

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON FRIDAY THE 18TH DAY OF MARCH, 2016
BEFORE THE HONOURABLE JUSTICE

M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/376/15

BETWEEN

MRS. MINNIE AJUWEDE IGBRUDEPLAINTIFF

AND

- 1. ECOBANK LTD**
- 2. ASSET MANAGEMENT
CORPORATION OF NIGERIA**

} **DEFENDANTS/
APPLICANTS**

RULING

This Ruling is in respect of two (2) Preliminary Objections filed by the Defendants herein.

The first is the objection of the 1st Defendant dated 15th September, 2015 and filed on the same date in these terms:-

**“NOTICE OF PRELIMINARY OBJECTION
BROUGHT PURSUANT TO ORDER 16 RULE 2 AND 26
RULES 2 & 3 OF THE FEDERAL HIGH COURT (CIVIL
PROCEDURE) RULES 2009 AND UNDER THE
INHERENT JURISDICTION OF THIS HONOURABLE
COURT**

TAKE NOTICE that this Honourable Court will be moved on theday of .. 2015 at the hour of 9 O'clock in the forenoon or so soon thereafter as Counsel may be heard on behalf of the above named 1st Defendant/Applicant for:

AN ORDER dismissing this suit for being an abuse of process of this Honourable Court.

AND for such further or other orders as this Honourable Court may deem fit to make in the circumstances.

GROUND FOR MAKING THE APPLICATION

- (1) On 13 May 2014, the Plaintiff commenced an action against the Defendants herein vide a Claim at the Investments and Securities Tribunal (IST), Lagos Judicial Division, in suit number *IST/LA/OA/2013* seeking *inter alia* the orders of

the IST invalidating Margin Facility Agreement between the Plaintiff and 1st Defendant herein and damages for alleged acts of negligence and breach of contract in management of the margin facility.

- (2) On 8 December 2014, the IST dismissed the said suit IST/LA/OA/2013 for want of jurisdiction and for being an abuse of Court process having regard to the sister suit pending at the Federal High Court, Lagos in suit number FHC/L/CS/228/2014 in respect of same subject matter and same parties.
- (3) Being dissatisfied with the Ruling of IST, on 9 February 2015, the Plaintiff lodged an Appeal against the decision and filed its Brief of Argument and an application to amend her Notice of Appeal in Appeal number CA/L/61/2015. This Appeal is a continuation of proceedings at IST.
- (4) Whilst the aforementioned proceedings at the Court of Appeal (CA/L/61/2015) is pending between the Plaintiff and the Defendants, on 23 March 2015, the Plaintiff commenced this action

against the Defendants seeking for damages for alleged acts of negligence and breach of contract in management of the margin facility.

- (5) The appeal in CA/L/61/2015 arising from the proceedings at the IST between the parties herein has not been determined prior to the commencement of this suit.
- (6) The facts relied upon to ground this action is the same facts upon which the facts forming the subject matter of the appeal at the Court of Appeal, Lagos Division (CA/L/61/2015) against the Defendants herein is predicated.
- (7) There is a real possibility of two parallel /conflicting decisions being reached in respect of one and the same subject matter from the two actions as against the 1st Defendant/Applicant. FURTHER take notice that the 1st Defendant. /Applicant will at the hearing of this application rely on the processes filed by the parties in this matter.”

The application was supported by an affidavit and a written address. The Plaintiff filed a Counter affidavit and a written address in opposition.

The second is the objection of the 2nd Defendant dated 23rd October, 2015 and filed on 26th October, 2015 in the following terms:-

**“NOTICE OF PRELIMINARY OBJECTION
BROUGHT PURSUANT TO ORDER 26 RULES 1 & 2;
ORDER 13 RULE 20 OF THE FEDERAL HIGH
COURT CIVIL PROCEDURE RULES, 2009; SECTION
6 (6) OF THE CONSTITUTION OF THE FEDERAL
REPUBLIC OF NIGERIA, 1999 (AS AMENDED) AND
UNDER THE INHERENT JURISDICTION OF THIS
HONOURABLE COURT”**

TAKE NOTICE that this Honorable Court shall be moved on theday of..... 2015 or the next/earliest resumed hearing date at the hour of 9 O'clock in the forenoon or so soon thereafter as Counsel may be heard on behalf of the 2nd Defendant/Applicant to raise a preliminary objection to the competence of the entire suit as presently constituted, and pray this Honourable Court in consequence for:

1. AN ORDER striking out the Claimant/Respondent's claim in this suit against the 2nd Defendant/Applicant as it discloses no reasonable cause of action against the 2nd Defendant/Applicant.
2. AN ORDER striking out the Claimant/Respondent's claim in this suit as against the 2nd Defendant/Applicant for want of jurisdiction.
3. AN ORDER striking out the Claimant/Respondent's claim in this suit as against the 2nd Defendant/Applicant for gross abuse of Court Processes.

AND for such further order or other orders as this Honorable Court may deem fit to make in the circumstance on the grounds set out in the schedule below:

GROUND FOR PRELIMINARY OBJECTION:

- (a) The Statement of Claim in so far as it relates to 2nd Defendant/Applicant does not disclose a reasonable cause of action to warrant this

Honourable Court's adjudicatory powers against it.

- (b) That prior to the commencement of this suit, the 2nd Defendant/Applicant has failed, refused and neglected to comply with the provisions of Section 43(2) of the AMCON Act 2010, which mandates that a valid pre-action notice is addressed and served on AMCON before the commencement of any Court proceedings against the Corporation.
- (c) That prior to the commencement of this suit, there is a pending appeal, *CA/L/61/2015*, at the Court of Appeal, Lagos Division, which stems from a Ruling delivered at the Investment and Securities Tribunal, *IST/LA/OA/03/2014*. That the issues for adjudication before the Court of Appeal stems from the fact that the Plaintiff seeks to concurrently pursue same claims against the same Defendants, before two different courts, even where the dispute arose from same set of facts. The Investment and Securities Tribunal declined to lend itself to the abusive machinations of the Plaintiff by its Ruling of 8th December, 2014. That while this appeal is yet to

be determined, the Plaintiff has commenced this action at the Federal High Court.

- (d) That the duplicity of prosecution of these matters on similar facts is irritating, annoying and an abuse of Court process.
- (e) This Honorable Court has the power under the Rules of this Court, the Federal High Court Act and the Constitution of the Federal Republic of Nigeria, 1999 (As amended) to strike out/dismiss any incompetent suit or proceedings.

AND TAKE FURTHER NOTICE that at the hearing of this preliminary objection, reference shall be made to and reliance placed on the originating and other frontloaded processes filed in this suit by the Plaintiffs/Respondents.”

The application was supported by an affidavit and a written address. The Plaintiff filed a Counter affidavit and a written address in opposition.

At the hearing, both objections were argued being jurisdictional in nature. Learned Counsel relied on the

processes filed and adopted their respective written addresses.

Prior to considering the issues raised by the parties on the merits, I looked at the documents filed by the parties in this case. It appears clear from the records of Court that the 1st and 2nd Defendants were served with the Originating processes in this suit on the 26th of March 2015 and 27th of March 2015 respectively, the 1st Defendant's Notice of Objection was filed on 15th September, 2015 and that of the 2nd Defendant on 26th October, 2015. Both Preliminary Objections were filed outside the 21 days period prescribed by Order 29 Rule 4 (a) of the Rules of this Court.

Filing of Notice of preliminary objection outside twenty one days of service of originating processes is offensive to **ORDER 29 RULE 4 (A) OF THE FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES 2009.**

It appears clear to me that, the Notice of Preliminary Objection was not duly filed and it is trite law that “ when a process is not duly filed before the Court, it does not exist in the eyes of the law and as such the jurisdiction of the Court cannot be said to be properly invoked” **UNITY BANK**

PLC VS. KAY PLASTIC (NIG) LTD (2011) 51 W.R.N. PAGE 96 AT 104.

The applicability and scope of Order 29 of the Rules of this Court has been dealt with by the Appellate Courts. In its recent decision in Suit No: CA/L/1200/2014, **NIGERIAN GAS COMPANY LTD VS. GASLAND COMPANY LTD** delivered on the 3rd day of July, 2015, the Lagos Judicial Division of the Court of Appeal held as follows:-

“In my modest opinion, the sole issue (supra) formulated by the Appellant is identical to the Respondent's issue for determination and based on that premise I propose to follow the Appellant's said issue for determination for the discourse.

A careful appraisal of the record relating to the appeal indicates that the Court below did not prefer to deal with the substantive action before the preliminary objection to its jurisdiction to entertain the substantive *action*. Rather the court below stated that both the preliminary objection to its jurisdiction and the substantive action would be taken in one package.

The Court below followed the decision of the Court (Lagos Division) In **CBN V. AKINGBOLA AND ANOR (SUPRA)** in arriving at the said decision. In that case which is also reported as **CBN V. AKINGBOLA AND ANOR. (2013) 3 BFLR 128 AT 153-154 the Court** (Coram Saulawa, Ikeygh and Iyizoba, J.CA) held that alia that:-

*“.....the Court below was right to invoke order 29 rule 1 of its rules (supra) to order that the preliminary objection be heard together with the substantive action at which the preliminary objection to jurisdiction, locus standi and justifiability/reasonable cause of action of the substantive matter will be taken first followed by the substantive matter and a decision given on them in one package by the court below for the purpose of saving time, cost and duplication of effort by the parties and the Court below. See **SENATE PRESIDENT V. NZERIBE (2004) 9 NWLR (PT.878) 251 AT***

274 thus -

" ... saying that the issue of jurisdiction should be resolved first however does not mean that it should be resolved separately. It can be taken along with arguments on the merits of the case. The important thing is that the court should first express its view on jurisdiction before considering the merits.

The advantage of so proceeding is that in the event of an appeal by any of the parties, it is easy for the Appellate court to express its views on the decision of the lower Court as to jurisdiction and merit of the case. This removes the necessity for two appeals - one as to jurisdiction and the other as to the merit of the case".

There is again the case of **AMADI V. N.N.P.C. (2000) 10 NWLR (PT. 674) 79 AT 100**, where Uwais, C.J.N., held inter alia that-

"with the success of the plaintiff's appeal before us the case is to be sent back to the High Court to be determined, hopefully, on its merits after a delay of 13 years. Surely, this could have been avoided had it been that the point was taken in the course of the proceedings in the substantive claim to enable any aggrieved party to appeal on both the issue of jurisdiction and the judgment on the merit in the proceedings as the case might be".

Even where facts are needed to resolve preliminary objection, for the purpose of convenience and economy of time, the preliminary objection can be taken with the substantive matter. See **OLORUNKUNLE AND ANOR. V, ADIGUN AND ORS (2012) 6 NWLR (PT.1297) 407 AT 426** where this

Court (Okoro, Bage And Pemu, J G.A.) followed **AMADI V. N.N.P.C. (SUPRA)** on the same issue to hold *inter alia* that-

"It is instructive that the Supreme Court has given support to the position taken by the learned trial Judge in that an objection to jurisdiction where facts are needed to resolve it can be heard together with the substantive matter and an appeal taken together if need be".

See also **GOVERNOR OF CENTRAL BANK OF NIGERIA V. AKINGBOLA (2013) 3 BFLR 158 AT 178 -179.**

The hierarchy of Courts in Nigeria in descending order is the Supreme Court followed by the Court of

Appeal, then the other Superior Courts of Record (Federal High Court, High Court of a State; the Federal Capital Territory, High Court of a Sharia Court of Appeal and Customary Court of Appeal; and the National Industrial Court) and at the base of the pyramid of Courts are the inferior Courts (Magistrate Courts Sharia/Customary/Area Courts etc and other Tribunals established by an Act or Law) vide Section 6(5)(a-k) of the Constitution of the Federal Republic of Nigeria 1999, as amended (1999 Constitution). A decision given by the Supreme Court is binding on the Courts below it with respect to the matter decided which is in issue before the Courts below it, while a decision given by the Court of Appeal binds the courts below it on the same

issue; similarly a decision given - by the Federal or High Court, for instance, binds the inferior Courts below it; so, the Court below out of judicial discipline merely obeyed precedent or the doctrine of stare decisis when it followed the decision of the Court of Appeal in **CBN V. AKINGBOLA AND ANOR (SUPRA)**. The Court below cannot be faulted in the circumstance vide **OKONJO V. ODJE AND ORS. (1985) 10 SC 267 AT 268 - 269, CLEMENT V. IWUANYANWU (1989) NSCC 234, AFRICAN NEWSPAPERS V. AKANO (2013) ALL FWLR (PT.605) 345, SULEMAN V. C.O.P. PLATEAU STATE (2008) 8 NWLR (PT.1089) 298.**

Now Order 29 of the Rules of the Court below provides -

"29(1) Where a defendant wishes to –

- (a) dispute the Court's jurisdiction to try the claim; or
- (b) argue that the Court should not exercise its jurisdiction, he may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have, and the Court may take such application together with the Plaintiff's substantive suit in so far as the substantive suit does not involve the taking of oral evidence

- (2) A Defendant making such application must first file along with the application a memorandum of appearance stating that he is appearing conditionally.
- (3) A Defendant who files a memorandum of appearance does not, by so doing, lose any right that he may have to dispute the Court's jurisdiction.
- (4) An application under this order shall;
 - (a) Be made within twenty one days after service on the Defendant of the

originating process,
and

(b) Be supported by affidavit where it is not based on ground of law alone.

(5) If the Defendant files an acknowledgment of service and does not make such application within the period specified in rule 4 of this order, any such application can only be taken at the conclusion of the trial.

Originating process is defined in Order 1 Rule 5 of the Rules of the Court below to mean any Court process by which a suit is initiated. The definition covers a suit commenced by writ of summons as is the case

here, as well as by originating summons, for example; consequently, the Respondent's action which was commenced by a writ of summons is within the bracket of Order 29 of the Rules of the Court below.

As stated in **CBN V. AKINGBOLA (SUPRA)** in PAGES **150 - 151** of the law report while considering Order 29 of the Rules of the Court below-

"There are three significant instances that give order 29 of the rules of the Court below mandatory or compulsory content. First if a Defendant files the preliminary objection within 21 days of service on him of

the originating process and the originating process does not involve the taking of oral evidence the preliminary objection must be taken together with the originating process.

Second, if the preliminary objection is filed after 21 days of the service on the Defendant of the originating process, the preliminary objection must be taken with the originating process at the conclusion of trial, whether or not the originating process does not require the taking of oral evidence.

And third, if the preliminary objection is filed and the originating process entails

oral evidence whether or not it was filed by the defendant within 21 days of service on him of the originating process, the preliminary objection must be taken first and separate from the originating process as a threshold issue. These are the only three instances discernable from order 29 of the rules of the Court below showing the court below has no discretion to exercise in the implementation of order 29 of its rules, in my view." (My emphasis).

See also **Governor, CBN V. AKINGBOLA (SUPRA) AT 176.**

Evidently, the Appellant brought the preliminary objection to jurisdiction of the Court below outside the 21 days required to have it taken alone as a threshold issue which necessitated the invocation of Order 29 Rule 4 of the Rules of the Court below for the objection to be heard together with the substantive action. The rationale is based on case management to the effect that a party who raises the preliminary objection to jurisdiction early will be heard on it instantly, while a party such as the Appellant, who decided to raise it much later after issues have been joined would be heard on it together with the substantive suit. It does not mean the relevant

rules of the Court below forbid the raising of preliminary objection to jurisdiction, nor does the said rule of Court whittle down any substantive law. It is a matter of procedure and the scheduling of the business of the Court below in accordance with its rules. What it does mean is that time which is a scarce natural resource and which is also the backbone of litigation must be properly managed by the parties and, in the event a party is tardy in the management of time such a party will be heard last in matters of preliminary objection as stipulated by the Rules of the Court below. See by analogy the case of **AFRICAN**

**PETROLEUM PLC V.
ADENIYI AND ORS. (2011)
15 NWLR (PT.127) 562.**

The penalty for the failure of a party to take any step in the proceedings within the time stipulated therefore is made obvious in the proviso to Order 48 of the Rules of the Court below for computation of time in these words-

"Provided that any party who defaults in performing an act within the time authorized by the Judge or under the Rules shall pay to the Court an additional fee of N200. 00 (Two hundred naira) for each day of such default at the time of compliance".

The proviso (supra) clearly makes the keeping of time for performing an act by any of the parties obligatory or compulsory, which is based on the footing that any enactment that prescribes penalty for default in carrying out the requirements of the enactment makes the provisions of the enactment in question mandatory.

Rules of Court are not for fancy, or for decoration. They are for orderly presentation of cases. When time is of the essence in keeping with the rules of court, the time frame must be complied with; or the party in default may lose the advantage provided by the rules of Court and face the

consequences of disobedience stated by the Rules of Court. Thus in **NIGERIAN NAVY AND ORS. V. LABINJO (2012) 17 NWLR (PT.1328) 56 at 84**, the Apex Court held inter alia that –

"The rules of Court are meant to be obeyed. The purpose of the rules is to regulate matters in court and assist parties to any suit or appeal to present their cases for the purpose of fair and quick trial or hearing. Where the rules are quickly complied with, there will be quick dispensation of justice".

Again it was held in the Apex Court case of **MC INVESTMENTS LTD AND ANOR V. CORE INVESTMENTS AND CAPITAL MARKETS LIMITED (2012) 12 NWLR (PT.1313) 1 AT 17** particularly At Page 20 that:-

*The Appellant should be reminded that rules of Court are meant to be obeyed. Any party who fails to obey Court rules does so at his own peril. Such a party as the Appellants herein cannot be heard to complain. See: **AFOLABI V. ADEKUNLE (1983) NSCC 398 AT 405, (1983) 2 SCNLR 141; UNIVERSITY OF LAGOS V. AIGORO (1985) 1 NWLR (PT.1) 143".***

See also **UNIVERSITY OF LAGOS V. AIGORO (1985) 1 NWLR (PT.1) 143, WELLINGTON V. REGISTERED TRUSTEES IJEBUODE (2000) 5 NWLR (PT.647) 130** which were followed in **NIGERIAN NAVY AND ORS. V. LABINJO (SUPRA); WILLIAMS V. HOPE RISING VOLUNTARY FUNDS SOCIETY (1982) 13 N.S.C.C. 36, A-G., FEDERATION V. BICOURTNEY LTD. (2012) 14 NWLR (PT.1321) 467.**

The argument that Order 29 Rule 4 of the Rules of the Court below deprives the Appellant of its statutory and constitutional right to raise the issue of jurisdiction at any time is neither here nor there. The Court below simply adhered to its rules by holding that the issue was

raised at the stage of the proceedings when the time for it to be determined as stated by the rules of the Court below had not come and/or was not ripe.

Invariably, at the opportune time stipulated by the rules of the Court below, the issue of jurisdiction will be heard first and determined before the substantive suit is looked into and, in the event the matter goes on appeal the Appeal Court will have the benefit of dealing with the entire case inclusive of the objection to jurisdiction in one fell swoop for the purpose of saving time and costs and/or protracted litigation vide **CBN V. AKINGBOLA (SUPRA)** at **151** thus:-

The fundamental objective of the rules of the Court below is to

promote speedy dispensation of justice and avoid protracted trial. Consequently, if oral evidence is to be taken at the hearing of the main action, its protracted nature due to cross-examination and re-examination would unduly delay or bog down the just and expeditious disposal of the preliminary objection contrary to the spirit and soul of the rules of the Court below expressed in order 1 rule 4 thereof thus -

"The fundamental objective of these rules is, just and expeditious disposition of cases".

The touchstone of order 1 rule 4 of the rules of the Court below is therefore for it to do justice fairly and avoid

delay plus unnecessary cost of protracted litigation. The Court below, accordingly, had to balance the criteria of fairness, justice, convenience, time management and/or efficient case management for the purpose of attaining justice in the case by deciding to hear both the preliminary objection and the main application together.

In the present case, the advantage and protection the appellant will have of having its preliminary objection attended to first shall not be lost as the preliminary objection will be heard before the substantive matter at the time both the preliminary objection and

the substantive matter are taken together.

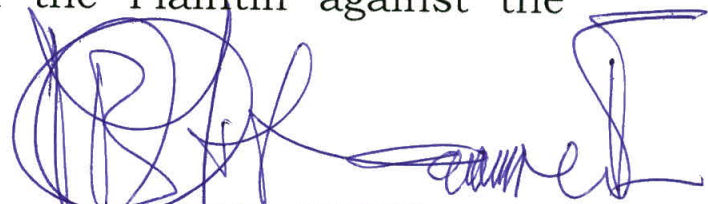
The Court below would also have to rule on the preliminary objection first, thus giving priority to the preliminary objection over and above the substantive matter.”

See also **GOVERNOR, CBN V. AKINGBOLA (SUPRA) AT 176 -177.**

On the whole, I see no merit in the interlocutory appeal and hereby dismiss it as the Court did not refuse to hear the objection to its jurisdiction at all: it stated merely that the objection should have been taken with the substantive

action as required by its rules.”

I hold that the Notices of Preliminary Objection are incompetent and they are struck out. The issues of jurisdiction shall be taken at the conclusion of trial in line with Order 29 Rule 5 of the Rules of this Court. N10,000 cost is awarded in favour of the Plaintiff against the Defendants.



M.B. IDRIS
JUDGE
18/3/16

C. Edeki for the Plaintiff

A.N. Okoye with P. Lanre- Ladenegan for the 1st Defendant

A. Akinyemi for the 2nd Defendant