

IN THE HIGH COURT OF JUSTICE  
IN THE BENIN JUDICIAL DIVISION  
HOLDEN AT BENIN CITY  
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,  
JUDGE, ON WEDNESDAY, THE 7<sup>TH</sup> DAY OF DECEMBER, 2016.

SUIT NO. B/196/2016

BETWEEN:

- |  |   |                         |
|--|---|-------------------------|
| 1. DOMESTIC GAS SHOP (a division of<br>A.U. Lucky Enterprises Nigeria Limited) | } | CLAIMANTS & RESPONDENTS |
| 2. MR. LUCKY AGBAHIE UGHERUGHE   |   |                         |

AND

- |  |   |   |
|--|---|---|
| 1. UNIVERSAL INVESTMENT AND<br>DEVELOPMENT COMPANY PLC | } | DEFENDANT/APPLICANT<br>DEFENDANT/RESPONDENT |
| 2. MR. SAMUEL O. OTOMAKILI                             |   |   |

RULING

This is a Ruling on a Motion on Notice, brought pursuant to Order 37 Rules 1, 2 & 3 of the Edo State High Court (Civil Procedure Rules), 2012 and under the inherent jurisdiction of the Court, praying the Court for:

An order striking out or dismissing this suit in its entirety.

The grounds upon which this application is based are as follows:

- a) That this suit is incompetent;
- b) That the 1<sup>st</sup> Claimant is not a juristic person;
- c) That this suit is statute barred; and
- d) That the land that is the subject matter of this suit is situate at Ogbike Street, Emevor town, Delta State of Nigeria.

And for such further order or other orders as this Honourable Court may deem fit to make in the circumstances,

The application is supported by a 10 paragraphs affidavit and a Written Address of Counsel.

Moving the application, the learned Counsel for the 2<sup>nd</sup> Defendant/Applicant, J.E.Ogedegbe Esq., relied on the supporting affidavit and adopted the Written Address as his arguments in the motion.

In his Written Address, the learned Counsel formulated three issues for determination as follows:

1. Whether from the circumstances of this case, this Court can exercise jurisdiction over a piece of land situate in Ogbike street, Emevor town in Delta State;
2. Whether the 1<sup>st</sup> Claimant is a juristic personality; and
3. Whether this suit is not statute barred.

Arguing Issue 1, learned Counsel submitted that the issue of jurisdiction can be raised at any stage of the proceedings and referred to the case of: *Dairo vs. Union Bank Plc & Anor (2007) Vol.152 LRCN 18 at 22.*

He posited that to determine the issue of jurisdiction, the Court should look at the Writ of Summons, the Statement of Claim and the Rules of Court. Again he cited the case of: *Dairo vs. Union Bank Plc & Anor (2007) Vol.152 LRCN 18 at 27.*

Furthermore, Counsel submitted that the Court can take judicial notice of the processes filed in the suit by virtue of section 122(2) (m) of the Evidence Act.

He pointed out that from the processes filed; the subject matter of the suit is at Ogbike Street, Emevor town in Delta State. Furthermore, he maintained that the address of service of the 2<sup>nd</sup> Defendant is in Delta State and the office of the 1<sup>st</sup> Defendant is in Warri in Delta State.

He further argued that although the 2<sup>nd</sup> Claimant was arrested in Benin City, the arrest was done in frustration arising from the breach of the Lease Agreement.

He therefore submitted that the ancillary nature of the averments in paragraphs 26 and 27 of the Statement of Claim is made clear when read in conjunction with paragraphs 8,9,10,27,28,29 and 30.

He submitted that relief 39(1) - (5) being ancillary to the ones at paragraphs 39(6)-(10), cannot confer jurisdiction on this Court where the Court lacks jurisdiction over the main reliefs. He referred the Court to the case of: *Gafar vs. The Government of Kwara State (2007) Vol.146 LRCN 744 at 748.*

Furthermore, Counsel submitted that Order 2 Rule 1 of the Edo State High Court Civil Procedure Rules, 2012 provides that actions relating to land should be instituted where the land is located. He said that since the land is in Delta State, this Court cannot entertain the suit.

Arguing Issue 2 learned Counsel submitted that the 1<sup>st</sup> Claimant (Domestic Gas Shop) is not a juristic person. He submitted that it is only a juristic person that can bring an action in law. He stated that on their own showing, the juristic person is A.U.Lucky Enterprises Nigeria Ltd. And not Domestic Gas Shop. He maintained that this affects the competence of the action and relied on the case of: *Reptico S.A. Geneva vs Afribank Nigeria Plc.(2013) Vol.225 LRCN Pt.1 p.102 at 114.*

He urged the Court to hold that the 1<sup>st</sup> Claimant/Respondent is not a juristic person.

On Issue 3, Counsel referred the Court to paragraphs 21 to 26 of the Statement of Claim and submitted that the action is statute barred. He maintained that the cause of action arose in 2004,2005 and 2007.He maintained that by virtue of section 4(1)(a) of the Limitation Law, Laws Of Bendel State as applicable to Edo State, the Claimants had six years to file this action. He quoted the said law:

*“4(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-*

*(a) Actions founded on simple contract or on tort”*

Counsel submitted that from the foregoing provisions, it is clear that relief 39(1) ó (5) is statute barred. He argued that where the law prescribes a particular method of exercising a statutory power, such power must be exercised accordingly

and no other method is permissible. He relied on the cases of: *Nigerian Social Insurance Trust Fund Management Board vs. Klifco Nigeria Ltd.*(2010) Vol.186 LRCN 1at 5; and *Christiana I Yare vs. National Salaries, Wages & Income Commission* (2013) Vol.219 LRCN (Pt.2) 53 at 58.

He finally submitted that the Court should strike out or dismiss this suit for want of jurisdiction and relied on the case of: *Inakoju & Ors vs. Adeleke & Ors* (2007) Vol. 143 LRCN 1 at 10.

In opposition to this motion, the learned Counsel for the Claimants/Respondents filed a Counter Affidavit of 15 paragraphs together with a Written Address which he adopted as his arguments in opposition to the motion.

In his Written Address, the learned Respondents' Counsel S.A.Nkwor Esq., responded to the Issues for Determination raised by the Preliminary Objection.

Learned Counsel submitted that Issues (1) and (2) of the Preliminary Objection are exactly the same as the objections raised and contested by the defendants in Suit No. B/230/2008 from 2008 to 2015 which was pending before Honourable Justice E.A. Edigin.

He informed the Court that in the former suit, the Defendants/Applicants filed a Preliminary Objection dated 8/6/2009, where it contested:

- (1) That the name DOMESTIC GAS SHOP is not a juristic person; and
- (2) That the Edo State High Court lacks the jurisdiction to hear the case because, according to them, the landed property used as a pledge in the truncated contract lies in Emevor Town, Delta State.

Counsel maintained that the preliminary objection was overruled in favour of the Claimants.

Furthermore Counsel stated that the trial court in deciding the said preliminary objection, made specific pronouncements as follows:-

- (1) That Suit No. B/230/2008 is competent.
- (2) That Domestic Gas Shop is a juristic person known to law.

- (2) That the cause of action in the Suit No. B/230/2008 was not about land, but about the wrongful termination, by the Defendants, of the Lease Financing Contract which took place here in Benin City, (not in Emevor, Delta State).

According to him, the court emphasized that it had jurisdiction to hear and determine the case irrespective of whether or not the landed property was in Emevor town in Delta State.

He further submitted that the defendants herein who were also the Defendants/Objectors in Suit No. B/230/2008, never appealed against all the judgments made against their preliminary objections.

He submitted that it is trite law that a judgment of a competent court of law stands and remains so until it is set aside by a higher court. He said that the defendants have the onerous task to tell this Court the higher court that set aside all the rulings made against them in their preliminary objections in suit No. B/230/2008 from 2008 till 2015, particularly in respect of their above stated issues.

Furthermore, he submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein, in another "Counter Affidavit" filed on 19/9/2013 - in Suit No. B/230/2008, at paragraphs 4, 5, and 6 thereat, acknowledged the existence of the above stated Judgment of His Lordship, Honourable Justice E.A. Edigin on the 12<sup>th</sup> of May 2011 to the effect that the name "Domestic Gas Shop" is a Juristic Person.

Counsel urged the Court to take judicial notice that facts admitted need no further proof. He said that having admitted on oath that there was such a ruling by the Edo State High Court, neither of the objectors in this suit should be allowed to deny same again.

On the alleged plea of statute bar, Counsel submitted that the defendant/applicant misunderstood the intent and purposes of the Edo State Limitation Law Cap. 89- (Vol. 4, Laws of the defunct Bendel State) particularly Section 4. He argued that this Section concerns actions founded on SIMPLE CONTRACT or TORT. He submitted that this cause of action is not founded on

SIMPLE CONTRACT or on TORT but on the unilateral and wrongful termination of the Lease Financing Agreement by the 1<sup>st</sup> Defendant. He maintained that the other reliefs stated in the Writ of Summons and the Statement of Claim are mere ancillaries, consequent upon the actions of the 1<sup>st</sup> Defendant including its failure to return Claimant's landed property at Emevor, Delta State which said landed property and signed cheques were used as pledge for the contract on the direction of the 1<sup>st</sup> Claimant.

He submitted that the Lease Financing Agreement (the contract) made between the Claimants and the Defendants in this suit, was made under seal by both parties and is well documented and referred the Court to the No. 1 document in the Claimants' List of Documents to be relied on during trial, to wit: "UIDC OFFER OF LEASE letter dated 22/4/2004"

Counsel submitted that the term *SIMPLE CONTRACT* is defined in *Black's Law Dictionary* at page 348 where it said: "see *Parol Contract (2)*". There, the term *PAROL CONTROL* is defined at page 347 as – "a contract or modification of a contract that is not in writing or is only partially in writing" underlining ours. See *ADESOYE OLANLEGE VS AFRO CONTINENTAL NIGERIA LIMITED – 1996 7 NIGERIA WEEKLY LAW REPORT (Pt. 458) pages 29 and 39 paragraph "H", Ratio 1 (SC)*.

Counsel argued that since this action is not founded on simple contract or tort, the action is not caught by the said Limitation Law.

He posited that the 1st Defendant is only worried because it knows that it wrongfully sold the Claimants' landed property which was used as pledge to secure the contract, to the 2nd defendant, who knew about the circumstances surrounding the said landed property before he purchased it.

He said that despite repeated demands by the Claimants to the 2<sup>nd</sup> Defendant to vacate and deliver peaceable possession, he still went ahead to develop same.

He argued that the 1<sup>st</sup> defendant having unilaterally truncated the Lease Financing Contract, the Claimants have their options, one of which is to go to court to seek redress as in this suit. See: *ODUSOGA VS RICKETTS – 1997 7 WEEKLY LAW REPORTS OF NIGERIS (Pt.511) page 1, Ratio 7. And MANYA VS IDRIS 2000 FEDERATION WEEKLY REPORT (Pt. 23) page 1237 Ratio 6.*

He therefore urged the Court to dismiss this Preliminary Objection with exemplary costs as same lacks merit both in law and in fact.

I have carefully considered all the processes filed in this application, together with the arguments of the learned counsel for the parties.

I adopt the issues for determination in this application as formulated by the learned Counsel for the 2<sup>nd</sup> Defendant/Respondent with some slight modifications as follows:

1. Whether from the circumstances of this case, this Court can exercise jurisdiction over this suit;
2. Whether the 1<sup>st</sup> Claimant is a juristic personality; and
3. Whether this suit is not statute barred.

#### ISSUE 1:

It is an elementary principle of law that the issue of jurisdiction can be raised at any stage of the proceedings. It is fundamental and pivotal. It can even be raised by the Court *suo motu*. See: *SLB Consortium Ltd. vs.NNPC (2011) 9 NWLR (Pt.1252) 317 at 335.*

In determining the issue of jurisdiction, it is the Claimant's originating processes that are to be considered. See: *Okorochoa vs. UBA Plc. (2011) 1NWLR (Pt.1228) 348 at 373;and A.G. Federation vs. A.G.Abia (2001) 11NWLR (Pt.725) 689 at 740.*

The gravamen of the objection under this issue is *inter alia* that the pledged piece of land is situate in Ogbike Street, Emevor town in Delta State. The applicant

has argued very forcefully that this singular fact has robbed this Court of the jurisdiction to entertain this suit.

Upon a careful consideration of the Writ of Summons and the Statement of Claim in this suit it is to be observed that the main claim is not over the land in Delta State but a Lease Financing Agreement between the 1<sup>st</sup> Defendant and the Claimants. The land was simply used as a pledge or collateral.

It is settled law that in an action for specific performance of a contract, mortgages, pledges etc, where the immovable property used as a security is outside the jurisdiction of the court, the claimant can enforce the action in the place where the contract was made although the property is out of jurisdiction. See: *The British Bata Shoe Company Ltd. vs. Melikan (1956) 1 FSC 100*; and *Ngige vs. Capital Bancorp Ltd. & Anor.(1999) 7 NWLR (Pt.609) 71 at 79-80*.

Furthermore, it is settled law that where a contract ought to have been performed in a particular place, the Court that is seized of jurisdiction is the Court where the breach of contract occurred .See: *A.S.T.B vs. King Davidson (2000) 12 NWLR (Pt.681) 298 at 315*.

Flowing from the foregoing principles, I am of the view that the mere fact that the pledged property is in Delta State cannot deprive this Court of the jurisdiction to entertain this suit. Furthermore, upon a close examination of the originating processes, I agree with the learned counsel for the Claimant that the issue of the pledged land is merely ancillary to the issue of the Lease Financing Agreement.

I therefore hold that this Court can entertain this suit.

On the issue of whether the 1<sup>st</sup> Claimant is a juristic person, I am guided by the Statement of Claim in this suit.Paragraphs 1 and 2 thereof state as follows:

1. *1<sup>st</sup> Claimant is a company incorporated under the Company & Allied Matters Act, Laws of the Federation of Nigeria, 1990.Its head office is at No.74, Akpakpava Street, Benin City, Edo State of Nigeria. Claimant shall rely on the incorporation and registration certificates.*

2. *The Lease Financing contract leading to the cause of action in this suit was entered into and carried out in the name of DOMESTIC GAS SHOP.*

From the above, it is evident that the contract was actually entered into with a company *incorporated under the Company & Allied Matters Act, Laws of the Federation of Nigeria, 1990 with its head office at No.74, Akpakpava Street, Benin City, Edo State of Nigeria.* *Ex facie*, this is clearly a juristic person. The juristic personality is: *A.U.Lucky Enterprises Nigeria Limited.*

However, the confusion in identity emerged when the juristic person entered into the contract under the name: *“Domestic Gas Shop”* which is clearly not a juristic person but a division within the corporate entity. The crucial issue to be considered is: What is the implication of this arrangement whereby a juristic entity enters a contract in the name of a non juristic entity and goes further to institute a suit in that name? That is the challenge before the 1<sup>st</sup> Claimant in this suit.

It is settled law that the competency of a plaintiff to sue or a defendant to be sued is a preliminary issue that must be determined in any action. See: *Makeri vs. Kafinta (1990) 7 NWLR (Pt.163) 411 at 420.*

Furthermore, the competency to institute an action is a *sine qua non* to the action itself. See: *Lawal vs. Younan & Sons & Co. (1961) 1 All NLR 245.*

Any action instituted on behalf of a corporate entity should be brought under the corporate name. See: *Ode & others vs. The Diocese of Ibadan (1966) 1 All NLR 287 at 289. Bambe & Ors vs. Aderinola & Ors (1977) 11 NSCC 1at 4.*

In this suit the corporate entity is: *“A.U.Lucky Enterprises Nigeria Limited”*. Curiously, the suit was not instituted under the corporate name but under the name: *“Domestic Gas Shop”*, which is indisputably a non corporate name and in fact a division within the corporate body. This is clearly an error. Unless the proper party is in Court, I am of the view that it will be futile to proceed to adjudicate with the 1<sup>st</sup> Claimant in this suit not being a juristic person. The action as presently constituted is obviously defective.

I am not unmindful of the vehement submissions of the Claimant's Counsel to the effect that in a previous suit (Suit No. B/230/2008) which was pending before a Benin High Court, the Court ruled that Domestic Gas Shop is juristic person. I do not think I am bound by the ruling of that Court for the following reasons:

1. The said ruling was given when the previous suit was part heard before that Court. The Court thereafter struck out the suit and the suit was filed *de novo* before this Court;
2. The orders made by the previous Court are deemed to have expired when the suit was struck out inconclusively;
3. The said High Court which gave the said orders is a Court of coordinate jurisdiction with this Court. I am at liberty to depart from that view on the matter.

Sequel to the foregoing, I therefore resolve Issue 2 in favour of the Applicant.

Coming to Issue 3 which is on whether the action is statute barred, the law is now settled that where a law prescribes a period for instituting an action, proceedings cannot be instituted after that period.

Furthermore, where an action is statute-barred a plaintiff who might have had a cause of action loses the right to enforce the cause of action by judicial process because the period laid down by the limitation law for instituting such an action had elapsed and the right to commence the action would have been extinguished by law. See: *Dr Tosin Ajayi vs. Princess Mrs Olajumoke Adebiji NSCQR Vol. 50 2012 p. 492.*

The learned Counsel for the Applicant has seriously contended that the action which is founded on a Simple Contract is statute barred by virtue of section 4(1)(a) of the Limitation Law, Laws Of Bendel State as applicable to Edo State, having being filed after six years. This is a very fundamental objection.

The learned Counsel for the Claimant/Respondent has countered this by submitting that the Lease Financing Agreement (the contract) made between the Claimants and the Defendants in this suit, was not a *simple contract* subject to the Statute of Limitation but a *contract under seal*. He referred the Court to the No. 1 document in the Claimants' List of Documents to be relied upon during trial, to wit: "UIDC OFFER OF LEASE letter dated 22/4/2004".

It is pertinent to observe that the Contract document is not yet an exhibit in this suit. The frontloaded Lease Agreement is not exhibit until it is tendered at the trial. It will be premature for me to make a finding at this stage on a document which is not an exhibit before me.

Consequently, I am unable to make a finding on the true nature of the contract executed by the parties. The issue of whether it was a Simple Contract or a Contract under seal will be determined in a substantive trial. Thus the issue of whether the contract is statute barred cannot be resolved on this Preliminary objection.

In effect, I am unable to resolve Issue 3 in favour of any of the parties.

On the whole, this Preliminary Objection succeeds in part. I hold that the 1st Claimant/Respondent is not a juristic person and cannot institute this action against the Defendants. Consequently, the name of the 1st Claimant is hereby struck out from this suit. Costs assessed at N10,000.00 (ten thousand naira) is awarded in favour of each the Defendants in this suit.

P.A.AKHIHIERO  
JUDGE  
07/12/16

COUNSEL:

J.E.OGEDEGBE ESQ. í í í í í í í í í 2ND DEFENDANT/APPLICANT

S.A.NKWOR ESQ. í í í í í í ..í í í .CLAIMANTS/RESPONDENTS