

IN THE FEDERAL HIGH COURT OF NIGERIA

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

ON THURSDAY, THE 23RD DAY OF JUNE, 2016

BEFORE HIS LORDSHIP HON. JUSTICE A. R. MOHAMMED

(JUDGE)

SUIT NO. FHC/ABJ/CS/986/2014

BETWEEN:

A & H NIGERIA LIMITED

.....

PLAINTIFF

AND

**1. THE HONOURABLE MINISTER,
PETROLEUM RESOURCES.**

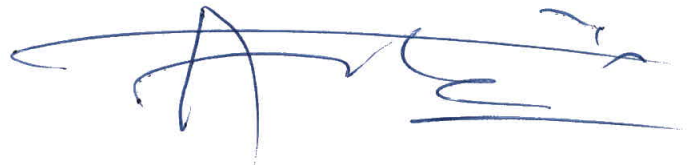
**2. THE PERMANENT SECRETARY,
MINISTRY OF PETROLEUM RESOURCES**

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..... DEFENDANTS

RULING

By a motion on notice dated 2/7/15 but filed on 3/7/15, the Defendants seek for:



- 1. AN ORDER of the Honourable Court setting aside the judgment entered in favour of the Plaintiff in default of defence on 29th June, 2015;**

2. AN ORDER directing the parties to submit themselves to arbitration at the Regional Centre for commercial Arbitration.

The grounds upon which the application is brought were given as follows:-

1. The judgment was given without jurisdiction as the action of the Plaintiff arose from simple contract and subject to arbitration agreement.
2. The judgment was obtained through misrepresentation and concealment of material fact.



The motion dated 2/7/15 is supported by a 30 paragraph affidavit deposed to by Gwantok I. D. Danjuma, a Senior Executive Officer and litigation clerk in the legal services Department of the Ministry of Petroleum Resources. Attached to the affidavit in support are exhibits marked A, B and C respectively. There is a written address in support of the application.

The Plaintiff reacted to the motion dated 2/7/15 with a counter affidavit filed on 16/7/15 and deposed to by Linus Idoko, a litigation clerk in the law firm of Solicitors to the Plaintiffs. The Defendants then filed Further and Better Affidavit.

I have read the Defendants' motion dated 2/7/15, the affidavit in support, the exhibits attached and the written address in support thereof. I have also read the Plaintiff's counter affidavit and the written address attached to it. I have equally read the Defendants' Further and Better Affidavit with the exhibits attached.

The case of the Defendants as can be deduced from the affidavit in support of the motion is as follows:-

1. That the writ of summons in this suit which was filed on 22nd December, 2014, was served on the Defendants on 20th March, 2015.



2. That due to political activities in the Country, in which the 1st Defendant was involved, the writ of summons was mistakenly mixed up with other mails awaiting action by the 1st Defendant and only discovered in May, 2015.

3. That the writ of summons was eventually forwarded to the Legal Services Department on 19th May, 2015 and assigned to a counsel for handling on 21st May, 2015.

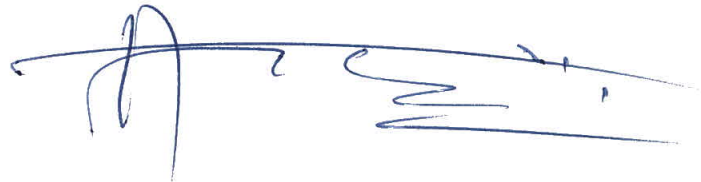
4. That the processes were assigned to Mr. B. M. Yusuf, but mistakenly placed by the clerical staff on Mr. Nasir Habeeb's

table who was handling the contract matter before he was posted to another Ministry.

5. That the processes were left on Mr. Nasir's table until the attention of the Department was drawn to the processes by the officer who succeeded Mr. Nasir and discovered the processes meant for Mr. B. M. Yusuf on Mr. Nasir's vacant table.
6. That by the time the processes got to B. M. Yusuf prepared an application for extension of time within which to enter appearance and file the Defendant's Notice of Intention to defend.
7. That having prepared the necessary processes in defence of the Defendants, Mr. B. M. Yusuf handed them over to the deponent for filing in Court on Friday, 26th June, 2015 as he had to travel on official assignment for two weeks.
8. That no sooner than B. M. Yusuf left for an official assignment, a Hearing notice was received by the Legal Department on the Defendants on Friday, 26th June, 2015 for hearing slated for Monday the 29th day of June, 2015.



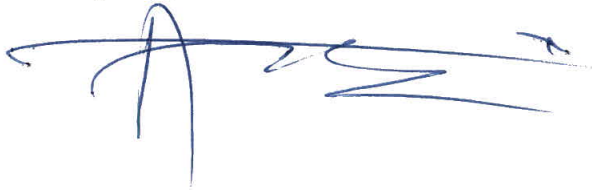
9. That attempts to file processes were botched due to non-payment for default period.
10. That the matter came up on the 29th of June, 2015 and judgment was entered for the Plaintiff.
11. That the contract for renovation of furniture of staff offices of the Defendants was awarded to the Plaintiff in the year 2012 and agreement No. 39312 dated 21st March, 2012 was signed by both parties.




Other depositions in the affidavit related to how the Plaintiff paid for completion of 65% of work done under the contract, and that the Agreement of the parties provides for arbitration to resolve any dispute on the contract. See paragraphs 4 – 27 of the Defendant's affidavit in support of the Defendant's motion dated 3/7/15.

In the Plaintiff's counter affidavit in opposition to the Defendant's motion dated 3/7/15, it was essentially deposed as follows:-

1. That the Plaintiff filed it's writ of summons on the 11th of December, 2014 for a liquidated sum of ₦13,723,366.65 against the Defendants.

2. That pursuant to the application of the Plaintiff on 17th March, 2015, the writ of summons was placed under the undefended list and marked as such.
3. That the Court adjourned the suit for hearing on the following dates: 23/4/2015, 21/5/2015, 17/6/2015 and finally judgment was delivered on 29/6/15.
4. That the Defendants were served with hearing notices for each of the above dates but neither appeared nor file any Notice of Intention to defend the suit with affidavit for over 90 days after the writ of summons was served on them.
5. That the Defendants only sent a letter of adjournment on 29th June, 2015 which was refused and judgment was delivered under the Undefended List. 
6. That the 1st Defendant was not involved in any political activity that prevented her from attending to the writ of summons marked under the Undefended List.
7. That B. M. Yusuf, who is counsel in the legal services department of the Defendants, has been assigned to handle

this matter since the writ of summons was served on the Defendants on 20th March, 2015.

8. That Nasir Habeeb was already posted out of the Ministry sometime in August, 2014 long before the writ of summons was served on the Defendants.
9. That the processes got to the Defendant in good time, but the Defendants refused to respond accordingly for no just cause.
10. That the Defendants only came to Court on 29th June, 2015 to serve the Court with a letter of adjournment.
11. That hearing notice for 29th June, 2015 was served on the Defendants on 19th June, 2015. 
12. That the Defendants never said they were not satisfied with the performance of the contract, but simply refused to fulfill their obligations without reason after the Plaintiff completed the contract.
13. That since the contract was concluded, there is no dispute to arbitrate upon and the Plaintiff sued to enforce his right through the Court and obtained judgment.


See paragraphs 3(b) – (p) of the Plaintiff's counter affidavit.

In their written address, the Defendants contended that the subject matter of the Plaintiff's action is purely a contract between the Plaintiff and the Defendants, which robs this Court of jurisdiction. It was also contended that nowhere under Section 251 (1) of the 1999 Constitution is this Court vested with jurisdiction to hear and determine contract issues. Reference was made to the cases of **MIL. ADMIN. BENUE STATE VS. ABAYILO (2001) 5 NWLR PART 705, 19 page 305** and **A.G. FED. VS. GUARDIAN NEWSPAPERS LTD (1999) 9 NWLR PART 618, 187 at 202.**



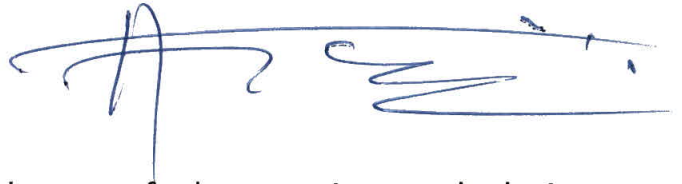
It was also contended that by clause 15.1 of the Contract Agreement, there is an arbitration agreement between the Plaintiff and the Defendants within the provision of Section 1 (2) of the Arbitration and Conciliation Act Cap. A18 LFN 2004. Reference was then made to Section 2 of the Arbitration Act and the case of **M. V. LUPEX VS. N.V.C. & S. LTD (2003) 15 NWLR PART 844, 469,** to the effect that an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the Court. That parties are bound by their covenant under the agreement. The Court was urged to grant the application to set aside it's judgment.

In the Plaintiff's written address, it was stated that failure to file Notice of Intention to Defend after five days of service of the writ of summons presupposes that there was no defence on the merit to the suit, and the Court has a duty in such circumstance to deliver judgment. Reference was made to the case of **MARK VS. EKE (2004) 5 NWLR PART 865, 54**, to the effect that a judgment entered on the Undefended List is a judgment entered on the merit and is not judgment on default, and the Court will not have jurisdiction to set aside its judgment even if there was a mistake. It was contended that the only exception to the above rule is when the judgment is a nullity owing to a failure to comply with an essential condition such as service of process. It was however contended that the judgment of this Court was not a nullity, neither was it given in default, therefore the Court cannot set it aside. That this Court has become functus officio and cannot sit on appeal over its judgment.



On reference to the arbitration clause in the Agreement of the parties, the Court was referred to the case of **LIGNES AERIENNES CONGOLAISES VS. AIR ATLANTIC NIG. LTD (2006) 2 NWLR PART 963, 49**, to the effect that a party to an agreement with arbitration clause has the option to either submit to arbitration or to have the dispute decided by the Court. That the choice of arbitration does not bar resort to the Court to obtain security for any eventual award. It was further contended that arbitration clause in a contract is only a

medium of dispute resolution when it arises, that is when the contract exist. It was however contended by the Plaintiff that the contract between the Plaintiff and the Defendants terminated by the completion of the contract since 2012, therefore an arbitration clause cannot be invoked by any of the parties. The Court was urged to refuse the application.



Having reviewed the affidavit evidence of the parties and their written argument in relation to the Defendants' motion dated 3/7/15, the only issue for determination, in my view, is whether or not, this Court can set aside the judgment delivered on 29th June, 2015? The starting point in the resolution of this issue is to appreciate the fact that the judgment of this Court delivered on 29th June, 2015 was a judgment delivered pursuant to a claim for a liquidated money demand under the Undefended List procedure. Judgment given on a matter for a liquidated money demand under the undefended list is regarded as a judgment on the merit. In the case of **MARK VS. EKE** supra **at page 76 paragraphs D – E**, the Supreme Court stated thus:-

“A judgment obtained on the undefended list is a judgment on the merit and the procedure adopted in setting it aside in the case of Bank of the North Ltd v. Intra Bank supra by relying on the provisions of the old English rules under Order 14 rule 11 of

the said old rules in dealing with default judgment was wrong and the Judge would have no power to set aside the judgment under these rules dealing with default judgment in a matter where the judgment was entered under the undefended list”.

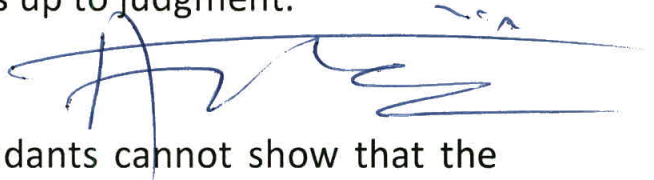
However, an exception to the above principle was given by the Supreme Court in page 77 paragraph F in the same case of MARK VS. EKE supra, as follows:-

“A judgment or order which is a nullity owing to failure to comply with an essential provision such as service of process can be set aside by the Court which gave the judgment or made the orders”...



From the above holding, it is clear that a judgment on the merit can be set aside if it can be shown that a fundamental non-compliance with the provision of the law has occasioned in the matter. Such non-compliance could be lack of service of originating process on a Defendant, issues relating to pre- action notice or any condition precedent to the exercise of jurisdiction or adjudication of the matter. In the instant case, none of those essential conditions exist. The Defendants are not saying that they have not been served with the writ of summons brought under the undefended list. In fact, the Defendants have admitted in their affidavit in support of the motion

dated 3/7/15 that the writ of summons under the undefended list was served on them on 20th March, 2015. See paragraph 4 of the affidavit in support of the Defendants' motion dated 3/7/15. The contention of the Defendants rather, is that the subject matter of the Plaintiff's action does not fall within the jurisdiction of the Court. This issue ought to have been raised in the Defendants' affidavit in support of Notice of Intention to defend as a defence to the action or better still by the filing of a Notice of preliminary objection to challenge the competence of the suit. However, the Defendants chose to stay away from the proceedings up to judgment.



It is my view that so long as the Defendants cannot show that the suit was heard when a condition precedent to the hearing of the matter has not been fulfilled, the Court has no power to tinker with the judgment. The only remedy available to the Defendants in the circumstances of this matter is to go on appeal. This Court is functus officio, having delivered judgment in this suit without any defence put forward by the Defendants to defend the suit. See the provisions of order 12 rule 4 of the Federal High Court Rules, 2009, which states thus:

“Where any Defendant neglects to deliver the notice of defence and affidavit prescribed by rule 3(1) of this order, or is not given leave to defend by the Court, the suit shall be heard as an

undefended suit, and judgment given thereon, without calling upon the Plaintiff to summon witnesses before the Court to prove his claim formally”.

In consequence of the above finding, the Defendants’ motion dated 3/7/15 seeking to set aside the judgment of this Court delivered on 29/6/15 under the undefended list has failed and it is accordingly dismissed.



**HON. JUSTICE A. R. MOHAMMED
JUDGE
23/6/16.**

APPEARANCES:-

B. S. Barau Esq. with Obehi Imhanlahimi Esq. for the Plaintiff.

F. A. Agama Esq. for the Defendants.