In the instant case, it is shown in the pleadings of the Respondent that he contracted with the 1st and 2nd Appellants, and he also counterclaimed against them. It follows, then, that the 2nd Appellant was an instrumental part of the transaction who cannot now be extricated from the transaction on a mere technical legal point.

We are of the considered view that the learned senior magistrate, having held that the 1st Appellant is not a juristic person, the option open to the trial court was to strike out its name from the suit and proceed with the 2nd Appellant, who is a natural person. It would have been different if the Respondent had denied ever dealing with the 2nd Appellant with respect to the contract.

In FAM-LAB NIGERIA LIMITED & ANOR v JAHMARCO NIG. LTD & ANOR (2018) LPELR – 44730 (CA). The court held thus:

“In the face of the first appellant not being a legal persona ficta, cognisable in law, the action, which is parental to the appeal, vis-a-

vis the first appellant is tainted with incompetence. In the interest of clarity and emphasis, the incompetence which infests the suit is personal to the first appellant as constituted on the record. Put starkly, the incompetence does not, in the least, pollute the entire suit in that the second appellant is a human being clothed with legal personality.”

Also in **PHIZER INCORPORATED & ANOR v PROF. IDRIS MOHAMMED (2013) 16 NWLR (Pt 1379) 155**, the Court of Appeal held inter alia:

“A suit in the name of a juristic person and non-juristic person may be had, but it need not fail, for the name of the non-juristic person wrongly joined could be struck out, retaining the juristic person and sustaining the suit. In the instant case, since the 1st Appellant is a juristic person, the joinder of a non-juristic person as a 2nd Defendant could not void the action. All that was needed was for the name of the non-juristic person to be struck out.”

Admirably, the appellants sued jointly and severally. In this wise, the second Appellant will inherit all the benefits and debts/burden that will emanate from the action. It is on record, discernible from the statement of defence, warehoused between pages 41-45 of the record, that the Respondent counter-claimed against the Appellants. It must be stressed that in relation to the Respondent's claim against the appellants and vice versa, both parties stand in pari delicto

given the non-juristic personality of the 1st appellant, see **NWAOLISAH V. NWABUFOH (2011) 14 NWLR (PT. 1268) 600.**

In light of the above, we hold the view that the learned senior magistrate was right to have held that the 1st Appellant was not a juristic person but wrong to have struck out the suit for lack of jurisdiction. The position of the law is that the trial court would strike out the name of the 1st Appellant for not being a juristic person.

In conclusion, this appeal is allowed. The order of this court is as follows:

1. That the judgment of His Worship Nnenna Kajeh delivered on the 31st Day of January 2023 in Suit No. CV/DUT/318/21 between EITECH ENERGY LTD & ALOY ONUOHA v MR. CHARLES C. UTOM is hereby set aside.
2. The entire suit is remitted back to the Chief Magistrate for re-assignment to another District Judge to hear and determine the matter on its merits.

HON. JUSTICE Y. HALILU
PRESIDING JUDGE

HON. JUSTICE E. ENENCHE
HON. JUDGE

JUDGMENT IN THE CROSS-APPEAL

The Respondent, upon service of the Notice of Appeal, cross-appealed on three (3) grounds as contained on the face of the Notice of Cross-Appeal dated and filed 28/8/2023. The reliefs sought from the appeal are as follows:

1. An order of court setting aside the judgment of the trial court not expunging the evidence of the 2nd Appellant for not being signed and sworn before a Commissioner of Oath and therefore dismissing the case of the Appellant.
2. An Order of Court setting aside the judgment of the trial court that the Respondent/Cross Appellant did not prove a breach of contract against the Appellant and uphold the counterclaim of the Appellant.
3. An Order of the court entering the appropriate judgment in favour of the Cross Appellant, which the lower court did not do.

We are of the considered view that having set aside the substantive judgment; it will amount to an academic issue and an exercise in futility to delve into the merit or otherwise of the cross-appeal since the judgment wherein the cross-appeal stands has been set aside.

We must also state here that a counterclaim is an independent action that ought to be considered separately by the trial court; its judgment should be distinct from the substantive judgment.

Parties are to abide by the judgment in the substantive appeal.

**HON. JUSTICE Y. HALILU
PRESIDING JUDGE**

**HON. JUSTICE E. ENENCHE
HON. JUDGE**