**MAGNUM INTERNATIONAL LIMITED**

**V.**

**ENERCON NIGERIA LIMITED**

IN THE COURT OF APPEAL OF NIGERIA

ON THURSDAY, THE 6TH DAY OF FEBRUARY, 2020

CA/L/714/2018

**LEX (2020) – CA/L/714/2018**

**OTHER CITATIONS**

3PLR/2020/27 (CA)

(2020) LPELR-49501 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

JOSEPH SHAGBAOR IKYEGH, JCA

TIJJANI ABUBAKAR, JCA

**BETWEEN**

MAGNUM INTERNATIONAL LTD - Appellant(s)

AND

ENERCON NIG. LTD - Respondent(s)

**ORIGINATING COURT**

FEDERAL HIGH COURT (Holden at Lagos)

**REPRESENTATION**

N. C. Ibeh with him, E. B. Folorunso - For Appellant

AND

E. Dike - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION AND CONCILIATION - APPOINTMENT OF ARBITRATOR: Section 7(4) of the Arbitration and Conciliation Act - Whether precludes the constitutional right of appeal over the decisions of tribunals/Court – Sections 241 (1), 242 and 243(1) and (2) of the 1999 Constitution (as amended) in review - Interpretative guides open to the Court confronted with Section 7(4) of the Arbitration and Conciliation Act

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION AND CONCILIATION - APPOINTMENT OF ARBITRATOR:- Power of Court to appoint arbitrator for parties pursuant to Sections 7(2) and 34 of the Arbitration and Conciliation Act – Conditions precedent for proper exercise thereof

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION AND CONCILIATION - ARBITRATION CLAUSE: Arbitration clause which forms part of a contract - Whether is a separate and independent contract – Forum with power to determine same - How determined - Jurisdiction of the Arbitral Tribunal to determine disputes over the validity or existence of an arbitration clause – Basis of

CONSTITUTIONAL LAW – JUDICIAL POWERS AND PROCESSES –ALTERNATIVE DISPUTE RESOLUTION - RIGHT OF APPEAL:- Arbitral proceedings – Right to appeal the decision of any tribunal/court in Nigeria – Constitutional basis and guarantee of – Section 7(4) of the Arbitration and Conciliation Act which purport to take away the right of appeal against the appointment of an arbitrator by the Court for the parties – Interpretative guidelines to retaining the intention of the legislature – Primacy of Sections 1(3), 241 (1), 242 and 243(1) and (2) of the 1999 Constitution – Attitude of Court to indirect invitation to pronounce on constitutionality of Section 7(4) of the Arbitration and Conciliation Act

COMMERCIAL LAW – CONTRACT – ARBITRAL CLAUSE:- Where parties freely and voluntarily enter into contracts in or by which they chose to include an arbitration clause therein – Principle that an arbitral clause, even though incorporated into the main agreements/contracts, is separate and distinct from the contract such that it survives and remains valid even when the main agreements/contracts come to an end - Section 12 of the Arbitration and Conciliation Act - Article 21(2) of the Arbitration Rules - Power and authority or jurisdiction of a High Court to appoint an arbitrator in line with the provisions of Section 7(2)(a)(i) of Arbitration and Conciliation Act in review

ETHICS – LEGAL PRACTITIONER – PLEADINGS:- Duty of diligence - Proliferation of multiple issues for determination from a single ground of appeal – Attitude of Court thereto – Whether “a practice loathed and deprecated by the appellate Courts”

**PRACTICE AND PROCEDURE ISSUES**

APPEAL- CROSS-APPEAL/RESPONDENT NOTICE:- Grounds of cross-appeal by the Respondent - Grounds which can be relied on by Respondent to contend that the decision/judgment of the Lower Court should be affirmed on grounds other than those relied on by it – Meanings - Distinctions between - Court of Appeal Rules, 2016, Order 9(1) and (2) – Whether a cross-appeal cannot be brought by way of a Respondent's Notice

APPEAL - ISSUE(S) FOR DETERMINATION:- Appellate Court - Whether has the power to reframe issues for determination different from ones advanced by appellants and to determine appeals thereon

APPEAL - ISSUE(S) FOR DETERMINATION:- Proliferation of issues for determination from a single ground of appeal - Attitude of appellate Courts thereto

APPEAL - JURISDICTION:- Issues for determination by respondent attacking the validity of contract upon which the suit appealed against was founded – Whether question of jurisdiction – Duty of appellate court thereto

INTERPRETATION OF STATUTE – RULES OF COURT:- Court of Appeal Rules, 2016, Order 9(1) and (2) – Proper construction of

INTERPRETATION OF STATUTE:- Section 7(4) of the Arbitration and Conciliation Act – Proper construction of

WORDS AND PHRASES:- Respondent’s Notice/Grounds of Cross-Appeal - Respondent’s Notice/Ground of Intention to contend that the judgment/decision of the Lower Court should be affirmed on grounds other than those relied on by that Court – Meanings – Distinction between

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The suit was based on a disputed contract which contained an arbitration clause. The trial Court pursuant to Section 7(2) and (3) of Arbitration and Conciliation Act granted an application by way of originating motion of the Respondent for the appointment of an arbitrator for the Appellant which was opposed by the Respondent.

DECISION(S) APPEALED AGAINST

The Respondent was dissatisfied with the decision by the Lower Court to grant the application to appoint an Arbitrator.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

4.1 Whether or not the Learned Trial Court was right to have assumed jurisdiction on the Respondent’s Originating Motion in respect of a dead or expired Memorandum of Understanding (MOU - Exhibit MIL1) and Addendum (Exhibit MIL2) and appointed an arbitrator for the Appellant on the basis of same (from Ground 1 of the Notice of Appeal).

4.2 Whether or not an arbitration cause can exist in the face of total death or expiration of an entire agreement (from Ground 2 of the Notice of Appeal).

4.3 In the alternative, upon a thorough examination of clause 8 of Exhibit MIL2 (Addendum), the Respondent was not stopped from bringing its application for appointment of arbitrator for the Appellant for the purpose of arbitration proceedings aimed at recovering its money from the Appellant after one (1) year from the date of Exhibit MIL2 (from Ground 3 of the Notice of Appeal).

4.4 In the alternative, whether upon an examination of Clause 9 of Exhibit MIL2, Exhibit MIL2 does not supersede even the arbitration clause contained in Exhibit MIL1 (MOU) in the light of inconsistency, ambiguity or conflict between Exhibit MIL1 (MOU) and Exhibit MIL2 (Addendum) to the extent that there can be no arbitration between the Appellant and the Respondent (from ground 3 of the Notice of Appeal).”

*BY RESPONDENTS*

A preliminary objection to the competence of the appeal was raised and two (2) issues, in the alternative, formulated for decision on the merit of the appeal. While the ground of the objection is that the decision to appoint an arbitrator by the Lower Court is not subject to appeal by virtue of Section 7(4) of the Arbitration and Conciliation Act (ACA), 2004, the issues are as follows:-

“4.1 Whether an arbitration clause contained in a contract is an agreement independent of the main or primary contract, so that the invalidity of the main or primary contract does not entail the invalidity of the arbitration clause.

4.2 Whether the arbitration agreement between the Respondent and the Appellant is valid and subsisting.”

*AS ADOPTED BY COURT*

Whether the Lower Court has the requisite jurisdiction and competence to make the appointment of the arbitrator in question.

DECISION OF COURT OF APPEAL

1. Within the circumstances of the case, the Lower Court had the requisite power and authority or jurisdiction to appoint the arbitrator for the Appellant in line with the provisions of Section 7(2)(a)(i) of Arbitration and Conciliation Act.

For the aforementioned reasons, the appeal is misconceived, lacking in merit and bound to fail. In consequence wherefore, the appeal is dismissed.

2. Respondent Respondent’s Notice of Intention to contend that the judgment/decision of the Lower Court should be affirmed on grounds other than those relied on by that Court was misconceived as the grounds set out amounted to a challenge or attack of the decision in the Ruling, rather than a support it on other grounds and thus liable to be struck out.

**MAIN JUDGMENT**

MOHAMMED LAWAL GARBA, J.C.A. (Delivering the Leading Judgment):

On the 15th March, 2018, the Federal High Court (Lower Court), sitting at Lagos, granted the application by way of originating motion of the Respondent for the appointment of an arbitrator for the Appellant which was opposed. Expectedly, the Respondent was dissatisfied with the decision by the Lower Court and so brought this appeal against same on four (4) grounds contained on the Notice of Appeal filed on the 14th May, 2018 from which the four (4) issues are set out for determination in the Appellant’s brief filed on the 16th July, 2018.

The issues are as follows:-

“4.1 Whether or not the Learned Trial Court was right to have assumed jurisdiction on the Respondent’s Originating Motion in respect of a dead or expired Memorandum of Understanding (MOU - Exhibit MIL1) and Addendum (Exhibit MIL2) and appointed an arbitrator for the Appellant on the basis of same (from Ground 1 of the Notice of Appeal).

4.2 Whether or not an arbitration cause can exist in the face of total death or expiration of an entire agreement (from Ground 2 of the Notice of Appeal).

4.3 In the alternative, upon a thorough examination of clause 8 of Exhibit MIL2 (Addendum), the Respondent was not stopped from bringing its application for appointment of arbitrator for the Appellant for the purpose of arbitration proceedings aimed at recovering its money from the Appellant after one (1) year from the date of Exhibit MIL2 (from Ground 3 of the Notice of Appeal).

4.4 In the alternative, whether upon an examination of Clause 9 of Exhibit MIL2, Exhibit MIL2 does not supersede even the arbitration clause contained in Exhibit MIL1 (MOU) in the light of inconsistency, ambiguity or conflict between Exhibit MIL1 (MOU) and Exhibit MIL2 (Addendum) to the extent that there can be no arbitration between the Appellant and the Respondent (from ground 3 of the Notice of Appeal).”

As can be noted easily, against the recognized and accepted practice of brief writing in the appellate Courts, two (2) issues; i.e., Issues 4.3 and 4.4, are indicated to have been formulated from a single ground of appeal: ground 3. The Issues are thereby proliferated being based on a single ground of the appeal, a practice loathed and deprecated by the appellate Courts. See Bamikole v. Oladele (2010) 1 NWLR (Pt. 1229) 483; Nwokearu v. State (2013) 16 NWLR (Pt. 1380) 207; Roda v. FRN (2015) 10 NWLR (Pt. 1468) 427; Iweka v. SCOA (2000) 7 NWLR (Pt. 664) 325 @ 338.

In the Respondent’s brief filed on 2nd October, 2018, deemed on 2nd December, 2019, a preliminary objection to the competence of the appeal was raised and two (2) issues, in the alternative, formulated for decision on the merit of the appeal. While the ground of the objection is that the decision to appoint an arbitrator by the Lower Court is not subject to appeal by virtue of Section 7(4) of the Arbitration and Conciliation Act (ACA), 2004, the issues are as follows:-

“4.1 Whether an arbitration clause contained in a contract is an agreement independent of the main or primary contract, so that the invalidity of the main or primary contract does not entail the invalidity of the arbitration clause.

4.2 Whether the arbitration agreement between the Respondent and the Appellant is valid and subsisting.”

The Appellant filed a Reply brief on the 17th October, 2018 in response to the objection.

I would deal with the objection by the Respondent first since it goes to question and even attack the competence of the appeal and in consequence, the jurisdiction of the Court to adjudicate over it. The Respondent’s arguments on the objection are that by virtue of the provisions of Section 7(4) of the Arbitration and Conciliation Act and the decision of the Court in Bendex Engr. Corp. v. Efficient Petrol Nig. Ltd (2001) 8 NWLR (Pt. 715) 333 and Ogunwale v. Syrian Arab Republic (2002) 9 NWLR (Pt. 771) 127, the decision by the Lower Court to appoint an arbitrator for the Appellant is not subject to appeal. It is contended that the earlier decision by the Court in Nig. Agip Oil Co. Ltd v. Kemmer (2001) 8 NWLR (Pt. 716) 506 @ 510 was distinguished by the Court on the ground that the issue in the appeal was whether the Federal High Court had the jurisdiction to entertain the originating summons filed before it and not on the order for appointment of an arbitrator.

Learned Counsel argues that the right of appeal conferred under Section 241 of the 1999 Constitution would be completely exercised when an appeal was filed by a party after which the appellate Court’s duty would be to refer the parties back to arbitration, in case of appeal on default appointment of an arbitrator, as in the Appellant’s case. According to Counsel, this Court has no jurisdiction to determine any matter that is the subject of arbitration, citing M. V. Lupex v. N. O. C. & S. Ltd (2003) 15 NWLR (Pt. 844) 496; Savoia v. Sonubi (2000) 12 NWLR (Pt. 682) 539 @ 551 and Onward Ent. Ltd. v. MV Matrix (2010) 2 NWLR (Pt. 1179) 531. The case of Environmental Dev. Constr. v. Umara Associates (2000) 4 NWLR (Pt. 652) 293 @ 303 was referred to on the submission that once a party has agreed to arbitration in a contract, the agreement is binding since it has the same effect as if it had been made by a Court order.

The Appellant’s submissions on the objection are that, on the authority of Section 241 (1) (a) of the 1999 Constitution as well as Adigwe v. FRN (2015) ALL FWLR (Pt. 805) 76 at 88-9 and FRN v. Dairo (2015) NWLR (Pt. 776) 486 @ 510, a party has the right to appeal against the final decision of a High Court sitting as a Court of first instance, as of right and that any law which purports to deny such a right is unconstitutional and void pursuant to Section 1(3) of the Constitution. It is also the argument of Learned Counsel for the Appellant that since the appeal is on the issue of jurisdiction, it cannot be defeated by an objection, and reliance was placed on Adigwe v. FRN (supra). Section 36(1) of the Constitution and the case of Omoniyi v. Alabi (2015) ALL FWLR (Pt. 774) 181 @ 197 on the right of the Appellant to fair hearing were referred to and the Court is urged to hear the appeal on its merit.

Without the need to say more than is necessary on the objection, the law is beyond viable argument that being a constitutional right vested on and guaranteed for a person/party who is dissatisfied with the decision of High Court, sitting as a Court of first instance or trial Court, the right of appeal cannot be taken away or denied by the provision of any other statute or law which is inferior to the Constitution. Any such statute or law which purport to take away or deny a party in the judicial proceedings of a High Court, or indeed any Court established by or pursuant to the provisions of the Constitution, the right of appeal against the decision of such a Court will be inconsistent, in conflict and contradiction with the provisions of Sections 241 (1), 242 and 243(1) and (2) of the 1999 Constitution (as amended) and to the extent of its inconsistency with the constitutional provisions, shall be void under Section 1(3) of the Constitution. See Uwagba v. FRN (2000) 13 NWLR (Pt. 684) 242; Nabaruma v. Offodile (2004) 13 NWLR (Pt. 891) 599, Edjekpo v. Osia (2007) 8 NWLR (Pt. 1037) 635; Min., FCT, M. H. Nig. Ltd (2011) 9 NWLR (Pt. 1255) 272; Nigerian Army v. Yakubu (2013) 8 NWLR (Pt. 1355) 1; Eligwe v. Okpokiri (2015) 2 NWLR (Pt. 1443) 348; Adigwe v. FRN (2015) 18 NWLR (Pt. 1490) 105.

For the provisions of Section 7 (4) of the Arbitration and Conciliation Act relied on by the Respondent’s Counsel for the objection, they are as follows:-

“(4) A decision of the Court under Subsections (2) and(3) of this section shall not be subject to appeal.”

The provisions of Subsection (2) and (3) referred to in the Subsection (4) deal with the procedure for appointment of an arbitrator/arbitral Tribunal where no procedure was specifically agreed to by the parties to the arbitration agreement or/and where a party fails to act as required under the procedure agreed to by the parties or where the parties or party appointed two (2) arbitrators are unable to agree on the appointment of a 3rd arbitrator or a third party or institution fails to perform the duty imposed on it under the procedure agreed to by the parties.

In the circumstances enumerated in Subsections (2) and (3), the Court is empowered on the application of any of the parties to appoint an arbitrator or arbitrators, as the case may be, in default.

In the case of Bendex Engr. Ltd. v. Efficient Pet Nig. Ltd (supra), the application of the provisions Section 7(4) to the case was considered by this Court and in the lead judgment of Olagunju, J.C.A., after finding that the provisions did not apply to the facts of the appeal, stated that:-

“In conclusion let me say with emphasis that forfeiture of the right of appeal is a serious matter beyond the mere gambit of a preliminary objection as a daunting ploy calculated to stun an opponent as the right of appeal is a constitutional right: see Eze v. Ejelonu (1999) 6 NWLR (Pt. 605) 134, 142-142; and Ibrahim v. Balogun (1999) 7 NWLR (Pt. 610) 254, 266. Without getting involved in doctrinal debate on the constitutional implications of Sub-section 7(4) of Arbitration and Conciliation Act which is outside the scope of this appeal, I feel impelled to note in passing the approach to the interpretation of legislation on the deprivation of right such as Sub-section 7(4) of the Act. Particularly instructive is the principle that any legislative provision which seeks to deprive the citizenry of his rights, be they personal or propriety rights, must be interpreted fortissime contra-preferentes, i.e. strict construction against the person relying on the power of deprivation. See Bello v. The Diocesan Synod of Lagos (1973) 3 SC 103, (1973) 1 All NLR (Pt.1) 247, 268; Ereku v. Military Governor of Mid-Western State (1974) 10 SC 59, (1974) 1 All NLR (Pt. II) 163, 170-171; Peenok Investments Ltd. v. Hotel Presidential Ltd. (1982) 12 SC 1, 25-26, (1983) 4 NCLR 122; and Din v. Attorney-General of the Federation (1988) 4 NWLR (Pt. 87) 147, 184-185.”

Then, in the case of Nigerian Agip Oil Co. Ltd v. Kemmer (supra), this Court again considered the provisions of Section 7(4) of the Arbitration and Conciliation Act and unanimously decided that the provisions cannot take or deny the constitutional right of appeal provided for and conferred by the provision Section 241 of the Constitution. Ogebe, J.C.A. (then), in the lead judgment at page 517 of the Report, after setting out the entire provisions of Section 7 of the Arbitration and Conciliation Act, said that:-

“Subsection 4 of this section cannot override the right of appeal conferred by Section 241 of the 1999 Constitution.”

Ikongbeh, J.C.A., who dissented on the issue of jurisdiction of the Federal High Court to entertain the matter leading to the appeal, stated on the effect of Section 7(4) of Arbitration and Conciliation Act, that:-

“Mr. Nwosu’s objection to the appeal is predicated on the provisions of Section 7(4) of the Arbitration and Conciliation Act, Cap 19, Laws of the Federation, 1990, which makes the decision of the Court to appoint an arbitrator final and not subject to appeal. Mr. Okpoko, S.A.N., however, provided the short answer to this objection when he drew attention to the provisions of Section 241 of the 1999 Constitution, which gives the appellant an unrestricted right of appeal and Section 1(3), which proclaims the superiority of the constitutionally guaranteed right. If Section 7(4) of the Arbitration and Conciliation Act, to the extent that it restricted the right of appeal, had been good law, it ceased to be so when the Constitution came into force. For this reason, I too find no merit in Mr. Nwosu’s objection.”

The position of the law stated by the Court on the legal effect of the provisions of Section 7(4) of Arbitration and Conciliation Act on the right of appeal conferred and vested by the provisions of Section 241 of the Constitution in these cases, is applicable in all other cases wherein they are sought to be relied on to challenge the competence of an appeal on the ground that there is no such right on the basis of the provisions of the Arbitration and Conciliation Act.

Again, in the case Ogunwale v. Syrian Arab Republic (supra), Chukwama-Eneh, J.C.A., in the lead judgment of the Court, stated on the implication and application of the provisions of Section 7(4) of Arbitration and Conciliation Act in relation to the Constitutional right of appeal, that:-

“Section 241(1) of the 1999 Constitution has [by] the provisions unequivocally conferred on any aggrieved party the right to appeal indeed as of right in circumstances covered by Section 241(1)(a)(b) and (c) of the 1999 Constitution. The fact that the instant Arbitration and Conciliation Act, 1990, Cap. 19, Laws of the Federation is an existing law is of no consequence in challenging any of the rights conferred in Sections 243 and 315 of the Constitution have not abridged the right of appeal given to the appellant under Section 241(1) of the 1999 Constitution. Without going flat out to declare the provisions of Section 7(4) and 34 unconstitutional, it is enough to say here that they cannot override the clear right of appeal conferred on the appellant by Section 241(1) of the 1999 Constitution. The bottom line of the matter is that appellant’s right of appeal in this matter has constitutional backing.”

The above position apart, the Court in the aforenamed case has stated the conditions to be met or satisfied for the provisions of Section 7(4) of Arbitration and Conciliation Act to apply in respect of a decision by a High Court on appointment of an arbitrator. The provisions only render non-appealable proceedings challenging the procedure for appointing arbitrators as stipulated in Subsections (2) and (3). The conditions for the application of the provisions of Section 7(4) of Arbitration and Conciliation Act, were prescribed in the case of Ogunwale v. Syria Arab Republic (supra) as follows:-

(1) a binding, valid, compellable arbitration clause;

(2) a dispute capable of being referred to arbitration; and

(3) a party must have refused or defaulted to make an appointment.

These conditions must co-exist, otherwise Section 7(4) will not apply to the decision of a High Court appointing an arbitrator and in order to determine whether or not the provisions apply, this Court is to have regard to the grounds of an appeal and the issues raised for decision in the appeal.

The four (4) grounds of this appeal, without particulars are thus:-

“GROUND 1

The learned trial judge erred in law when he ruled without jurisdiction on the originating motion based on dead or expired Memorandum of Understanding (Exhibit MIL1) and Addendum (Exhibit MIL2), filed by the Respondent and appointed an arbitrator for the Appellant on the basis of same.

GROUND 2

The learned trial judge erred in law when he held that the arbitration clause still exists where there is no valid agreement between the Appellant and the Respondent and went ahead to appoint an arbitrator for the Appellant on the basis of a dead agreement.

GROUND 3

The learned trial judge erred in law when he appointed an arbitrator for the Appellant for the purpose of arbitration proceedings between the Appellant and Respondent, contrary to Clauses 8 and 9 of the Addendum (Exhibit MIL2) executed between the parties.

GROUND 4

The entire ruling is against the weight of evidence (affidavit evidence).”

I have set out the issues raised by the Appellant for determination in the appeal, before now.

Undoubtedly, a calm reading of both the grounds of appeal and the issues submitted for decision, communally show a challenge to the competence of the Lower Court on the basis of the arbitration agreement upon which the appointment of the arbitrator for the Appellant was made by the Lower Court.

The grounds and issues simply question and attack the validity of the arbitration Clause(s) in the agreements admittedly entered into by the Appellant and the Respondent in respect of the vessel and investment in question.

The grounds and issues do not even pretend to challenge the procedure provided for in the provisions of Section 7(2) and (3) of Arbitration and Conciliation Act pursuant to which the application was made and on the basis of which the Lower Court’s decision to appoint an arbitrator, was taken by it. Once again, the provisions of Section 7(2) and (3) merely provide for the situations, circumstances and procedure for the appointment by the Court in default of either an agreement or failure to appoint an arbitrator as provided for in Section 7(1).

Where an appeal challenges the decision of a Court on the basis of failure to follow or contravention of the procedure for the appointment of a default arbitrator provided for in Section 7(2) and (3), the provisions of Sub-section (4) may come into effect when the conditions stated in Ogunwale v. Syrian Arab Republic and Bendex Engr. v. Efficient Pet. Nig. Ltd (both supra) were met for its application.

Since the basis of the appeal is the competence or jurisdiction of the Lower Court to make the appointment of an arbitrator for the Appellant on the basis of the validity of the arbitration clause in their agreement, and not on the procedure set out in Section 7(2) and (3), the provision of Sub-section (4) is inapplicable. For that reason, the preliminary objection lacks merit, is over-ruled and dismissed.

Now, like I stated earlier, the appeal is predicated on the validity of the arbitration clause and the competence of the Lower Court to make the appointment pursuant thereto, so the germane and crucial issue to decide in the appeal is whether the Lower Court has the requisite jurisdiction and competence to make the appointment of the arbitrator in question. I intend to decide the appeal on the basis of this sole question, taking into account the relevant and material submissions of Counsel thereon, on the authority of, among many other cases, Sha v. Kwan (2000) 8 NWLR @ 700, Chabasaya v. Anwasi (2010) NWLR (Pt. 1201) Okafor v. Abumofuani (2016) 12 NWLR (Pt. 1525) 117, Governor, Ekiti State v. Olubunmo NWLR (Pt. 1551) 1 @ 33, by which this Court has the power to determine appeals on the basis of issue/s it considers proper and crucial.

Appellant’s Submission:

The arguments are to the effect that the Lower Court erred in assuming jurisdiction over the application for the appointment of an arbitrator because the agreement, in which the arbitration clause was included, had expired and so was dead. Learned Counsel said the agreement, MOU (Exhibit MIL1) was entered into on 5th May, 2011 for two (2) years, by the parties and so it expired by the 4th May, 2015 and since the parties are bound by the terms of their agreement, which the Court cannot re-write for them, there was no live agreement on the basis of which it could have properly assumed jurisdiction to make the appointment. A.G. Rivers State v. Attorney General, Akwa Ibom State (2011) ALL FWLR (Pt. 579) 1023 @ 1056, Kwam v. Rago (2000) FWLR (Pt. 22) 1129 @ 1148; The Owners of the MV Lupex v. Nigeria Overseas Chait & Ship Limited (2003) LPELR-SC21/2000 (sic), inter alia, were cited for the submission. It is also submitted that the parties agreed that the arbitration clause in their contract in Exhibit MIL1 was to be revoked and nullified by being superceded by the Exhibit MIL2 and so there was no valid arbitration agreement to base the appointment of an arbitrator in default, by the Lower Court. The case of Joseph v. Kwara State Polytechnic (2014) ALL FWLR (750) 1215 @ 1236, Section 169 of the Evidence Act, 2011 and page 1516 of the 9th Edition of the Black’s Law Dictionary on the definition of the word “supercede” were referred to and the Court is urged to adopt the persuasive authority of the American case of Dasher v. RBC Bank (USA), No. 13-10257, 2014 WL504704 (11th Cir. Feb. 10, 2014).

In summary, the Court is urged to hold that the Lower Court lacks the jurisdiction to make the appointment in the absence of a live agreement/contract between the parties and to allow the appeal.

Respondent’s Submissions:

It is submitted that an arbitration clause contained in a contract is separate and independent of the main contract so that the invalidity of the main contract does not entail the invalidity of the arbitration clause. Section 12(2) of ACA, Article 21(2) of the Arbitration Rules, 1st Schedule, ACA (AR) and Tweedale & Tweidale, Arbitration of Commercial Disputes (Oxford University Press, 2007) Paragraphs 455 were cited in support.

It is then submitted that the arbitration clause 8 in Exhibit MIL1 is separate and independent of the Exhibits MIL1 and MIL2, which are said to be subsisting and valid on the authority of Attorney General, Rivers State v. Attorney General, Akwa-Ibom (supra) and Royal Exchange Assurance v. Bentworth Finance Nigeria Limited (1976) 11 SC, 107.

Sections 12(1) and 2 of Arbitration and Conciliation Act were cited and it is maintained that the parties have made an arbitration agreement in both Exhibits MIL1 and MIL2 which they did not revoke and so are bound by it as stated in Africa International Bank Limited v. Int. Dimensional System Limited (2012) ALL FWLR (Pt. 656) 413 @ 452.

It is the further submission of the Respondent that it is the arbitral Tribunal that has the power to determine the validity of Exhibits MIL1 and MIL2 in relation to the arbitration clause between the parties under the provisions of Section 12(1) & (2) of Arbitration and Conciliation Act. Heyman & Ors. V. Darwins Limited (1942) AC, 356; Bremer v. Ulkan Schiffbau & Maschinenfabrik v. South Shipping Corporation (1981) 1 Lloyd’s Rep. 253 are relied on for the submission and it is contended that the invalidity, death or expiration of the Exhibits MIL1 and MIL2 shall not invalidate the arbitration agreement contained therein.

In conclusion, it is said that the Court lacks the jurisdiction to determine the existence or validity of the contract containing an arbitration clause and urged to dismiss the appeal.

Resolution:

I should state, at the onset, that it is not the case of the Appellant that the Lower Court lacks the requisite jurisdiction to adjudicate over the parties or the subject matter of the contract in which they included an arbitration clause.

The law is now very elementary in all Courts of superior record in Nigeria, that the requisite jurisdiction of a Court to entertain and adjudicate over a matter or case is the lifeblood and foundation of all judicial proceeding to be conducted by it, the absence of which or any fundamental defect in which, renders such proceedings completely useless for being legally null, void and of no effect from the beginning to the end. Madukolu v. Nkemdilim (1962) 1 ALL FWLR 587 (1962) SCNLR, 341 and Oloba v. Akereja (1988) 7 SCNJ 56 provide sufficient authority for this position of the law which has remained sacrosanct.

The basis of the appeal, once more, is on the validity of both the contracts; Exhibits MIL1 and MIL2, between the parties and the arbitration clause, which admittedly were both agreed to by the parties and on the basis of which the Lower Court made the appointment of an arbitrator pursuant to the provisions of Section 7(2) (a)(i) of Arbitration and Conciliation Act. Undoubtedly, the parties in both Exhibits MIL1 and MIL2, freely and voluntarily entered into contracts in or by which they chose to include an arbitration clause therein and that being the position, the law is that even though incorporated into the main agreements/contracts; i.e. Exhibits MIL1 and MIL2, the arbitration clause or agreement, is separate and distinct from them such that it survives and remains valid even when the main agreements/contracts come to an end.

Section 12(2) of Arbitration and Conciliation Act provides that:-

“(2) For the purposes of Subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.”

Then Article 21(2) of the Arbitration Rules says that:-

“2. The arbitral Tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of this article, an arbitration clause which forms part of a contract and which provides for arbitration under Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

See NNPC v. Clifco Nigeria Limited (2011) 2 SCRN 101 (2011) 4 MJSC, 142, Stabilini Visinoni Limited v. Mallison & Partners Limited (2014) 12 NWLR (Pt. 1420) 134. By the provisions of Section 12(1) of Arbitration and Conciliation Act, it is the arbitration Tribunal and not the Court that should determine the main and primary complaint and challenge to the validity or existence of the arbitration agreement between the parties under which the appointment of an arbitrator was made by the Lower Court for the purposes of Exhibits MIL1 and MIL2. The section provides that:-

“12(1) An arbitral Tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.”

In these circumstances, the Lower Court had the requisite power and authority or jurisdiction to appoint the arbitrator for the Appellant in line with the provisions of Section 7(2)(a)(i) of Arbitration and Conciliation Act for the purpose of Exhibits MIL1 and MIL2, admittedly entered into by the parties.

For the aforementioned reasons, the appeal is misconceived, lacking in merit and bound to fail. In consequence wherefore, the appeal is dismissed.

I have observed that the Respondent filed a Respondent’s Notice of Intention to contend that the judgment/decision of the Lower Court should be affirmed on grounds other than those relied on by that Court.

However, the grounds set out on the Notice and intended to be relied on by the Respondent to urge the Court to affirm the Ruling appointing an arbitrator for the Appellant are that:-

“Ground 1: Error in Law

The learned trial Judge erred in law when he failed to hold that an arbitration clause contained in a contract is an agreement independent of the main or primary contract, so that the validity of the main or primary contract is not a condition for the Court to enforce the arbitration clause.

Particulars of Error

(1) The parties have the arbitration clause contained in a Memorandum of Understanding supplemented by an Addendum thereto.

(2) The learned trial Judge held that Memorandum of Understanding and the Addendum are non-existent, (that is to say they are invalid).

(3) The learned trial Judge held in pages 2 and 5 of the Ruling that the main or primary contract in which an arbitration clause is contained has to be valid for the Court to enforce the arbitration clause.

Ground 2: Error in Law

The learned trial Judge erred in law when he decided on the existence or validity of the Memorandum of Understanding between the parties and the Addendum thereto.

Particulars of Error

(1) The learned trial Judge held that Memorandum of Understanding and the Addendum are non-existent, (that is to say they are invalid).

(2) The learned trial Judge lacks the jurisdiction to determine the existence or the validity of the contract of which an arbitration clause forms a part.

(3) It is the arbitral Tribunal that has the jurisdiction to determine the existence or the validity of the contract of which an arbitration clause forms a part.”

Clearly, the purport of these grounds, indicated to be errors of law committed by the Lower Court in the Ruling in question, is to challenge or attack the decision in the Ruling, rather than support it on other grounds than relied on by the Lower Court for its decision to make the appointment at the instance of the Respondent. These grounds constitute and are complaints arising out of dissatisfaction of the Respondent with the decision of the Lower Court which if successful, will lead to a reversal of the findings made by that Court on the points of complaints therein. The grounds are therefore grounds of cross-appeal by the Respondent and not grounds which can be relied on to contend that the decision/judgment of the Lower Court should be affirmed on grounds other than those relied on by it. In this regard, it must be pointed out that there is a difference between a cross-appeal and a Respondent’s Notice to contend that the decision of a Lower Court should be affirmed by an appellate Court on grounds other than those relied on by that Court and that one cannot be a substitute for the other. In addition, a Respondent cannot file a cross-appeal and a Respondent’s notice at the same time in respect of appeal against a decision by a Lower Court. In Williams v. Daily Times of Nigeria Limited (1990) 1 NWLR (Pt. 124) 1 @ 54, a “cross-appeal” was defined as “an appeal by the appellee.”

See also Enang v. Archibong (2009) LPELR-8523 (CA), Owena Mass Transport Company Limited v. Imafidon (2011) LPELR-4810(CA), Akpan v. Bob (2010) 17 NWLR (Pt. 1223) 421, Opara v. D.S. Nigeria Limited (1995) 4 NWLR (Pt. 390) 440, B.C.E. Consulting Engineering v. NNPC (2004) 3 NWLR (Pt. 859) 1. From these definitions, a cross-appeal arises where the parties to a decision/judgment by a Trial/Lower Court are both dissatisfied with all or some parts or aspect of it and each filed a notice of appeal against same. The first in time to be filed, will be the Notice of Appeal and the 2nd in time, becomes the Notice of Cross-Appeal, respectively and the common relief to both of them would be to set aside the part or portion of the decision/judgment of the trial/Lower Court the party is dissatisfied with on the grounds of the appeal, even though each is separate and independent of the other for the purpose of determination. Igwe v. Kalu (2002) 14 NWLR (Pt. 787) 435, S.B.N. Limited v. M.P.I.E. Limited (2004) 6 NWLR (Pt. 868) 146, Opara v. D.S. Nigeria Limited (supra) Military Administrator, Benue State v. Ulegede (2001) FWLR (Pt. 78) 1268 @ 1291, Gabida v. Marcus (2003) FWLR (Pt. 169) 1451.

Under the Court of Appeal Rules, 2016, Order 9(1) and (2) provide for a Respondent’s Notice to contend in an appeal before the Court as follows:

“1. A Respondent who not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court should be varied, either in any event or in the event of the appeal being allowed in whole or in part, must give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court to make, or to make in that event, as the case may be.

2. A Respondent who desires to contend on the appeal that the decision of the Court below should be affirmed on grounds, other than those relied upon by that Court, must give notice to that effect specifying the grounds of that contention.”

The Respondent’s Notice in this appeal is the one provided for in Sub-Rule (2) above and so it is one which not only supports the decision/judgment/ruling by the Lower Court, but also it is supposed to contend that it should be affirmed by the Court on grounds other than those relied on by that Court. The Respondent’s Notice is therefore, not a cross-appeal which essentially seeks to challenge the decision/judgment of a trial/Lower Court and prays for its review and reversal. From the grounds set out on the Respondent’s Notice, the Respondent is clearly dissatisfied with and is complaining about the alleged errors of law committed in the Ruling by the Lower Court and which the Court is called upon to reverse.

Learned Counsel for the Appellant is right when he stated at paragraph 7 on page 4 of the Appellant’s Reply brief that by the Respondent’s Notice, the Respondent ‘is trying to set up another appeal other than the Appellant’s appeal before this Court. A cross-appeal cannot be brought by way of a Respondent’s Notice to contend that the decision of a Lower Court be affirmed on grounds other than those relied on it for the decision since the two are in direct opposite and total contradiction of each other.

In these premises, the Respondent’s Notice is misconceived and liable to be struck out.

In the final result, the appeal is dismissed for lacking in merit and the Respondent merits the cost of prosecuting it before the Court. There shall be costs of Three Hundred Thousand Naira (N300,000.00) to be paid by the Appellant to the Respondent for the prosecution of the appeal.

**JOSEPH SHAGBAOR IKYEGH, J.C.A.:**

I am in full agreement with the comprehensive judgment prepared by my learned brother, Mohammed Lawal Garba, J.C.A., (Hon. P.J.), which I had the benefit of reading in draft.

**TIJJANI ABUBAKAR, J.C.A.:**

My learned brother GARBA JCA, granted me the privilege of reading before today the comprehensive leading Judgment just delivered in this appeal. I am in complete agreement, I also endorse the entire reasoning and conclusion and adopt the Judgment as my own. I have nothing extra to add.