**TONIQUE OIL SERVICES LIMITED & ANOR**

**V.**

**UNITED BANK FOR AFRICA PLC**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 4TH DAY OF MARCH, 2016

CA/L/591/2014

**LEX (2016) - CA/L/591/2014**

OTHER CITATIONS

2PLR/2016/58 (CA)

(2016) LPELR-40071(CA)

**BEFORE THEIR LORDSHIPS**

CHINWE EUGENIA IYIZOBA, J.C.A

YARGATA BYENCHIT NIMPAR, J.C.A

ABIMBOLA OSARUGUE OBASEKI-ADEJUMO, J.C.A

**BETWEEN**

TONIQUE OIL SERVICES LIMITED

MR ANTHONY ADEJUGBE - Appellant(s)

AND

UNITED BANK FOR AFRICA PLC - Respondent(s)

**ORIGINATING COURT**

HIGH COURT LAGOS

**REPRESENTATION**

OLUYINKA ONAMADE, ESQ. with him, R. OKAFOR (MISS) and O.M. AKINWANDE (MISS) - For Appellant

AND

GLORIA A. OPEYOKUN (MRS) with her, ENIOLA IRINOYE (MISS) - For Respondent

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

BANKING AND FINANCE LAW:- Banking practices – Grant of loan/overdraft facilities to corporate entity backed with personal guarantee of Managing Director of Company - Recovery of

DEBTOR AND CREDITOR LAW:- Recovery of bank overdraft to corporate entity backed with personal guarantee of Managing Director of Company – Action to recover same – Whether guarantor is a necessary party

**PRACTICE AND PROCEDURE ISSUES**

ACTION - CAUSE OF ACTION: Definition of cause of action and reasonable cause of action

ACTION - PARTY(IES) TO AN ACTION: Who is a necessary party – Relevant considerations

**MAIN JUDGMENT**

**CHINWE EUGENIA IYIZOBA, J.C.A**. :(Delivering the Leading Judgment):

The Respondent as Claimant in the High Court Lagos on 24/4/14 filed a writ of summons and statement of claim in Suit LD/1O52/2013 against the Appellants jointly and severally for:

I) The sum of N200,036,243.64 (Two Hundred Million, Thirty Six Thousand Two Hundred and Forty-three Naira Sixty four Kobo) being the amount owed the Claimant by the 1st Defendant on account of the loan/overdraft facility granted the 1st Defendant by the Claimant which facility was, guaranteed by the 2nd Defendant.

II) interest on the amount claimed in "i" above of the rate of 22% per annum from June 2013 till judgment and thereafter at the same rate till liquidation of the judgment debt.

The Appellants who were defendants at the lower Court filed a statement of defence and counter-claim together with a Motion on Notice dated 17th day of February 20I4 for an order striking out the name of the 2nd Defendant and dismissing this suit against the 2nd Defendant for not disclosing any reasonable cause of action against the 2nd Defendant. The Respondent (the Claimant therein) filed a counter-affidavit in opposition to the Defendants (now Appellants) Application. In a considered ruling the Court dismissed the application and awarded cost of N50, 000.00 against the Appellants in favour of the Respondent. The Appellants dissatisfied with the ruling filed this interlocutory appeal. Briefs were filed and exchanged. The Appellants' brief was settled by Olayinka Onamade Esq., while the Respondent's brief was settled by Gloria A. Opeyokun (Mrs.). Out of the two grounds of appeal in the Notice of Appeal, the appellants formulated two issues as follows:

1. Whether from the Statement of claim in this case, the 2nd defendant can be said to be a necessary party.

2. Whether the lower Court was not wrong to have referred to and looked at an affidavit and its exhibit to determine that a reasonable cause of action has been disclosed against defendant.

The Respondent in its brief formulated a sole issue to wit: whether the claimant/Respondent has a reasonable cause of action against the 2nd Defendant/ Appellant.

**APPELLANTS' ARGUMENTS:**

On issue one, whether from the Statement of Claim, the 2nd defendant can be said to be a necessary party Mrs. Opeyokun in her brief of argument submitted that it is trite law that to determine if a party is a necessary party to an action, the Court can only look at the state of the pleadings; that it is the averments contained in the Statement of Claim that will be considered in reaching the conclusion. He relied on the cases of BEBEJI OIL ALLIED PROD.LTD V. PANCOSTA LTD (2007) 36 WRN 163,195 (40-45), CHEVRON NIG. LTD V. LONESTAR DRILLING NIG LTD. (2007) 36 WRN 1 at 13 (30-40) 2007 NWLR (PT.1059)168 at 176-177 H-D; (SC). Learned counsel submitted that based on the pleadings i.e. the Statement of Claim and its accompanying Processes: the Defendant is not a necessary party to the action and that the dispute con be resolved in his absence.

On issue 2 whether the lower Court was not wrong to hove referred to and looked at on affidavit and its exhibit to determine that a reasonable cause of action has been disclosed against the 2nd defendant, counsel submitted relying on RINCO CONST. LTD V. VEEPEE IND. LTD (2005) 9 NWLR (PT.929) 85 and OMOLEYE (2004) 37 WRN 88 Ratio 3 that it has since been settled that to discover whether a reasonable cause of action has been disclosed against a Defendant, recourse must only be had to the Statement of Claim. Counsel contended that looking at the pleadings include looking at the documents pleaded therein and other processes which by law are required to accompany the pleadings. She further submitted relying on UBN V UMEODURAGBA (2004) 13 NWLR (PT. 89) 352 that in determining the matter, the Court cannot look at any affidavit or its exhibit. Counsel argued that in the instant case, while paragraphs 2 and 8 of the Statement of Claim are to the effect that the 2nd Defendant is a personal guarantor of the facility, no written guarantee was front-loaded as part of the documents to be relied upon; and that counsel argued rendered the paragraphs impotent and unsubstantiated as Guarantees are required by law to be in written form. He cited BASSEY V. PAMOI NIG LTD (2011) AFWLR PT. 5O9 1443 Ratio 9. Counsel urged the Court to allow the appeal and to hold that no reasonable cause of action was disclosed against the 2nd Appellant.

**RESPONDENTS ARGUMENTS :**

Mr. Olayinka Onamade for the Respondent on his sole issue, whether the Claimant/Respondent has a reasonable cause of action against the 2nd Defendant/Appellant referred to some authorities where the phrase "reasonable cause of action" was defined and submitted that the Law is settled that in determining whether a cause of action or reasonable case of action exists in a case the Court has to look at and consider the facts as pleaded in the statement of claim. In other words, the only relevant document a Court needs to consider in the determination of whether a cause of action or a reasonable cause of action exists or is shown in a case, is the statement of claim which contains all the facts relied on by the Plaintiff in making a claim against a defendant and seeking judicial remedy from the Court.

Counsel submitted that from the definitions of a cause of action or reasonable cause of action; it con simply be said to be constituted by either a single fact or combination of facts averred by a Plaintiff in his pleadings which the law will recognize as giving him a right to make a claim against a defendant for a remedy or relief in Court. The factual situation disclosed by the facts in the Plaintiffs' pleadings on which he relies to support the claim made must be recognized as giving him the right capable of being claimed against the Defendant. Every fact which it would be necessary for the Plaintiff to prove, if traversed in order to support his right to the judgment of the Court. Counsel further submitted relying on Shell Petroleum Development Company Nigeria Limited Vs. XM Federal Limited (2006) 16 NWLR (Pt.1004) 189 and Bello Vs. A.G. Oyo State (1980) 5 NWLR. 828 that in the determination of the existence of a cause of action, the Court is not concerned with whether or not the Plaintiff would succeed in proving his claim as that would only come for consideration when issues are joined and evidence adduced by the parties in proof of their Positions in a case. The Court is consequently not concerned with the success or failure of the plaintiff's claim at the stage of determining whether a cause of action was disclosed by the facts averred in the statement of claim. Counsel submitted that the Respondent herein by virtue of the averments in Paragraphs 3, 8, 10, 11, and 17 of the Statement of Claim has disclosed a reasonable cause of action against the 2nd Appellant. Counsel submitted that on the face of the pleadings the Respondent had disclosed a reasonable cause of action against the 2nd Appellant. He further submitted that the fact that the lower Court mentioned Exhibit AA1 (2nd Appellant's personal guarantee) attached to Respondent's Counter affidavit should not lead to a reversal of the Ruling of the trial Court. He urged the Court to uphold the ruling of the lower Court and to dismiss the Appellants' interlocutory appeal with substantial costs.

**RESOLUTION**

In the Reply brief Mrs. Opeyokun argued that the single issue formulated by the Respondent does not arise from and is not distilled from any of the Grounds of Appeal contained in the Notice of Appeal. In the motion that gave rise to this appeal at page 78 of the Record, the Appellant proved the Court to strike out the name of the 2nd Defendant and to dismiss the suit against him for not disclosing any reasonable cause of action against him. It was at the hearing of the motion that the Respondent raised the issue of necessary party. In his judgment at page 118 of the Record, the learned trial judge identified two issues for determination to wit:

1. Whether the 2nd Defendant is a necessary party?

2. whether there is a reasonable cause of action against the 2nd Defendant?

After considering the issues, the learned trial Judge dismissed the motion. In essence there is no difference between the two concepts. Ground 2 of the Notice of Appeal states that the trial Judge erred in law when she relied on an exhibit attached to a counter-affidavit to arrive at the finding that a cause of action has been disclosed. Particular 1 of the ground says that the learned trial judge looked beyond the statement of claim to arrive at the decision that the statement of claim disclosed a reasonable cause of action. This in effect means that instead of upholding the view that there is no reasonable cause of action by confining his consideration of the matter to the statement of claim, the learned trial judge considered and relied on an exhibit attached to the counter-affidavit of the Respondent in coming to the conclusion that there is no reasonable cause of action. In essence, the question for determination here is whether the learned trial judge was right in holding that the Plaintiff/Respondent is a necessary party in the suit and also whether the procedure he adopted in arriving at the decision that the Respondent has a reasonable cause of action against the 2nd Appellant is correct. Inherent in this latter question is the issue whether there is a reasonable cause of action. It is quite obvious then that the Respondent's sole issue arose from ground 2 of the Notice of Appeal. Whether the Respondent herein has a reasonable cause of action against the 2nd Appellant and whether the 2nd Appellant is a necessary party to the suit are the issues determined by the lower Court which gave rise to this appeal. Those are the grounds of appeal. The Respondent's sole issue arose from ground 2 of the grounds of appeal..

In the case of Babayeju V. Ashamu (1998) 9 NWLP (Pt. 5671 546, Ogwuegbu JSC quoted a passage from Anon V. Raphael Tuck & Sons Ltd (1956) 1 Q.B.D. 357 at 380 which has become the litmus test for determining a necessary party to a suit:

"...a necessary party is someone whose presence is necessary as a party. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party."

See also Peenok Investment Ltd v. Hotel Presidential Ltd (1982) 12 SC (Reprint) 1. In Oshoboja Vs. Amuda (1992) 6 NWLR (250) 690 @ 702 C-G cited by learned counsel for the Respondent, the Supreme Court defined a cause of action and reasonable cause of action thus:

"The words "cause of action" have been defined by this Court in a number of cases to simply mean the facts which when proved will entitle a plaintiff to a remedy against a defendant-see Bello v. A.G. Oyo State (1986) 5 NWLR (pt. 45) 828 at 8764: Egbe v. Adefarasin (1987) NWLP (Pt. 47) I 669 at p.20; Thomas v. Olufosoye (1986) I NWLP (Pt. 18) 669 at p. 682F...On the other hand the meaning of the phrase ,'reasonable cause of action" has been considered in Drunmond - Jackson v. British Medical Association & Ors. (1970) I WLR 688 at p. 696C, (1970) 1 All E.R. 1094 at p.1101e where Lord Pearson said:-

"... I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by Paragraph (2) of the Rule) only the allegations in the pleading are considered. If when those allegations are considered it is found that the alleged cause of action is to fail, the statement of claim should be struck out.

'...It follows therefore that what the learned trial judge needed to do in the present case was not to examine whether the plaintiffs Amended Statement of Claim disclosed any ground of law to support their claim as demanded by the defendant but whether the Amended Statement of Claim contained facts which if proved the plaintiffs would succeed..."

See also other cases cited by the Respondent: Adumora Vs. Ajufo (1988) 3 NWLR (Pt.80) 1, Ogbimi Vs. Ololo (1993) 7 SCNJ 447, Sanda Vs. Kukawa L.G. (1991) 2 NWLR. (174) 379.

All that is required therefore is to show that the statement of claim contained facts which if proved the plaintiffs would succeed. consequently, the procedure for determining whether a person is a necessary party in a suit or whether a Plaintiff has a reasonable cause of action is the same. The decision can only be made after an examination of the facts pleaded in the statement of claim. It has nothing to do with the nature of the defence and the statement of defence is consequently not relevant. It is also irrelevant whether or not the action will succeed. see Shell B.P. Petroleum Dev. Co. of Nig. Ltd V. LONESTAR DRILLING NIG. LTD. (2007) 16 NWLR (PT.1059) 168 @ 179 B-C, 193A-B.

The grouse of the Appellants is that the learned trial Judge looked at the exhibit attached to the counter affidavit of the Respondent instead of confining himself to the Statement of claim in coming to the conclusion that the Respondent/Claimant has a reasonable cause of action against the 2nd Appellant. Further, that if the learned trial Judge had confined himself to the Statement of Claim, the failure of the Respondent/Claimant to frontload the written personal guarantee rendered the claim unsustainable and disclosed no cause of action against the 2nd Appellant. The learned trial judge in his Ruling at page 119-120 of the printed Record observed:

"On the second issue identified for determination, I have this to say that it is trite that before a conclusion is arrived at whether an action discloses a reasonable cause of action, if is mandatory that the Court should peruse and examine the Claimant's statement of claim and writ of Summons. See the cases of Onibuda Vs. Akimbo & Ors. (1982) 7 SC Pg. 60, Kingsley Madu Vs. Victoria Encomium & Anr. (1986) 2 NWLR. (Pt. 26) Pg. 23 and Mobil Producing Nig. Vs. Lagos State Environment Agency (2002) 12 S.C. Pt. 1 Pg. 26. Once the Averments in the pleadings show a real controversy the Court cannot rule that same discloses no cause of action against 2nd Defendant/Applicant. The success or otherwise of the claimants claim is not a matter for consideration at this stage. What is important is whether the Statement of Claim raises questions to be determined by the Court. The mere fact that Claimant's case is weak or not likely to succeed is certainly not a ground for striking it out .See the case of panache Communications Ltd. Vs. Aihomu (1994) 2 NWLR. (Pt. 317) pg 420 at 425. It is clear from the statement of claim before the Court that there is a reasonable cause of action against the 2nd Defendant. I refer to Paragraphs 3,6, 8,11 and 12 of the Statement of Claim."

The learned trial Judge made it clear as shown above that it is the statement of claim that determines whether there is a reasonable cause of action. With all due respect to learned counsel for the Appellant, the above view of the learned trial judge cannot be faulted. In Paragraphs 3, 5, 6, 7, 8, 11 and 12 of the Statement of Claim the plaintiff/Respondent averred;

3. The 2nd Defendant is the Managing Director and Chief Executive Officer of the 1st Defendant and gave his personal guarantee for the loan".

"5. Sometime in May 2007 the 1st Defendant approached the claimant through its Managing Director for overdraft facility

"6. By a letter dated May 22nd, 2007 the 1st Defendant was offered credit facility of N42,032,500.00. with terms and conditions on the offer letter which was accepted by the 1st Defendant with a memorandum of acceptance duly signed by the 2nd Defendant with the Secretary on behalf of the 1st Defendant".

"7. on the 29th October 2007, the 1st Defendant was offered credit facility in the tune of N40,000,000.00 with terms and conditions in the offer letter which was accepted by the 1st Defendant with a memorandum of acceptance duly signed by the 2nd Defendant with the secretary. The letters of offer dated 22nd May 2007 and 29th October, 2007 are pleaded and will be relied upon by the Claimant at the hearing.

"8. In fulfillment of the terms and conditions of the offer letter dated 22nd May 2007 the 2nd Defendant entered a personal guarantee for the repayment of the loan".

11. By a letter dated 19th September,2011 the Claimant did demand for the outstanding indebtedness which has accrued interest by the 1st Defendant on its account but the Defendants did not make good their promises to offset the credit facility. The Claimant's letter shall be pleaded and shall be relied upon at the hearing.

12. The Claimants states that the Defendants have flouted the terms of the covenant as contained in the letter of offer of overdraft facility by refusing to liquidate their indebtedness but got an accountant SMD Consulting to do a reconciliation of its account which said reconciliation and computation was rejected by Claimant by a letter dated 13th February 2013. The said letter shall be relied upon at the trial.

In the face of the above averments in the Statement of Claim, can it be said that the learned trial Judge was wrong in holding the 2nd Appellant to be a necessary party to the suit or that the Respondent has a reasonable cause of action? Certainly not! The facts are that loans were given to the 1st Appellant and that the 2nd Appellant as its managing Director and Chief Executive personally guaranteed the loans. The money was not repaid when the Respondent demanded payment, hence the institution of the suit. If it is true and proven that the 2nd Appellant personally guaranteed the loans, he will be liable on the guarantee. The Appellants cannot be correct in their contention that failure to plead and frontload the written guarantee means there is no reasonable cause of action. They are matters which can only be considered during trial. The Respondent may succeed or may fail. But she has to be given a hearing on the merits. There are in the face of the Statement of Claim facts which if proved would mean success for the Respondent. They may be unable to prove the facts whether time comes but the time has not yet come. The Appellants jumped the gun. There was no need for the learned trial judge to consider the annexure in the counter affidavit in holding that there is a reasonable cause of action. But no miscarriages of justice has arisen as a result. On the contrary it supports the Respondent's case that there is a reasonable cause of action and that the 2nd Appellant is a necessary party in the proceedings. The appellants' 2nd issue (whether the lower Court was not wrong to have referred to and looked at an affidavit and its exhibit to determine that a reasonable cause of action has been disclosed against the 2nd defendant) is nothing short of undue attention to mere technicality. If in the face of the statement of claim there was no reasonable cause of action, then recourse to an annexure in the counter-affidavit to find reasonable cause of action would become an issue of concern. Under the circumstances in the present case it is of no moment.

I am satisfied that the lower Court was right in its decision. This appeal has no merit. I agree with the learned trial Judge that the motion on notice and indeed this appeal as well are mere ploys to delay the hearing of the case and to waste the precious time of the Court. The appeal is dismissed as lacking in merit with costs assessed at N100. 000.00 in favour of the Respondent.

**MAIN JUDGMENT**

**YARGATA BYENCHIT NIMPAR, J.C.A**.:

I had the privilege of reading the judgment just delivered by my learned brother, CHINWE EUGENIA IYIZOBA, JCA in advance and I am in complete agreement with the reasoning and conclusion arrived at in the lead judgment.

The judgment considered all the issues distilled by the parties and it leaves no room for me to add anything. I also dismiss the appeal. I abide by the consequential orders made in the lead judgment.

**ABIMBOLA OSARUGUE OBASEKI-ADEJUMO, J.C.A**.:

I have read in advance the very illuminating judgment just delivered by my learned brother, IYIZOBA, JCA.

I agree with the reasoning and conclusion therein. Viewed from all ramifications, the Appellant's appeal is devoid of any merit and I also dismiss same with the costs assessed at N100,000.00 in favour of the Respondent.