

SUPREME COURT OF NIGERIA
27TH FEBRUARY, 1996. SC. 192/1989
CORAM:- M. L. UWAIS CJN, M. E. OGUNDARE,
E. O. OGWUEGBU, Y. O. ADIO, A. I. IGUH, JJSC.

KANO STATE OIL AND ALLIED
PRODUCTS LTD APPELLANT
AND
KOFA TRADING COMPANY LTD. RESPONDENT

ARBITRATION - Appointment of Arbitrator - Application to court for the same - For applicant to be entitled - He must be a party to the contract.

ARBITRATION - Parties to the contract - Whether applicant is a party to the contract - To entitle it to pray for the appointment of an arbitrator.

COURTS - Error in Law - It is wrong for courts - To import in to case - not raised by any of the parties.

PRACTICE & PROCEDURE - Commencement of proceedings - For appointment of arbitrator by court - Is by motion as provided under s. 6(2) Arbitration law.

PRACTICE & PROCEDURE - Commencement of proceedings - Where applicant resorts to method prescribed by law - Complaint against method without merit.

FACTS

The Respondent (as applicant) filed a motion on Notice in the High Court of Kano State, Kano, praying the court to appoint a sole arbitrator to decide the dispute between the Appellant herein and the respondent. The respondents' motion was supported by affidavit deposed to by Alhaji Aminu Ibrahim Kafa, the Managing Director of the respondent. The appellant raised a preliminary objection to the commencement of the proceedings by a motion on Notice instead of Writ of Summons. The preliminary objection its over ruled and the trial court heard the application and granted the prayers of the respondent.

The decision of the trial court, was appealed against to the Court of Appeal by the appellant unsuccessfully. The appellant has further appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

“(1) Whether the Court of Appeal was right in holding that the Respondent could commence proceedings for the appointment of an arbitrator by Court of trial by Motion on Notice in the circumstance of this case.

(2) Whether the Respondent is a party to the submission and can rely on the provisions of the Arbitration Clause to invoke the court’s power under section 6 of the Arbitration Law Cap. 7 Laws of Northern Nigeria 1963 applicable to Kano State. Etc see p. 344

HELD (Unanimously dismissing the appeal per lead judgment OGUNDARE JSC)

Section 6 (2) Arbitration Law prescribes mode

1. In my respectful view, the conclusion of Achike JCA states the correct law. Section 6(2) of the Arbitration Law of Kano State sets out the mode of approaching the court for the appointment of an arbitrator. Although Order 2 rule 1 of the High Court (Civil Procedure) Rules, 1976 of Kano State provided that -”Every suit shall be commenced by an application to registrar for the issue of a writ of summons.” It is not the only method of commencing actions in the High Court. The High Court law and Rules of each State recognize other methods of commencing proceedings. (p. 346 C)

Application brought as prescribed by law

2. Section 6(2) of the Arbitration Law having prescribed the method - by application - for approaching the court for the appointment of an arbitrator where the parties could not agree and that method having been resorted to by the Applicant/Respondent in this case, I must hold that there is no merit in the complaint against the competence of the proceedings in the trial High Court. I, therefore, answer Question (1) in the affirmative. (p. 347 G)

Application for appointment of Arbitrator

3. While acknowledging that under the deed (Exh. B) tendered in evidence before him the Applicant/Respondent was not a party to the original contract by assignment, the learned Judge, with respect, imported another deed not in evidence before him and on which he had no evidence as to its execution. In any event it is clear from the affidavit evidence before him that the basis of the Applicant’s claim was Exhibit B and if that document did not support its claim, the learned Judge ought to have so found and reject the application. It is not for him to speculate in the manner he did. His reliance on equity arose out of a misconception of the application before him. To be entitled to the appointment by the court of an arbitrator

the party applying

must be a party to the submission, that is, he must be a party to the contract for arbitration. (p. 353 F)

Courts - Error in law

4. I agree entirely with the above submissions. The Applicant/Respondent admitted in Respondent’s Brief that a mistake was made “where the name of Alhaji Aminu Ibrahim Kofa was inserted in the Deed of Assignment instead of KOFA Trading Company Limited.” By this admission the Respondent was saying it was not a party to Annexure B, though in error. Having gone through Annexure B I cannot myself say that a mistake was made. In any event issue of mistake or error was not raised by either party and it is wrong of the two courts below to import same into the Applicant’s case. (p. 356 C)

Arbitration - Parties to the contract

5. The conclusion I reach on Question (2) is that the Applicant/Respondent was not a party to the submission and could, therefore, not rely on Annexure A in praying for the appointment of an arbitrator. The only persons, who, do so under Annexure B were Alhaji Aminu Ibrahim Kofa and the Appellant. In view of the conclusion I reach on Question (2), Question (3) does not arise and I do not consider it necessary to go into the issues raised on question (4). Suffice it to say that this appeal succeeds and it is hereby allowed. I set aside the judgment of the court below and the ruling of the High Court. Having held that the Applicant/Respondent was not a party to the submission, it had no locus standi to bring its application which is accordingly, hereby struck out. (p. 356 D)

NOTABLE POINT OF INTEREST***ADIO JSC******1. Duty of court - Is not to set up a different case***

One other question was that the issue of mistake or error, if any, was not raised by any of the parties and there was no suggestion of equitable assignment. They were matters introduced or imported by the two courts below. This raises the question of the duty of a court in relation to matters pending it. The duty of a court is to consider and determine the case before it light of the complaints made or issues properly raised by the parties. A court should not set up for the parties a case different from the one set up by the parties themselves in the pleadings or their affidavits. It was, therefore, wrong for the two courts below to introduce the question of mistake or error, if any, and the question of equitable assignment into this case.

REPRESENTATION

B Parties absent and not represented by counsel.

CASES REFERRED TO

- Lahan v. Attorney-General of W.R (1963) ANLR 224 (Reprint)
Akunnia v. Attorney-General, Anambra State (1977) 5 SC. 161
C Fajinmi v. The Speaker, Western House of Assembly (1962) A.N.L (Pt. 1) 206 (Reprint)
Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (Part 39)
Salomon v. Salomon & Co. Ltd (1897) A.C. 22
Ikpeazu v. African Continental Bank Ltd. (1965) N.M.L.R. 374
Lagos State Development Property Corporation v. Nigerian Land & sea Food Ltd. (1992) 5 N.W.L.R. (Pt. 244) 653
D Qniah v. Onyia (1989) 1 N.W.L.R. (Pt. 99) 514
Ojo-Osagie v. Adonri (1989) 1 N.W.L.R. (Pt. 349) 131

STATUTES AND RULES REFERRED TO

- Arbitration Law, Cap. 7, Laws of Kano State, s. 6(1) (a)
E Arbitration Act, Cap. 13, Laws of the Federation of Nigeria and Lagos 1958
High Court Law, cap. 49, Laws of Northern Nigeria 1963 (applicable in Kano State), s. 2.
High Court Civil Procedure Rules of Kano State, 1976, Order 2, rule 1, Order 8, rule 1.

F

BOOK REFERRED TO

Aguda - Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria.

LEAD JUDGMENT BY OGUNDARE JSC

- G By a motion on notice filed in the High Court of Kano State, the Applicant (now Respondent before us) prayed the court “to appoint a sole Arbitrator to decide the dispute between Kasoap and Kofa Trading Company (Nig.) Limited in respect of a contract dated 15th October 1984 “
The motion which was supported by an affidavit sworn to by Alhaji Aminu Ibrahim Kofa, the Managing Director/Chairman of Kofa Trading Company Limited and to which was annexed a number of documentary exhibits,
H was brought under Section 6(1)(a) of the Arbitration Law, Cap. 7 Laws of Kano State and the Arbitration Act, Cap. 13 Laws of the Federation of

(who is now Appellant before us) raised a preliminary objection to the motion on the ground that an action could not be commenced by way of motion but by writ of summons. The objection was overruled by the learned trial Judge, Saka Yusuf J. The motion which was vigorously opposed by the Respondent, was subsequently argued. The learned trial Judge in a reserved ruling found for the applicant, holding -

“In the light of foregoing therefore I am satisfied from the facts before the court that the applicant had served notice on the respondent for the appointment of an arbitrator. I am also satisfied that it is more than seven clear days that this notice was served without any positive response from the respondent. In view of the inability of the applicant and the respondent to agree I am duty bound to appoint an arbitrator for them.

By the powers therefore conferred on me by Section 6(1)(a) and (2) of the Arbitration Law of Laws of Northern Nigeria 1963 adopted and applied in Kano State read in pari pasu with the Arbitration Act Cap. 13 of Laws of Federal Republic of Nigeria 1958, (sic) I Saka Yusuf, a High Court Judge of Kano State appoint Messrs Adegboyega Adegbulugbe & Co., Chartered Accountants 57, Airport Road, P. O. Box 5717 Bompai Kano. (Tel: 622869) as an arbitrator to hear and determine the dispute now pending between Kofa Trading Company Nig. Ltd. and Kano State Oil and Allied Products Ltd.

That the Higher Registrar of this court should convey this order of appointment to Messrs Adegboyega Adegbulugbe & Co., with a view to obtain his consent to act as the arbitrator.

That if Messrs Adegboyega Adegbulugbe consents, this should be communicated to both Kofa Trading Company Nig. Ltd., and Kano State Oil and Allied Products Ltd., the two parties to arrange meeting with the arbitrator with a view of drawing up terms of reference agreeable, to the two parties.

That the arbitration expenses which are likely to be incurred should be borne by the two parties in the rate of 50 & 50.”

Being dissatisfied with the decision the respondent appealed unsuccessfully to the Court of Appeal. The respondent has now further appealed to this Court upon 7 grounds of appeal. Written Briefs were filed and exchanged and the appeal was set down for hearing. On the date for hearing both parties and their counsel were absent in court and the appeal was, pursuant to Order 6 rule 8(6) of the Rules of this Court, taken as having been argued on the written Briefs.

In the Respondent/Appellant's Brief the following 4 questions are set down as calling for determination in this appeal, that is:

B “(1) Whether the Court of Appeal was right in holding that the Respondent could commence proceedings for the appointment of an arbitrator by the Court of trial by Motion on Notice in the circumstance of this case.

C (2) Whether the Respondent is a party to the submission and can rely on the provisions of the Arbitration Clause to invoke the Court's power under Section 6 of the Arbitration Law Cap. 7 Laws of Northern Nigeria 1963 applicable to Kano State.

(3) If the answer to No.2 above is positive, whether the Court of Appeal was right in holding that the Respondent had satisfied the conditions precedent to the exercise of the powers conferred upon the court by Section 6 of the Arbitration Law.

D (4) Whether the Court of Appeal rightly exercised the powers conferred upon it under Section 16 of the Court of Appeal Act, having regards to the circumstances of the case, in appointing a Sole Arbitrator.”

The applicant/Respondent adopted the above questions.

QUESTION 1:

E The contention of the Appellant here is that the Respondent should not have come by way of motion to institute the proceedings but by way of a writ of summons. This contention did not find favour with the two courts below. Ruling on the preliminary objection the learned trial Judge observed:

F “The issues involved in the preliminary objection before the Court are simple. Can the applicant seek the relief which is being sought by way of a motion or a writ of summons.

Order 2 rule 1 of the High Court (Civil Procedure) Rules 1976 provides “Every suit shall be commenced by an application to the registrar for the issue of a writ of summons.”

The pertinent question then is what is a suit?

G The High Court Law Cap. 49 of the Laws of Kano 1963 defines “suit” as includes action. Under the same High Court Law “action” is defined as meaning “a civil proceeding commenced by a writ of summons or in such other manner as may be prescribed by rules of Court but does not include a criminal proceeding”. “Proceeding” is not defined under CAP 49 of the High Court Law nor by the Civil Procedure Rules 1976 but in the Oxford Companion to Law by D.M. Walker “Procedure” in H its narrower and more exact sense, is defined as “comprising only a part of Adjective Law; and includes the principles and rules governing the

steps to be taken in initiating and carrying through a legal claim or other proceedings from framing the writ, petition or other means of initiating the claim to final judgment.

In essence a suit may be said to include an action whereby a legal claim is initiated by a writ to its final judgment.

It is again necessary to ask whether the application before the Court is one to initiate a legal claim to its final judgment or whether it is just an Interim Order?

I have no doubt in my mind that what the application before the Court is seeking the Court to do is an Interim Order since the enforcement of any award made by the arbitration is still subject to the Court action. By Order 8 rule 1 of the High Court Civil Procedure Rules, 1976, it is provided “Interlocutory applications may be made by motions at any stage of a cause or matter.”

It is not therefore tenable for the counsel to respondent to argue that the Order being sought could not be commenced by a motion. It is an interlocutory matter and as such all interlocutory matters or cause are usually made by motion at any stage of the proceedings.

The same view and procedure are adopted and followed in a Lagos High Court judgment which went to the Supreme Court on appeal in the case of Royal Exchange Assurance v. Bentworth Nigeria Ltd. (1976) U.I.L.R. p. 293, where the Supreme Court re-affirmed the judgment of Lagos High Court delivered by (Sowemimo J.) as he then was that where a party refuses within a given time after due notice to have an arbitrator appointed, the Court has full power and jurisdiction to appoint an arbitrator on an application properly made by the party who has served such notice. When his Lordship Udo Udoma JSC was reviewing the judgment of the High Court in that of the Supreme Court he said on page 295 of the report:

“The time “Stipulated in the notice having expired, the respondent by motion dated 27th August, 1966 in the High Court of Lagos State Suit No. M/179/66 applied to the Court to exercise its powers under Section 6 of the Arbitration Act (Cap. 13) by making an Order appointing an arbitrator to inquire into the matter”

Thus when the High Court was being asked to make an Order appointing an arbitrator, the application before that Court was by a motion and not by writ of summons as contended by the counsel to the respondent.”

Achike, J.C.A., in his lead judgment in the Court of Appeal opined thus:

“Therefore, the contention can hardly be sustained that Order 2 Rule 1 provides exclusively that all actions and proceedings must, of necessity, be commenced by a writ of summons since there is express

provision for commencement of action additionally in other manner as may be prescribed by Rule of Court or by other original proceedings". I will cast my lot with the proponents who ascribe a liberal interpretation to Order 2 Rule 1 within the context of the meaning of the terms "action" and "cause" as

B contained in Section 2 of the High Court Law of Northern Nigeria, 1963 applicable to Kano State."

After a review of the submissions of learned counsel for the appellant in the appeal, the learned Justice of the Court of Appeal went on to conclude:

C "From the foregoing I am satisfied that the application upon motion on notice by the respondent wherein it prayed the court under Section 6 of the Arbitration Law to appoint an arbitrator in the circumstances of this case, cannot be impugned. Section 6(2) stipulates that such request by the applicant-suppliant should be done by application and no where was it said that it should be made by a writ of summons nor that the pendency of proceedings should be a condition precedent for making such application."

D The same arguments as proffered in the courts below have again been put forward in the written briefs filed in this appeal. In my respectful view, the conclusion of Achike JCA states the correct law. Section 6(2) of the Arbitration Law of Kano State sets out the mode of approaching the court for the appointment of an arbitrator. It states:

E "6(2) If the appointment is not made within seven days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties." (italics mine).

F Although Order 2 rule 1 of the High Court (Civil Procedure) Rules, 1976 of Kano State provided that -

"Every suit shall be commenced by an application to the registrar for the issue of a writ of summons."

G It is not the only method of commencing actions in the High Court. The High Court Law and Rules of each State recognise other methods of commencing proceedings. For Instance, Section 2 of the High Court Law Cap. 49 Laws of Northern Nigeria 1963 (applicable in Kano State) defines the word "action" as meaning -

"a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court,"

H And "suit" is defined as including action. See: Aguda on Practice and Procedure of the Supreme Court, Court of Appeal and High

Courts of Nigeria, paragraph 3.09 on page 18 as to the various methods of commencing civil proceedings in the various High Courts. See also: Ashiru Noibi v. R. J. Fikolati & Anor. (1987) 1 NWLR (Pt.52) 619 at 630; (1987) 3 S.C. 105, 115 -116 per Uwais, J.S.C. (as he then was) where the learned Justice said:

"It is true that by the provisions of Order 2 rule 1 of the High Court (Civil Procedure) Rules, Cap. 45 of the Laws of Ondo State of Nigeria, 1978 -

"Every action shall be commenced by writ of summons, which shall show the cause of action and be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action."

The word "action" has been defined in Order 1 rule 2 of the High Court (Civil Procedure) Rules to mean -

"a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court, but does not include a criminal proceeding."

In view of this definition, it appears to me that Order 2 rule 1 is not free from ambiguity. For if an action can be commenced by a writ of summons or any other manner as may be prescribed by rules of court, it cannot rightly be "argued that the provision of Order 2 rule 1 that all actions must commence with writ of summons, is the exclusive and only way that a suit can commence in the High Court. Indeed there are, in fact, other ways in which a case can commence in the High Court. For instance an originating summons is required under the provisions of a number of statutes (such as section 10 of the Public Lands Acquisition Act, Cap. 67 of the Laws of the Federation of Nigeria, 1958, for court to determine the persons entitled to compensation under the Act) to commence an action. In proceedings in respect of the infringement of fundamental rights (see F Order 1 rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 1979), the prerogative orders of habeas corpus, mandamus, certiorari and prohibition, action is commenced by application to the High Court. And in election and divorce cases, action begins with petition (See Section 119(4) of the Electoral Act, 1982 and Section 112(4) of the Matrimonial Causes Act 1970)."

This Court, has, in Lahan v. Attorney-General of W.R. (1963) 2 SCNLR47; (1963) All NLR 224 (Reprint), held that where statutory provision is made for making a claim, that ought to be pursued in making it. And in Akunnia v. Attorney-General, Anambra State (1977) 5 S.C. 161, this Court, following Fajimi v. The Speaker, Western House of Assembly (1962) 1 SCNLR 300; (1962) A.N.L.R. (Pt.1),206, (Reprint), held that The word "action" has been defined in Order 1 a statute but in respect of which no rules of practice and procedure exist, the proper procedure is an originating Notice of Motion.

Section 6(2) of the Arbitration Law having prescribed the method by an application for approaching the court for the appointment of an arbitrator where the parties could not agree and that method having been resorted to by the Applicant/Respondent in this case, I must hold that there is no merit in the complaint against the competence of the proceedings in the trial High Court. I, therefore, answer Question (1) in the affirmative.

QUESTION (2):

This question, in my respectful view, is the main issue in this appeal. In the affidavit in support of the application for the appointment of an arbitrator, Alhaji Aminu Ibrahim Kofa deposed, inter alia, as follows:

"1. That I am the Managing Director/Chairman of Kofa Trading Company Limited which is the applicant in this case and by virtue of my position, I am familiar with the facts of this case.

2. That by finance contract dated 15th day of October 1984, duly executed between Ma'ana Investment Limited Kano, and Kano State Oil and Allied Products Limited Kano, whereby some rights and commitments are incumbent on both parties to carry out the provisions of the contract.

Please see Annexure (A).

3. That the Finance contract makes provision for the appointment of an Arbitrator in case of any dispute between both parties see clause 19 Annexure (A).

4. That during the course of the execution of the contract Ma'ana Investment Limited decided with the consent and approval of Kano State Oil and Allied Products Limited to assign its rights and obligations under the finance contract Annexure (A) to Kofa Trading Company Limited. See Annexure (B).

5. That Kano State Oil and Allied Products Limited clearly indicated in writing that it shall be bound by such assignment when duly executed. Please see Annexure (C).

6. That the Deed of Assignment was duly signed and executed by both Ma'ana Investment Company Limited and Kofa Trading Company Limited and forwarded to Kano State Oil and Allied Products Limited, as earlier agreed - see Annexure (C).

7. That since the execution of the Deed of Assignment Kano State Oil and Allied Products Limited ceased to deal with Ma'ana Investment Limited and started dealing with Kofa Trading Company Limited in line with the finance contract dated 15th October, 1984 (Annexure A). Please see Annexures B, E, F and G.

8. That in accordance with the provisions contained in the Deed of Assignment and as approved by Kano State Oil and Allied Products Limited all rights, privileges, duties and obligations under Annexure (A) are vested on Kofa Trading Company Limited."

Annexed to the affidavit are some documents, principally the original agreement between the Appellant and MA' ANA Investment Limited (Exhibit A) and the deed of assignment whereby MA' ANA Investment Limited assigned its rights and obligations under Exhibit A (Exhibit B). The question to be determined is: to whom did MA' ANA Investment Limited assign its right and obligations?

Exhibit reads:

THIS AGREEMENT BETWEEN: Kano State & Allied Products Ltd., whose address is 123 Maganda Road, Kano Nigeria (hereinafter referred to as the Importer which expression shall include their personal representative, Manager receiver, liquidator and assign) and Alhaji Aminu Ibrahim Kofa whose address is Kofa Trading Company Ltd., Murtala Mohammed Road, Kano Nigeria (hereinafter referred to as the financial (sic) which expression shall include his personal representative, administrator, executor and assign) on one part and Ma'ana Investment Limited, 50, Ado Bayero Road, Kano Nigeria (hereinafter referred to as the which expression shall include their persona] representative, manager, receiver, liquidator and assignee) of the other part.

WHEREAS: Under and by virtue of an agreement dated 15th October 1984 (hereinafter referred to as the Initial Agreement which expression shall include all subsequent amendments between the agreeing and the particularly described as Schedule "A" parties) between the Importer and the Vendor. The Vendor is entitled to certain Rights and Privility (Sic) upon completion of his finance/supply obligation according to the law, intent and meaning of the said initial agreement.

AND WHEREAS: Under and by virtue of an agreement dated 7th January 1985 (hereinafter referred to as the Supplementary Agreement more particularly described as Schedule "B" between the Vendor and the Financier, the Vendor is indebted to the financier to the tune of N6,543,666.65 (Six million Five Hundred and Forty Three Thousand Six Hundred and Sixty Six Naira Sixty Five Kobo) under terms and condition of the said Supplementary Agreement contained therein.

AND WHEREAS: The financier have requested the Vendor for an Assignment of the Vendor's Rights under the Initial Agreement as and complete satisfaction of the Vendor's responsibility under the Supplementary Agreement and the Importer has consented to the assignment.

AND WHEREAS: The Vendor has agreed to assign his Rights and interest under the Initial Agreement to the Financier for and additional consideration of the sum of N50,000.00 (Fifty Thousand Naira only).

Nigerian currency.

NOW THIS DEED WITNESS AS FOLLOWS:

1. That in pursuance of the said foregoing agreements and in consideration of the sum of N50,000.00(Fifty Thousand Naira), Nigerian currency paid to the Vendor by the Financier, the receiver (sic) of which is
B hereby acknowledge by signing this document, the (Vendor) as the bene

factor of the Initial Agreement hereby assigns the receiver of all that privileges, rights, duties and obligations contained in the Initial Agreement
C unto the financier.

2. The Vendor hereby covenants to indemnify the Financier at all actions by third parties for title or other interest on the Initial Agreement. The Vendor further covenants with the Financier pass directly unto him the Kano State Government Guarantee states the Initial Agreement.

3. The Importer hereby covenants with the Vendor to transfer
D deal and pass any claim of responsibility with the Financier to the total exclusion of the Vendor.

4. The Financier hereby covenants with the Vendor henceforth during the execution of the said Initial Agreement to negotiate and pay all charges, impositions, outgoings and fees to the following:

E Mahammadu Wabili, Ibrahim Mudi & Co. Aeromaritime (Nigeria) Limited, Alhaji Mohammadu Sani Abdullahi

The financier hereby further covenants to keep the Vendor indemnified against all claims, actions or demands on account of the said covenants or conditions in any way relating therefore and the Financier
F hereby from the date of the execution of this law becomes the Legal Benefactor of the Initial Agreement at the supplementary Agreement is fully satisfied.

The Schedules Referred To Above Are Attached To And Form Part of This Deed.

In Witness Whereof The Vendor Has Hereunder Set His Hand And Seal And The Financier And The Importer Have Individually Set
G Their Hands And Seal This Day And Year First Above Witness.

Signed, Sealed and Delivered by)

The Within Named the Vendor) Sgd:

Ma'anah Investment Limited)

In the Presence of:

H Name: Alhaji Ado Danda

Address: Box 1077, Kano

Occupation: Trader

Signature:

Signed, Sealed and Delivered)

By The Within Named, the)

Financier, Aminu Ibrahim Kofa)

B

In the Presence of:

Name: Abdulkadir Bantiti

Address: 174 Sarari Kano City

Occupation: Trader

Signature:

Signed, Sealed and Delivered)

By the within named, Kano)

State Oil & Allied Products Limited)

D

In the Presence of:

Name:

Address:

Occupation:

Signature:

E

If the above Agreement was the deed of assignment (as it was held out to be) whereby Ma'ana Investment Limited transferred its rights and obligations under its contract with the Appellant (Exh. A), then the
F assignment was to Alhaji Aminu Ibrahim Kofa "whose address is Kofa Trading Company Ltd., Murtala Mohammed Road, Kano" and referred to in the deed as the "Financier"; it was not to Kofa Trading Company Limited who is the Applicant/Respondent in these proceedings. Alhaji Kofa was undoubtedly the Managing Director of Kofa Trading Company
G Ltd., but he did not execute the deed as such but in his personal name. There is no evidence that, in executing the deed, he was acting as agent of Kofa Trading Company Limited. In the event of a dispute between the parties to the original contract necessitating recourse to arbitration (as provided for in Exhibit A), the parties to the submission would be Alhaji Aminu Ibrahim Kofa and Kano State Oil & Allied Products Limited (the
H Appellant in this appeal).

It might be that it was the Appellant who performed the contract but it could only have done so as agent of Alhaji Kofa; there is no evidence of any assignment of the contract from Alhaji Kofa to Kofa Trading

Company Limited (the Respondent). This contention was made clear from the beginning of the proceedings in the submissions of learned counsel for the Appellant in the trial High Court. The learned trial Judge, in this ruling, observed:

B “As has been pointed out the respondent did not consider it necessary to file a counter affidavit, however, this notwithstanding, he contended on points of law that the Deed of assignment was between Alhaji Aminu Ibrahim in person and Ma’ana Investment Corporation.

C It was his view that Kofa Trading Company Ltd., was not a party to the agreement and as such it could not take any advantage under it. If I am right in acuping (sic) that the learned counsel made this submission because of the Deed of assignment annexed to the motion paper, I will concede that the learned counsel was right to a point.”

D One would have thought that this observation determined the matter before him.

The learned trial Judge went on, however, to observe further:

“However, the matter between the applicant and the respondent does not rest there alone.

E This is because sometime on 21st June, 1985, Kano State Oil and Allied Product Ltd., wrote to the Managing Director Ma’ana Investment Ltd. By paragraphs 3 and 4 it is said:-

F 3. We have noted that in the draft you forwarded under covering letter of 29th May, 1985, Kasoap has been made a party to the proposed assignment whereas in the one sent to Kasoap under the covering letter of 27th May, 1985, the proposed agreement was a tough affair between Ma’ana Investment Ltd. and Kofa Trading Company Ltd.

G 4. As advised by our solicitors, an assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action or of any estate or right therein, as such Kasoap cannot be a party to the proposed assignment since it is not transferring any property to anyone. The assignment should be between Ma’ana Investment Ltd., and Kofa Trading Company Ltd.

H Apparently Kano State Oil and Allied Products Limited anxious to see that the deed of agreement was quickly executed between Ma’ana and Kofa Trading Company followed up with another letter of 16th August 1985 forwarding a properly prepared Deed of assignment to the Managing Director of Kofa Trading Company. The contents of the letter read thus:-

“We are enclosing herewith 3 Original copies of the signed Deed of Assignment between Ma’ana Investment Limited and Kofa Trading

Company Nigeria Limited and kindly request you to get the document duly dated and stamped at the Revenue office of the State Ministry of Finance and Economic Planning. The documents should be returned to us as soon as this is effected.”

Although there is nothing before the court to show the contents of the new Deed of assignment nor to show when it was stamped and registered but from the contents of this letter one thing is very certain. This is to the effect that this was a new Deed of assignment between Ma’ana Investment Ltd., and Kofa Trading Company Limited and that the New Deed had

C been duly signed by the parties mentioned in it and what remained then was for stamping and registration. It can therefore be presumed that after the stamping and registration the, Deed of Assignment was duly executed between the parties. This assumption of mine is more evident from the subsequent correspondences from the Respondent to the applicant where the respondent addressed all these letters to the Managing Director of Kofa Trading Company Ltd., and not Ahaji Aminu Ibrahim. D

E It is therefore not correct to say that the Deed of assignment was between Alhaji Aminu Ibrahim in his personal capacity and Ma’ana Investment Ltd., and that Kofa Trading Company Ltd., could not take advantage under the deed because he was not a party. It is abundantly clear from the above that the assignment was between Ma’ana Investment and Kofa Company Ltd. But, in case my assumption is wrong, I have not slightest doubt in my mind that all the subsequent steps and action by the Respondent after the letter of 21st June, 1985, where ours to make the applicant believe that the respondent was dealing with no other person F but Kofa Trading Company Ltd.”

And concluded:

G “I therefore agree with the learned counsel to the applicant that the respondent knew very well the person they were dealing with. They were certainly dealing with Kofa Trading Company Nig. Ltd., and not Alhaji Aminu Ibrahim and since they voluntarily allowed to be bound by the Deed of assignment, they must be bound by it notwithstanding the facts that the terms are now unfavourable to them.”

H While acknowledging that under the deed (Exh. B) tendered in evidence before him the Applicant/Respondent was not a party to the original contract by assignment, the learned Judge, with respect, imported another deed not in evidence before him and on which he had no evidence as to its execution. In any event it is clear from the affidavit evidence before him that the basis of the Applicant’s claim was Exhibit B

and if that document did not support its claim, the learned Judge ought to have so found and reject the application. It is not for him to speculate in the manner he did. His reliance on equity arose out of a misconception of the application before him. To be entitled to the appointment by the court of an arbitrator the party applying must be a party to the submission, that is, he must be a party to the contract providing for arbitration. Submission is defined in Section 2 of the Arbitration Law as meaning:

“a, written agreement to submit present or future differences to arbitration,

C whether an arbitrator is named therein or not.”

The claim before him was not one in quantum meruit as to justify his recourse to equity.

The Court of Appeal, per Achike, J.C.A., had this to say on the issue under consideration:

D “Now to Issues No.2 and No.3 which relate to the third ground of the original grounds of appeal. The crux of the two issues is whether the respondent is a party to the submission. The relationships between the respondent, appellant and another juristic person, Ma’ana Investment Ltd., Kano (hereinafter referred to as M) are clearly set out in some of the paragraphs of the affidavit in support of Respondent’s motion.”

E After setting out paragraphs 1 -11 of the affidavit in support, the learned Justice of Appeal continued:

F “Briefly, Annexure A shows that there was an initial agreement between the appellant and M, which broadly involved the business of “crushing of seed refining vegetable oil and manufacture of allied products”. Subsequently, with the consent of the parties, to wit, appellant, respondent and M, (See Annexure B) all M’s interest in the said business was transferred or assigned to the respondent who effectively stepped into M’s shoes, as we had noted, with appellant’s consent and knowledge of same.”

G I pause here to observe that the “respondent”, that is applicant, was never a party to Annexure B. The learned Justice continued -

H “The mix-up in the arrangement between the three parties has arisen from the insertion in Annexure C the name of “Alhaji Aminu Ibrahim Kofa” referred to as the “financier” as opposed to “Kofa Trading Company Ltd.” the respondent in this suit. There is no doubt that there is some difference between these two appellations: the former is a natural legal person (a human being) whereas the latter is a juristic person, a creature of statute.”

After a review of the submissions of learned counsel for the parties,

the learned Justice found:

“It is correct to say, as submitted by appellant’s counsel, that the Deed of Assignment ex facie showed that M assigned his entire interests in the business to Alhaji Aminu Ibrahim Kofa and not to the respondent.

But to accept that submission, without more, is to take an over simplistic view of the mix-up. With respect to Mr. Sanyaolu, that line of argument is very pedestrian. To accede to same is to deliberately turn one’s back to the overwhelming affidavit evidence placed at the disposal of the court which predominated in favour of the respondent. The main paragraphs of the affidavit in support of the motion have earlier been reproduced in this judgment. They showed unmistakably what was intended, and indeed accomplished by the three chief dramatis personae, namely, the assignment of his entire interest to the respondent with the appellant fully brought into the picture. It will be manifestly absurd and inequitable to hold otherwise.”

And concluded:

D “I, therefore hold, even without invoking the beneficent provisions of section 131(1)(a) of the Evidence Act, but upon the totality of the unchallenged affidavit evidence placed at the disposal of the lower court that there was in fact an assignment by M to the respondent of the former’s interest as contained in the original written agreement, Annexure A, executed between the appellant and M. Therefore, the respondent as the assignee of M’s rights in Annexure A was competent to assert all the right contained in Annexure A, including the right under clause 19 which provided for submission of disputes to arbitration.”

F Mr. Sanyaolu, learned counsel for the Appellant has, in the Appellant’s Brief, argued thus:

“With the greatest respect, it is submitted that the court below was in error in reaching that conclusion because:

(1) The Respondent did not allege and did not rely on mistake or on any clerical error. It alleged forcefully in paragraphs 4 to 6 of the affidavit in support of its motion that the Deed of Assignment (Annexure C) was between Ma’ana Investment Limited and Kofa Trading Company Limited.

(2) The Court below introduced issues of mistake and errors and of equitable assignment when these issues were never raised by the parties. The Court can not inject its own views for matters which there should be, but which there was no evidence before it. See: Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (Pt.39) at page 39.

(3) The contents of the affidavit in support of the Respondent’s motion, particularly paragraphs 4 to 6 and Annexure C (the Deed of Assignment) contradict the assertion by the Respondent that the assignment

was between Ma'ana Investment Ltd., and the Respondent and there was nothing left for the Appellant to challenge by a counter-affidavit.

The court below indeed at page 100 of the Record of Appeal described Annexure C as "the discredited deed of assignment." (See also page 104 of the Record).

B (4) The principle of estoppel by conduct as stated in Section 150 of the Evidence Act and relied upon by the Court below at pages 98 to 99 in holding that -

C "The unchallenged affidavit evidence clearly showed that the appellant not only had knowledge of the assignment between M and respondent but that

in fact, and on several occasions, it dealt with the respondent upon the existence of the said assignment" is, with the greatest respect erroneous, since the facts upon which the Respondent relied in the affidavit in support of the motion did not make out the plea."

D The agreement relied upon by the Respondent is express (Annexure C) and it is a Deed of Assignment. No misrepresentation was alleged or proved. It is also submitted that an estoppel by conduct can not operate if its effect is to override or circumvent positive rules of law, which in this case, is the provision of Section 131(1) of the Evidence Act. (See Phipson E on Evidence 12th Edition, paragraph 141 to 214)."

F I agree entirely with the above submissions. The Applicant/Respondent admitted in Respondent's Brief that a mistake was made "where the name of Alhaji Aminu Ibrahim Kofa was inserted in the Deed of Assignment instead of Kofa Trading Company Limited." By this admission the Respondent was saying that it was not a party to Annexure B, though in error. Having gone through Annexure B, I cannot myself say that a mistake was made. In any event, issue of mistake or error was not raised by either party and it is wrong of the two courts below to import same into the Applicant's case.

G The conclusion I reach on Question (2) is that the Applicant/Respondent was not a party to the submission and could, therefore, not rely on Annexure A in praying for the appointment of an arbitrator. The only persons, who could do so under Annexure B were Alhaji Aminu Ibrahim Kofa and the Appellant.

H In view of the conclusion I reach on Question (2), Question (3) does not arise and I do not consider it necessary to go into the issues raised on Question (4). Suffice it to say that this appeal succeeds and it is hereby allowed. I set aside the judgment of the court below and the ruling of the trial High Court. Having held that the Applicant/Respondent was not a party to the submission, it had no locus standi to bring its application

which is, accordingly, hereby struck out. I award N1,000.00 costs to the Appellant.

UWAIS CJN

B I have had the privilege of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I agree with it entirely. I have nothing to add.

Accordingly, the appeal is hereby allowed. The decisions of the courts below are set aside with N1,000.00 costs to the Appellant. C

OGWUEGBU JSC

D I have had the privilege of a preview of the judgment just delivered by the learned brother Ogundare, J.S.C. I am in agreement with him that this appeal succeeds.

The respondent being a total stranger to Exhibit "C" (the Deed of Assignment), cannot rely on the provisions of the Arbitration Clause contained in Exhibit "A" to invoke the Court's power under Section 6 of the Arbitration Law Cap. 7 Laws of Northern Nigeria, 1963 applicable E in Kano State.

The party to Exhibit "C" is "Alhaji Aminu Ibrahim Kofa whose address is Kofa Trading Company Ltd., Murtala Mohammed Road, Kano Nigeria" and NOT the respondent - (Kofa Trading Company Limited). The respondent therefore lacks the locus standi to initiate the proceedings F leading to this appeal.

For this and the fuller reasons contained in the judgment of my learned brother Ogundare, J.S.C., I allow the appeal and strike out the application. The appellant is entitled to N1,000.00 costs.

ADIO JSC

G I have had the privilege of reading, in advance, the judgment just read by my learned brother, Ogundare, J.S.C., and I entirely agree with his reasoning and conclusion. I too allow this appeal.

H My learned brother, Ogundare, J.S.C., has, in the lead judgment, given a comprehensive summary of the facts of this case and it is not necessary for me to repeat them. I, however, wish to make some comments. The crucial and fundamental question was whether the respondent was a party to the agreement which made provision for the appointment of

an arbitrator and matters connected with it. A careful examination of the relevant documents showed that the respondent was not a party to the relevant agreement. The parties to the agreement were the appellant and Alhaji Ibrahim Kofa. This is the legal position even if Alhaji Ibrahim Kofa owned majority of all the shares in Kofa Trading Company Limited.

B Upon incorporation of a company, it becomes a body corporate and, in the eyes of the law, it is a person which is distinct from its members or shareholders. The Kofa Trading Company Limited was an artificial person which, in law, is separate from Alhaji Ibrahim Kofa, a natural person. See *Salomon v. Salomo & Co. Ltd. (1897) A. C. 22.*

C In view of the legal position explained above, another legal principle becomes applicable. It is that Alhaji Kofa could not legally enforce an

D agreement, to which he was not a party and it does not matter that the respondent was a party to it nor could the respondent enforce an agreement, to which it is not a party and it does not matter that Alhaji Kofa was a party to it. In short only the parties to a contract or an agreement can enforce it. A person who is not a party to it cannot do so even if the contract was made for his benefit. See *Ikpeazu v. African Continental Bank Ltd. (1965) N.M.L.R. 374*; *Lagos State Development Property Corporation v. Nigerian Land & Sea Food Ltd. (1992) 5 N.W.L.R. (Pt. 244) 653*; and *Union Beverages Ltd. v. Pepsi Cola International Ltd. (1994) 3 N.W.L.R. (Pt.330) 1.*

F One other question was that the issue of mistake or error, if any, was not raised by any of the parties and there was no suggestion of equitable assignment. They were matters introduced or imported by the two courts below. This raises the question of the duty of a court in relation to matters pending before it. The duty of a court is to consider and determine the case before it in the light of the complaints made or issues properly raised by the parties. A Court should not set up for the parties a case different from the one set up by the parties themselves in the pleadings or their affidavits See *Oniah v. Onyia (1989) 1 N.W.L.R. (Pt.*