

SUPREME COURT OF NIGERIA
13TH JANUARY, 2006. SC. 57/2002
CORAM:- I. L. KUTIGI, U. A. KALGO, D. MUSDAPHER,
W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC

NIGERIAN NATIONAL APPELLANT
PETROLEUM CORPORATION

AND

1. LUTIN INVESTMENTS LTD
2. HON. JUSTICE UCHE OMO RESPONDENTS
(LEARNED ARBITRATOR)

ARBITRATION - Company - Incorporation - Proof of - Allegation that 1st respondent - Is different from the Company appellant entered agreement with - Is not established (H1)

STATUTES - Interpretation - Courts - Arbitration Act - Clear words - Should be given effect - Without resort to external aid - Arbitration tribunal has the power - To determine venue for the proceedings s.16 (1) & (2) of the Act (H2)

ARBITRATION - Venue for the proceedings - Where not fixed by the parties' agreement - The arbitrator has power to determine it (H3)

ARBITRATION - Venue - Appeals - Arbitrator's fixing of venue for proceeding abroad - Is not contrary to s. 16 of the Act - As rightly found by the Court of Appeal (H4)

FACTS

The plaintiff/appellant entered into an agreement with the 1st defendant/respondent on 23-2-1992. The agreement made provision for reference to arbitration in the event of any dispute that the parties are not able to settle mutually. A dispute arose which the parties referred to the 2nd defendant/respondent as their agreed arbitrator in accordance with

clause 2 of their agreement. In the course of the arbitration proceedings, counsel for the appellant objected to the continuation of the proceedings. He contended that whereas the agreement was entered between appellant and Lutin Investment Ltd., Geneva, Switzerland, the party Lutin Investment of British Virgin Island that initiated the arbitration proceeding is a complete stranger to the agreement. That the said agreement having provided for arbitration under Nigerian law, the arbitrator was wrong to move the venue for the proceedings to England.

The 2nd respondent/arbitrator overruled the objections, stating that if in the course of hearing, the appellant shows that there are two separate Lutin Investment Ltd. companies involved, normal consequences will follow. Appellant then filed a claim before the Federal High Court Lagos seeking inter alia, a declaration that the mutual appointment of the arbitrator is no longer considered reasonable, fair, etc. The trial Federal High Court dismissed the appellant's entire claim. Its appeal to the Court of Appeal was also dismissed. Being dissatisfied, appellant has further appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per **KALGO JSC**)

Company - Incorporation - Proof of

1. There was also nothing in the pleadings of the respondent either before the arbitrator or the Federal High Court admitting that Lutin Investment Limited of Geneva, Switzerland and Lutin Investment Limited of British Virgin Island are two distinct and different companies with identical names. And on the question of burden of proof, it is in my view, the duty of the appellant who alleges to prove that there are two companies involved and that the claimant, now 1st respondent, was a complete stranger to the Agreement giving rise to the arbitration. He had failed to do so according to the record.

I therefore entirely agree with the Court of Appeal that as at this stage, there was insufficient evidence to prove that there were two different companies bearing the name Lutin Investment Limited. The use of the words “*based*” or “*registered*” in Geneva could not without more be conclusive proof of incorporation in Switzerland. I have also no doubt that

the best evidence of proof of incorporation of a company is the production of a genuine Certificate of Incorporation from the Company registration authority of any particular country. There was nothing to that effect in this case as at the time of filing the appeal. This issue must fail and I answer it in the negative. (p. 70 C)

STATUTES - Interpretation - Courts - Arbitration Act

2. It is now well settled that the cardinal principle of the interpretation of Statutes is that where the words used by the legislature in a Statute are clear and unambiguous in their ordinary meaning, effect should be given to them without resort to any external aid. The duty of the Court therefore is to interpret the words as used in the Statute.

I will now consider the provisions of Section 16(2) of the Arbitration and Conciliation Act 1990 mentioned earlier in this judgment.

According to subsection (1) of S.16 above, the arbitral tribunal has the full powers to determine or decide the place where the arbitration proceedings shall take place unless the parties have themselves earlier agreed on where the proceedings shall take place. Subsection (2) of S.16 opened with the words “*Notwithstanding the provisions of subsection (1)*”. The word or expression “*Notwithstanding*” is a term of exclusion in legal drafting; it simply means “*inspite of or irrespective of or disregarding*”. Therefore it means that inspite of the provisions of subsection (1) of S.16, and unless the parties have agreed, the rest of the provisions of subsection (2) shall apply. See for example *Olatubosun v. NISER* (1988) 3 NWLR (Pt.80) 25; *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 357) 414. And the rest of the subsection gives arbitral tribunal the power to meet “*at any place it considers appropriate*” for any of the purposes set out therein, and “*any place*” is not restricted to Nigeria only. It appears clearly to me that the most important factor in determining the place of arbitral proceedings according to S.16 (1) and (2) above, is the agreement of the parties before coming to arbitration. (p. 72 B)

ARBITRATION - Venue for the proceedings

3. It is abundantly clear that the parties have agreed to be bound by the

provisions of the Arbitration Act, 1990 of the Federal Republic of Nigeria and any revision thereto, and so S.16(1) and (2) above applied to the arbitration proceedings in this case.

By subsection (1) of section 16 of the said Act, the arbitral tribunal has the power to determine the place of the arbitral proceedings except where the parties agreed on a place. And subsection (2) of section 16 of the same Act says that excluding or inspite or irrespective of the provisions of subsection (1), the arbitral tribunal may still meet at a place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property. It appears to me that S.16 of the Act deals with two types of situations in the arbitral proceedings. Subsection (1) deals with determining or deciding the place where the arbitration shall take place and subsection (2) deals with the place where arbitral tribunal may meet for the purpose set out in that subsection such as hearing evidence of the parties, their witnesses or the inspection of goods or documents relevant to the arbitration.

I have carefully examined the Agreement entered into by the parties on pp.272-278 of the record, and I am satisfied that no where in any clause of the Agreement did the parties agree on the place of the arbitral proceedings or where the tribunal shall meet. They however agreed to be bound by the laws in force in Nigeria to govern their relationships. Clause 11 of the Agreement provides: -

“LAW OF THE AGREEMENT

This agreement shall be deemed to be a Nigerian Agreement and shall be governed and construed in accordance with the Laws in force in the Federal Republic of Nigeria. Parties to the Agreement shall comply with these laws”

Therefore since the said Act governs the Agreement between the parties and no where in it did the parties agree on the place to conduct arbitral proceedings, the arbitrator (2nd respondent) has full and unfettered powers to determine or decide where the proceedings shall take place or continue pursuant to the provisions of S.16 of the said Act. (p. 73 F)

Arbitrator’s fixing of venue for proceeding abroad

4. The Court of Appeal, after setting out the provisions of S.16 in its judgment, per Oguntade JCA (as he then was) said: -

“Under the above provisions, unless both parties agreed to the contrary, an arbitral panel can on its own decide the place of the arbitral proceedings and may meet at any place it considers appropriate. In the instant case, the arbitral panel agreed to sit in London for the purpose of taking the evidence of Mr. Leno Adesanya and one or two other witnesses. Even if the appellant thought that the decision to go to London to take the evidence of some witnesses to be called by the 1st respondent was inconvenient or needlessly expensive, the decision still remained one arrived at in absolute compliance with S.16 of Cap. 19 above.”

I entirely agree with this finding. I do not therefore agree with the learned counsel for the appellant that the lower courts have wrongly extended the interpretation of S.16 of the said Act or that the phrase “any place it considers appropriate” did not empower the arbitrator to conduct proceedings anywhere outside Nigeria. No where in the said Act or the Agreement between the parties, was there any provision or clause respectively indicating that all proceedings in the arbitration must be restricted or limited to within Nigeria only. In the circumstances, I answer issue 2 in the affirmative. (p. 74 F)

REPRESENTATION

Chief Solomon Asemota SAN, with him H.B. Abina and Kunle Ula, for Appellant.

Uche Nwokedi Esq., with John Erameh, for 1st Respondent.

Babatunde Fagbohunlu, for 2nd Respondent.

CASES REFERRED TO

Fawehinmi v. N. B. A. (No.2) (1989) NWLR (Pt. 105) 558 at 632

A-G Bendel State v. A-G Federation (1983) 1 SCNLR 293

Odua Investment Co. Ltd. v. Talab (1997) 10 NWLR (Pt.523) 1 at Page 59

City Engineering (Nig.) Ltd. v Nigeria Airports Authority (1999) 11

NWLR (Pt.625) 76 at P.86

Olatubosun v. NISER (1988) 3 NWLR (Pt.80) 25

Kotoye v. Saraki (1994) 7 NWLR (Pt. 357) 414

J.K. Randle v. Kwara Breweries Ltd. (1986) 6 S.C. 1 @ 7

African Continental Bank PLC & anor. v. Emostrate Ltd. (2002) 8 NWLR (Pt. 770) 501 @ 575, 577; (2002) 4 SCNJ 299 @ 309

B Bank of Baroda v. Iyalabani Ltd. (2002) 7 SCNJ 287 @ 301 - 302

Udih v. Elizabeth Idemudia (1998) 3 S.C. 50; (1998) 3 SCNJ 36

Ezemba v. Ibeneme & anor (2004) 7 SCNJ 136 @ 158

International Messengers (Nig.) Ltd. v. Pegofor Industries Ltd. (2005) 5 SCNJ 120 @ 135

C Arinze v. First Bank Nig. Ltd. (2004) 12 NWLR (Pt.888) 668 @ 673, 675, 679; (2004) 5 S.C. 100; (2004) 5 SCNJ 183 @ 188

Alhaji Maingge v. Alhaji Gwamma (2004) 7 S.C. (pt.II) 86 @ 97; (2004) 7 SCNJ. 361 @ 372

D STATUTES REFERRED TO

Evidence Act s. 74(1)(f)

Companies & Allied Matters Act s. 54

Arbitration And Conciliation Act, 1990 ss. 16(1) & (2), 56(2)

E

LEAD JUDGMENT BY KALGO JSC

This appeal arose as a result of arbitration proceedings. Briefly the facts giving rise to this appeal are these. The appellant entered into an Agreement with the 1st respondent on 23/2/92, which made provision for reference to arbitration in the event of and dispute arising between the parties thereto which dispute could not be mutually settled. A dispute actually arose between the parties and reference was then made to an arbitrator appointed by and agreed to by both parties. The 2nd respondent herein was the arbitrator jointly appointed by the parties and all references were submitted and made to him in accordance with clause 2 of the said Agreement.

G

In the course of the arbitral proceedings, the learned counsel for the appellant objected to the continuation of the proceedings on the grounds that: -

H

(i) the Agreement of 23/12/92 was entered between the appellant

and Lutin Investment Limited Geneva Switzerland, but the party that initiated the arbitral proceedings is Lutin Investment of British Virgin Island, a complete stranger to the Agreement and

(ii) the said Agreement provided for arbitration under the Nigerian law and therefore it was wrong to move the arbitration to London, England, for any reason.

The learned arbitrator, the 2nd respondent herein, after hearing the submissions of learned counsel for the parties to the arbitration, overruled the objections of the learned appellant's counsel but in respect of objection (i) he ruled that:

"There is therefore only one company that is the Claimant i.e. Lutin Investment Limited. If in the course of the hearing of witnesses the respondent (now appellant) succeeds in showing that there are two separate companies involved then the normal consequences will follow."

In respect of objection (ii) the learned arbitrator also ruled that since the parties did not specifically agree on where the arbitration is to be held, in their Agreement, the law gives him full powers to decide the locale of the arbitration.

The appellant was dissatisfied with this ruling and consequently filed a civil summons against the respondents in the Federal High Court, Lagos claiming the following reliefs:-

"1. A DECLARATION that the learned Arbitrator Hon. Justice Uche Omo mutually appointed by the parties to the arbitration to arbitrate over the disputed claim of GBP 24,200 + N61,829,934.94 + \$89,260,790.39 by the claimant (the 1st Defendant hereto) is no longer considered reasonable, fair, impartial, suitable and qualified to continue with the arbitration proceedings."

2. A DECLARATION that the learned arbitrator Hon. Justice Uche Omo acted without authority and beyond the scope of the Agreement between the parties and against public policy when he ordered that the Arbitration moves to and sit in London, at the expense of the parties to take evidence from the Claimant's witness."

3. AN ORDER removing the Arbitrator from office to which he had been appointed and in which he had partially served."

The parties filed and exchanged pleadings, called evidence and addressed the Court and the learned trial Chief Judge, Belgore, C.J. in his judgment delivered on 20th December, 1997 dismissed the whole claims of the appellant.

B The appellant appealed against his decision to the Court of Appeal which after hearing the appeal also dismissed the appeal as lacking in merit. He then further appealed to this court on 2 grounds.

C In this court, the parties filed and exchanged written briefs as required by the rules of court. In the appellant's brief, the following issues for determination were identified: -

D *"1. Whether there was sufficient evidence on record, that should lead to the conclusion that Lutin of Geneva, Switzerland and Lutin of British Virgin Island are two different and distinct companies, based on the legal principle that words with fixed meaning in a written contract or document need no further proof by oral evidence to mean something different from what they express.*

E *(ii) whether the Court of Appeal was right in holding that "any place it considers appropriate" under section 16 of Cap.19 Laws of Nigeria extends to taking evidence in London by the Arbitrator against the wish of one of the parties to the arbitration agreement, the proper, correct and scope of the interpretation of the words:- "any place it considers necessary" in section 16(2) of the Arbitration Act 1990 of the Laws of Federal*

F *Republic of Nigeria.*

G *(iv) whether on the facts and circumstances of this case, the 1st Respondent is entitled in law to take advantage for its own benefit the evidence of Mr. Leno Adesanya who was the sole representative and Agent in Nigeria of the 1st Respondent in the light of the events leading to the disagreement of the parties and culminating in the arbitration proceedings."*

H The two issues raised by the 1st Respondent in his brief reads: -
"1. whether Arbitration initiated by Lutin Investment in British

Virgin Island ought to be dismissed in limine because the agreement from which the Arbitration arose was signed by Lutin Investment Limited based in Geneva Switzerland.

2. Whether or not the Arbitrator has an unfettered Discretion to take evidence anywhere he considers necessary."

The 2nd Respondent adopted into the sole issue formulated by the 1st Respondent.

C I have carefully studied the issues for determination set out by the parties to this appeal in their respective briefs as against the grounds of appeal filed by the appellant in this Court, and I am of the view that issues raised by the appellant are apposite, in the circumstances of this case, and I intend to consider them accordingly.

D I will take issue (1) first. This issue deals with whether there was sufficient evidence that Lutin of Geneva, Switzerland and Lutin of British Virgin Island are two different and distinct companies in the circumstances of this case.

E In the arbitration, before the 2nd respondent, the claimant was LUTIN INVESTMENT LIMITED company registered in the British Virgin Island, described as "Geneva based" company with "registered office" in Geneva Switzerland. Chief Asemota, learned SAN for the appellant submitted before the Arbitrator that the claimant had no locus standi in the matter as, according to him, Lutin Investment of British Virgin Island, F was a complete stranger to the Agreement now in dispute and could not therefore take advantage of the Arbitration clause in the said Agreement. The Arbitrator heard the arguments of the parties' counsel on this and ruled that there was insufficient evidence to prove that there are two companies involved and that the claimant had locus standi in the matter at that stage. G

H The appellant then instituted the present action in the Federal High Court Lagos claiming several reliefs, which were all, dismissed at the end of the trial. He then appealed to the Court of Appeal on 6 grounds and raised 6 issues for the determination of that Court. The 5th issue in the appellant's brief in that Court fully corresponds with the first issue now raised by the appellant in this appeal. The Court of Appeal after considering the issue before it had this to say per Oguntade JCA (as he then was): -

“The reasoning of both the arbitrator and the court below is simple and straightforward. They both were saying that the evidence available at the time when the preliminary objection was raised was not sufficient to lead to a conclusion that there existed two different companies bearing the name Lutin Investment Limited. The mere fact that a company was described as based and registered in a country could not without more be conclusive proof of its being incorporated in that country. It has always been recognized under the Nigerian Law that the conclusive way to show the incorporation of a company is the production of the Certificate of Incorporation. The arbitrator had not shut the door against the appellant for he concluded that if it were shown that there were two companies by the name Lutin Investment Ltd., the normal consequences would follow. I affirm the reasoning and conclusion on the point of the Court below.”

It is common ground that the parties to the Agreement, which gave rise to the dispute and permits the parties to submit to arbitration, are: -

- (i) Nigerian National Petroleum Corporation and
- (ii) Lutin Investment Limited.

The head of the agreement provides: -

“THIS AGREEMENT is made the 23rd day of December, 1992, BETWEEN NIGERIAN NATIONAL PETROLEUM CORPORATION a company established under the Laws of Federal Republic of Nigeria (NNPC) of the first part and LUTIN INVESTMENT LIMITED, A Geneva based company having its registered office at 16 Geneva Guisan, 1204, Geneva (For the attention of MR. ROD ALEXANDER, SWITZERLAND) with a representative place of business located at 10/12 Calcutta Crescent, Apapa, Lagos (OWNER) of the other part.”

Learned SAN for the appellant submitted in his brief and in court that since the second party to the said agreement was shown to have its registered office in Geneva Switzerland the Court must take judicial notice of the fact that Lutin Investment Limited is a Swiss Company and that no further proof is required pursuant to the provisions of S.74 (1) (f) of the Evidence Act. He cited no legal authority in support of this contention.

Learned Counsel for the 1st and 2nd respondents separately in their respective briefs submitted that at the stage of the arbitration proceedings

when the appellant raised its objection and on the evidence produced at the trial in the Federal High Court, there was insufficient evidence to establish that there were two different companies bearing the name Lutin Investment Limited. Counsel for the 2nd respondent further submitted that the Nigerian Law (S.54 of Companies and Allied Matters Act Cap. 20 Laws of Federation of Nigeria 2004) recognise the possibility that a company may be incorporated in another country and yet be based for operational purposes in Nigeria.

It appears to me very clearly that the learned appellant's counsel is not relying on an evidence produced by him before the arbitrator or the trial court, to prove that the claimant 1st respondent, had no locus standi in the arbitration. Rather he was relying on the wording of the head of the Agreement and the provisions of S.74(1) (f) of the Evidence Act.

I have carefully examined the record of proceedings in this appeal and find nothing in the arbitration proceedings or in the evidence before the trial Federal High Court to establish that there are two companies involved in this case. In fact the 2nd party recited in the head of Agreement quoted above described Lutin Investment Limited as a “Geneva based company having its registered office in Geneva.”

According to the Oxford Advanced Learner's Dictionary 5th Edition to chase somebody or oneself in or at.... “means to situate some body in a place in or from which they operate.” This therefore only means that the company was “situated” in Geneva. And “register” by the same Dictionary cited above, means “to record or name an event, a sale etc., in a list for official purposes: to make something known officially or publicly especially so that it is recorded.” This also indicates that the company was recorded at the address given in Geneva for record purposes only and not incorporated as a company. There was nothing to show or prove that it was “incorporated” in Geneva. The Agreement itself did not say so as was done in the case of the N.N.P.C. of the first part. Also S.74 (1) (f) of the Evidence Act on facts which the court must take judicial notice of provides: -

“(f) The existence, title and national flag of every State or Sovereign recognized by Nigeria;”

By this provision, our Courts must take judicial notice of the

existence, title and national flag of any country recognized by Nigeria. Assuming Nigeria has recognized Switzerland as a Sovereign State, which I do not doubt, then our courts can and must take judicial notice of its existence, title and national flag. This does not cover the capital city or town of the country concerned in this case Geneva. With respect to the Learned SAN for the appellant, this provision of S.74 of the Evidence Act has nothing to do with the incorporation of the company concerned even if it is registered in Geneva, Switzerland.

There was also nothing in the pleadings of the respondent either before the arbitrator or the Federal High Court admitting that Lutin Investment Limited of Geneva, Switzerland and Lutin Investment Limited of British Virgin Island are two distinct and different companies with identical names. And on the question of burden of proof, it is in my view, the duty of the appellant who alleges to prove that there are two companies involved and that the claimant, now 1st respondent, was a complete stranger to the Agreement giving rise to the arbitration. He had failed to do so according to the record.

I therefore entirely agree with the Court of Appeal that as at this stage, there was insufficient evidence to prove that there were two different companies bearing the name Lutin Investment Limited. The use of the words “based” or “registered” in Geneva could not without more be conclusive proof of incorporation in Switzerland. I have also no doubt that the best evidence of proof of incorporation of a company is the production of a genuine Certificate of Incorporation from the Company registration authority of any particular country. See Fawehinmi v. N.B.A. (No.2) (1989) NWLR (Pt. 105) 558 at 632. There was nothing to that effect in this case as at the time of filing the appeal. This issue must fail and I answer it in the negative.

I now move to consider the 2nd issue. This issue is essentially complaining about the interpretation of the provisions of section 16(2) of the Arbitration and Conciliation Act 1990 Laws of Federal Republic of Nigeria given by the arbitrator and confirmed by trial High Court and the Court of Appeal. The effect of the interpretation was to extend the proceedings of the arbitrator to London, United Kingdom, where the

evidence of witnesses was to be taken.

The learned counsel for the appellant submitted in his brief that the arbitrator has wrongly and unreasonably extended the application of the provisions of section 16(2) aforesaid and it was also wrong for the lower courts to confirm this. Learned counsel contended that the Agreement entered into by the parties provided that it shall be governed by the Nigerian law and by Article 16 of the Agreement, the place agreed by the parties is Nigeria and the arbitrator cannot locate any place outside Nigeria in pursuance of the Agreement. Counsel pointed out that the purpose of limiting the application of the Agreement to Nigeria was to allow the High Court in Nigeria to intervene whenever appropriate and generally to protect the arbitrator and the conduct of the arbitration. He further submitted that in law, the words, “*any place it considers appropriate*” in section 16(2) of the Arbitration act, Cap. 19 of the Laws of the Federation; 1990, is to be restricted in its interpretation to mean “anywhere in/or within Nigeria” and not anywhere in the world. Learned Counsel therefore submitted that the decision to extend meaning of the provisions of S.16(2) of the said Act to overseas countries, has breached the substantive law of Nigeria and was contrary to the intendment of the said Act and the Agreement entered into by the parties more especially as one of the parties is opposed to it.

For the 1st respondent, it was submitted in the brief that the 2nd respondent the arbitrator has the powers under S. 16(1) and (2) of the said Act to determine and locate the place where the arbitration proceedings can take place in order to be fair and just to both parties. For this reason, learned counsel submits that the reasoning and findings of the Court of Appeal in this matter cannot therefore be faulted. In his oral argument in Court, learned counsel referred to the preamble and S.56(2) of the said Act and submitted that the lower courts have taken cognisance of the importance of international arbitration which involved a foreign company as in this case, and this entitled the arbitrator to take proceedings outside Nigeria in fairness to the parties.

The learned counsel for the 2nd respondent relied on his brief and also fully adopted the submissions of the 1st respondent’s counsel. He pointed out that there were concurrent findings in this appeal, which should not be disturbed. He urged the court to dismiss the appeal.

It is now well settled that the cardinal principle of the interpretation of Statutes is that where the words used by the legislature in a Statute are clear and unambiguous in their ordinary meaning, effect should be given to them without resort to any external aid. The duty of the Court therefore is to interpret the words as used in the Statute. See A-G Bendel State v. A-G Federation (1983) 1 SCNLR 293; Odua Investment Co. Ltd. v. Talab (1997) 10 NWLR (Pt.523) 1 at Page 59; City Engineering (Nig.) Ltd. v Nigeria Airports Authority (1999) 11 NWLR (Pt.625) 76 at P.86

I will now consider the provisions of Section 16(2) of the Arbitration and Conciliation Act 1990 mentioned earlier in this judgment. Section 16(1) and (2) provide:

(1) *“Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.*

(2) *“Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties or for the inspection of documents, goods or other property.”* (Underlining mine)

According to subsection (1) of S.16 above, the arbitral tribunal has the full powers to determine or decide the place where the arbitration proceedings shall take place unless the parties have themselves earlier agreed on where the proceedings shall take place. Subsection (2) of S.16 opened with the words *“Notwithstanding the provisions of subsection (1)”*. The word or expression *“Notwithstanding”* is a term of exclusion in legal drafting; it simply means *“in spite of or irrespective of or disregarding”*. Therefore it means that in spite of the provisions of subsection (1) of S.16, and unless the parties have agreed, the rest of the provisions of subsection (2) shall apply. See for example Olatubosun v. NISER (1988) 3 NWLR (Pt.80) 25; Kotoye v. Saraki (1994) 7 NWLR (Pt. 357) 414. And the rest of the subsection gives arbitral tribunal the power to meet *“at any place it considers appropriate”* for any of the purposes set out therein, and *“any place”* is not restricted to

Nigeria only. It appears clearly to me that the most important factor in determining the place of arbitral proceedings according to S.16 (1) and (2) above, is the agreement of the parties before coming to arbitration. This must be contained, in the Agreement entered into between the parties giving rise to the arbitration. By Clause 12 of the Agreement dated 23rd December, 1992, the parties agreed that: -

“(a) Any dispute arising out of this Agreement which cannot be settled by mutual agreement shall be referred to an arbitrator to be agreed between the parties or failing such agreement, to an arbitrator appointed by the Chief Justice of the Federal Republic of Nigeria, on application of either party to him;

(b) Any reference shall be deemed to be a submission to Arbitration within the Arbitration Act Cap. 19 of Laws of Nigeria 1990 or any subsequent revisions thereto;

(c) The findings of the arbitrator shall be binding on the part hereto.”

It is abundantly clear that the parties have agreed to be bound by the provisions of the Arbitration Act, 1990 of the Federal Republic of Nigeria and any revision thereto, and so S.16(1) and (2) above applied to the arbitration proceedings in this case.

By subsection (1) of section 16 of the said Act, the arbitral tribunal has the power to determine the place of the arbitral proceedings except where the parties agreed on a place. And subsection (2) of section 16 of the same Act says that excluding or in spite of or irrespective of the provisions of subsection (1), the arbitral tribunal may still meet at a place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property. It appears to me that S.16 of the Act deals with two types of situations in the arbitral proceedings. Subsection (1) deals with determining or deciding the place where the arbitration shall take place and subsection (2) deals with the place where arbitral tribunal may meet for the purpose set out in that subsection such as hearing evidence of the parties, their witnesses or the inspection of goods or documents relevant to the arbitration.

I have carefully examined the Agreement entered into by the parties on pp.272-278 of the record, and I am satisfied that no where in any clause of the Agreement did the parties agree on the place of the arbitral proceedings or where the tribunal shall meet. They however agreed to be bound by the laws in force in Nigeria to govern their relationships. Clause 11 of the Agreement provides: -

“LAW OF THE AGREEMENT

This agreement shall be deemed to be a Nigerian Agreement and shall be governed and construed in accordance with the Laws in force in the Federal Republic of Nigeria. Parties to the Agreement shall comply with these laws”

Therefore since the said Act governs the Agreement between the parties and no where in it did the parties agree on the place to conduct arbitral proceedings, the arbitrator (2nd respondent) has full and unfettered powers to determine or decide where the proceedings shall take place or continue pursuant to the provisions of S.16 of the said Act.

The Court of Appeal, after setting out the provisions of S.16 in its judgment, per Oguntade JCA (as he then was) said: -

“Under the above provisions, unless both parties agreed to the contrary, an arbitral panel can on its own decide the place of the arbitral proceedings and may meet at any place it considers appropriate. In the instant case, the arbitral panel agreed to sit in London for the purpose of taking the evidence of Mr. Leno Adesanya and one or two other witnesses. Even if the appellant thought that the decision to go to London to take the evidence of some witnesses to be called by the 1st respondent was inconvenient or needlessly expensive, the decision still remained one arrived at in absolute compliance with S.16 of Cap. 19 above.”

I entirely agree with this finding. I do not therefore agree with the learned counsel for the appellant that the lower courts have wrongly extended the interpretation of S.16 of the said Act or that the phrase “any place it considers appropriate” did not empower the arbitrator to conduct proceedings anywhere outside Nigeria. No where in the said Act or the Agreement between the parties, was there any provision or clause respectively indicating that all proceedings in the

arbitration must be restricted or limited to within Nigeria only. In the circumstances, I answer issue 2 in the affirmative.

I have examined issue (iii) and (iv) in the appellant’s brief and found them to be merely ancillary to issues (i) and (ii) considered above. The resolution of both or either of them, even if in favour of the appellant, cannot affect the findings in issues (i) and (ii) and would not assist the appellant in any way in this case. I do not therefore, in the circumstances intend to consider issues (iii) and (iv) of the appellant in the determination of this appeal.

I have earlier determined issue (i) and (ii) against the appellant. The trial Federal High Court and the Court of Appeal have also done the same. There is therefore concurrent findings of the two lower courts on this. This Court does not entertain the habit of interfering with the concurrent findings of the lower courts unless special reason or circumstances are shown. There are no such circumstances shown here at all.

Therefore from all what I have said above. I find no merit in this appeal. I accordingly dismiss it with N10,000.00 costs in favour of the respondents.

KUTIGI JSC

I have had the privilege of reading in advance the judgment just rendered by my learned brother Kalgo, J.S.C. I agree with his reasoning and conclusions. The appeal is clearly without merit and it is hereby dismissed with N10,000.00 costs against the Appellant.

MUSDAPHER JSC

I have read before now, the judgment of my lord Kalgo, JSC just delivered with which I am in agreement. For the same reasons so clearly and comprehensively stated, I too find no merit in this appeal. I accordingly dismiss it. I abide by the Order for costs contained in the aforesaid judgment.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother KALGO JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

In resolving the issue as to whether there are two different companies with separate legal personality named Lutin Investment Ltd., it is very instructive to note that the appellant in instituting the action at the trial court specifically sued Lutin Investment Ltd. which is the company that entered into the contractual agreement with the appellant resulting in the arbitration. Both the trial and lower courts held that the fact that the company was described as “*based and registered in Geneva*” does not make it a different company from one that is incorporated in the British Virgin Islands; that a company may be incorporated in one country but be based and registered in another country for the purposes of carrying on its business and that if in the course of the proceedings and as a result of further evidence adduced by the witnesses, it becomes established that the claimant and the party that entered into the agreement with the appellant are two different and separate companies, then the normal consequence will follow. These are concurrent findings by the trial and lower courts and the appellant has not satisfied this court why the said findings should be disturbed. I hold the view that the Court of Appeal is right in confirming the decision of the trial court on the matter particularly as the appellant has not been shut out completely on the issue since if in the process of continuing with the proceedings evidence is produced to confirm the allegation of the appellant that two separate companies are involved in the matter the proper order would be made by the tribunal. In short the decision is in effect that the objection is premature particularly as there is no evidence or sufficient evidence to support the contention of the appellant that two separate companies are involved in the proceeding.

That apart, it is trite law that the only way incorporation of a company can be established in any proceeding is by tendering the certificate of its incorporation.

This has not been done in this case and by the decision of the two courts, that, if in course of further proceedings evidence of that nature is produced the law will take its course, it is clear that appellant still has opportunity to tender the certificates of incorporation in proof of its allegation. This court has the jurisdiction to interfere or disturb the evaluation of evidence and or concurrent findings of fact by the Court of Appeal and the trial court but would only exercise that jurisdiction if the findings of fact in question are not reasonably justified by the evidence available and the appellant seeking such a disturbance of the findings of fact demonstrates that the said findings are perverse, or are wrong conclusions from accepted credible evidence and that these resulted in a miscarriage of justice - see *Owoyemi vs. Adekoya* (2003) 18 NWLR (Pt.852) 307 at 335. As stated earlier in this judgment, the appellant has failed to satisfy this court of the existence of any of the conditions needed for the court to exercise its jurisdiction to set aside or interfere with or disturb the, concurrent findings of fact in this matter.

On the issue as to whether or not the Arbitrator has an unfettered discretion to take evidence anywhere he considers necessary, it is necessary to look at the terms of the arbitration agreement between the parties and the provisions of section 16 of the Arbitration and Conciliation Act.

The agreement between the parties is dated 23rd December, 1992 and clause 12 of it is very relevant; it provides, in effect, as follows: -

- (a) that any dispute between the parties that cannot be resolved by mutual agreement shall be referred to an arbitrator;
- (b) that the arbitrator shall be appointed upon agreement by the parties.
- (c) that where the parties cannot agree on the appointment of an arbitrator, the arbitrator shall be appointed by the Chief Justice of the Federal Republic of Nigeria, upon an application by either party,
- (d) that the arbitration proceedings shall be governed by the provisions of the Arbitration and Conciliation Act; and
- (e) that the arbitrator’s findings shall be binding on the parties to the agreement.

These provisions in the agreement clearly show that parties did not reach an agreement as to the place of arbitration or the rules for

the conduct of the arbitration; neither did they restrict the powers of the arbitrator. It is therefore my view that in order to resolve the issue in the absence of any express terms in the agreement, recourse has to be made to the provisions of the Arbitration and Conciliation Act which automatically regulates issues of place of arbitration, power of the arbitrator, etc. The relevant provision is section 16 of the Act subsection (1) which provides that unless the parties have agreed, the arbitral tribunal or arbitrator has the power to determine the place of arbitration; and sub-section 2 thereof confers powers on the arbitration tribunal, unless the parties agree to the contrary, to decide the place it considers appropriate for consultation among its members; for the hearing of witnesses, experts or the parties; or for the inspection of documents, goods or other property.

From the foregoing, I hold the view that under our law, an arbitrator or an arbitral tribunal has the power and discretion to decide as regards where it holds its meetings, conduct hearings, take evidence etc. I further hold the view that such place as decided by the arbitrator or arbitral tribunal may be different from the seat of the arbitration except the parties expressly agree to the contrary in their arbitration agreement. In the instant case as found earlier in this judgment, there is no such agreement by the parties. I therefore hold that the decision of the arbitrator to go to London to take evidence of the 1st respondent's witnesses, which decision was confirmed by both the trial and lower courts, was not in violation of the terms of the arbitration agreement between the parties thereto neither is it in violation of the provisions of the Arbitration and Conciliation Act particularly the provisions of section 16 thereof. It is also my view that the power or discretion of the arbitrator to go abroad to hear evidence from witnesses etc, etc is very wide and general and therefore not limited to where the witness is a fugitive offender; in fact the fact that one of the witnesses to be heard in London is a fugitive offender is not relevant.

I fail to see how the decision of the arbitrator, who is the 2nd respondent in this appeal, to go to London in the circumstances can be said to constitute a misconduct as argued by learned senior Counsel for the appellant. There is, unfortunately, no evidence at all in support of that sweeping allegation.

In conclusion I too dismiss the appeal for lack of merit and abide by all consequential orders made in the said lead judgment of my learned brother KALGO JSC including the order as to costs.
Appeal dismissed.

OGBUAGU JSC

The Appellant and the 1st Respondent, entered into an Agreement - Exhibit B on 23rd December, 1992. Exhibit 'B', contains a provision for reference to an Arbitrator in the event of a dispute which had arisen between the parties. The parties themselves, appointed the 2nd Respondent as a SOLE Arbitrator. In the course of, the arbitral proceedings, two contentious issues arose as have been clearly set out in the Lead Judgment of my learned brother, Kalgo, JSC.

Let me also reproduce the short Ruling of the 2nd Respondent. It reads thus,

"..... if it was shown that there are two Companies by the name Lutin Investment Ltd., the normal consequence would follow".

It is plain to me and this is not disputed by the Appellant, that the Appellant has not shown that there are two (2) Companies by the name Lutin Investment Ltd. I suppose and this is also settled law, that the way to show the incorporation or registration of a Company, is by the production of the Certificate. See *The Registered Trustees of Apostolic Church Ilesha Area v. Attorney-General Mid-Western State & 2 ors.* (1972) NSCC (vol. 7) 247 @ 250; (1972) 4 S.C. 123 @ 136; - per Sowemimo, Agu, JSC; *J.K. Randle v. Kwara Breweries Ltd.* (1986) 6 S.C. 1 @ 7 - per Uwais, JSC (as he then was) now CJN and *African Continental Bank PLC & anor. v. Emostrate Ltd.* (2002) 8 NWLR (Pt. 770) 501 @ 575, 577; (2002) 4 SCNJ 299 @ 309 - per Uwaifo, JSC.

It is noted by me that at the stage of the arbitration proceedings when the Appellant, raised its objection there was no evidence to talk of satisfactory evidence before the trial court from the Appellant, to support its said contention, that there are two (2) separate/different companies with

separate legal personality known as and called or registered/incorporated as Lutin Investment Ltd. See also Section 6 of the Companies & Allied Matters Act.

Perhaps, at the expense of repetition, let me reproduce the findings of fact by the trial court at page 328 of the Records and the pronouncement of the court below at pages 422 to 423 of the Records respectively.

The learned trial Judge, stated inter alia as follows:

“On the issue of two different companies, bearing Lutin one of Geneva and the other of Lutin of Virgin Islands, there was no sufficient evidence before me that there were such two different companies. The Plaintiff’s witness gave evidence of contract between Nigerian National Petroleum Corporation and Lutin Investment Limited and whether that Company is in Geneva or Virgin Island or whether the Company with which N.N.P.C. entered into a contract was not the Company that took N.N.P.C. before the Arbitration was not given in evidence. The issue of two Companies was therefore not made and it is dismissed”. (the underlining mine)

The court below - per Oguntade, JCA, (as he then was) after reproducing the findings of fact by the 2nd Respondent and that of the trial court, stated at page 423 of the Records, inter alia, as follows:

“The reasoning of both, the arbitrator and the court below is simple and, straightforward. They both were saying that the evidence available as at the time when the preliminary objection was raised was not sufficient to lead to a conclusion that there existed two different companies bearing the name Lutin Investment Ltd. The mere fact that a company was described as based and registered in a country could not without more be conclusive proof of its being incorporated in that country. It has always been recognized under the Nigerian Law that the conclusive way to show incorporation of a company is the production of the Certificate of Incorporation. The arbitrator had not shut the door against the appellant for he concluded that if it was shown that there were two companies by the name Lutin Investment Ltd., the normal consequences would follow. I affirm the reasoning and conclusion on the point of the court below”. (the underlining mine)

The Appellant, has in the instant appeal, once again, raised the same issue as to whether there was sufficient evidence before the 2nd Respondent, the trial court and the court below, supporting a conclusion that there exists two different legally, distinct companies, bearing the name Lutin Investment Ltd.

I note that both in the Appellant’s Brief of Argument and in the oral submissions of its learned Senior Advocate on the 18th October, 2005; when this appeal was heard, no attempt was made, to persuade this Court, to fault the findings of fact by the trial court or the said decision of the court below that will warrant this Court, overturning them and in particular, that of the court below whose reasoning and conclusion, I hereby affirm as they are borne out from the printed Records.

It is pertinent to observe or point out, that the parties from the Records as stated by the Appellant, are

“NIGERIAN NATIONAL PETROLEUM PLAINTIFF CORPORATION

and

1. LUTIN INVESTMENT LTD.

2. HON. JUSTICE UCHE OMO
DEFENDANTS LEARNED ARBITRATOR”

i.e. The 1st Defendant, is Lutin Investment Ltd. who the Appellant sued and not Lutin Investment of British Virgin Island. Certainly, the place of registration, has nothing to do with the place of Business.

As a matter of fact, at page 62 of the Records, is a letter written and signed by the learned SAN dated 31st October, 1994 addressed to The Deputy IGP, Ikoyi, Lagos. A reading of the Title and the first three (3) paragraphs, will put me or no one in doubt, that all along, the said learned Senior Advocate - S. A. Asemota, Esqr, had been consistent in knowing or believing and never in doubt, that the claimant, in no other than the 1st Defendant - Lutin Investment Ltd., and no other 2nd company.

I hold therefore, that in the absence of the Appellant, producing before the trial court, any evidence of two (2) certificates incorporating/registering two separate and distinct companies bearing the same name as Lutin Investment Ltd, all the “fuss” by the Appellant and his learned Senior Advocate of Nigeria in respect of this issue, with respect, are not

only grossly misconceived, but amount to an exercise in futility. Since the Appellant, was given the liberty by the 2nd Respondent, to adduce evidence in support of its said assertion/contention, but it chose to “create” trial and appeals, in a contention that I further hold is absolutely premature in all the circumstances, I have no hesitation in holding that neither the decision of the 2nd Respondent, the trial court and the court below in any way or manner, constituted any miscarriage of justice as erroneously alleged by the Appellant.

Public policy, I am aware, is always at the root of the defence of illegality. See perhaps, Lord Devlin’s pronouncement/statement in the case of *St. John Shipping Corporation v. J Rank Ltd.* (1956) 3 All E.R. 683, 691.

From the provisions of Sections 54, 57 and 58 of the Companies and Allied Matters Act, Cap. 20 Laws of the Federation of Nigeria, 1990, it is evident, that where a Company, has obtained an exemption from incorporation under the above Act/Section, there is the possibility, that such a company, may be incorporated in another country and yet, may have a base/operation in Nigeria, though not incorporated under the Nigerian Law. See *Bank of Baroda v. Iyalabani Ltd.* (2002) 7 SCNJ 287 @ 301 - 302 where the dissenting Judgment of Ayoola, JCA, (as he then was), was approved by this Court - per Ejigunmi, JSC.

I note that the 2nd Respondent held, as appears at page 260 of the Record, and from what I have stated above, that the name of the claimant, (sued by the Appellant as the 1st Defendant), is Lutin Investment Ltd., and that it was a company of/with the same name, that entered into the contractual Agreement with the Appellant. That the fact that it is in that Agreement described as based and registered in Geneva, does not, make it a different company from the one that is incorporated in the British Virgin Islands. I cannot agree more. The findings and holding, are justified.

For the avoidance of doubt, let me reproduce substantially part of the evidence of P.W.1 - Dan Bello Sani Naadiyalle (a Legal Officer in the Appellant’s employment and was, the Appellant’s own witness), at pages 145 and 146 of the Records. He swore inter alia, thus:

“..... I know 1st Defendant company Lutin Investment Ltd. I

know the 2nd Defendant. There was a contract between the 1st Defendant and the Plaintiff. The 1st Defendant was to provide sea vessel for storage facilities by the Plaintiff. The contract was contained in an agreement entered into in 1991. I did not participate in the negotiation leading to the agreement though was in the Plaintiff’s company then. (sic) There was a dispute between the parties after the agreement, which led to the Plaintiff to terminate the contract. When the contract was terminated by the Plaintiff the 1st Defendant went into arbitration. A sole arbitrator was appointed in the person of the 2nd Defendant. I was at all the sittings of the arbitration”.

(the underlining mine)

He then, without objection, tendered the record of the arbitration sittings as Exh. A.

I also reproduce hereunder the letter written by the learned counsel to the Appellant to the Deputy Inspector General of Police dated 31st October, 1994, which appears at page 62 of the Records. It reads inter alia, as follows:

“SOLOMON ASEMOTA & CO.
SOLICITOR&ADVO-
CATES
PUBLIC
NOTARIES

31st October, 1994

The Deputy Inspector General of Police,
Federal Investigation and Intelligence Bureau,
The Nigeria Police,

Alagbon Close,
Ikoyi, Lagos.

Attention: AIG L. Bawa

Dear Sir,

E: IN THE MATTER OF AN ARBITRATION BETWEEN
LUTIN INVESTMENT LIMITED v. NNPC

We are solicitors to Nigeria National Petroleum Corporation (NNPC) in respect of the above-mentioned Arbitration, initiated by a company known as Lutin Investment Limited (the Claimant in the matter).
In the Points of Claim filled by the Claimant before the Arbitration,

they claimed the following aggregate sums of money from NNPC.

(a) £24,200.00 (Pounds Sterling)

(b) N16,829,934.94 (Naira)

(c) \$89,260,790.39 (American Dollars)

B In our statement of defence however, we have not only denied that they are entitled to the sums claimed or any sum of money at all, but have also filed a Counterclaim in which we have listed in detail the various sums of money which were erroneously collected by the Claimant and which we now claim should be refunded to the Respondent – NNPC. C We claim by our Counterclaim a refund of the sum of \$43,345,242.46 by Lutin Investment Limited, being money collected by them for services which they did not render.” (the underlining mine)

D It can be seen from the above, that the Appellant, at all material times, to its knowledge and that of its said SAN, were in no doubt, as to the company or legal entity, that entered into the said contract agreement with it. i.e. The 1st Defendant - Lutin Investment Ltd., and no other second company or two companies. Their said witness - on oath, - (he swore by the Koran), said so. So, this issue of there being two (2) companies, in E my humble but firm view, was raising a red herring. This “gimmick” so to say, has unfortunately and vexatiously, been carried from the trial court to the court below and to this Court albeit, with much emphasis and force by the learned counsel for the Appellant - Asemota, Esq., (SAN).

F Let me, with respect, dismiss, the submission of the learned SAN in his reply on points of law during the oral hearing, that the onus or burden of proof that there is only one Lutin Investment Ltd., is on the Respondents as according to him, they will lose, if such evidence was not tendered by them, as grossly misconceived Asemota, Esq. (SAN), I am sure, is aware of the well settled law, that he who asserts, must prove. See Sections 135 G (1) & (2) and 137 (1) of the Evidence Act and the cases of Udih v. Elizabeth Idemudia (1998) 3 S.C. 50; (1998) 3 SCNJ 36; Ezemba v. Ibeneme & anor (2004) 7 SCNJ 136 @ 158 citing International Messengers (Nig.) Ltd. v. Pegofor Industries Ltd. (2005) 5 SCNJ 120 @ 135 (both per Onu, JSC.)

H I note that at page 154 of the Records, Asemota, Esqr, (SAN), stated inter alia, during his submissions before the trial court, as follows:

“..... The arbitrator ruled even before the Respondent called evidence to reconcile Lutin Investment of Geneva and one of Virgin Island. No evidence is taken on this issue in this Court either”. (the underlining mine)

B He then at this stage, asked for an adjournment. I suppose this statement, is a further recognition by the learned SAN, that the onus/ burden of proof of this assertion of two companies, squarely, rested on the Appellant. I so hold.

C As regards the issue of whether or not the 2nd Respondent, has an unfettered discretion to take evidence anywhere he considers necessary, my quick answer, is DEFINITELY! He has. This is because, this discretion, was/is conferred on the 2nd Respondent, by Statute. Section 16(1) & (2) of the Arbitration and Conciliation Act Cap.19 of the Laws of the Federation, 1990 or Cap. 18 of same Laws, 2004 (which is clear D and unambiguous), provides as follows:

“The place of arbitral proceedings shall be determined by the arbitral tribunal”. (the underlining mine)

E For the avoidance of doubt, let me reproduce in full, its provisions. It reads thus

“(1) Unless otherwise agreed by parties, the place of arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. F

(2) Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members for hearing witnesses experts or the parties, or for the inspection of documents, goods or other property”. G

See also Article 16 in the First Schedule of the Arbitration Rules.

H Exhibit B, Clause 12, did not say that the proceedings, shall be in Nigeria and in Nigeria only. So, to go to London, was/is within the discretion or powers of the 2nd Respondent. I so hold. What is more, there is no evidence in the Records or the Agreement, that the parties agreed as to “the place of arbitration, or that they made any express terms or provision in the said Agreement, as to the rules for the conduct of the arbitration or curtailing or restricting the powers or discretion of the arbitrator in any

way or manner. Where there is a Sole Arbitrator as in the instant case, the said Arbitrator, is the person from subsection (2) of the Act, who will decide where to sit in or outside Nigeria and hear or take the evidence of a witness or witnesses. Where there is no agreement by the parties as to place of the arbitral proceedings, the sole Arbitrator or arbitral tribunal, shall decide or determine the same. I so hold.

I note that from the Records, there is no where, the complaint or grouse of the Appellant and his learned SAN, is that going to London or outside Nigeria, is not CONVENIENT to it. All that is said or canvassed by the Appellant and his learned SAN, is that the 2nd Respondent, has no powers or discretion, to decide to go to London and take the evidence of witnesses which included that of a “*fugitive offender*”.

So, apart from the clear and unambiguous provisions of the Section/ Act which I am bound not to give any strained interpretation other than its ordinary or literal interpretation, it will look absurd and ridiculous to me, if an Arbitral tribunal or a Sole Arbitrator, does not have a discretion as to where to sit and hear/take evidence of the parties and/or their witness/ witnesses.

Surely and certainly, by the 2nd Respondent deciding (as he was entitled to do by statute and thus, had both the power/discretion and jurisdiction in this/that regard), to take a witness and some other witnesses outside Nigeria, it cannot and could not, in my humble but firm view, constitute a misconduct as was even orally submitted to this Court by the learned SAN. The application for his removal just because he exercised (rightly in my view), the discretion conferred on him by statute, was most discourteous of and an insult to the 2nd Respondent to say the least. Speaking for myself, the mere suggestion/application that he be removed because of an unfounded/baseless allegation of “*misconduct*”, in my respectful but firm view, was/is an infradig on the part of the Appellant and Asemota, Esq, (SAN). It is rather distasteful to any reasonable person, to think of it.

I note that during the oral hearing of this appeal, Asemota, Esq, (SAN) referred to their Issue (iii) which is whether it is not against public policy for an Arbitrator to travel abroad - London “*for the benefit of a*

fugitive offender” to take evidence from such offender in an arbitral proceedings. He also referred to pages 62 to 76 of the Records as to public policy and submitted that an arbitration, must comply with substantive laws. It is his further submission that the Arbitrator, has breached the rules of substantive law of this Court, by extending Section 16 of the Arbitration and Conciliation Act by holding that it also applies in England and therefore, could decide the case any where outside Nigeria. That the 2nd Respondent, was not entitled to do so. That this, constitutes a misconduct.

Firstly, an Arbitration, is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The arbitrator, who is not an umpire, has the jurisdiction, to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently, the whole of the arbitration proceedings, will be null and void and of no effect. This will include any award, he may subsequently make. In the instant case, as I have noted herein in this Judgment, it was the parties who in their own wisdom, appointed the 2nd Respondent, as their Arbitrator.

Smith, L. J. in the case of *Montgomery Jones & Co. v. Liebenmtal* (1898) 78 L.T. 406 @ 408, stated inter alia, as follows:

“..... *I, for my part, have always understood the general rule to be that parties took their arbitrators for better or worse both as to decision of fact and decision of law*”. (the underlining mine)

Secondly, at the expense of repetition, I, with respect, regard the said charge/accusation of misconduct by the Appellant and his learned SAN, as made in very bad faith and unjustified in all the circumstances of the case. That he made a “harmless” Ruling which in any case, he was entitled to make and which the Appellant and his learned counsel, did not like or which they considered as not being favourable/acceptable to them, is no excuse for making that charge of misconduct

As far as I am concerned, there is no evidence of any kind of misconduct on the part of the 2nd Respondent to warrant the suggested or intended or factual/actual application to remove him. He exercised his

discretion as he was empowered by law/statute. If one of the witnesses - Mr. Leno Adesanya who was the Sole representative and Agent in Nigeria of the 1st Respondent, is a “*fugitive offender*”, can he in his circumstance, come to Nigeria, to give evidence for the 1st Respondent? I or one may ask. I think not. If he had committed an “*offence*” in Nigeria and he “*escaped*” to London, common-sensically, the Appellant cannot expect him to come/return to Nigeria where he will run the risk of being arrested and perhaps, detained.

To cast aspersions or impugn the 2nd Respondent’s integrity by one of the parties who found him worthy to be appointed their Arbitrator, because of his said Ruling, in my respectful and humble view, is unfair and unbecoming of a SAN. There is no doubt and this is settled, that where an Arbitrator has misconducted himself, the court, may set aside the arbitration if improperly procured or where an award has been made by him. The popular saying of Smith L. J. afore-mentioned, will not apply, where there is proof of a misconduct by the Arbitrator where the arbitration or any award, was improperly procured. I hope and believe that the 2nd Respondent, will forgive them their “*trespasses*”.

Thirdly, being a discretion conferred on the 2nd Respondent by law, the attitude of an Appellate Court such as this Court in respect of judicial discretion, has been stated and restated. See the case of Dangote v. Civil Service Commissions Plateau State (2001) 9 N.W.L.R. (Pt. 717) 132 @ 161 -162 ; (2001) 4 SCNJ. 17 - per Karibi-Whyte, JSC, referred to in the case of General & Aviation Services Ltd. v. Captain Paul M. Thahal (2004) 4 SCNJ. 89 @ 105. I have already stated hereinabove, that the 2nd Respondent exercised his discretion conferred on him by law/statute. Therefore, this Court cannot interfere.

As rightly submitted by the learned counsel for the 1st Respondent during the oral hearing, by virtue of Section 56(2) of the Act, the instant arbitration, is an International and not a Domestic Arbitration. The exercise of the said 2nd Respondent, having not been shown by the Appellant, to be manifestly wrong or fraudulent, that exercise, I hold, cannot be questioned by this Court. The Appellant, having failed woefully, to show the two courts (trial and court below) and this Court, where the decision/Ruling

of the 2nd Respondent, is against public policy, this appeal, must fail and it fails.

I suppose that public policy, arises only in the execution or performance of contract or other such private dealings. See St. John Shipping Corporation v. J. Bank Ltd. (supra).

Fourthly, there are concurrent findings of fact by the two lower courts. For the attitude of this Court, see recently, the cases of Arinze v. First Bank Nig. Ltd. (2004) 12 NWLR (Pt.888) 668 @ 673, 675, 679; (2004) 5 S.C. 100; (2004) 5 SCNJ 183 @ 188 - per Belgore, JSC., citing several cases therein and Alhaji Maingge v. Alhaji Gwamma (2004) 7 S.C. (pt.II) 86 @ 97; (2004) 7 SCNJ. 361 @ 372 - per Akintan, JSC, citing some other cases therein, just to mention but a few.

Since I prefer the issues formulated by the 1st Respondent and adopted by the 2nd Respondent, as being germane to the controversy in this appeal, my answers to issues of the Appellant, are rendered thus:

Issues Nos (i) and (iii) are in the Negative.

Issue No. (ii) is in the Affirmative/Positive.

Issue No. (iv), is neither here nor there.

What is more, it was not formulated from any of the grounds of Appeal of the Appellant. The effect and consequences, are now firmly settled. See recently, the cases of Okolo & anor. v Union Bank of Nigeria (2004) 1 SCNJ. 125 - per Tobi, JSC., citing several cases therein. Mark & anor. v. Eke (2004) 1 SCNJ. 245 @ 267 - 268 - per Musdapher, JSC, and of course Mobil Producing Nig. Unlimited v. Chief Monokpo & anor. (2003) 18 NWLR (pt. 852) 346 @ 423 cited and relied on by the learned counsel to the 2nd Respondent (it is also reported in (2003) 12 SCNJ 206 @ 245) - per Tobi, JSC.

As to the two (2) issues of the Respondents, my answer to their Issue No. 1, is rendered in the Negative, while my answer to their Issue No. 2, is rendered in the Affirmative/Positive.

In the end result, having had the advantage and privilege of reading before now, the Lead Judgment of my learned brother, Kalgo, JSC, while I entirely agree with his reasoning and conclusion, it is from the foregoing and the fuller reasons in the said lead Judgment, that I too, dismiss the

appeal which is not only frivolous, but has wasted the precious time of the parties, the two lower courts and this Court. I too, hereby affirm the decision of the court below. I abide by the consequential order in respect of costs although the costs should and ought to have been more, if the Rules of this Court, had permitted such an award by me.

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