IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI, ABUJA

THIS TUESDAY, THE 13TH DAY OF SEPTEMBER, 2022.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI -- JUDGE

SUIT NO: CV/475/2018

BETWEEN:

RAMON TRILLO MARQUINA .... CLAIMANT/RESPONDENT

AND

THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES COMMISSION .... DEFENDANT/APPLICANT

RULING

The present application raises the important and controversial question of immunities and priviledges of International Institutions and whether they can properly be impleaded in local or municipal courts.

Let me however briefly situate the claim(s) subject of the extant action.

By a writ of summons and statement of claim dated 6th December, 2018, the plaintiff, a lawyer at the Lucena bar (Spain) claim the following Reliefs for professional services rendered against defendant as follows:

i. **A DECLARATION** that the Defendant's persistent failure to settle the Claimant's fees for legal services rendered amounts to a breach of contract.

ii. **AN ORDER** directing the Defendant to pay to the Claimant the sum of:

1. €30, 474 Representing arrears of professional fees plus re-imbursable expenses for legal services provided by

		the Claimant to the Defendants in the Arbitration matter of JDP V. ECOWAS at The Hague.
2.	**33% Interest**	**On the entire Judgment sum from the date of Judgment until final liquidation.**
3.	**N3, 500, 000**	**Representing cost of this action.**

The Defendant was duely served and they filed a defence dated 29th February, 2019 and set up a counter-claim against plaintiff in the following terms:

i. **AN ORDER that the defendant to Counter-claim was in breach of the Contract for legal service executed on the 14th day of July,, 2014 when he abandoned the arbitration proceedings in Contract number FED/2010/256=135. Between JDP CONSTRUCTION NIGERIA LTD V. ECOWAS COMMISSION Coram: DAVID W RACE (Presiding Arbitrator/Neutral), PETER HJ CHAPMAN (Co/party appointed arbitrator) and IGNACIO NUNO VILLAR (Co/party appointed arbitrator) JDP CONSTRUCTION NIGERIA LTD V. ECOWAS COMMISSION before the pronouncement of the final decision of the arbitral tribunal.**

ii. **AN ORDER that he defendant to Counter-claim was negligent in the representation of the counter-claimant's interest in the arbitration proceedings in Contract number FED/2010/256=135. Between JDP CONSTRUCTION NIGERIA LTD V. ECOWAS COMMISSION Coram: DAVID W RACE (Presiding Arbitrator/Neutral), PETER HJ CHAPMAN (Co/party appointed arbitrator) and IGNACIO NUNO VILLAR (Co/party appointed arbitrator) which adversely affected the counter-claimant's interest and occasioned a significant loss to the counter-claimant.**

iii. **AN ORDER directing the defendant to Counter-claim to forfeit and refund the sum of €36, 000.00 (Thirty Six Thousand Euros) Only being 60% of monies had and received by the defendant to Counter-claim as initial deposit, for breach of the underlining contract for legal service executed on the 14th day of July, 2014.**

iv. **AN ORDER directing the defendant to Counter-claim to indemnify the counter-claimant in the sum of €1,637.087.40 (One Million, Six Hundred and Thirty Seven Thousand, Eighty Seven Euros and Forty Cent) Only awarded against it as recoverable cost as awarded by the arbitral tribunal on grounds of his negligent misrepresentation.**

v. **AN AWARD of general damages against the defendant to Counter-claim.**

vi. **Cost of action assessed at N5, 000, 000.00 (Five Million Naira) Only.**

The claim and counter-claim above are clear and rooted in simple contract.

The defendant/counter-claimant however filed a Preliminary Objection challenging the jurisdiction of the court to entertain the action. Being a threshold issue, I considered that it be determined first.

The objection is dated 28th February, 2018 and the defendant seeks for the following Reliefs:

1. **An Order dismissing and/or striking out this instant suit in limine for lack of requisite jurisdiction of the Honourable Court to entertain and adjudicate over suit.**

2. **And for such further order or orders as this Honourable Court may deem fit to make in the circumstances.**

GROUNDS

1. **That the defendant is an international institution with immunities and privileges exempting it from being a party and subject to proceedings before National Courts of member states within the ECOWAS Community.**

2. **That the High Court of the Federal Capital Territory Abuja, Nigeria being a National Court of member state within the ECOWAS Community and the Nigeria State being a signatory to all its enabling instrument, lacked the requisite vires to hear and determine any matter concerning the defendant without express submission to the jurisdiction in the underlining contract.**

3. **That the defendant did not expressly or remotely submit itself to the jurisdiction of this court at the time of contracting with the claimant.**

4. **That the matter is a basic contractual dispute between the claimant, a foreign National and the ECOWAS Commission which falls within the exclusive jurisdiction of the ECOWAS Court.**

Pursuant to the Rules of this Court, the Applicant filed a written address in which one issue was raised for the determination of this court as follows:

1. **Whether by virtue of the status of the defendant and enabling instruments establishing and regulating it, the defendant is not subject to the jurisdiction of any National Court within its member state (including this court), therefore divesting this court of requisite vires to entertain and adjudicate over instant suit.**

The address on the above issue forms part of the Record of Court. I will only highlight the essence of the submissions made by Applicant.

On issue 1, Counsel to the defendant submitted that jurisdiction is the fulcrum of any successful proceeding; that any court assuming jurisdiction in excess of its powers is an exercise in futility. Jurisdiction cannot be implied by agreement. He submitted further that where a court is faced with a jurisdictional question, such question must first be answered before proceeding to hear any other matter. He cited the following cases **Bronik Motors Ltd & Anor V Wema Bank Ltd (1983) 1 SCNLR 296; Okoya V Santili (1990) 2 NWLR (pt.131) at 172; Madukolu V Nkemdilim (1962) 2 SCNLR 341.**

Counsel further submitted that this court, being a National Court within the Federal Republic of Nigeria, a member state within the ECOWAS Commission lacks the requisite jurisdiction to entertain, hear and determine this suit against the defendant being a regional but international institution. Counsel stated that the ECOWAS court was established in 1975 by 15 ECOWAS Countries including Nigeria with its headquarters in Abuja, Nigeria. That the court is independent of the influence of the ECOWAS and private individuals have direct access to the court. That the said court serves as a forum for the settlement of investors' contractual disputes, human rights violations and adjudication of commercial transactions as it relates to host states and individuals. He cited the following provisions: **Article 15 (1-4) of the Revised**

Treaty of the ECOWAS (1993); Article 9 (4); Article 10 of the Supplementary Protocol (A/SP.1/01/05). He contended that the above provisions gives a clear indication that the ECOWAS community court of justice is the appropriate forum, convenient for the adjudication of this dispute and not national court.

He submitted also that the defendant (ECOWAS) being a regional institution possess international legal personality with immunities and privileges from legal proceedings brought against it before National Courts. He placed reliance on a book by Yemi Oke: The law and practice of International Institution at page 13; Article 88 (1) of the Revised Treaty of Economic Community of West African States (ECOWAS); Article 2 of the General Convention and Immunities of ECOWAS. He submitted further that ECOWAS being a regional organisation with 15 member states enjoys jurisdictional immunities as an international body. He relied on the publication by Ramses A. Wessel, Professor of International and European Law and Governance, University of Twente, the Netherlands published in the Cambridge Handbook on Immunities and International Law, Cambridge University Press, 2019. He submitted further that all Executive actions of the Defendant is done and executed by the President of ECOWAS who is an official of the Commission as contained in enabling instruments which enjoys immunities and privileges. See The United Nations Charter 1945; Article 3, Section 4 of the Convention on Privileges and Immunities of specialised Agents of the United Nations, 1946.

Counsel submitted that the facts and the reliefs sought by the claimant clearly shows that this matter relates to a dispute between an individual and an international body and that the poser that comes to mind is to determine whether this court, under the laws of a member-state have jurisdiction considering the subject matter and the fact that this said international body has an established forum (Community Court of Justice) for the determination of such disputes concerning the commission. That upon contracting with the international body for the execution of a service, the contract and all ancillary matters related thereto has left the realm of any national court or administrative body; this is to create the desired autonomy and independence of the commission from control of National Governments and their courts. He cited the case of **Dr. Mahamat Seid Abazeneseid V Republic of Mali & 2 ors CCJ/Law Report (2013) CCJELR.**

Counsel submitted extensively on the fact that the defendant is an international organisation and that to bring the court before a National Court is to denigrate the image and reputation of the defendant as an international organisation.

The defendant also filed a response titled "Defendant's Reply on Points of Law to the Claimants' Response to the Defendant's Preliminary objection." Which again essentially accentuated the points earlier made that this court lacks the jurisdiction to entertain this action. At the hearing, counsel to the defendant/applicant adopted the submissions in the written addresses and urged the court to decline jurisdiction dismiss and or strike out the case.

The **claimant/respondent** on the other hand filed a counter-affidavit of eight paragraphs dated 27th November, 2019 and a written address. The said counter-affidavit was however withdrawn since the objection was not supported by an affidavit and the court struck out the said counter-affidavit from the record.

The claimant/respondent address raised one issue for the determination to wit:

"Whether having regard to the writ of summons and statement of claim, this court has jurisdiction to hear and determine this suit"?

The address on the issue equally forms part of the Record of Court. I will also highlight the substance of the submissions.

Counsel to the claimant submitted that it is the claimant's claim that determines whether or not a court is cloaked with jurisdictional competence to hear and determine an action. He stated that whenever the issue of jurisdiction is raised, the court is bound to confine itself to and consider the writ of summons and statement of claim. He relied on the following cases amongst others: **FGN V Oshiomole (2004) 3 NWLR (pt.860) 305; A-G Federation V Guardian Newspapers Ltd (1999) 9 NWLR (pt.618) 187 at 233; B.B. Apugo & Sons Ltd V O.H.M.B (2016) 13 NWLR (pt.1529) 206 at 240.**

Counsel then dealt at length on the original jurisdiction of the High Court which extends to all causes and is unlimited. Counsel placed reliance on **Sections 255 (1) and 257 (1) of the Constitution of Nigeria 1999 (As Amended).** Counsel also dealt at some length on the supremacy of the constitution. Counsel relied on **Sections 1 (1) and 12 (1) of the Constitution** and the case of **Abacha V Fawehinmi (2000) 6 NWLR (pt.660) pages 356 – 357 para G-E per Ejiwunmi (JSC).** Counsel contended that the laws, International instruments

relied on by the defendant to divest this court of jurisdiction to entertain the matter cannot be applicable same having not been domesticated or enacted into our local laws by the National Assembly.

On the case of **Madukolu V Nkemdilim (supra)** cited by defendant, counsel contended that the case does not help this application as nothing in this suit can be said to have fallen short of the standard enumerated in the said case. That the case of **Madukolu (supra)** cloaks this court fully with jurisdictional powers to hear and determine this suit on the merits.

Counsel further submitted that the doctrine of immunity as it related to the defendant is misconceived; that there is no clear provision under the defendant's establishment rules that removes the defendant from the sphere of the jurisdiction of this court as what transpired between parties was purely civil and or contractual matters. Counsel submitted further that sovereign immunity does not cover commercial transactions. That a contracting state cannot claim immunity from the jurisdiction of a court of another contracting state if it participated with one or more persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the state of the forum and the proceedings concern the relationship in a matter arising out of that participation, between the state on the one hand and the entity or any other participant on the other hand. **Trentex Trading Corp. V Central Bank of Nigeria (1977) 1 Q.B. 529.**

It was submitted that in the instant case, the defendant is the contracting state and its seat as well as registered office can be found in Abuja, Nigeria. That not only does the defendant have its seat, office and place of business here in Abuja, Nigeria; the transaction sought to be enforced by the claims in this suit is a simple commercial transaction for the provision of legal services. That the defendant cannot after enjoying the said service now refuse to pay for the said services using the flag of immunity as a shield. That to accept the arguments of defendant will create adverse ripple effect on commercial transactions between private individuals and sovereign bodies.

Counsel further submitted that having recourse to ECOWAS court will be against the basic principle of law or the rule of natural justice if "*nemo judex in causa sua,*" meaning "a person would not be a judge in his own course." Counsel states that it will be a travesty of justice for the claimant to sue the defendant before its own court as no justice will be served by having recourse to

the said ECOWAS court. He cited the case of **Unibiz (Nig.) Ltd V Commercial Bank Credit Lyonnais Ltd (2003) LPELR – 3380 (SC)** on what fair hearing entails.

It was submitted that since the claimant has pleaded material facts in the statement of claim and disclosed the work done, it is his right to be paid for the work done, but the defendant continually withheld this payments which constitute an infraction of his right. He relied on the case **Nwaka V SPDC (2003) 2 SCM 145.**

He submitted that by this application challenging the jurisdiction of court, the defendant is deemed to have admitted all the facts contained in the writ of summons and the statement of claim; therefore that this court should restrict itself to the writ of summons and statement of claim in the determination of this application, but not the statement of defence. The case of **Henry Stephen Engr. Lts V Yayubu (Nig) Ltd (2009) LPELR – 1363 (SC)** was cited.

The Plaintiff equally filed and address on the Appeal Court decision in Appeal No. CA/A/173/2020 Between: The **President of the Commission of Economic Community of West African States V Babacar Ndiaye** delivered on 9th March, 2021 which counsel contended is distinguishable from the extant case.

At the hearing, counsel to the defendant/respondent adopted the submissions in the written addresses and urged the court to dismiss the defendant's application for lacking in merit.

I have carefully considered the submissions on both sides of the aisle and the issue thrust by the extant application is one which does not present an intricate issue of law but nonetheless it is one that has continued to generate considerable debate in legal circles. The issue has to do with the priviledges and immunities of International Institutions such as ECOWAS in the extant case and whether they can be impleaded in local or municipal courts.

It is trite principle of general application that jurisdiction is fundamental threshold issue and is the blood that gives life to survival of an action in court and without it, the court lacks the competence to adjudicate over the person and subject placed before it. It is therefore important that the court ascertains whether it has jurisdiction before embarking on the determination of a dispute brought before otherwise, it may be embarking on a futile exercise because a

decision given without jurisdiction and no matter how well written creates no legal obligation or confers any right on the parties. See **Uti V Onoyiwe (1991) 1 SCNJ 25; Adetayo & Ors V Ademola & ors (2010) LPELR 155 (SC); Tukur V Gov. Gongola State (1989) 4 NWLR (pt.117) 517.**

All courts are creatures of statute and it is the statute that creates a particular court that will also confer jurisdiction on it and it is part of the duty of the court in exercising its interpretative function to expound the jurisdiction of the court but not to expand it. That power of expansion resides exclusively with the legislature. See **Gafar Vs the Government of Kwara State & ors (2007) 4 NWLR (pt.1024) 37; Tukur V Gov. Gongola State (supra) 517 at 546 – 547.**

Flowing from the above, the issue of jurisdiction of a court therefore is a fundamental threshold issue critical to the adjudication of the matter before it. It is trite law that a court can only be competent if among other things, all the conditions to its having jurisdiction are fulfilled. The locus classicus of the competence of the court to adjudicate is the Supreme Court decision of **Madukolu V. Nkemdilim (1962)1 AII NLR (pt.4)587.** In that case, it was stated that a court is said to be competent to adjudicate when:

"a. **It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and**

b. **The subject matter of the case is within its jurisdiction and there is no feature which prevents the court from exercising its jurisdiction; and**

c. **The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.**

Any defect in the competence of the court is fatal and the proceedings however well conducted and decided are a nullity as such defect is extrinsic to the adjudication."

These principles have been restated in many subsequent decisions of the Supreme Court including **Ogunsanya V. Dada (1990)6 N.W.L.R (pt.156)347; Osafile V. Odi (No1)(1990)3 N.W.L.R (pt.137)130; Odofin V. Agu (1992)3 N.W.L.R (pt.229)350 at 365; Rossek V. ACB Ltd (1993)8 N.W.L.R**

(pt.312)382 at 437 C-G; 487 G-B; A.G. Lagos V. Dosunmu (1989)3 N.W.L.R (pt.111)552.

The extant objection falls within the second leg of the above three critical elements of competence. Indeed one of the essential elements for the exercise by the court of its jurisdiction is that the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction. Two grounds were streamlined by Applicant as providing basis for this jurisdictional challenge.

The first ground relied on by the defendant to situate lack of jurisdiction is the contention that the ECOWAS court has provided avenue or has its own court for the filing of extant cases of this nature and that by implication the jurisdiction of local courts are ousted from entertaining such actions.

Now with respect to the ECOWAS court, and like our local courts, they are also a creation of statute and it is equally the statute that circumscribes the jurisdiction of the ECOWAS court. The contents of the statute, instruments, treaties etc creating such courts are imperative to the interpretation of the jurisdiction of such tribunal. Indeed the court itself in several of its decisions stated that the determination of its jurisdiction, is limited to the different statutes creating the court. In **Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) V. Federal Republic of Nigeria & Another ECW/CCJ/APP/0808 (October 2009)**, the Court noted that:

> ***"It is well established principle of law that jurisdiction is a creature of statute. The statute that spells out the jurisdiction of this Court is the Supplementary Protocol on the Court of Justice, specifically Article 9 thereof. For this Court to have subject-matter jurisdiction over the suit as instituted by the plaintiff, the subject matter of the suit must fall within the confines of Article 9 of the Supplementary Protocol to the Court... The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of the Federal Republic of Nigeria cannot oust the jurisdiction of the Court... This Court clearly has subject matter jurisdiction over human violations in so far as these are recognised by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS.***

Also, in **Keita and Another V Mali ECW/CCJ/APP03/07 (March 2001)**, the Court stated that:

> *... as regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions, and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies and founds the legal proceedings brought before the Court. From this standpoint, the Court has to determine the extent to which the Application instituting proceedings makes a demand on any Community text."*

Therefore the application of jurisdiction regulating rules in the case of any International Institution or Organisation such as the ECOWAS Court cannot be deduced outside the clear confines of the laws creating such body or organisation.

In this regard, the relevant documents for the interpretation of the jurisdiction of the ECOWAS Community Court of Justice are the **1991 Protocol, the 1993 Revised ECOWAS Treaty, the 2002 Supplementary Protocol** and **the 2005 Supplementary Protocol**. A collective interpretation of these instruments does not support the contention of counsel to the defendant that the ECOWAS court has sole exclusive jurisdiction to entertain simple cases for fees for services rendered as presented in the presented action.

Indeed, it is to be noted that the court indeed never **even initially had jurisdiction over cases presented by this dispute**. At the creation of the tribunal, it was established as an international tribunal for the settlement of dispute between states and intergovernmental organisations vide Article 56 of the 1975 Treaty. At its inception, individuals were not even competent to bring actions before the court. It was only in the **2001 Supplementary Protocol** on Democracy and Good Governance, that a provision reviewing the 1991 Protocol extended the competence of the court to cover actions involving the violation of Human Rights and the exhaustion of local remedies rule was introduced for such actions brought before the court. Therefore the 2001 protocol modified the functions and competence of the court to include the power to determine cases involving the violation of Human Rights. The power to entertain cases of **this nature** only came into the sphere of the ECOWAS court with the Amendments made to its existing jurisdiction regulating rules or protocol.

The fact of the expansion of its jurisdiction does not *ipso facto*, tantamount to the ousting of jurisdiction of municipal courts to entertain actions such as presented in this case. Indeed the protocol and supplementary protocol did not provide any clear defining relationship between the court and national institutions. The municipal courts clearly has subject matter jurisdiction over such contractual disputes in so far as the statute or law setting up the courts confers and imbues the court with such jurisdiction and there is nothing defined or streamlined divesting municipal courts of such jurisdiction.

The bottom line is that in the absence of exclusivity with respect to the jurisdiction regulating rules of the ECOWAS court to entertain contractual disputes, it does not with respect lie with counsel to impute such exclusive jurisdiction to the ECOWAS court. There really cannot be any additions or interpolations to the jurisdictional rules of the ECOWAS court beyond what is enshrined in the applicable protocols.

If the objection was predicated on the sole basis that it was only the ECOWAS court that has jurisdiction to entertain this case, the conclusion I would have arrived at may be different precisely because the sphere of jurisdiction of national courts and international courts or tribunal is blurred as both spheres overlap in different areas of jurisdiction with no apparent jurisdictional hierarchy with respect to sphere of influence, control or authority.

That is however not the end of the matter. Another major plank of the objection is the **Diplomatic, Immunities and Priviledges Act, 1962** which it was contended provides immunity for organisations such as ECOWAS from being impleaded in municipal courts.

In determining the issue of jurisdiction, particularly as it relates to the issue of immunity, the nature of the subject matter of the action and the status of parties are paramount considerations. See **I'CONGRESS DEL PARTIDO (1981) 2 ALL ER 1046**.

In matters involving organisations such as defendant and whether they can be impleaded in local courts, the judicial approach oscillates between the absolute immunity principle and the restrictive immunity approach. See **AFRICAN RE CORPORATION V. AIM CONSULTANTS LTD (2004) 14 NWLR (PT.884) 23 AT 242 TO 243; TRENDTEX TRADING CORP. V C.B.N (2004) ALL FWLR (PT.238) 776 AT 824 TO 826; PHILLIPPINE ADMIRAL CASE (1976) 2 WLR 214; THAI-EUROPE TAPIOCA**

SERVICE LTD V GOVT. OF PAKISTAN (1975) 1 WLR 1485 and ALCOM V REPUBLIC OF COLOMBIA (1984) 2 ALL ER 6.

In resolving this issue, I will not go into the debate and considerable legal literature on both sides of the aisle; I will essentially refer to the different interesting and enriching positions enunciated by our Superior Courts on these principles and then apply the availing authority on the issue. That appears to me to be a safer course to adopt in the light of the fluidity of the jurisprudence on the issue.

In *AFRICAN RE CORPORATION V AIM CONSULT LIMITED (supra)* the appellant and the respondent entered into an agreement under which the respondent provided building construction consultancy services to the appellant. An article of the said agreement stipulated that disputes between the parties must be referred to arbitration. Due to differences over the respondent's professional fees, a reference was made to an arbitral tribunal, which gave its award in favour of the respondent. The respondent sought to enforce the arbitral award at the High Court to which the appellant filed an application seeking to set aside the respondent's suit on the ground that the appellant was immune from legal process and that the court lacked jurisdiction to entertain the respondent's suit. In response to the respondent's contention and in dismissing the appeal, the Court of Appeal held that a government department that enters into a commercial transaction is not immune from legal action instituted in respect of any dispute arising from the transaction. This decision it would appear supports the restrictive concept principle.

Similarly, the Appeal Court sitting in Lagos in a Judgment delivered on 30th March, 2017 applied the **concept of restrictive immunity** in Appeal No. **CA/L/92/2006 between Transproject Nig. Ltd V Ayo Akintunde (Trading under the name and style of Laniyan Akintunde and Ibrahim), the Republic of Bulgaria, the Ministry of Foreign Affairs, Bulgaria and the Embassy of the Republic of Bulgaria.**

In the case, the Appellant sought for the following Reliefs against Respondents:

"1. **A DECLARATION that by virtue of the sale for valuable consideration, and subsequent effective uninterrupted possession of the block of flats known as flats No. 2 and 14 located in the Bulgarian Embassy Complex at No. 3, Walter Carrington Crescent, Victoria**

Island, Lagos, Claimant became seized for itself absolutely and without any encumbrance, exclusive possession of the said premises.

2. A DECLARATION that the Claimant is entitled to quiet and peaceful possession of the said flats No. 2 and 14 in the Bulgaria Embassy Complex.

3. AN ORDER of perpetual injunction restraining the Defendants whether by themselves, privies, servants, agents whomsoever and howsoever defined from further trespassing, selling, leasing and disturbing the peaceful and quiet possession of the premises and/or committing any unlawful act(s) inconsistent with the rights of Claimant.

4. N10, 000, 000.00 (Ten Million Naira Only) damages for trespass.

5. Cost of this suit."

The lower court struck out the suit for want of jurisdiction. In allowing the appeal in a unanimous judgment, the court per **Abimbola Osarugue Obaseki-Adejumo, JCA** after a comprehensive analysis of the law and various decisions on the issue held as follows:

> *"In my considered view there is no reason why the Respondents should be immune from a legal suit of this nature. The Appellant herein is not challenging a sovereign/governmental act, but is merely seeking sundry reliefs, which arose from a purported contract of sale of property by the Respondents. A fortiori, the Respondents will undoubtedly not expect this court to fold its hand in akimbo when having regards the advertisement contained in Guardian Newspaper Advert of 1st November, 2004 and transmitted as part of the record at page 20 thereof, the 2nd to 4th Respondents through the 1st Respondent have put up for sale by bid, the 'embassy premises'. By way of an aside, it is easy to speculate that the Respondents after selling the property will thereafter at its own will and volition, turn around and renege on their obligations under the conceived contract of sale, and then hide under the cloak of immunity and inviolability of diplomatic premises. Thus, it is the duty of this court to balance the unfettered right of access of every Nigerian citizens to the court with the privileges of immunity accorded to foreign missions under*

international law. If I may add, the proceedings herein do not in any way assault the dignity of the Respondents. See per LORD DENNING, MR in RAHIMOOLA V NNIZAM OF HYDERABAD AND ANOTHER (1958) AC 379 AT 418, where he reasoned that "it is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it."

To this extent, I have no hesitation in holding that the learned trial judge erred when he held that the Respondents are immune from legal proceedings as per the Appellant's claim. This issue is resolved in favour of the Appellant."

In *AFRICAN REINSURANCE CORPORATION V ABATE FANTAYE* **(1986) 3 NWLR (pt.32) 811 SC** the plaintiff, Abate Fantaye had commenced proceedings in the High Court of Lagos State against the defendant, an international organisation for wrongful determination of his employment with the defendant. The defendant then brought an application praying the court to strike out or dismiss the plaintiff's claim for want of jurisdiction on the grounds that since the defendant was an international organisation, it enjoyed diplomatic immunity from suit or legal process. A certificate from the Ministry of External Affairs to this effect was relied upon by the defendant, but it was rejected by the court which ruled that the defendant had waived its diplomatic immunity. The defendant [now appellant] appealed against the ruling of the High Court, relying *inter-alia*, on the **order** issued by the Ministry of External Affairs, titled "African Re-insurance Corporation Order 1985". The order was issued after the High Court ruling and conferred immunity on the appellant against all suits except those relating to re-insurance and where the appellant expressly waived its immunity.

On appeal, several articles of the treaty establishing the appellant as an international organisation founded by members of the African Union with headquarters in Nigeria were considered pertinent to the suit.

Article 48(1) of the treaty provides that:

"Legal action may be brought against the corporation in a court of competent jurisdiction in the territory of a country in which the corporation has its headquarters, or has appointed for the purpose of accepting service or notice or process, or have otherwise agreed to be sued."

Article 46 on status of the organisation provides:

> *"To enable the corporation effectively fulfill its purpose and carry out the function entrusted to it, the status, immunities, privileges set forth in this chapter shall be accorded the corporation in the territory of each state member and each state member shall inform the corporation of the specific action which it has taken for such purpose".*

Article 53 on waiver provides:

> *"The immunities, exemptions and privileges provided in this chapter are granted in the interest of the corporation. The board of directors may waive to such extent and upon such conditions as it may determine, the immunities, exemptions and privileges provided in this chapter in cases where its action would in its opinion further the interest of the corporation".*

The appellant's counsel submitted that the certificate and the order issued by the Minister were decisive. The respondent's counsel conceded that the appellant was an international organisation, which enjoys diplomatic immunities and privileges but submitted that the immunity must be taken as having been waived by virtue of Article 48 of the treaty establishing the appellant or by virtue of the steps the appellant had taken to defend the action at the High Court.

The Court of Appeal dismissed the appeal on the ground that the framers of the agreement establishing the appellant did not intend to protect it from being sued once its main object was to undertake mercantile transactions and that at any rate the appellant had waived immunity by taking steps to defend the matter. The court reasoned that "a corporation or other establishments dealing in commercial transaction are not normally accorded privileges and immunities from being sued".

On further appeal to the Supreme Court, the apex court unanimously allowed the appeal holding *inter-alia*, as follows:

> *"(a) That the appellant was an International organisation so recognised by the minister by virtue of Section 11 of the Diplomatic Immunities and Privileges Act (1962).*
>
> *(b) That by virtue of that fact and the order issued by the Minister to that effect, the organisation was entitled to immunity from jurisdiction.*

(c) Although the immunity could be waived, such waiver must be expressly done by its board of directors in line with Article 53 of its treaty and that the requirement having not been met, the lower courts were in error to have held that the immunity had been waived.

(d) Article 48 of the organisation's treaty which renders it capable of being sued at the locus of its headquarters can only be enforced between state members of the organisation and not by the respondent."

In the **recent decision** of the **Court of Appeal** Abuja Division between the **President of the Commission of the Economic Community of West Municipal States V Babacar Ndiaye – Appeal No. CA/A/173/2020**, delivered on **19th March, 2021** the Court of Appeal restated in clear terms that a state enjoys immunity from the jurisdiction of municipal courts, in respect of itself and its person.

In the case the Respondent sought declaratory orders and monetary reliefs against Appellant arising from his suspension of his employment as a staff of ECOWAS for being in violation of the ECOWAS Staff Regulation. The Appellant argued that it enjoyed immunity from legal suits, and on that basis challenged the jurisdiction of the lower court to hear and determine the suit.

The Industrial Court held it has jurisdiction but on Appeal, the Court of Appeal in a unanimous decision emphasized the point that by virtue of Section 18 of the Diplomatic Immunities and Priviledges Act, Cap 09 LFN 2004, the Appellant could not be impleaded before the lower court. The case situated the clear position with respect to the status of ECOWAS as an international organization and confirmed that it enjoyed immunity from the suit. The court re-emphasized the position that the authority of **African Insurance Corporation V. Abate Fantaye (1986) 3 NWLR (pt.32) 811** put to rest the issue of immunity from proceedings in municipal courts enjoyed by persons like the Appellant or in this case organizations like ECOWAS.

Let me here refer to the instructive pronouncements of the law lords in the Appeal. In the lead judgment, **Boloukuromo Moses Ugo JCA** stated thus:

"I shall not hesitate to say that it is amazing that despite all the materials supplied it by the appellant- including evidence in the form of Exhibit CA from minister of foreign affairs and even case and

statutory law- confirming his immunity from prosecution in the municipal courts of Nigeria, the trial National Industrial Court still ruled against his objection and claimed jurisdiction for itself over him. I shall first refer to Exhibit CA addressed to Respondent by Nigeria's Minister of foreign affairs which respondent exhibited to his affidavit... Section 18 of the Diplomatic Immunities and Privileges Act Cap D9 Laws of the Federation of Nigeria 2004, states clearly that:

> *"if any proceedings any question arises whether or not any organization of any person is entitled to immunity from suit and legal process under any provision of this Act, a certificate issued by the minister stating any fact relevant to that quarter shall be conclusive evidence of that fact"*

so this certificate of the minister of foreign affairs of Nigeria attached to the affidavit of Chika Onyewuchi in support of appellant's application/objection before the trial National Industrial Court for striking out the suit is sufficient and in fact conclusive evidence of the immunity claimed by the appellant. That also includes statement of the minister in paragraph 2 of the same certificate that the ECOWAS Revised Treaty of 1993 was ratified by the Federal Republic of Nigeria in 1st July 1994 thus putting paid to the trial judge's contention that appellant needed to prove that the said treaty was ratified by the Nigeria for him to properly claim immunity."

His Lordship, **Stephen Jonah Adah JCA** in his supporting judgment stated as follows:

> *"Under the principles of customary International law, a foreign sovereign cannot be impleaded in the court of another sovereign in any legal proceedings either against his person or for the recovery of specific property or damages, neither can his property or property in his possession be seized or detained by legal process.*
>
> *Furthermore, in the case of African Reinsurance Commission V Fantanye (1986) 3 NWLR Pt.32, 811 the Supreme Court held inter alia that under the diplomatic immunity and priviledges Act 1962, no. 42 Diplomatic immunities are claimable by organizations declared by the minister of external affairs to be organizations, the members which are sovereign powers (whether foreign powers or commonwealth thereof).*

Where the evidence before the court shows that the defendant is a department of a sovereign state, albeit itself a corporation body, then the action is one between the plaintiff and the foreign sovereign state, or the part of the foreign sovereign states represented by the departmental body concerned. The immunities under the first schedule to the Diplomatic immunities and Privileges Act 1962, include immunity from suit and legal process. The appellant, being an international organization enjoys immunity from suit and legal process, both by virtue of Section 11 and 18 of the 1962 Act, and Certificate issued by the Minister of External Affairs. Where a sovereign or International Organisation enjoys immunity from suit and legal process, waiver of such immunity from suit and legal process, waiver of such immunity is not to be presumed against it. Thus waiver of immunity by a sovereign or international Organisation must be expressly and positively done by that sovereign or International Organisation."

The above is the latest decision on the issue by the Superior Court of Appeal which is binding on this court particularly since the defendants in both cases are the same. The facts in the case of Babacar Ndiaye and the present case may differ but the reason for the decision or the principle of the decision cannot be ignored or be said to be inapplicable here. A lower court such as mine is bound by the *ratio decidendi* of a higher court. See **ADESOKAN V ADETUNJI (1994) 5 NWLR (PT.346) 540 AT 577; AFRO-CONTINENTAL LTD V AYANTUYI (1995) 9 NWLR (PT.420) 411 AT 435.**

Most importantly, as already alluded to, the decision of the Supreme Court in the **Fantaye case (supra)** would appear to reinforce the position taken by the Court of Appeal that the defendant cannot be impleaded in local courts unless they have expressly waived their immunity and all courts are bound by the decision of the Apex Court.

As a logical corollary, on the basis of these decisions and the extant provisions of the Diplomatic Immunities and Privileges Act, this court will clearly have no jurisdiction to entertain the **present action** and the **counter-claim**. Happily in this case, there exists another judicial route to entertain and determine the grievances of parties- the **ECOWAS Court**. Both parties clearly must resort to this court to ventilate their competing claims.

The **fear by claimant** that he may not obtain justice because the case will be heard by an institution of ECOWAS appears to me rather unfounded. It appears to me rather far-fetched that the justices of the ECOWAS court will be guided by other extraneous considerations other that the facts and circumstances of the case and the law. There is really nothing to support the alarming speculation that they are unable to function impartially just because the case involves ECOWAS. If such a suggestion is to be lamely accepted, then even at the local level, cases will not be handled by judges against the Government or its institutions. I leave it at that.

Finally what are the appropriate orders to make in the circumstances. The Applicant has prayed for a dismissal or striking out of the claim. Now in law it is trite principle that where the court finds it has no jurisdiction, it should strike out the action, not dismiss it. A dismissal of an action suggests an adjudication on the merits and there can be no adjudication on the merits where there is no jurisdiction or competence to adjudicate. See **DIN V A.I.G FED. (1986) 1 NWLR (PT.17) 471 AT 508 F-G; OKOLO V UBN (2004) 3 NWLR (PT.859) 87 AT 110.** Accordingly, the proper order, following the lack of jurisdiction finding is the striking out of the suit. See **NDIC V CDN (2002) 7 NWLR (PT.766) 272 AT 300 E.**

Both the **substantive action** and the **counter-claim** are accordingly struck out. No order as to cost.

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Hon. Justice A.I. Kutigi

Appearances:

1. ***Jideofor Onuoha, Esq., for the Claimant/Respondent.***

2. ***M.J. Numa, Esq., with B.J. Tabai Esq., for the Defendant/Applicant.***