

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

M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/1567/14

BETWEEN:-

OTTO SHIP MANAGEMENT PTE LTD PLAINTIFF
(Bareboat Charterers of the
MT "RED FISH 3")

AND

AG BUTLER NIG. LTD DEFENDANT
(Charterers of the
MT "RED FISH 3")

JUDGMENT

This is an Originating Summons dated 17th October, 2014 filed pursuant to sections 1(1) (a) & (3) of the Admiralty Jurisdiction Act 1991, Order 3 Rule 6, Order 26 Rule 1, Order 56 Rule 8 of the Federal High Court (Civil Procedure) Rules 2009, and under the inherent jurisdiction of the Court. The issues formulated for determination, and the reliefs sought are as follows:-

“ORIGINATING SUMMONS

**BROUGHT PURSUANT TO SECTION 1 (1), (A) & (3) OF
THE ADMIRALTY JURISDICTION ACT, 1991; ORDER 3
RULES 6, ORDER 26 RULE 1, ORDER 56 RULE 8 OF THE
FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES, 2009
AND UNDER THE INHERENT JURISDICTION OF THE COURT**

Let: The Defendants

AG BUTIER NIG. LTD of the 16 Oniru Place Road, Victoria-
Island Lagos

In the Lagos Judicial Division within *thirty (30) days*
after the service of this summons on you, inclusive of
the day of such service do cause an appearance to be
entered for you to this summons, which is issued upon
the application of the Plaintiff herein who claims for the
determination of the following questions:-

- (1) Whether the Plaintiff is the Beneficial Owners
of the vessel, "RED FISH 3"?
- (2) Whether the parties hereto entered into a Time
Charter party dated 04/01/14 for the use and
hire of the Claimant's vessel, "Red fish 3" at all
material times?
- (3) Whether the Plaintiff is entitled to receive

charter hire on the vessel, "pursuant to the Charter Party (c/p) terms aforesaid?"

- (4) Whether the Defendant has breached the terms of clause 12 (a) of the c/p aforesaid by their neglect, refusal and/or failure to pay charter hire to the Plaintiff as agreed in the c/p despite repeated demands?
- (5) Whether, upon the Defendant's neglect, refusal and/or failure to pay charter hire to the Plaintiff as aforesaid, the Plaintiff is entitled to terminate the c/p pursuant to clause 31 thereof
- (6) Whether the Plaintiff is entitled to the immediate« re-delivery or possession of the vessel following the termination of the c/p?
- (7) Whether, upon the termination of the c/p as aforesaid, the Defendant's crew on board the vessel should not disembark from the vessel forthwith?

STATEMENT OF RELIEFS

- WHEREOF the Plaintiff claims against the Defendant for the following declarations:-

1. A DECLARATION that the Plaintiffs are the Beneficial Owners of the vessel "RED FISH 3" at all material times to this action.
2. A DECLARATION that pursuant to the relevant Charter Party (c/p), the Plaintiffs as Beneficial Owners of the "RED FISH 3" ("the vessel") are entitled to receive payment of any (outstanding) charter hire on the vessel
3. A DECLARATION that the Defendant has breached the terms of the relevant c/p by their neglect, refusal and failure to pay charter hire to the Plaintiff despite repeated demands.
4. A DECLARATION that the Plaintiff is entitled to terminate the c/p pursuant to clause 31 upon the Defendant's neglect, refusal and failure to pay the hire.
5. A FURTHER DECLARATION that the Plaintiff is entitled to the re-delivery of the vessel "RED FISH 3" following the termination of the C/P
6. An Order directing the Defendant's crew on board the

vessel to disembark forthwith, and

7. An order of perpetual injunction restraining the Defendant from forcefully keeping or detaining the vessel or from tampering therewith”

The application was supported by an affidavit and a written address. A Further affidavit was also filed in support of the application.

The Defendant filed a Counter Affidavit and a written address in opposition. The Plaintiff then filed a reply affidavit and an address in reply on points of law. The Defendant filed an additional Counter Affidavit, and the Plaintiff filed a Further and Better affidavit.

At the hearing, Learning Counsel for the parties relied on the processes filed and adopted their respective written addresses.

In the Plaintiff's written address the only issue formulated for determination was as follows:-

“Whether by reason of the breach of the charter party by the Respondent, the Applicant is not entitled to terminate the charter party and a re-delivery of the vessel “RED FISH 3”

It was contended that it is trite principle of law that parties to an agreement retain the commercial freedom to determine their own terms, and that it is also a well established principle of law that parties to a written contract such as bills of lading or a charter-party are bound by the terms, conditions and clauses contained therein.

That Contracts or contractual obligations presume the notion that agreements (pacts) therein are meant to be obeyed. It was submitted that parties herein should be held to their agreement, on the apposite principle of *pacta servenda sunt*, having regard to the justice of this case

It was also contended that breach of contract is committed when a party to a contract, without lawful excuse fails, neglects or refuses to perform an obligation he undertook in the contract or either performs the obligation defectively or incapacitates himself from performing the contract or by wrongfully repudiating the contract and the breach entitles the other party to exercise his right under the contract for repudiation of the contract

It was argued that the Defendant breached a fundamental term of the charter party by failing to pay charter hire, and that the Plaintiff is entitled to the reliefs sought.

At the hearing, the Plaintiff had withdrawn its reliefs 5, 6 and 7, and the issues distilled from them.

The following cases were relied on:-

- (1) NIKA FISHING CO. LTD VS. LAVINA CORP.
(2008) 16 NWLR (PT. 1114) 509.**
- (2) SONA BREW PLC VS. PETERS (2005) 1 NWLR
(PT. 908) 1**
- (3) LARMIE VS. DPMS LTD (2005) 18 NWLR (PT.
958) 438**
- (4) SONNAR LTD VS. NORWIND (1987) 4 NWLR
(PT. 66) 520**
- (5) KEMTES NIG. LTD VS. FAB ANEH NIG. LTD
(2007) ALL FWLR (PT. 384) 320**
- (6) PAN BUILDER (NIG) LTD VS. FBN LTD (2000) 1
NWLR (PT. 642) 684.**

In the Defendant's written address, the following issues were posed for determination:-

- (1) Whether the Plaintiff is the beneficial owners of the vessel "MY RED FISH 3".
- (2) Whether the parties hereto entered into a Time Charter Party Agreement dated 04/01/2014 for the use and hire of the Plaintiff's vessel "MV RED FISH 3" at all material times
- (3) Whether the Plaintiff is entitled to receive charter hire on the vessel "pursuant to the Charter Party (C/P) terms aforesaid
- (4) Whether the Defendant/Respondent has breached the terms of clause 12(a) of the Charter Party aforesaid by their neglect, refusal and/or failure to pay charter hire to the Plaintiff as agreed in the Charter Party despite repeated demand
- (5) Whether upon the Defendant/Respondent's neglect, refusal and/or failure to pay Charter Party hire to the Plaintiff/Applicant as aforesaid the Plaintiff/Applicant is entitled to terminate the Charter Party pursuant to clause 31 thereto.
- (6) Whether the Plaintiff/Applicant is entitled to the immediate re-delivery or possession of the vessel following the termination of the Charter Party

- (7) Whether upon the termination of the charter party as aforesaid, the Defendant/Respondent's crew on board the vessel should not disembark from the vessel forthwith.

It was argued that the Plaintiff was not the beneficial owner of the vessel, and that the time charter party never commenced. That the Plaintiff was not entitled to charter hire, and that the Defendant did not breach the charter party, and also that the Plaintiff was not entitled to terminate the charter party. That the Defendant is not in possession of the vessel, and that the Plaintiff is not entitled to the re-delivery of the vessel.

It was argued that the suit was not properly instituted because the Plaintiff has not asked the Court to determine any question of construction as it applied to the time charter party, and that the suit was filed in abuse of the process of the Court in view of the pending Suits No. FHC/PH/CS/219/14 and FHC/L/CS/1557/14.

The Court was urged to strike out the case. The following authorities were relied on:-

“LIST OF JUDICIAL AUTHORITIES REFERRED TO:

1. **ATAGO V. NWUCHE & ORS (2012) VOL 213 LRCN PG 43 @ 66UZ.**
2. **INEC V. ATUMA & ORS (2013) VL. 223 LRCN (PT 2) PG 48 @ 72UZ.**
3. **N.I.C V. F.C.I CO. LTD (2007) 2 NWLR (PT 1019) PG 610.**
4. **OSSIEC & ANOR V. NCP & ORS (2013) VOL. 223 LRCN (PT 1) PGG 96 @ PGS 122ZJJ & 123A.**

LIST OF STATUTORY AUTHORITY REFERRED TO:
FEDERAL HIGH COURT (CIVIL PROCEDURE)
RULES, 2009”

I have read the entire processes filed and I have reviewed the submissions made in the written addresses filed.

In the Originating Summons, the issues formulated for the determination of the Court by the Plaintiff in this case are as follows:-

- (1) Whether the Plaintiff is the beneficial owners of the vessel “RED FISH 3”?

- (2) Whether the parties hereto entered into a Time Charter Party dated 04/01/14 for the use and hire of the claimant's vessel, "RED FISH 3" at all material times?
- (3) Whether the Plaintiff is entitled to receive charter hire on the vessel, pursuant to the Charter Party (C/P) terms aforesaid?
- (4) Whether the Defendant has breached the terms of clause 12(a) of the c/p aforesaid by their neglect, refusal and/or failure to pay charter hire to the Plaintiff as agreed in the c/p despite repeated demand?
- (5) Whether, upon the Defendant's neglect, refusal and/or failure to pay Charter hire to the Plaintiff as aforesaid, the Plaintiff is entitled to terminate the c/p pursuant to clause 31 thereof?
- (6) Whether the Plaintiff is entitled to the immediate re-delivery or possession the vessel following the termination of the C/P?

(7) Whether, upon the termination of the c/p as aforesaid, the Defendant's crew on board the vessel should not disembark from the vessel forthwith.?"

However, in the written address filed by the Plaintiff herein in support of this case, the Plaintiff raised only one issue for determination, and which it argued as follows:-

“Whether by reason of the breach of the charter party by the Respondent, the Applicant is not entitled to terminate the charter party and a re-delivery of the vessel RED FISH 3?”

The law is clear that the parties herein have no liberty to formulate fresh issues for determination or questions outside that which has been formulated by the Plaintiff in the body of the Originating application in actions commenced by Originating summons. There are only two options available by which fresh issues or questions may be raised to wit: by filing new/fresh originating summons or by filing an amended originating summons. The Plaintiff

in fact has not got the privilege to raise a fresh issue as has been done in this case.

Any rejection from succinct provision of the law stated above renders any such fresh questions or issues for determination baseless, goes to no issue and would be ignored by the Court.

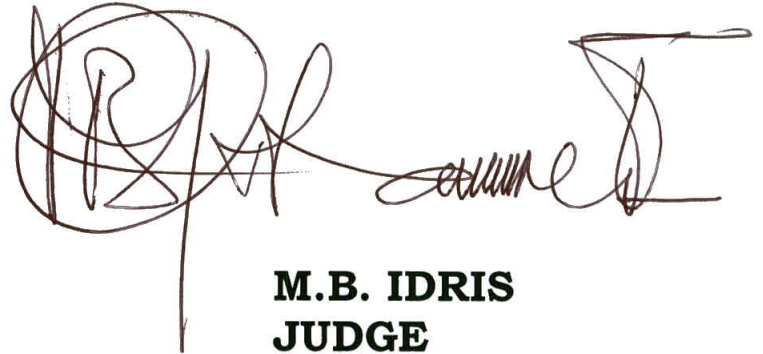
In the case of **ALUBANKUDI VS. A.G. FEDERATION (2002) 17 NWLR (PT. 796) 338 @ 357-358**, Chukwumah Eneh JCA (as he then was) had this to say on this issue:-

“The crux of the issue which has arisen for consideration from the objection is whether ground four which has no bearing whatsoever on the judgment appealed from could be canvassed on appeal. The Appellant having opted to bring the instant action by way of Originating Summons upon which he raised two substantive questions for determination by the trial Court and the two questions have been set forth in detail above. The Court below duly pronounced on the two

Appellant properly to raise by amendment such further questions that were appropriate to the type of reliefs he was seeking by means of ground four. Not having done so, it was wrong indeed fundamentally irregular to seek to introduce the fresh question by raising ground four. So that a Court as the Court below as well as this Court would lack the competence to hear and determine a matter raised completely outside the questions posed to the Court in the Originating Summons for determination. The Appellant, I must emphasize should have sought an amendment to the instant originating summons to include such further questions raised in ground four before the Court below”

I hold that this Court lacks the competence to determine the sole issue raised by the Plaintiff in the written address filed, having abandoned the specific issues formulated by it in the Originating Summons. The appropriate order to make in the circumstances is one striking out this suit.

It is struck out. N10,000 cost is awarded in favour of the Defendant against the Plaintiff.

A handwritten signature in dark ink, consisting of a large, circular, scribbled initial 'M' followed by a cursive 'B. IDRIS'.

**M.B. IDRIS
JUDGE
18/1/16**

A. Olorunfemi with A. Aromire for the Plaintiff

K.K. IHEME for the Defendant