**THE VESSEL MT. SEA TIGER & ANOR**

**V.**

**ACCORD SHIP MANAGEMENT (HK) LIMITED & ORS**

IN THE COURT OF APPEAL OF NIGERIA

ON THURSDAY, THE 6TH DAY OF FEBRUARY, 2020

CA/L/1127/2017

**LEX (2020) - CA/L/1127/2017**

**OTHER CITATIONS**

3PLR/2020/46 (SC)(2020) LPELR-49498 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

JOSEPH SHAGBAOR IKYEGH, JCA

TIJJANI ABUBAKAR, JCA

**BETWEEN**

1. THE VESSEL MT. SEA TIGER

2. SEA TIGER TANKERS S.A. - Appellant(s)

AND

1. ACCORD SHIP MANAGEMENT (HK) LTD

2. CROWLEY ACCORD SHIP MANAGEMENT LTD

3. CROWLEY MARITIME CORPORATION - Respondent(s)

**ORIGINATING COURT(S)**

FEDERAL HIGH COURT [Holden at Lagos State]

**REPRESENTATION**

J. I. Ajad - For Appellant

AND

Ebuka Ibenegbu - For Respondent

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

SHIPPING AND ADMIRALTY - ACTION IN REM:- Agent of a disclosed principal in an admiralty action in rem – Principle that he can be sued and be individually liable along with the principal for a wrong done to a 3rd party – Distinction from civil causes – When principle would apply even where the principal was not a party to the proceedings

SHIPPING AND ADMIRALTY - ACTION IN REM:- Owners of a shipping vessel - When will be held to be a party to an admiralty action in rem even though not specifically described by name in the initiating processes of the action - Non description of the owners of a vessel by name or non-joinder of the owners of a vessel expressly - Whether affects the competence of an admiralty action in rem

SHIPPING AND ADMIRALTY - ACTION IN REM - PARTIES:- Description of parties to an admiralty proceeding - Order IV, Rule 1 of the Admiralty Jurisdiction Procedure Rules, 1993 (AJPR) – Specification of the defendant/plaintiff - Owners of the Ship "A" - Other persons interested in the Ship "X" (detailing registration of shipping if known) – When will be deemed sufficient

SHIPPING AND ADMIRALTY - ACTION IN REM - PARTIES:-Non-description of ship owner by known or correct name or mis-description of a party – When would be deemed a mere misnomer

SHIPPING AND ADMIRALTY - ACTION IN REM: A party who has taken steps and submitted to the procedural Jurisdiction of court in an admiralty action in rem – Legal effect - Whether amounts to waiver of right to fall back on an arbitration clause in the Ship Management Agreement in order to question or challenge the suit

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION:- A pre-action arbitral clause in a Ship Management Agreement – Principle that the inclusion of arbitration clause in a contract or agreement between parties does not ipso facto, take away or deprive the Court of the requisite jurisdiction to entertain an action in respect of the contract or agreement – Nature of jurisdictional challenge raised by arbitral clause – Whether procedural or substantive

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION:- When a party to an arbitration agreement may apply to a Court for stay of proceedings under or pursuant to Section 5(10) of the Arbitration and Conciliation Act, (ACA) – What would constitute ‘taking a step in a judicial proceeding’ – Whether a party would be deemed to have waived right to challenge the jurisdiction of court pursuant to a pre-action arbitration clause by taking a step in the judicial proceeding

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION:- A pre-action arbitral clause in a Ship Management Agreement – Waiver of – Proof of – Failure to challenge court action initiated without recourse to arbitration – When out of court settlement brought to the notice of the Court to effect its proceedings would amount to a waiver – Legal effect

CONSTITUTIONAL LAW – JUDICIARY – COURT JUDGMENTS AND FAIR HEARING:- Rule that only parties to a proceeding before a Court are bound by its findings, decisions and orders – Constitutional basis of - Section 36(1) of the Constitution of Nigeria – Validity of an order made against a party who is not a party to the proceedings thereto

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- “Taking a step in a proceeding:- What constitutes – The making of any application whatsoever to the Court, even though it be merely an application for extension of time – Whether suffices

ACTION – MISNOMER:- When a misnomer is said to occur in a case - Where a competent and identified party sues or is sued in an incorrect name by way of mis-description or mistake in the description of its name in the initiating processes of the case – Proper treatment of by court

ACTION - PARTIES:- Admiralty action in rem – Party duly served with originating processes – Principle that the Court will be entitled to proceed with the consideration of and deal with the process because it has no duty to wait for a party who has opted, failed or refused to respond or react to its process – Legal effect

ACTION – JURISDICTION:- Failure of a party duly served with originating processes to challenge the jurisdiction of Court – When will be deemed proof of submission to the jurisdiction of the Court

ACTION – JURISDICTION:- Distinction between procedural jurisdiction and jurisdiction as a matter of substantive law – Legal effect

APPEAL - REPLY BRIEF:- Reply brief – Proper use of – Duty of appellant to strictly address new points or issues arising from Respondents’ brief - Order 19, Rule 5(1) of the Court of Appeal Rules, 2016 – Attitude of Court to failure thereto - Whether it is not proper to use a Reply brief to extend the scope of the appellant's brief or raise new issue not dealt with the respondent's brief

JUDGMENT AND ORDER – ENROLLED ORDER:- Enrolled order which forms part of the Record of Appeal which binds both the parties to an appeal and the Court – Challenge thereto – Whether cannot be done by mere submissions or statement in a brief of argument

JUDGMENT AND ORDER - CONSENT JUDGMENT:- Settlement by parties of the action/claims on their own outside of the Court and agreement of the terms and conditions of the settlement in writing – Duty to file the terms and conditions so agreed in the Court's Registry as part of the processes of the case for the Court to be formally seized thereof – Effect of failure to move and pray the Court to make the terms and conditions of the settlement its judgment in the case as between the parties with their consent

JUDGMENT AND ORDER - CONSENT JUDGMENT: Conditions precedent for the existence of a valid consent Judgment - Provisions of the Evidence Act - Mere settlement of cause of action/claims in a case out of the Court by the parties alone - Whether does not automatically constitute a valid consent judgment of the Court

JUDGMENT AND ORDER - CONSENT JUDGMENT:- Settlement by parties of the action/claims on their own outside of the Court and agreement of the terms and conditions of the settlement in writing – Duty to file the terms and conditions so agreed in the Court's Registry as part of the processes of the case for the Court to be formally seized thereof – Effect of failure to move and pray the Court to make the terms and conditions of the settlement its judgment in the case as between the parties with their consent

JUDGMENT AND ORDER - JUDGMENT OF COURT:- Principle that only parties to or in judicial proceedings of a Court of law in a case are subject to the jurisdiction of the Court and are to be legally bound by any findings, orders and decisions reached therein. – Basis of

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The background facts that led to the claims, briefly, are that the 2nd Appellant and the 1st Respondent, both foreign, entered into a Ship Management Agreement (SMA) on the 18th February, 2012, in Hong Kong for the management of the 1st Appellant Vessel “MT Sea Tiger”. In clauses 23 and 25 of their agreement, the parties agreed that any dispute arising from or in respect of the agreement shall be referred to International Arbitration in London. However, in alleged breach of the arbitration clauses/agreement, when a dispute arose as to payment of the management fees between the parties, the 1st Respondent instituted the Suit NO. FHC/L/CS/1789/2013 for the arrest of the 1st Appellant for which it gave an indemnity as to damages in favour of the Appellants for any loss or damages that they may suffer as a result of the arrest in the event that the application for the order was found frivolous.

Eventually, the Respondents withdrew the suit by a notice of discontinuance and the vessel was ordered to be released by the Lower Court on 27th February, 2014. In consequence of the arrest of the 1st Appellant from 31st December, 2013 to 27th February, 2018, the Appellants sued the Respondents for damages and losses suffered.

Their claims were dismissed.

DECISION(S) APPEALED AGAINST

1. The Lower Court was wrong to have held that the parties in the case were parties in the earlier case before it and that 1st Appellant was a party who submitted to its jurisdiction having participated in the action, even though it admitted that the name of the 1st Appellant’s name was not written in that case.

2. The Lower Court erred in holding that the parties to the ship management agreement had entered into a consent judgment in the aforenamed suit since the 2nd Appellant was not a party to the suit and could not have entered into a consent judgment or taken any step in the action since it was only the owners of the cargo on board the 1st Appellant who appeared and applied for the release of their cargo.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

“(i) Whether the 2nd appellant not being sued as a party in suit no. FHC/L/CS/1789/2013 by virtue of the ship management agreement dated 18th February, 2013 between Sea Tiger Tankers S. A. and Accord Ship Management (HK) Limited and having taking no steps in suit no.FHC/L/CS/1789/2013, the Court was right to have held that they were a party in the proceeding of suit no. FHC/L/CS/1789/2013 and they waived their right to the international arbitration clause?

(ii) Whether there is a privity of contract between MT. Sea Tiger and Owners of MT. Sea Tiger and Accord Ship Management (HK) Ltd in respect of the Ship Management Agreement dated 18th February, 2012 in suit no.FHC/L/CS/1789/2013?

(iii) Whether the appellants and the respondents entered into an executed consent judgment which was made the judgment of the Court in suit no. FHC/L/CA/1789/2013, whereby the lower Court held that the appellants entered a consent judgment and that the respondents had a right to breach Clause 23 and 25 of the ship management agreement by arresting the appellant vessel MT. Sea Tiger, which clauses referred any dispute in respect of the said ship management agreement to arbitration in London, United Kingdom?

(iv) Whether international arbitration agreements by foreign companies are not recognized under the Nigeria law by virtue of Nigeria being a signatory to the convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which Nigeria ratified on the 17th of March, 1970, which the Arbitration and Conciliation Act, has domesticated the convention of the Recognition and Enforcement of Foreign Arbitral Award in the second schedule, Section 54(1) of the Act?”

*BY RESPONDENTS*

[No issues are identified for determination, but arguments were made, supposedly, on the Appellants’ issues]

*AS ADOPTED BY COURT*

[Adopted the issues framed by the Appellant for the resolution of the Appeal]

MAIN DECISION OF SUPREME COURT

1. In the present appeal, there is no record of the terms of settlement of the said suit or that if there were terms of settlement, they were filed in Court, entered and made the consent judgment by the Lower Court as between the parties therein. All that is part of the Record of Appeal is the Enrolled Order referred to earlier, which was also relied on by the Lower Court in the Ruling appealed against, for the statement and finding that a consent judgment was entered in the suit between the parties.

2. The Appellants are deemed to have abandoned and waived their right to arbitration embedded into the Agreement.

3. Appeal therefore lacking in merit and liable to be dismissed.

**MAIN JUDGMENT**

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

The Appellants being dissatisfied with the dismissal of their claims against the Respondents in Suit No. FHC/L/CS/242/2016 by the Federal High Court, sitting at Lagos (Lower Court) in a decision delivered on 5th June 2017, brought this appeal vide the Notice of Appeal filed on 21st August, 2017 against it on four (4) grounds.

The background facts that led to the claims, briefly, are that the 2nd Appellant and the 1st Respondent, both foreign, entered into a Ship Management Agreement (SMA) on the 18th February, 2012, in Hong Kong for the management of the 1st Appellant Vessel “MT Sea Tiger”. In clauses 23 and 25 of their agreement, the parties agreed that any dispute arising from or in respect of the agreement shall be referred to International Arbitration in London. However, in alleged breach of the arbitration clauses/agreement, when a dispute arose as to payment of the management fees between the parties, the 1st Respondent instituted the Suit NO. FHC/L/CS/1789/2013 for the arrest of the 1st Appellant for which it gave an indemnity as to damages in favour of the Appellants for any loss or damages that they may suffer as a result of the arrest in the event that the application for the order was found frivolous.

Eventually, the Respondents withdrew the suit by a notice of discontinuance and the vessel was ordered to be released by the Lower Court on 27th February, 2014. In consequence of the arrest of the 1st Appellant from 31st December, 2013 to 27th February, 2018, the Appellants sued the Respondents for damages and losses suffered and claimed thus:-

“1. AN ORDER for the payment of the sum of US$1,975,703.42 (one million, nine hundred and seventy five thousand, seven hundred and three Dollars forty cent) by the defendants to the plaintiffs being damages caused by the wrongful arrest of the plaintiff's vessel MT Sea Tiger by the defendants in violation of Clause 23 of the Ship Management Agreement dated the 18th of February, 2012, between the 2nd plaintiff and 1st defendant and by virtue of the indemnity and undertaking dated 30th of December, 2013, as to damages given by the 1st defendant in favour of the plaintiffs in Suit No.FHC/L/CA/1789/2013.

2. AN ORDER for the payment of 21% interest on the judgment sum by the defendants to the plaintiffs from the day of the judgment till the debt is liquidated.”

In the Appellants’ brief filed on the 26th September, 2017, the following issues are set out for decision by the Court in the appeal:-

“(i) Whether the 2nd appellant not being sued as a party in suit no. FHC/L/CS/1789/2013 by virtue of the ship management agreement dated 18th February, 2013 between Sea Tiger Tankers S. A. and Accord Ship Management (HK) Limited and having taking no steps in suit no.FHC/L/CS/1789/2013, the Court was right to have held that they were a party in the proceeding of suit no. FHC/L/CS/1789/2013 and they waived their right to the international arbitration clause?

(ii) Whether there is a privity of contract between MT. Sea Tiger and Owners of MT. Sea Tiger and Accord Ship Management (HK) Ltd in respect of the Ship Management Agreement dated 18th February, 2012 in suit no.FHC/L/CS/1789/2013?

(iii) Whether the appellants and the respondents entered into an executed consent judgment which was made the judgment of the Court in suit no. FHC/L/CA/1789/2013, whereby the lower Court held that the appellants entered a consent judgment and that the respondents had a right to breach Clause 23 and 25 of the ship management agreement by arresting the appellant vessel MT. Sea Tiger, which clauses referred any dispute in respect of the said ship management agreement to arbitration in London, United Kingdom?

(iv) Whether international arbitration agreements by foreign companies are not recognized under the Nigeria law by virtue of Nigeria being a signatory to the convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which Nigeria ratified on the 17th of March, 1970, which the Arbitration and Conciliation Act, has domesticated the convention of the Recognition and Enforcement of Foreign Arbitral Award in the second schedule, Section 54(1) of the Act?”

In the “RESPONDENTS’ BRIEF OF ARGUMENT” filed on 17th November, 2017, no issues are identified for determination, but arguments were made, supposedly, on the Appellants’ issues.

An Appellants’ Reply brief was filed on 27th November, 2019 in reaction to the Respondents’ brief.

The Issues 1, 2 and 3 of the Appellants appear to represent the complaints embedded in the grounds of the appeal and are the germane issues that call for decision by the Court in this appeal.

I intend to consider and determine the appeal on the basis of these issues on the authority of Bankole v. Pelu (1991) 8 NWLR (Pt. 211) 523; Opara v. D. S. Nig. Ltd. (1995) 4 NWLR (Pt. 390) 440; Uko v. Mbaba (2001) 4 NWLR (Pt. 704) 460; Chabasaya v. Anwasi (2010) 10 NWLR (Pt.201) 163; Fed. Min. of Health v. Comet Shipping Agencies Ltd (2016) 2 ALRN, 83 among other cases. The issues would be treated together.

Appellants’ Submissions on Issues:

The submissions are to the effect that the Lower Court was wrong to have held that the parties in the case were parties in the earlier case before it and that 1st Appellant was a party who submitted to its jurisdiction having participated in the action, even though it admitted that the name of the 1st Appellant’s name was not written in that case. It is contended that the parties to the ship management agreement who are foreign registered companies had chosen and consented to an international arbitration in their agreement which was entered into outside the jurisdiction of the Lower Court in Hong Kong and so are bound by it. That the 1st Respondent breached the agreement by arresting the Appellants’ ship in Suit No. FHC/L/CS/1789/2013 in which the 2nd Appellant was not a party and did not take any part or step in the said action. The cases of Nika Fishing Co. Ltd. v. Lavina Corp. (2008) 16 NWLR (Pt. 1114) 523, on the law that parties are bound by their agreement and Onward Ent. Ltd. v. MV Matrix (2010) 2 NWLR (Pt. 1179) 536 on what constitutes taking step in judicial proceedings are cited and it is maintained that the 2nd Appellant was not a party in the earlier suit and did not take any step therein for it to be said to have submitted to the jurisdiction of the Lower Court or waived the arbitration agreement.

On Issue 2, it is submitted that the Respondents have no privity of contract with the 1st Appellant and Owner of MT Sea Tiger for them to have instituted any action against them in Suit No. FAHC/L/CS/1789/2013 to arrest the vessel belonging to the 2nd Appellant on the authority of B. M. Ltd v. Woermann-Line (2009) 13 NWLR (Pt. 1157) 158. Owoniboys Tech. Service Ltd v. UBN Ltd (2003) 15 NWLR (Pt. 844) 553 on the construction of terms and conditions of a contract between parties, which are binding on them and that the Court cannot re-write the contract for them as stated in Yadis Nig. Ltd v. G.N.I.C. Ltd (2007) 14 NWLR (Pt. 1055) 590 was cited. Learned Counsel says there was no privity of contract between the Respondents and the MT Sea Tiger and Owners of MT Sea Tiger in the Suit No. FHC/L/CS/1789/2013.

The submissions on Issue 3 are that the Lower Court erred in holding that the parties to the ship management agreement had entered into a consent judgment in the aforenamed suit since the 2nd Appellant was not a party to the suit and could not have entered into a consent judgment or taken any step in the action since it was only the owners of the cargo on board the 1st Appellant who appeared and applied for the release of their cargo. According to Counsel, the owners of the cargo did not enter into any consent judgment on behalf of the Appellant which was made the judgment of the Lower Court and that the Respondents’ application of 27th February, 2017 for the release of the vessel was not a consent judgment. R. A. S. C. Ltd v. Akib (2006) 13 NWLR (pt. 997) 339; Afegbai v. A. G., Edo State (2001) 14 NWLR (Pt. 733) 454 and Oshoboja v. Amuda (1992) 6 NWLR (Pt. 250) 693 on the nature, ingredients, conditions for the validity of a consent judgment and the distinction between a consent judgment and submission to judgment by a party, were referred to. It is maintained that there was no consent judgment between the Appellants and the Respondents in the Suit No. FHC/L/CS/1789/2013 for the Lower Court to act on as the Appellant was forced to pay the Respondents the management fees claimed in order to mitigate their damages from the arrest of their vessel.

The cases of M. V. Lupex v. N.O.C.&S. Ltd (2003) 15 NWLR (Pt. 844) 475; Confidence Ins. Ltd v. The Trustees Ondo State COE Staff Pension (1997-98) 7 NSC, 274; L. S. W. C. v. Sakamori Constr. Nig. Ltd. (2011) 12 NWLR (Pt. 1262) 580; Onward Ent. Ltd. v. MV Matrix (supra) and Nissan Nig. Ltd v. Yaganathan (2010) 4 NWLR (Pt. 1183) 142 were cited in the Appellants’ brief under Issue 4 in support of the Appellants’ case and in conclusion, the Court is urged to “uphold the appellants appeal”.

Respondents’ Submissions:

Citing Section 20 of the Admiralty Jurisdiction Act, 1991 (AJA), it is submitted that the Arbitration Clauses No. 23 and 25 of the Ship Management Agreement, are null and void for providing for a venue in London and that since the vessel was within the jurisdiction of the Lower Court, it properly assumed jurisdiction in the Suit No. FHC/L/CS/1789/2013. According to Counsel, the arbitration Clauses 23 and 25 amount to ousting the jurisdiction of the Court and so null and void especially as the issue relates to an admiralty matter as defined under Section 2 of Admiralty Jurisdiction Act, citing MV Lupex v. Nig. Overseas Chart & Shipping Ltd (1993-1995) 5 NSC, 182. It is his contention that the use of the word “or” in Section 20 of Admiralty Jurisdiction Act indicates that the provisions are disjunctive and that any of the grounds in paragraphs i-h could be sufficient to void any arbitration clause which prescribes a venue outside Nigeria and such a clause cannot be revived or be the basis upon which a legal right or liability could be premised. Ishola v. Ajiboye (1998) 1 NWLR (Pt. 532) 71 @ 79 and Ladoja v. INEC (2007) ALL FWLR (Pt. 377) 934 @ 980 were relied on for the argument and it further said that it is indisputable that the owners of 1st Appellant at the time of the proceeding in Suit No. FHC/L/CS/1789/2013, is a Nigerian Company and the place of performance, execution, delivery or default took place in Nigeria, that the 1st Appellant was within the territorial waters of Nigeria and so caught up by the provision of Section 20 (a) of Admiralty Jurisdiction Act. It is also argued that the Respondents who were Plaintiffs in the aforenamed suit, submitted to the jurisdiction of the Lower Court and that Court assumed jurisdiction thereby making Section 20 (d) and (h) of Admiralty Jurisdiction Act applicable to nullify and void Clauses 23 and 25 and modifying Sections 2 and 4 of the Arbitration and Conciliation Act(ACA), on the authority of M/V Panormos Bay v. Olam Nigeria, Plc (2004) 5 NWLR (Pt. 865) 1 and JFS Inv. Ltd. v. Brawal Line Ltd (2010) 18 NWLR (no part provided, but is Pt. 1225) 495. The cases cited by the Appellants on the bindness of the arbitration clauses 23 and 25, are said to be irrelevant as most of them were decided before the Admiralty Jurisdiction Act came into force and that the Lower Court acted in line with the law. Then, citing Section 5(4) of the Admiralty Jurisdiction Act, it is contended that in the suit named above, the owners of the 1st Appellant were referred as the beneficial owners and whether they were mentioned by name or not was immaterial since the 1st Appellant, through the master, is the agent of the owners. In addition, Counsel said the Appellant entered appearance and did not protest the reference as owners of the 1st Appellant.

On issue 2, Sections 4 and 5 of the Arbitration and Conciliation Act are cited for the argument that a party loses the recourse to arbitration in an agreement if the party takes steps in the course of any judicial proceedings and that the Appellants appeared, submitted and settled the matter in Suit No. FHC/L/CS/1789/2013. Also, that an arbitration clause is not a bar to recourse to Court for preservation pending the constitution of an arbitral tribunal and reliance was placed on Section 26(3) of Arbitration and Conciliation Rules, 1988(ACR, 1988) and United World Ltd v. Incorp. v. Mobile Comm. Serv. Ltd (1998) 10 NWLR (Pt. 568) (no page provided) but is page 106, and The NV Scheep v. MV "S. Araz" (2000) 15 NWLR (Pt. 691) 622. N.P.M.C. Ltd v. Compagne NOGA 1 & SS (1971) 1 NWLR 223 @ 226 and Obembe v. Wemabod Estates Ltd (1977) 5 SC, 115 @ 132 on what taking a step in proceedings means and it is submitted that the Appellants participated in the earlier case before the Lower Court, was represented by Tony Nkachi and so submitted to its jurisdiction, thereby taking steps in action without asserting their right to arbitration. Pages 99 and 560 of the Record of Appeal are referred to in support of the submission and the Court is urged to dismiss the appeal for lacking in merit.

Furthermore, it is said that pages 63-99 and 560 demonstrate that the Appellants not only consented to judgment in the earlier suit, but also paid the sum of U$112,000 and they are bound by the Record of Appeal.

The authorities cited by the Appellants on the recognition and enforcement of arbitral awards are said to be unhelpful to them in view of Section 20 of Admiralty Jurisdiction Act which applies to the ship management agreement as an admiralty matter.

It is then said, in conclusion, that the Respondents have established very strong grounds for dismissal of the appeal for lack of merit.

The submissions in the Appellants’ Reply brief are repetition and further arguments of the issues already canvassed in the Appellants’ brief and not replies or answers to new points or issues arising from the Respondents’ brief as stipulated in Order 19, Rule 5(1) of the Court of Appeal Rules, 2016.

In Ikine v. Edjerode (2001) 12 SC (pt. II) 94, Ejiwunmi, J.S.C., succinctly stated the law on the contents of an Appellant’s Reply brief in an appeal, thus:-

“A reply brief should be strictly limited to finding answers to questions raised in the Respondent’s brief which calls for a reply and where a Reply brief is necessary, it should be limited to answering new points arising from the respondent’s brief. It is not proper to use a Reply brief to extend the scope of the appellant’s brief or raise new issue not dealt with the respondent’s brief. It is not to afford an appellant another bite at the cherry.”

See also Mini Lodge Ltd. v. Ngei (2009) 18 NWLR (Pt. 1173) 254; Cameroon Airlines v. Otutuizu (2011) 23 MJSC (Pt. II) 56; Akayede v. Akayede (2009) 11 NWLR (Pt. 1152) 217; Duzu v. Yunusa (2010) 10 NWLR (Pt. 1201) 80.

Resolution:

By way of a general restatement of the law, only parties to or in judicial proceedings of a Court of law in a case are subject to the jurisdiction of the Court and are to be legally bound by any findings, orders and decisions reached therein. This position is rooted in the constitutional provision in Section 36(1) on the fundamental right of a person to fair hearing in the determination of his civil rights and obligations by a Court of law or other tribunal established by the law which is also premised on the principle of natural justice of audi alterem partem; i.e., hear the other side.

In that regard, a Court of law cannot validly make an order or give a decision which will affect the interest of a person that is not a party to a case and who was never heard in the matter in line with the fundamental right guaranteed by the Constitution. Any order made or decision taken against a person who was not a party to a case/matter in which the order was or decision taken will be in breach, and denial of the right to fair hearing of the person and so in contravention of the constitutional provisions guaranteeing the right. Such an order or decision cannot be allowed to stand against the person for being the product or outcome of proceedings which are constitutionally, null and void, ab initio, as far as the person in concerned for not being heard before the order was made or decision taken. Lebile v. Reg. Trustees of C & S (2003) 1 SC (Pt. 1) 25; (2003) 2 NWLR (Pt. 804) 399; Bamgboye v. Univ. of Ilorin (1999) 10 NWLR (Pt. 622) 290; Awoniyi v. Reg. Trust. R. O. AMORC Nig. (2000) 6 SC (Pt. 1) 103; A. N. P. P. v. INEC (2004) 7 NWLR (Pt. 271) 16; B. O. N. Ltd. v. Adegoke (2006) 10 NWLR (Pt. 983) 339. An order made or decision taken by a Court against a person who is not a party to a case is not binding on such a person and so made in vain since it cannot be enforced against him.A. G. Lagos State v. A. G. of Federation (2004) 18 NWLR (Pt. 904) 1; Ukpo v. Ngaji (2010) 1 NWLR (Pt. 1174) 175; Bello v. INEC (2010) 8 NWLR (Pt. 1196) 342; Uwazuruike v. A. G. Federation (2013) 10 NWLR (Pt. 1361) 105.

In the present appeal, the primary complaint by the Appellants is that the 2nd Appellant was not a party in the case before the Lower Court. The parties to the case No. FHC/L/CS/1789/2013 are as set out in the initiating process used to commence the suit in question, i.e., the writ of summons dated 31st December 2013, which appears at page 238 of Vol. 1 of the Record of Appeal. The parties set out thereon are:

“ACCORD SHIP MANAGEMENT (HK) LIMITED Managers of the MT. Sea Tiger EX TOGO) - PLAINTIFF

AND

1. THE MT. SEA TIGER

2. OWNERS OF THE MT SEA TIGER – DEFENDANTS”

The Indorsements on the Writ of Summons was follows:-

“The plaintiff claims against the Defendants jointly and severally the sum of USD97,694 (Ninety-seven Thousand, Six Hundred and Ninety-four United States Dollars) only being the balance due to the Plaintiff under the Ship Management Agreement for the provision of services to the 1st Defendant vessel and disbursements made as agent of the 2nd Defendant.

And the Plaintiff also claims the sum of USD35,000.00 (Thirty-Five Thousand United States Dollars) only as cost of this action together with interest at the rate of 15% on the total sum until payment.

The Plaintiff also claims interest on the aforesaid sums at the rate of 15% per annum from the 13th December 2013 until payment.”

As can easily be seen, the above claims are said to have arisen from or under the Ship Management Agreement (SMA) between the claimant (1st Respondent) and the Owners of the 1st Appellant for management services in respect of the 1st Appellant. Meanwhile, there is no dispute about the fact that the Ship Management Agreement entered into on the 18th February, 2012 was between the 1st Respondent and Sea Tiger Tankers S.A. for the management of the 1st Appellant. Then, in paragraph 2.10 of the Appellants’ brief, learned Counsel for the Appellants stated that:-

“2.10. There arose a dispute as to the payment of management fees between the 2nd appellant and the 1st respondent in respect of the ship management agreement dated 18th February, 2012. The 1st Respondent in clear disregard of Clause 23 of the Ship Management Agreement instituted an action in the Federal High Court, Lagos, Nigeria, in Suit No. FHC/L/CS/1789/2013 for the arrest of the appellants’ vessel MT. Sea Tiger.” (underline provided).

Very clearly, this statement by Learned Counsel has taken the fact beyond argument that 2nd Appellant is/are the owners of the 1st Appellant in respect of which the Ship Management Agreement was entered into by the named parties thereto. This is the import of the underlined portion of the statement by which the 2nd Appellant is admitted expressly, to be the owners of the 1st Appellant, for it is described as “the appellants” vessel MT Sea Tiger.

I also observed that throughout the Appellants’ brief, the fact that the 2nd Appellant that entered into the Ship Management Agreement with the 1st Respondent in respect of the 1st Appellant was/were the owners of the 1st Appellant was not denied or disputed so as to put it in issue in this appeal. In fact, by instituting or bringing the appeal jointly in the specific names of the Appellants shows that indeed, the 2nd Appellant are the owners of the 1st Appellant, whose arrest and detention was the foundation of their claims before the Lower Court against the Respondents, including the 1st Respondent who was alleged to have breached the arbitration clause in the Ship Management Agreement between them by the institution of the Suit No. FHC/L/CS/1789/2013.

The above apart, Order IV, Rule 1 of the Admiralty Jurisdiction Procedure Rules, 1993 (AJPR) provides that:-

“The writ in a proceeding commenced as an action in rem shall specify a relevant person in relation to the maritime claim concerned as a defendant and shall be in Form B in the Schedule to these Rules.”

Form B in the Schedule to the Rules is as follows:-

"”Writ of summons in action in rem in the Federal High Court in the Admiralty Judicial Division

Suit No………………

Admiralty Action in rem against: (The Ship “X” or as may be describing the property against which the action is brought)

Between the owners of the Ship “A” or as may be describing the plaintiff for (or name) - plaintiffs and

the owners of the Ship or as may be describing the property against which the action is brought - defendants.

To the defendants and other persons interested in the Ship “X” (detailing registration of shipping if known)

This writ of summons has been issued by the plaintiffs against the property described above in respect of the claim set out on the back.”

It is easily discernable from the Form B that the parties, an action in rem, such as the 1st Respondent’s action in Suit No. FHC/L/CS/1789/2013, is to be between the owners of a ship or as may be described by name, as Plaintiff and the owners of a ship or as may described by name, as Defendant against which the action was brought. In other words, the Plaintiff in such action shall be owners of a Ship whose name may be specified and the Defendant shall be the owners of the ship, whose name(s) may also be specified, against who/which the claims in the action are made. By the Form B, the owners of the 1st Appellant, who admittedly are the 2nd Appellant by their specified name, are/were parties to the Suit No. FHC/L/CS/1789/2013, even if their specified name was not used on the Writ of Summons and Statement of Claim to commence the action.

In addition, the learned counsel for the Respondents is right and I agree with him that the owners of the 1st Appellant, the 2nd Appellant as beneficial owners thereof, were/was a party to the Suit No: FHC/L/CS/1789/2013 by virtue of the provisions of Section 5(4)(a) of the AJA even though not specifically described by name in the initiating processes of the action.

Perhaps, I should also restate the law that the non-description of the 2nd Appellant by name or non joinder of the 2nd Appellant by its specific name did not affect the competence of the suit on the authority of, among a litany of other cases, A.G. Ferrero & Co. Ltd. V. Nnamini (2006) ALL FWLR (Pt. 339) 990, Cotecna Int’l Limited v. Churchgate Nigeria Limited (2010) 18 NWLR (Pt. 225) 346, Okoye v. N.C & F.C. Limited (1991) 1 NWLR (Pt. 199) 50, Iyere v. B.F.F.M. Limited (2008) 18 NWLR (Pt. 1119) 30 Anyanwoko v. Okoye (2010) 5 NWLR (Pt. 1185) 497, C.R.S.N. Corporation v. Oni (1995) 1 SCNJ, 218, (1995) 1 NWLR (Pt. 371) 270.

In addition, non-description of the 2nd Appellant by its known or correct name or the description of the 2nd Appellant as the owners of the 1st Appellant is a mere misnomer since the 2nd Appellant has acknowledged and expressly admitted being, in fact, the owners of the 1st Appellant. A misnomer is said to occur in a case where a competent and identified party sues or is sued in an incorrect name by way of mis-description or mistake in the description of its name in the initiating processes of the case. It arises when a mistake is made as to the name of a person (natural and artificial) who sues or is sued in an action or when an action is brought by or against the wrong name of a person. SeeA.B. Manu & Co. Nig. Ltd. V. Costain (W.A) Ltd (1994) 8 NWLR (Pt. 360) 1, Njoku v. U.A.C. Foods Limited (1999) 12 NWLR (Pt. 632) 557, Maersk Line v. Addide Investment Limited (2002) 11 NWLR (Pt. 778) 317.

This position of the law as it is and apart from it, I have demonstrated earlier that pursuant to the provision of Order IV, Rule 1 of the (AJPR), the description of the 2nd Appellant as ‘Owners’ of the 1st Appellant as a party to the Suit No: FHC/L/SC/1789/2013, being beneficial owners thereof was in law, procedurally, correct, right, regular and competent. See The Owners of the MV Lupex v. N.O.C & S Limited (supra), Owners of M.T. Ventures v. NNPC(1996) 6 ALRN 17, Anchor Limited v. The Owners of the Ship Elem 1 NSC, 42, K. Maertsch v. Bisiwa (2014) 10 NWLR (Pt. 1416) 479; Owners of MV “Arabella” v. N. A. I. C. (2008) 4-5 SC (Pt.II) 189, (2008) 11 NWLR (Pt. 1097) 182; The Owners MV “MSC Agata” v. Nestle Nig. Plc. (2014) 1 NWLR (Pt. 1388) 270.

Now, being a party to the said suit, did the 2nd Appellant take any step in the action and waive the right to arbitration agreed to in the Ship Management Agreement?

In Obembe v. Wemabod Estates Limited (1977) 5 SC, 115, it was held by the Supreme Court that:-

“A party who makes any application whatsoever to the Court, even though it be merely an application for extension of time, takes a step in the proceedings. Delivery of a statement of defence is also a step in the proceedings (see West London Diary Society Limited v. Abbot (1991) 44 LT. 376.”

This Court, relying on Obembe v. Wemabod Estates Limited, Confidence Insurance Limited v. Trustees of O.S.C.E. (1999) 2 NWLR (Pt. 591) 373, and Vol. 2 of Halsburys Laws of England, 4th Edition, 1991, Paragraph 627, decided in Onward Ent. Ltd. V. MV Matrix (2010) 2 NWLR (1179) 530 @ 551, that:-

“Steps in the proceedings have been held to include: the filing of an affidavit in opposition to summons for summary Judgment, service of a defence, and an application to the Court for leave to serve interrogatories, or for a stay pending the giving of security or costs, or for an extension of time for serving a defence or for an order for discovery or for an order for further and better particulars.”

All these decisions dealt with the circumstances when a party to an arbitration agreement may apply to a Court for stay of proceedings under or pursuant to Section 5(1) of the Arbitration and Conciliation Act, (ACA) in a case filed by a party to the arbitration before resort to arbitration, to await the outcome of the arbitration or for reference to arbitration agreed to by the parties.

I also wish to say that facts and circumstances which may constitute or amount to taking steps in judicial proceedings in which a stay may be granted for the purpose of reference to arbitration, vary from case to case, depending on the peculiarities of each. As shown in the judicial authorities, what constitutes taking a step by a party seeking for stay of proceedings begun in breach of an arbitration agreement between parties, is determined by the facts and circumstances of a case and so no hard and fast rule can be laid down to apply to all cases.

The argument by the Appellants Counsel here, based on the misconception that the 2nd Appellant was not a party to the Suit No: FHC/L/CS/1789/2013, is that the 2nd Appellant did not appear in the matter, did not take any step in the action and so could not have waived the right to insist on the arbitration clause in the Ship Management Agreement since it did not appear therein.

It is not the case of the 2nd Appellant in this appeal that the Appellants were not served with the writ and the statement of claim in the aforenamed suit or that the 2nd Appellant was not in any event, aware of the action through the 1st Appellant which was sued in its name. Although, in an admiralty action in rem, the 1st Appellant is a separate and distinct legal entity and personality that can sue or be sued individually or alone, see Section 5(2) of Admiralty Jurisdiction Act, K. Maertsch v. Bisiwa (supra), it stands, for the purpose of Ship Management Agreement and the Suit No: FHC/L/SC/1789/2013, in an agency relationship with the 2nd Appellant; its admitted/acknowledged owners or beneficial owners. However, unlike in ordinary civil suits, an agent of a disclosed principal in an admiralty action in rem, can be sued and be individually liable along with the principal for a wrong done to a 3rd party pursuant to the provisions of 16(3) and (4) of AJA. Daar Commercial Nigeria Limited v. W.D. Nigeria Limited (2012) 3 NWLR (Pt. 1287) 370.

Since the Appellants did not deny or dispute service of the originating processes in the Suit No: FHC/L/CS/1789/2013 on them or being aware of the action when it was instituted, whether or not they appeared at all in the case in response or reaction thereto, is non-sequitur because it was at their unfettered discretion. A party who was duly served or who has not denied service of an originating process/of a Court cannot be compelled or forced to appear before the Court in response, reaction or to answer to the process such that once there was no issue joined on the service of the process, the Court will be entitled to proceed with the consideration of and deal with the process because it has no duty to wait for a party who has opted, failed or refused to respond or react to its process. Principal, Government Secondary School, Ikachi v. Igbudu (2006) ALL FWLR (Pt. 299) 1420.

In the above circumstances, even though the 2nd Appellant did not enter formal appearance and was not represented by counsel in the Suit No: FHC/L/CS/1789/2013 and so did not take any step in the proceedings as defined in the cases cited earlier, the learned counsel for the Appellants did not dispute or deny the fact that the Appellant indeed, had participated in the proceedings by paying the negotiated sum of $112,000 to the 1st Respondent in order to secure the release of the 1st Appellant which formed the basis of the eventual release of the 1st Appellant from the arrest and detention ordered by the Lower Court in the course of the proceedings of the suit.

The failure or refusal by it to appear in reaction to the originating processes to enable the Appellant challenge the jurisdiction of the Lower Court on the ground of the arbitration clauses in the Ship Management Agreement along with the payment of the claim by the 1st Respondents, left no other reasonable presumption in law and option to the Lower Court than that the Appellants had submitted to the jurisdiction of that Court to adjudicate over the suit since the only challenge to the suit by the Appellants was entirely and completely predicated and founded on the arbitration clauses in the Ship Management Agreement and not on the lack of jurisdiction on the part of the Court, to in any event, entertain the suit on any cognizable ground of law. The failure or refusal to enter an appearance and be represented in the suit constituted and amounted to a muted but clear submission to the jurisdiction of the Lower Court in the case.

But let me quickly say that the law remains that where a Court has no jurisdiction on any cognizable ground in law, submission to its jurisdiction by the parties to a case cannot vest or confer valid jurisdiction on the Court to adjudicate over their case since acquiescence or consent of the parties cannot confer jurisdiction on a Court where none existed, statutorily. See Onyema v. Oputa (1987) 6 SCNJ, 176; Olaniyi v. Aroyehun (1991) 5 NWLR (Pt. 194) 652; Datome v. Duke (2006) ALL FWLR (Pt. 313) 159; Oloruntoba-Oju v. Abdul-Raheem (2009) 6 MJSC (Pt. 1) 1; Nyame v. FRN (2010) 7 NWLR (Pt. 1193) 344; Emeje v. Positive (2010) 1 NWLR (Pt. 1174) 48. I should also point out that there is a difference and distinction between what is known as procedural jurisdiction and jurisdiction as a matter of substantive law. Procedural jurisdiction or jurisdiction as a matter of procedural law, deals with procedure by which jurisdiction vested or conferred on a Court by a substantive statute or law, may be exercised by the Court. Jurisdiction as matter of substantive law is the jurisdiction specifically vested in or conferred on a Court to entertain and adjudicate over subject matters and parties that may be brought before it. Whilst a person/litigant or party in a case may and can waive the issue of procedural jurisdiction, he cannot waive or/and confer jurisdiction on a Court where the Constitution or a statute says that the Court does not have jurisdiction over a case. So a litigant/party may submit to the procedural jurisdiction of a Court in appropriate cases and the Court can properly assume such jurisdiction and proceed with a case over which it is seized of jurisdiction as a matter of substantive law. SeeNdayako v. Dantoro (2004) 13 NWLR (Pt. 889) 187; Etim v. Obot (2010) 12 NWLR (Pt. 207) 108.

In the Appellants’ case, they simply submitted to the procedural jurisdiction of the Lower Court by the waiver of the right to have insisted on reference to arbitration as contained in the Ship Management Agreement. The Appellants elected and chose to submit to the jurisdiction of the Lower Court and took steps in the case of the 1st Respondent and in law; “electio semel facta non patitier regressum”, meaning: election once made, cannot be recalled or resile from. See Ariori v. Elemo (1983) 1 SC, 13; Eperokun v. Univ. of Lagos (1986) 7 SC, 106; Onwo v. Oko (1996) 6 NWLR (Pt. 456) 554; Ushae v. C. O. P. (2006) ALL FWLR (Pt. 313) 86 @ 100.

This position part, the Enrolled Order of the Lower Court in the Suit No: FHC/L/CS/1789/2013, dated the 27th February, 2014 in respect of the Notice of Discontinuance filed by the counsel for the Plaintiff (1st Respondent) shows that the Defendants (Appellants) were represented by counsel. This is the Order:

“UPON THIS CIVIL CAUSE dated and filed on the 31st December, 2013 coming before the Court.

AFTER HEARING Emeka Nwigwe Esquire for the Plaintiff informing the Court that Parties have settled and that the Plaintiff have filed a Notice of Discontinuance against the Defendants and a consent to release the Vessel; he urged the Court to discontinue the Suit against the Defendant and to release the vessel from arrest.

Teny Nkadi Esquire for the Defendants confirming the position of the Plaintiff’s Counsel;

The Court having carefully considered the consent to Release and the Notice of Discontinuance dated and filed on the 27th day of February, 2014.

IT IS HEREBY ORDERED:

1. That the Vessel THE MT. SEA TIGER be and is hereby released from arrest based on the grounds that the Defendants have settled the Plaintiff’s claim.

2. That the Suit be and is hereby discontinued against the Defendants herein.

ISSUED AT LAGOS: Under the Seal of the Court and the hand of the Presiding Judge this 27th day of February, 2014.”

This Order forms part of the Record of Appeal which binds both the parties to the appeal and the Court; See: Ossai v. Wakwah (2006) 4 NWLR (Pt. 696) 208, Sapo v. Sunmonu (2010) 11 NWLR (Pt. 1205) 374, Audu v. FRN (2013) 5 NWLR (Pt. 1348) 397 and deemed or presumed to be correct on the authority of, among other cases, Sommer v. FHA (1992) 1 NWLR (Pt. 219) 1 NWLR (Pt. 219) 548, Texaco Panama Corp. v. SPDCN Limited (2002) 5 NWLR (759), 209, Adegbuyi v. A.P.C. (2015) 2 NWLR (1442) 1, and Brittania-U. Nigeria Limited v. Seplat Petroleum Development Company Limited (2016) 4 NWLR (Pt. 1503) 541. The Order shows that the Defendants (Appellants) were represented by a Counsel; one Tony Nkadi, Esq., who confirmed the statement by the Plaintiff’s (1st Respondent) Counsel that the parties to the case had settled it and consented to the release of the 1st Appellant. Even though the Learned Counsel for the Appellants has stated that the said Tony Nkadi appeared for Dangote Oil & Gas Company Limited, at paragraph 3.1.9 on page 10 of the Appellant Brief, as can easily be observed, Dangote Oil & Gas Oil Company Limited is not named as a party in the Enrolled Order, but only the 1st Respondent (as Plaintiff) and the Appellants (as Defendants).

In addition, the Record of Appeal (the Enrolled Order) has not been challenged by the Appellants in this appeal and so is binding on them and the Court. Even if the statement by learned Counsel for the Appellant is a denial that the Counsel recorded in the Enrolled Order to have appeared for the Appellants did not represent them, such a denial does not constitute or amount to a proper and effective challenge to or of the Record of Appeal which cannot be done by mere submissions or statement in a brief of argument. See Kwashi v. Pusmut (2010) 1 NWLR (Pt. 1176) 518, UBA Plc v. Ekanem (2010) 2 NWLR (Pt. 1179) 181, Madueke v. Madueke (2012) 4 NWLR (Pt. 1289) 77.

The law is settled, firmly, that the inclusion of arbitration clause in a contract or agreement between parties does not ipso facto, oust, take away or deprive the Court of the requisite jurisdiction to entertain an action in respect of the contract or agreement. Agbizounon v. The Northern Assurance Company Limited (1934) 11 NLR (HC) 178-9, Obembe v. Wemabod Estates Limited (supra), City Engineering Nigeria Limited v. F.H.A. (1997) 9 NWLR (Pt. 520) 224, Confidence Ins. Limited v. Trustees, O.S.C.O.E.S.P. (1999) 2 NWLR (Pt. 591) 373, Kayode v. Royal Exchange Assurance (1955) WRNLR, 154, Lignes Aeriennes Congolaises (LAC) v. Air Atlantic Nigeria Limited (ANN) (2006) 2 NWLR (Pt. 963) 49, N.V. Scheep v. “MV Araz” (2001) FWLR (Pt. 34) 543, K.S.U.D.B. v. Fanz Limited (1986) 5 NWLR (Pt. 39) 74, City Engr. V. FHA (supra).

In the above premises, the Lower Court is right that the Appellants submitted to its jurisdiction in the Suit No: FHC/L/CS/1789/2013 by the payment and settlement of the 1st Respondent’s claim in order to secure the release of the 1st Appellant from the arrest and detention it was placed under in the case thereby not only taking a step in the case, but actively and effectively so, in the circumstances of the case.

The statement by the Learned Counsel for the Appellants at paragraphs 3.4.10 on page 25 of the Appellant Brief that the Lower Court admitted that the 2nd Appellant did not submit to its jurisdiction, in the quoted excerpts of the Ruling appealed against, is incorrect, completely and deliberately misleading. What the Lower Court said in the Ruling, particularly at pages 970-1 Vol. II of the Record of Appeal is that:-

“There was no evidence at the time of any protest while the Plaintiff agreed to settle matters via consent judgment before this Honourable Court. Counsel to the Plaintiff tried to differentiate the fact that the Owners of the Vessel i.e. SEA TIGER TANKERS S.A. did not submit to the jurisdiction of the Court in FHC/L/CS/1789/2013.

Meanwhile in the action FHC/L/CS/1789/2013 the statement of claim sued “The OWNER of MT SEA TIGER” even though the name “SEA TIGER, TANKERS S.A.” was not written.”

Although Learned Counsel has very weakly said at paragraphs 3.4.5 on page 24 of the Appellant Brief that:-

“The appellant even though not sued in the action was forced to pay the respondents management fee claim in order to mitigate their damages due to the arrest of their vessel.”

The statement shows clearly that the Appellants were aware of the action, the claims which they did not deny, and paid same in order to secure the release of the 1st Appellant to them, thereby participated in the suit and took an active and positive step therein. Having taken an active step in the proceedings by settling the claim of the 1st Respondent against them, the 2nd Appellant cannot now be heard to seek to fall back on the arbitration clause in the Ship Management Agreement in order to question or challenge the suit.

Apparently, the Appellants’ action and step of payment/settlement of the 1st Respondent claim in that action, give the reasonable impression and presumption that they had waived the right to insist on the arbitration clauses in the SMA. The principle or concept of waiver in law is that, put simply, if one party in a transaction by his conduct or action/inaction lead another to believe that the strict rights arising under the transactions/contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not after wards be allowed to insist on the strict rights when it would be inequitable for him so to do.

Waiver is therefore the abandonment of a right by a person/party under a transaction/contract, knowing; expressly, by conduct or impliedly by omission. See United Calabar Company Limited v. Elder Dempster Lines Limited (1972) 8-9 SC, 31, (1972) ALL NLR, 681 @ 690, Ariori v. Elemo (1983) 1 SCNLR, 1 @ 13, (1983) NSCC, 1 @ 8, Olatunde v. O.A.U. (1998) 4 SC, 91, (1998) 5 NWLR (Pt. 549) 178, Adegoke Motors Limited v. Adesanya (1989) 3 NWLR ((Pt. 109) 250 @ 292, Odua Investment Company Limited v. Talabi (1997) 10 NWLR (Pt. 523) 1, Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 @ 449.

The Appellants here, fully aware of their right to insist on arbitration and to submit to the jurisdiction of the Lower Court by participating and taking a vital step in the proceedings of the Suit No: FHC/L/CS/1789/2013, chose and opted for the latter by the payment and settlement of the claim by the 1st Respondent against them leading to the release of the 1st Appellant and the eventual discontinuance of the action against them. Undoubtedly, by their choice, the Appellants did waive the second option of the right to have asserted and insisted on their right for the matter to be referred to arbitration by the Lower Court in line with the agreement in the Ship Management Agreement.

They cannot, based on the abandonment of that right, now be permitted at this stage to resile on the waiver and insist that the abandoned right was still available to them.

If the Appellants had opted for and insisted on the right to arbitration before the Lower Court, the established principle of law would have ordinarily been for that Court to hold the parties to the agreement to their intention express clearly in the arbitration clause(s) which bind them, as laid down in the cases cited by the Learned Counsel for the Appellant on the issue and a lot more. The position of the Nigerian Courts on holding parties to an arbitration clause/agreement bound by such agreement and their reluctance in interfering with the clauses in a contract by parties, has been consistent over the years in line with the provision of Section 34 of AJA. See Owners of M.V. Lupex v. N.O.C. & S. Limited (2003) 15 NWLR (Pt. 844) 475 @ 491, (2003) 6 SC (Pt. II) 62, Confidence Insurance Limited v. Trustees, O.S.C.O.E.S.P. (supra), Kano State U.D.B. v. Fanz Const. Co. Ltd.(1990) 6 SC, 103; (1990) 1 NWLR (Pt. 142) 1, JFS Inv. Ltd. V. Brawal Line Ltd (2010) 18 NWLR (Pt. 1225) 495, L.S.W.C. v. Sakamori Const. Nig. Ltd (2011) 12 NWLR (Pt. 1262) 580, Onward Ent. Ltd. V. MV Matrix (supra), Nissan Nigeria Limited v. Yaganathan (2010) 4 NWLR (Pt. 1183) 142.

The Learned Counsel for the Appellant has further argued, on the earlier misconception that the 2nd Appellant was not a party to the suit, that there was no privity of contract between the 1st Respondent and the parties in the Suit No: FHC/L/CS/1789/2013. This argument has been effectively determined and shown to be untenable by the finding that the 2nd Appellant was in fact and law, a party to the said suit although not sued in its correct and known name, but as admitted owners/beneficial owners of the 1st Appellant. There was, for that reason and on that ground, privity of contract in the Ship Management Agreement between the 1st Respondent and the 2nd Appellant as the parties thereto.

Learned Counsel has also argued that there was no consent judgment executed by the parties in the Suit FHC/L/CS/1789/2013 which was made the judgment of the Lower Court in the case, relying on, inter alia, R.A.S.C. Limited v. Akib (2006) 13 NWLR (Pt. 997) 339 and Oshoboja v. Amuda (1992) 6 NWLR (Pt. 250) 693 on the nature and constituents of a valid consent judgment of a Court.

In the present appeal, there is no record of the terms of settlement of the said suit or that if there were terms of settlement, they were filed in Court, entered and made the consent judgment by the Lower Court as between the parties therein. All that is part of the Record of Appeal is the Enrolled Order referred to earlier, which was also relied on by the Lower Court in the Ruling appealed against, for the statement and finding that a consent judgment was entered in the suit between the parties. In the case of Afegbai v. A.G. Edo State (2001) 14 NWLR (Pt. 733) 425 @ 454 (cited in the Appellant Brief, the Supreme Court stated when a valid consent judgment of a Court in a case can arise when it said:-

“To have a valid consent judgment, the parties must be ad idem as to the agreement and the terms of settlement must be filed in Court. It is the order of Court based upon the terms of settlement that is the consent judgment.”

From the definition and nature of a valid consent judgment above, the mere settlement of cause of action/claims in a case out of the Court by the parties alone, does not automatically results into or constitutes a valid consent judgment of the Court in the case. As stated by the apex Court above, for there to be a valid consent judgment in a case, after the parties to a case had amicably settled the cause of the action/claims on their own, outside of the Court and agreed on the terms and conditions of the settlement in writing, the terms and conditions so agreed must be filed in the Court's Registry as part of the processes of the case for the Court to be formally seized thereof. Thereafter, the Court must be moved and prayed to make the terms and conditions of the settlement as its judgment in the case as between the parties with their consent and which binds them in respect of the cause of action/claims. It is the order by the Court entering and making the terms and conditions of the settlement reached by the parties, as its binding judgment in the case that makes the judgment a consent judgment in the case which is entirely predicated and completely based on the parties’ consent and agreement.

From the Enrolled Order of the Lower Court above, none of the elements of a valid consent judgment as defined and described by the Apex Court above, is present as no terms of the settlement reached by the parties out of Court were mentioned or said to have been filed in Court and prayed to be made the judgment in the case.

All that is borne out by the Enrolled Order is that the “parties have settled and that the Plaintiff have filed a Notice of Discontinuance of the suit against the Defendants.”

The Lower Court was then urged to “discontinue the suit against the Defendant” and NOT to enter and make the terms of the settlement its judgment in the case based on the consent of the parties.

In these premises, the learned Counsel for the Appellants is right, and I agree with him that there is no record in the appeal that the parties in the Suit No: FHC/L/CS/1789/2013 had filed the terms of their settlement of the suit in the Lower Court and the said terms were entered and made the judgment of that Court in the case as between the parties thereto with their consent, for a valid consent judgment in the case to have emerged, which could be properly so called.

However the above notwithstanding, it may be recalled that I have found that the Appellants admittedly paid the claims of the 1st Respondent against them, thereby settling the cause of action/claims in the suit and since they were represented by Counsel at the proceedings of 27th February, 2014 who confirmed the settlement between the parties and consent to the discontinuance of the suit and release of the 1st Appellant based on the settlement, it was too late for the Appellants to attempt to resile from the settlement and go back to the abandoned right to have insisted on the arbitration clauses in the SMA. The law, by dint of the provisions of Section 169 of the Evidence Act, 2011, does not allow the Appellant to deny the settlement of the case No: FHC/L/CS/1789/2013 as borne out in the Enrolled Order of 27th February, 2014. The Appellants are estopped by the law from such denial. Ukaegbu v. Ugoji (1991) 6 NWLR (Pt. 196) 127 @ 146, Koiki v. Magnusson (1999) 5 SC (Pt. 111) 30, (1999) 8 NWLR (Pt. 615) 492, TikaTore Press Limited v. Abina (1973) 2 SC (Reprint) 67, Iga v. Amakiri (1976) 11 SC, 1, Ude v. Nwara (1993) 2 SCNJ, 47, (1993) 2 NWLR (Pt. 278) 638.

Lastly, learned counsel raised and argued issue 4, still reeling in the misconception that the 2nd Appellant was not sued in the Suit No: FHC/L/CS/1789/2013, made submissions on binding International Arbitration Clauses and duty of the Courts in Nigeria to uphold arbitration clauses in contracts entered into by the parties. All that needs be said is that the arguments are based on the Appellants’ right to insist on the arbitration Clauses 23 and 25 of the Ship Management Agreement for the dispute between them and the 1st Respondent to have been referred to arbitration as agreed to by the parties. Once again, the Appellants abandoned and waived the said right to arbitration, as demonstrated earlier and so all the submissions and arguments under 1ssue 4 have either been fully considered earlier or are irrelevant in view of the finding by the Court on the abandonment and waiver of the right to arbitration, by the Appellants.

On the whole, for reasons set out in this judgment, I find no merit in this appeal and it is hereby dismissed.

Parties shall bear their respective costs of prosecuting the appeal.

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

I agree with the comprehensive judgment prepared by my learned brother, Mohammed Lawal Garba, J.C.A., (Hon. P.J.) which I had the privilege of reading in print.

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

I read the comprehensive leading Judgment prepared and rendered in this appeal by my Lord and learned brother Garba J.C.A. I endorse the reasoning and conclusion and adopt the Judgment as my own.

I join my Lord in holding that Appellants appeal is patently lacking in merit and deserves to be and is hereby dismissed by me. I also abide by all the consequential orders including the order on costs.