IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, ABUJA
HOLDEN AT WUSE ZONE 2, ABUJA
BEFORE HON. JUSTICE NJIDEKA K. NWOSU-IHEME
ON TUESDAY, 28TH DAY OF MARCH, 2023.

SUIT NO: FCT/HC/CV/620/2022

BETWEEN:

DR MARIANNE J NGOULLA ..... APPLICANT

VS

THE ECONOMIC COMMUNITY OF

WEST AFRICAN STATES ..... RESPONDENT

RULING

The Respondent on the 8th day of December, 2022 raised a Preliminary Objection challenging the jurisdiction of this Honourable Court to entertain this originating motion and praying this court for the following reliefs;

1. **AN ORDER OF THIS HONOURABLE COURT dismissing and/or striking out the applicant's originating motion on Notice filed on the 28th day of November, 2022 with Suit Number: FCT/HC/CV/620/2022 between DR. MARIANNE J NGOULLA v. THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) for being an abuse of court of process and/or incompetent.**

2. **AND FOR SUCH FURTHER ORDER(S) as this Honourable Court may deem fit to make in the circumstances of this case.**

On 15/2/2023, the preliminary objection came up for ruling but the court set aside the proceedings of 6/2/2023 in interest of fair hearing and adjourned for hearing of all pending applications to 16/3/2023.

HIGH COURT OF THE FCT
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On 16/3/2023, parties adopted their respective applications and matter was adjourned for ruling.

Applicant filed a motion on notice on 16/2/2023 seeking the following reliefs;

1. **AN ORDER of this Honourable Court consolidating the originating actions in Suit No: FCT/HC/CV/620/2022 between Dr Marianne Ngoulla v ECOWAS and suit No: FCT/HC/CV/2694/2022 Between ECOWAS v Dr Marianne Ngoulla both of which have arise from one and the same final award given in a dispute between the parties herein by a three-man panel consisting of Chief Bayo Ojo, SAN (presiding Arbitrator), Dr Agada Elachi Esq. published on the 30th day of May, 2022 and Y. C. Maikyau SAN (dissenting).**

2. **AND FOR SUCH FURTHER ORDER(S) as this honourable Court may deem fit to make in the circumstances of this case.**

The applicants 12 paragraph affidavit was deposed to by one Shalom Emmanuel an associate counsel in the law firm of applicants counsel on 20/2/2023 deposing as follows;

1. The claimant instituted this originating motion bearing Suit No: FCT/HC/CV/620/2022 on 28th November, 2022 seeking recognition and enforcement of the arbitral award.
2. Prior to the filing of this originating motion, the respondent had already filed an originating motion on 15/8/2022 seeking to set aside the award with Suit No: FCT/HC/CV/2694/2022 currently pending before the Honourable Justice C. O. Agbaza of High Court No. 6 Maitama, Abuja (exhibit A).
3. Both suits are post arbitral proceedings arising from the same award and in order to avoid a multiplicity of actions can be tried by this court all at once as the issues are the same or identical and should be tried by one and the same Judge of the High Court to avoid conflicting judgements or orders. This court has power under the rules to consolidate actions.

In the applicant's written address, B. B. Daudu submitted a sole issue for determination to wit:

Whether the Applicant has placed sufficient materials before this honourable Court which warrants the exercise of this honourable Courts discretion in her favour to consolidate two

post arbitral actions, i.e Suit No: FCT/HC/CV/620/2022 between Dr Marianne Ngoulla v ECOWAS and Suit No: FCT/HC/CV/2694/2022 between ECOWAS v Dr Marianne Ngoulla pending before 2 different courts in this High Court, both of which have arisen from one final award given in a dispute between the parties herein by a three-man panel consisting of Chief Bayo Ojo, SAN (Presiding Arbitrator), Dr Agada Elachi Esq and Y. C. Maikyau SAN (dissenting)?

Numa SAN elected to reply orally to this application.

APPLICANTS ARGUMENT ON SOLE ISSUE

Daudu Esq. submitted that this court is vested with inherent powers to exercise its discretion on whether or not to consolidate application or actions before it in deserving circumstances. Relying on **Order 41 Rule 8(1) High Court of the Federal Capital Territory (Civil Procedure) Rules 2014 and OGUNSAKIN V AJIDARA (2008) 6NWLR (PT 1082) 1 @ 26 PARAS B-E.**

RESPONDENTS ARGUMENT ON SOLE ISSUE

Numa SAN in opposition to the application argued that it is misconceived and **order 41 Rule (8)(1) of the rules of the court** provide that the court can consolidate applications pending before it but not applications before 2 different court relying on **KASSAB V PAUL ULASI (1991) 2 NWLR PART 174 PAGE 448 @ P. 459 & 460, SHELL TRUSTEES LTD V IMANI & SONS LTD (2000) 6 NWLR PART 662 PAGE 639 PARAS 659.**

Numa Esq argued that it is only the chief judge of the FCT that can consolidate the matters and this court was urged to dismiss the application.

Daudu Esq. in his reply argued strenuously that consolidation is for convenience where they have common facts to avoid multiplicity of action.

If there are 2 motions; one to save and one to dismiss, court of equity must take the one to preserve. It is an issue of substantial justice as opposed to technical justice.

DECISION OF THE COURT

This court is not unmindful of the principal of the law that where there are two motions, one seeking to terminate a matter (destructive motion) and the other seeking to save the matter (constructive motion), the latter should be dealt with first. The application to terminate must abide the result of the

application to save the matter relying on ***BENUE STATE HOSPITALS MANAGEMENT BOARD & ORS V. KPUM (2019) LPELR-48133(CA) (PP. 121-122 PARAS. E).***

Therefore, this court will consider the application for consolidation.

Order 41 Rule 8 of the rules of this court states;

> **(1)The court may on application consolidate several actions pending before it, where it appears that the issues are the same in all the actions, and can therefore be properly tried and determined at the same time**
> **(2) Where actions are pending before different judges, a party desiring consolidation shall first apply to the chief judge for transfer of the matter to the court before whom one or more of the matters are pending.**

8(1) allows the court to consolidate several actions that are pending before it.

8(2) where the actions are pending before different judges, a party desiring consolidation shall apply to the Chief Judge for transfer of the matter.

In the suit at hand, all the actions are not pending before me and the assertions of the respondent were not challenged by the applicant.
In Suit No: FCT/HC/CV/620/2022 between Dr Marianne Ngoulla v ECOWAS is before this court while Suit No: FCT/HC/CV/2694/2022 between ECOWAS v Dr Marianne Ngoulla is before Hon. Justice Agbaza.
The rules of this court are clear and the party seeking consolidation ought to apply before the Chief Judge of FCT to transfer the matter before the court it seeks to hear the consolidated matters. Relying on case of ***KASSAB V ULASI (SUPRA)*** this court lacks the powers to consolidate as all the matters as they are not before me in this wise, the application lacks merit and is hereby dismissed.

In support of this preliminary objection is a 7 paragraph affidavit deposed to by DANIEL LAGO director, legal affairs of the respondent and a written address.
In the his affidavit, he deposed amongst others;

a. The applicant commenced this action seeking enforcement of an arbitral award published on the 30th day of May, 2022

between the same parties via an originating motion dated the 28th day of November, 2022.

b. There is already an application seeking to set aside the same award between the same parties in **Suit Number: Suit No: CV/2694/2022** between **THE ECOWAS COMMISSION v. DR. MARIANE J NGOULLA** filed on the 15th day of August, 2022 which was duly served on the applicant herein and endorsed by counsel to the applicant on the 13th day of October, 2022. Proof of Service was attached as Exhibit ECOWAS 1.
c. The motion seeking enforcement of the award filed during the pendency of the respondent's motion to set aside the arbitral award is an abuse of judicial process.
d. That the applicant did not seek and obtain leave of this Honourable Court ex-parte for the recognition of the award as a judgment of this court before seeking to enforce same.
e. The applicant has not complied with the statutory requirement in bringing an application for the recognition and enforcement of the arbitral award as provided for by the **Arbitration and Conciliation Act CAP A 18, Laws of the Federation of Nigeria 2004.**
f. The applicant failed to attach the certified true copy of the arbitration agreement as provided by law.
g. Court was urged to grant the objection, dismiss the applicant's application or in the alternative stay the motion sine die pending the determination of the annulment proceedings.

Applicant filed a 20 paragraph counter affidavit in opposition to the respondents notice of preliminary objection on 14th February, 2023 deposed to by P. B. Daudu, an associate Counsel in the law firm of the counsel to the applicant deposed as follows;

1. An award was granted in favour of the applicant to the tune of $3,365,444.00 as damages arising out of breach of contract and $168,272.00 as pre-award interest of 5% per annum. The award has not been complied which necessitated the filing of this application before this court for enforcement of the said award.

2. On 30th November, 2022 he witnessed the proceedings before Hon. Justice Agbaza wherein the court was informed of the pendency of the motion seeking recognition and enforcement of the arbitral award via an

oral application praying court to consolidate such applications. Court held that the processes filed were not before it and the applications would be heard on the next adjourned date.

3. This court has jurisdiction to hear both the motion seeking to set aside the award and also the motion for recognition and enforcement of the award one after the other.

4. Contrary to 5(f) of respondent's affidavit, The originating motion is seeking leave of court in its prayers for enforcement of the award published on 30th May, 2022 in the arbitral proceedings between the applicant and respondent.

Respondents 10 paragraph further affidavit in support of the preliminary objection filed 20/2/2023 deposed to by one Uzoamaka Obidike a legal officer in the respondent deposed that the applicant did not disclose before this court on 28th November, 2022 that there was a pending application to set aside the award.

That in the Respondents written address, M. J. Numa SAN submitted 2 issues for determination to wit:

1. ***Whether the applicant's motion filed on the 28th day of November, 2022 seeking to enforce an arbitral award published on the 30th day of May, 2022 already a subject of an earlier proceeding in Suit No: FCT/CV/2694/2022 seeking to set aside the same award does not constitute an abuse of judicial process.***

2. ***Whether the applicant's motion on notice with Suit No: FCT/HC/CV/620/2022 seeking enforcement of an arbitral award without first seeking and obtaining the leave of court ex-parte for recognition as a judgment of the court before filing its motion on notice for enforcement straight is not incompetent.***

In the applicant's written address, B. B. Daudu Esq submitted a sole issue for determination to wit:

Whether the Originating Motion filed on the 28th day of November, 2022 is competent and in line with the Arbitration and Conciliation?

This court shall determine this objection on the issues as formulated by the Respondent.

RESPONDENT'S ARGUMENT ON ISSUE ONE

Numa SAN's contention is that the originating motion filed on 28/11/2022 before this court in view of the pendency of the motion to set aside the arbitral award filed on 15/8/2022 is an abuse of judicial process. The application to set aside is first in time, and agitates amongst other grounds jurisdictional issues, which must first be determined before any other consideration. Relying on **PRESIDENT FRN & ANOR v. NATIONAL ASSEMBLY & ORS(2022) LPLER 58516 (SC) PG 24-25 PARAS F-A.**

The issues raised in the motion to set aside the award must be determined first on the merit before recourse can be made to and application made for recognition of the award.

The interpretation of sections 31 and 32 of the Arbitration and Conciliation Act (the Act) is that an application to enforce an award is subject to an application to refuse recognition or enforcement or to set aside the award. Relying on **SHELL TRUSTEES (NIG.) LTD. v. IMANI & SONS LTD (2000) Part 662 Page 639 paras C-D and Page 670 paras E-C.** Counsel submitted that the application to set aside must first be heard and determined before the applicants originating motion in this suit. Thus this suit constitutes an abuse of court process. **NTUKS v. NPA (2007) 13 NWLR (Pt. 1051) 392@419-420, H – A.** Numa SAN urged this court to dismiss this application as the consequence of an abuse of process is a dismissal. Referring to **USMAN v. BABA (2005) 5NWLR (PT 917) 113 @ 132 E-F.**

RESPONDENTS ARGUMENT ON ISSUE TWO

Counsel contended that the applicant's failure to seek and obtain leave ex-parte to recognize the award as a judgment of the court before proceeding with this application on notice to enforce same is fatal to the competence of the application. Referring to ***MADAYEDUPIN V. OLONINORAN (2013) 1 NWLR (PART 1334) P. 175 AT P. 204 PARAS E-F and*** **FDB FINANCIAL SERV. LTD v. ADESOLA (2000) 8 NWLR (PT. 668) 170 @ PG. 180, PARAS B –C.**

Relying on **section 31(3) of the Act and Order 19 Rule 13 of the Federal Capital Territory Civil Procedure rules 2018 (the Rules). TULIP (NIG.) LTD. v. N.T.M.S.A.S. (2011) PT 1237*P. 288, paras. F-G*** and rules court are meant to be obeyed.

Applicant failed to attach the duly authenticated original arbitration agreement or a duly certified copy of same as provided section 31(1) & (2) of the Act. The applicant's originating motion marked as Exhibits A1-A3 is photocopied reproductions of the original agreements, and they do not bear any mark of authentication or certification. The non-compliance with Section 31 of the Arbitration and Conciliation Act vitiates the competence of this application **ORAKUL RESOURCES LTD. v. N.C.C (2022) 6NWLR PT 1827 PAGE 590, PARAS C-D**

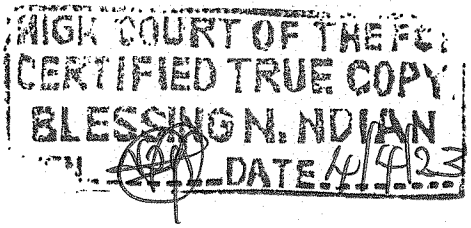
APPLICANTS ARGUMENT ON SOLE ISSUE

Counsel argued that reliance on facts in **SHELL TRUSTEES (NIG) LTD V IMANI & SONS LTD (2000) 6NWLR PT 662 PAGE 666** will not avail the respondent as it is distinguishable from the suit at hand as both applications are being filed in the same court of FCT, High Court. The aim of the motion seeking for recognition and enforcement of the arbitral award is to foster speedy dispensation of justice and not steal a match or foreclose respondent from exercising its right to challenge the award in question.

Section 31(1) and 51(1) of the Act does not expressly state that motion for recognition of award must be made exparte. There is no trace of the word exparte relying on **ENL CONSORTIUM LTD V SHAMBILAT SHELTER NIG LTD (2020) LPLER 50465 P 20-52 PARAS D-C. Equity looks at the form and not the content relying on ALLIED ENERGY V NIGERIA AGIP EXPLORATION LTD (2018) LPLER 45302.**

Daudu Esq. submitted that a copy of the arbitration agreement was annexed and not the original and this does not question or remove from the content of the document **SUNDERSONS LTD V C.S. PTE LTD (2015) 17 NWLR PART 1488 PAGE 373 A-B** it does not render the application incompetent.

Reply on point of law filed on 20/2/23, Numa SAN argued that the counter affidavit is incompetent as the deponent is an associate in the law firm of J.B. Daudu & Co. and a learned counsel cannot give evidence in a case he appears for a party as counsel qua advocate. Relying on **AKINLADE V INEC (2019) LPLER 55090 and BONIFACE ANYIKA & COMPANYV LAGOS NIGERIA LIMITED V KATSINA UZOR (2006) LPLER 790 SC (PAGE 15 PARAS B-E).**



Numa SAN submitted that the recognition of an arbitral award as a binding and final decision on parties to an arbitration is consequent upon the absence of an application by any party to the arbitration to set the arbitral award aside or after it has been refused by the court. In this case the award is subject to a challenge commenced earlier in time. Section **31(1) OF ACA MUST WAIT FOR THE DETERMINATION OF THE RIGHT IN SECTION 32 ACA FOR SETTING ASIDE. RELYING ON RAZ PALGAZI CONSTRUCTION V FCDA (2001) LPLER 2941 SC.**

The respondents application to set aside the award is not before this court as same was instituted within another division of this court with suit no FCT/HC/CV/2964/22 and ***SHELL TRUSTEES V IMANI (SUPRA) PAGE*** 670 will not avail the applicant.

DECISION OF THE COURT

Before I proceed to deal with the issue before me, Numa SAN urged court to discountenance the counter affidavit of the applicant as it was out of time and leave of this court was not sought to file same out of time.

Daudu Esq. responded that their motion on 15/2/2023 sought to regularize their counter affidavit. Numa SAN argued that that application did not have a prayer for extension of time. I have looked at the said motion and I agree that there is no prayer for leave to file the counter affidavit and the accompanying processes out of time. However, this court will not sacrifice justice at the altar of technicalities as courts and tribunals are enjoined to decide matters on the merits and should be wary of sacrificing justice on account of technicality." ***PER MUSDAPHER, J.S.C IN OKIKE V. LPDC (2005) LPELR-2450(SC) (PP. 25 PARAS. E).*** I therefore, grant leave to the applicant to file and serve their counter affidavit out of time and deem the processes already filed and served as properly filed and served.

Numa SAN also raised an objection that learned counsel to the applicant breached the provisions of the Rules of Professional Conduct for Legal Practitioners by deposing to the Counter affidavit on behalf of the client while being a counsel in the same suit as contained in applicants counter affidavit in opposition to the preliminary objection as counsel cannot be a witness in his own case.

The relevant provisions to be considered in resolving this issue are **Sections**

86 and 87 of the Evidence Act 1990 which reads as follows:

> **"86. Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.**
> **87. An affidavit shall not contain extraneous matter, by way of objection, or prayer, or legal argument or conclusion."**

A combined reading of the provisions of Sections 86 and 87 of the Evidence Act, supra, will reveal that a person who swears or deposes to an affidavit is called "the witness" in Section 86 of the Act supra, the witness must depose to only statement of facts and circumstances within his personal knowledge, or from information derived from other sources but which he believes to be true.
Now the question is whether a counsel to a party can depose to an affidavit on behalf of his client in a suit pending in court?

On this issue, the learned GEORGEWILL, J.C.A in the case of **ALHAJI ADEKUNLE AGBALAJOBI & ANOR v. GOVERNOR OF LAGOS STATE (2017) LPELR-41955(CA)** had this to say:

> **"...I have observed that none of the parties in contention in this application deposed to any of the affidavits and counter affidavit by themselves as all the affidavits were deposed to by either counsel in the law firm of their respective solicitors or the litigation officer. This trend or practice, though very rampant amongst counsel, is truly becoming worrisome. It is advisable and a better form of accepted practice that counsel qua counsel must refrain from deposing to affidavit on contentious matters of facts on behalf of their clients since counsel are at best only masters of the law while the facts which are sacred belongs rightly to their clients. This rule of practice is to ensure that counsel remain masters of the law whenever they are conducting a matter qua counsel and let their clients to whom the facts belong take hold of their facts except in very formal uncontested applications should a counsel his staff depose to affidavit of facts so that the need in**

some cases where the need to resolve conflict in affidavit may arise and counsel may have to be put in the witness stand to be cross examined in a matter he is acting qua counsel and not a party. This will also assist counsel to avoid the pitfall of breaching the provisions of Section 115(1) (2) and (4) of the Evidence Act 2011. A word, I think is enough for the wise and prudent counsel to take heed! See Ahmed V. CBN (2013) 45 WRN 25 @ p. 43. See also Josien Holdings Ltd. V. Lormead Ltd. (1995) 1 NWLR (371) 284; Dr.Maja V. Samoris (2002) 7 NWLR (Pt. 765) 178." Per GEORGEWILL,J.C.A (Pp. 16-17 paras. C)"

I am clearly of the considered opinion that learned counsel has by his deposing to the affidavits aforementioned, in an application that he is personally handling, unwittingly turned himself into a potential witness for the applicant. It is indeed an awkward position he has placed himself in. It ought not to be so. It is imprudent.

However, even though the practise is frowned at, there is no provision of statutes or even case law that allows this court to strike out the counter affidavit in issue and I will allow it but counsel should be guided moving forward the said counter affidavit of the applicant lives to die another day.

I must raise suo motu glaring paragraphs of the respondent's affidavit in support of her preliminary objection which appear to be legal arguments and contrary to the Evidence Act.
For this court to ascertain whether these paragraphs contain legal arguments, the court has to consider each paragraph as required by the law. In the apex decision of **ISHAYA BAMAIYI v. THE STATE & ORS (2001) LPELR-731(SC)** per **SAMSON ODEMWINGIE UWAIFO ,JSC (Pp. 26-27, paras. D-C)**

I think the legal position is clear, that any affidavit used in the Court, the law requires as provided in Section 86 and 87 of the Evidence Act, that is shall contain only a statement of facts and circumstances derived from the personal knowledge of the deponent or from information which he believes to be true, and shall not

contain <u>extraneous matter by way of objection, or prayer, or legal argument or conclusion.</u> The problem is sometimes how to discern any particular extraneous matter. The test for doing this, in my view, is to examine each of the paragraphs deposed to in the affidavit to ascertain whether it is fit only as a submission which counsel ought to urge upon the Court. If it is, then it is likely to be either an objection or legal argument. BAMAIYI V. STATE & ORS which ought to be pressed in oral argument; or it may be conclusion upon an issue which ought to be left to the discretion of the Court either to make a finding or to reach a decision upon through its process of reasoning. But if it is in the form of evidence which a witness may be entitled to place before the Court in his testimony on oath and is legally receivable to prove or disprove some fact in dispute, then it qualifies as a statement of facts and circumstances which may be deposed to in an affidavit. It therefore means that prayers, objections and legal arguments are matters that may be pressed by counsel in court and are not fit for a witness either in oral testimony or in affidavit evidence; while conclusions should not be drawn by witnesses but left for the court to reach.

The offensive paragraphs are paragraphs 5(e), (f), and (g) of the Respondents Affidavit in support of her objection:

e. The applicant's parallel motion seeking enforcement of an award filed during the pendency of the respondent/objector's motion for enforcement constitute an abuse of judicial process.

f. That the applicant did not ab initio seek and obtain leave of this Honourable Court ex-parte for the recognition of the award as a judgment of this court before seeking to enforce same.

g. The applicant has not complied with the statutory requirement in bringing an application for the recognition and enforcement of the arbitral award as provided for by the Arbitration and Conciliation Act CAP A 18, Laws of the Federation of Nigeria 2004.

I find that these paragraphs offend section 115(2) of the Evidence Act (as amended) the paragraphs contain legal arguments and are struck out accordingly.

Whenever the issue of jurisdiction, which is both intrinsic and extrinsic to judicial proceedings, arises or is raised in the course of proceedings (at all stages or steps of the judicial ladder), the court before which it arises or is raised has the duty and obligation to consider and determine it first before proceeding with other issues or taking further steps in the case. See ***ADEYEMI V ACHIMU/NDIC (2023) PART 1866 1NWLR P. 583 @ P. 610 PARAS B-D.***

Jurisdiction is the life-wire of a court as no court can entertain a matter where it lacks jurisdiction. The issue of jurisdiction can be raised at any time. See apex decision of ***DAIRO V UBN PLC (2007) 7 SC (PT II) PAGE 97 @ 111 paras 5-10.***

In the apex court decision of ***AUDU V APC (2019) LPLER 48134 SC PAGE 12,*** the court defined jurisdiction thus;

> **"Jurisdiction simply means "a Court's power to decide a case or issue" Black's Law Dictionary 9th Ed. Jurisdiction also refers to "the authority a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision" - Mobil Producing (Nig.) Unlimited V. LASEPA (2002) 18 NWLR (R. 798) 1 SC. Jurisdiction are of various types; substantive jurisdiction refers to matters over which the Court can adjudicate, and it is usually expressly provided by the Constitution or enabling statutes. PAGE 21** PER AMINA AUGIE JSC held thus;
>
> **".... jurisdiction is the pillar under which the entire case stands, therefore, filing an action in a court presupposes that the Court has jurisdiction. However, once the defendant shows that the court has no jurisdiction then the "foundation of the case is not only shaken but is broken. The case crumbles.**

See Okolo V. UBN (2004) 3 NWLR (Pt. 859) 87, wherein Tobi, JSC, added;

"In effect, there is no case before the Court for adjudication. The Parties cannot be heard on the merit of the case. That is the end of the litigation."

In ***EKWEOZOR V REGISTERED TRUSTEES OF THE SAVIOURS APOSTLE CHURCH 2020 SC LPLER 49568 PAGE 16*** the apex court held thus;

"The jurisdiction of a court including the trial court is determined by the plaintiff's claim as disclosed in the writ of summons and/or endorsed in the statement of claim. However, when evidence has been taken before the raising of the issue of jurisdiction, the court may refer to any part thereof necessary. In this instance a reference to the plaintiff's pleadings becomes necessary to clarify any grey areas. See Tukur v Government of Gongola State (NO. 2) (1989) 4 NWLR (Pt. 117) P. 517; Mustapha v Government Lagos State (1987) 2 NWLR (Pt.58) 539; Attorney General Kwara State v Olawale (1993) 1 NWLR (Pt. 272) 645; Adeyemi v Opeyori (1976) 9 - 10 SC 31."

Due to the decisive nature of jurisdiction, it cannot be conferred on or taken away from any court because the parties have agreed or consented to do so. See ***DAIRO V UBN PLC (2007) SUPRA @ 111 PARAS 10-15 and ADEYEMI V ACHIMU/NDIC (supra) P. 618 paras B-C.***

Flowing from the position of the law on jurisdiction, there are conditions which must be satisfied before this court can exercise jurisdiction.

In the recent decision of **PEOPLES DEMOCRATIC PARTY v. CHIEF NDUKA EDEDE & ANOR (2022) LPELR-57480(CA) (Pp. 28-29, paras. E-B),** court held;

"I also agree with the learned counsel, that going by the parameters set by Madukolu vs. Nkemdilim (1962) SCNLR 341,

and followed in Salati vs. Shehu (1986) INWLR (pt. 15) 198 @ 218, that a Court of law can only have and properly exercise its jurisdiction to hear and to determine a case before it where it is satisfied that:

(i.) The proper parties are before the Court.

(ii.) The Court's properly constituted as to its membership and qualification.

(iii.) Where the subject matter of the case is within the jurisdiction and there are no features in the case which prevent the court from exercising jurisdiction.

(iv.) Where the case comes before the Court initiated by due process of the law, and upon fulfillment of any condition precedent to the assumption of jurisdiction."

The present application filed by the applicant is an originating motion brought pursuant to **Sections 31, 51 and 57 of the Act and Order 19 Rule 13 of the Rules.** Seeking the following reliefs;

1. An Order of this Honourable Court recognizing as final and binding, the majority award published on 30th May, 2022 in the arbitral proceedings between the applicant (as claimant) and the respondent (as defendant) by the arbitral tribunal consisting of Chief Bayo Ojo, SAN (presiding Arbitrator), Dr Agada Elachi Esq and Y.C. Maikyau SAN (DISSENTING), and of the same effect as judgment of this Honourable Court.

2. An Order of this Honourable Court granting leave to the applicant to enforce the award published on on 30th May, 2022 in the arbitral proceedings between the applicant (as claimant) and the respondent (as defendant) by the arbitral tribunal consisting of Chief Bayo Ojo, SAN (presiding arbitrator), Dr Agada Elachi Esq and Y.C. Maikyau SAN (DISSENTING), and of the same effect as judgment of this Honourable Court.

The grouse of respondent counsel is two pronged

On issue one,

Whether the applicant's motion filed on the 28th day of November, 2022 seeking to enforce an arbitral award published on the 30th day of May, 2022 already a subject of an earlier proceeding in Suit No: FCT/CV/2694/2022 seeking to set aside the same award does not constitute an abuse of judicial process.

In the affidavit in support of the objection paragraph 5(b) it was deposed that there are already proceedings seeking to set aside the arbitral award between the same parties in suit number **CV/2694/2022 THE ECOWAS COMMISSION V DR MARIANNE J. NGOULLA,** the same parties in this suit Exhibit Ecowas 1, a copy of the proof of service of respondents originating motion seeking to set aside the arbitral award received by the applicant counsel and endorsed on 13th October, 2022 was attached.

The application before this court was filed on 28th day of November, 2022. It is clear even for a blind man that the application to set aside the award is earlier in time than the present application before me.

The crux of the matter is; what is the position of the law in view of these conflicting suits between 2 courts of co-ordinate jurisdiction.

I will turn now to the relevant sections of the ACA;

Sections 31 and 32 of the ACA provides that:

"31. (1) <u>An arbitral award shall be recognized as binding, and subject to this section and section 32 of this Act</u>, shall, upon application in writing to the Court, be enforced by the Court.

(2) The party relying on an award or applying for its enforcement shall supply-

(a) The duly authenticated original award or duly certified copy thereof;

(b) The original arbitration agreement or a duly certified copy thereof.

(3) An award may, by leave of the Court or a judge, be enforced in the same manner as a judgement or order to the same effect.

32. <u>Any of the parties to an arbitration agreement may request the Court to refuse recognition or enforcement of the award.</u>"

It is trite that where a statute is made up of clear and unambiguous words the intention of its makers is best deciphered by assigning the constituent words their grammatical meaning. See ***HON. COMMISSIONER FOR EDUCATION & ORS V. AMADI (2013) LPELR-19907(SC) (PP. 31 PARAS. A-A)***

A community reading of Sections 31 and 32 of the ACA is to the effect that an arbitral award shall be recognized subject to section 31 and 32 of the ACA and

section 32 provides that a party to the arbitration agreement may request the court to refuse recognition or enforcement of the award.

In the instant case, the respondent had filed an application in another court urging the court to refuse recognition of the award Exhibit (Ecowas 1). The applicant before me filed this application to enforce the same award.

Numa SAN relied heavily on the case of **SHELL TRUSTEES (NIG.) LTD. v. IMANI & SONS LTD** supra to argue that the application to set aside the award ought to be taken first before the application to enforce the award.

I have read the case relied on by counsel and it is not on all fours with the case at hand but relevant all the same. In that case, the matter started through a simple mutual agreement entered by both parties for the sole purpose of development of a property in Abuja known as "The United States of America Embassy Project" a serious dispute arose between the parties, which they referred to Arbitration in accordance to the terms of the agreement. An arbitration panel was eventually put in place and an award given on 27/2/98. The respondent (Imani & sons) sought leave to enforce the award in the High Court of the FCT and appellant filed a preliminary objection on the basis amongst others that there was an application to set aside the award before the High Court of Lagos. Saleh CJ of the High Court of the FCT granted leave to enforce the award and dismissed the objections. The appellant aggrieved filed this appeal to the court of appeal. The court in dismissing the appeal held as follows with regard to the existence of 2 applications filed before the high court in Lagos and Abuja one seeking to enforce and one seeking to set aside;

Page 659 paras C-E;

"I must admit that it goes without saying that if there are two applications before a court of law pending side by side one to enforce an award and the other to set it aside the latter shall be taken first. This I think is trite it needs no further authority on it. However those two applications, in the above situation must be pending before the same judge in the same action. In a situation where one application is before a particular judge and another before another court I am afraid the said position cannot apply.

Learned counsel for the respondent maintained that on p.4 of their brief that "where an application to set aside an award and an application to enforce an award are pending before a judge, the ordinary position is that the application to set aside the award should be taken first. However, this principle is

applicable to a situation where both applications are pending before the same Judge in the same action. It is inapplicable where counsel files an application to set aside before another judge in a different action in another jurisdiction after becoming aware of the application to enforce the award. It is the respondent's contention that such circumstances amount to an abuse of process."

Page 659Paras G-H

"Without much ado, I think it is crystal clear that it is wrong for a counsel to file an application to enforce an award before the Abuja High Court and another Counsel to deliberately decide to file an application to set aside the same award in a Lagos High Court. It is not neat at all. This is clearly a multiplicity of actions on same subject matter between the same parties in different courts which is in law an abuse of process and I so hold"

Page 660 paras E-F

"where an application, as in this appeal, for enforcement of the award was pending before an Abuja High Court it is not permitted for any counsel to travel to Lagos High Court or any court in Nigeria in order to file an application to set aside the application to enforce the same award. It is an abuse of process of the court, the court in Abuja is justified to ignore the application."

The facts in the appellate decision relied upon by Numa SAN are certainly not on all fours with the case this court is faced with. However, there are points of similarity. In the appellate decision there were two conflicting applications; the motion to enforce the award was filed first in the Abuja high court, while the motion to set aside the award was filed later in time before the Lagos High court. The motion to enforce the award was granted and upheld at the appellate court.

In the application at hand, the motion to set aside the award was filed first before the High Court of FCT, Court 11 Agbaza J. in Suit No: CV/2694/2022 between THE ECOWAS COMMISSION V DR MARIANE J. NGOULLA on 15th August, 2022 while the motion to enforce the award was filed before the High Court of FCT, Court 57 Nwosu-Iheme J. in suit No CV/620/2022 between DR MARIANE J. NGOULLA V THE ECOWAS COMMISSION on 28th November, 2022 Thus, both cases are distinct as in the appellate decision the application to enforce the award was earlier in time when the appellant went to Lagos to file the application to have the award set aside in another

jurisdiction entirely. See ***THE ADMIN. & EXEC. OF THE ESTATE OF ABACHA V. EKE-SPIFF & ORS (2009) LPELR-3152(SC) (PP. 64 PARAS. D)*** Each case must be determined upon its own peculiar circumstances as no two cases can be identical. They can be similar..."

Both cases are not on all fours but have a similar rallying point being that one party was aware of an application and went ahead to file another application before another court.

It is evident and uncontroverted that the application to set aside the award is first in time and this application to enforce the award is later in time. This application before me is clearly comprised of same parties and same subject matter which is a multiplicity of actions. **The sections 31 and 32 of ACA** are clear, the award cannot be enforced when an application to set aside the award is being sought.

In the apex decision of ***RAZ PAL GAZI CONSTRUCTION LTD V FCDA PART 722 P. 559 @ PAGE 571 PARAS D-E AND G-H*** relied on heavily by counsel to the applicant thus;

> **"If an award was not challenged then it became and was a final and binding determination of the matters between the parties... Once an award has been made and not challenged in court, it should be entered as a judgment and given effect accordingly.**
>
> **The only jurisdiction conferred on the court is to give leave to enforce the award as a judgment unless there is real ground for doubting the validity if the award. In other words if upon an application to enforce the award, the judge finds that the validity of the award is doubtful, he can refuse leave..."**

The next question is if the suit before me is an abuse of process?

In ***UNION HOMES SAVINGS LOAN PLC v. HIGH CHIEF SAMUEL AGBOOLA AKINTAN (2020) LPELR-51201(CA) (Pp. 14-17 paras. A).***

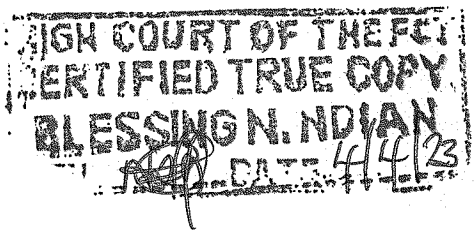
The phrase "Abuse of Process" was defined as the improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope. **See OGBORU & ANOR. VS. UDUAGHAN & ORS. (2013) LPELR 20805 (SC).** The feature of abuse of process of court is the improper use of judicial process by a party in litigation. **See ALLANAH & ORS. VS. KPOLOKWU & ORS. (2016) LPELR 40724 (SC).**

Abuse of court process means abuse of legal procedure or improper use of legal process. In considering whether an action constitutes an abuse of court process, the court is to critically consider the peculiar circumstances of each case in which the issue of abuse of court is raised to determine whether the act of the party complained of constitutes an abuse of court process. In arriving at what would constitute an abuse of court's process, the law has laid down some principle guiding the consideration of whether the process constitutes abuse of Court or not and to sustain the claim of abuse of process, there must co-exist the following:-

(1) Multiplicity of suit between the same opponents; on the same subject matter; and on the same issue. These preconditions are conjunctive.

In **SARAKI VS. KOTOYE (1992) 9 NWLR (PT. 264) 156,** the Supreme Court had this to say: "The multiplicity of action on the same subject matter between the same parties even where there exist a right to bring the action, is regarded as an abuse. The abuse lies in the multiplicity and manner of exercise of the right, rather than the exercise of the right per se. It further thus: "The abuse consists in the intention, purpose and aim of the person exercising the right to harass, irritate and annoy the adversary and interfere with the due administration of justice such as instituting different actions between the same parties simultaneously in different Courts, even though on different ground". See also **OYEYEMI & ORS. VS. OWOEYE & ANOR (2017) LPELR 42903 (SC); CPC & ANOR. VS. OMBUGADU & ANOR. (2013) LPELR 21007 (SC) and NWOSU VS. P.D.P. & ORS. (2018) LPELR 44 386 (SC).**

A Court is enjoined by law to examine each case predicated on its facts and circumstances in order to ascertain if it displays an abuse of Court process or not.



It is clear that the application before me presently in view of the matter already before my learned brother Hon. Justice Agbaza amounts to an abuse of court process.

Based on the facts and circumstances before me, I resolve issue one, it is hereby answered in the affirmative and in favour of the respondent.

On issue 2, the grouse of the respondent is that applicant seeking enforcement of an arbitral award ought to have first sought and obtained the leave of court ex-parte for recognition as a judgment of the court before filing its motion on notice for enforcement straight and it is incompetent.

Section **31 (3) of the ACA** which provides that:

> **"An award may, by leave of the Court or a judge, be enforced in the same manner as a judgement or order to the same effect."**

Furthermore, **Order 19 Rule 13 of the Rules** provides that:

> "***13. (1) An application to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made ex-parte, but the court hearing the application may order it to be made on notice."***

Counsel argued that before an application for the enforcement of an award can be validly commenced before this court, the applicant must have obtained the leave of this Honourable court ex-parte to recognize the award as a judgment of the court before proceeding with enforcement. Thus, leave of this court is a requisite condition precedent the applicant must fulfill before he can validly commence this suit seeking the recognition and enforcement of the award.

The argument here is two-pronged one is that leave of court is needed to enforce the award, and two that the applicant needed to have filed the application exparte.

Section 31(3) of the ACA makes requirement for leave of court to enforce the award and I agree with the counsel citing the case of **TULIP (NIG.) LTD. v. N.T.M.S.A.S. (2011) supra. P. 288 paras F-G and RAS PAL GAZI CONSTRUCTION COMPANY LIMITED V FEDERAL CAPITAL DEVELOPMENT AUTHORITY (2001) 10 NWLR PART 1237 PAGE 559 @571 PARAS G-H.**

On the face of the motion paper, prayer 2 in the reliefs states;

> An Order of this Honourable Court granting leave to the Applicant to enforce the award published on 30th May, 2022 in the arbitral proceedings between the Applicant (as claimant) and the Respondent (as defendant) by the arbitral tribunal consisting of Chief Bayo Ojo, SAN (presiding arbitrator), Dr Agada Elachi Esq and Y.C. Maikyau SAN (DISSENTING), and of the same effect as judgment of this Honourable Court.

This is clearly a prayer for leave to enforce the award and it is in conformity with the requirements of the ACA and the case law the argument of counsel to the applicant succeeds on this point and I so hold.

On the requirement to file an exparte application;

I have considered the argument of the learned silk and I have taken a cursory look at the provisions of the law and the originating motion filed before me, the applicant came by way of motion on notice. The rules of the court reproduced above state clearly that an application to enforce an award may be made ex-parte but the court upon hearing the application may order that it be made on notice. The word used is "may". This does not denote compulsion "Generally the word 'May' always means 'may'. It has long been settled that may is a permissive or enabling expression. In **Messy v. Council of the Municipality of Yass (1922) 22 S.R.N.S.W. 494 per Cullen, C.J at pp.497, 498** it was held that the use of the word 'may' prima facie conveys that the authority which has power to do such an act has an option either to do it or not to do it. See also Cotton, **L.J. in Re Daker, Michell v. Baker (1800) 44 CH.D 282.** But it has been conceded that the word may acquire a mandatory meaning from the context in which it is used. **See Johnson's Tyre Foundary Pty Ltd. v. Shire of Maffra (1949) A.L.R. 88.see*EDEWOR V. UWEGBA & ORS (1987) LPELR-1009(SC) (PP. 45-46 PARAS. B-B).***

I find that the application filed before this court need not come by way of an ex-parte application as that is **NOT** the only option available to the applicant.

The last grouse of the respondent is that the applicant failed to attach original or certified true copies of the arbitration agreement sought to be relied upon for enforcement of the award

Section 32(2) of the ACA provides;

> **(2) The party relying on an award or applying for its enforcement <u>shall</u> supply;**

(a) The duly authenticated original award or duly certified copy thereof•

(b) The original arbitration agreement or a duly certified copy thereof.. '

I have gone through the originating motion; paragraph 7 of the affidavit in support of the motion has attached Exhibits A1, A2 and A3. The three consultancy contracts entered into between the claimant and the respondent are not certified or the originals attached. This is clearly a condition precedent for the filing of the application before me. A condition precedent to instituting an action simply delays the right of a party to approach a court for redress in establishing his right to the happening or occurrence of an event. This means that until the event happens, an aggrieved party cannot rush to court, that is to say, the door of the court room will be closed to such a person. It is after the event has happened that the closed court room will be open for the party. This is what condition precedent means. **See FBN V. KOLO 2021 LPLER 56082 (PP. 87-88 PARAS. A).**

Counsel relied on the case of ***A.S.T.C. v. QUORUM CONSORTIUM LTD (2004) 1 NWLR (PT. 855) 601 @ PG. 631 PARAS. G-H, that where a special procedure is prescribed for enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is fatal to the enforcement of the remedy.***

The non-compliance to section 32(2) is fatal to the application and I so hold.

Also, Order 19 Rule 13(1) of the Rules provides;

(1) An application to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made ex-parte, but the court hearing the application may order it to be made on notice.

(2) The supporting affidavit shall-

a. Exhibit the arbitration agreement and the original award or in either case certified copies of each.

The high court rules also provided a mandatory provision for the commencement of the application to enforce the award and the use of the word "shall" connotes compulsion on the part of the party to perform the act.

Rules of Court must be complied with, observed and obeyed and that non-compliance attract the sanction of incompetency, striking out or dismissal as

the case may be ***ADESOLA & ANOR V. FALADE-FATILA & ORS (2014) LPELR-23800(CA) (PP. 28 PARAS. B)***

Issue 2 is resolved in part in favour of the respondent.

I find merit in the preliminary objection and find that in the instant case, the appropriate order to make in view of the surrounding circumstances is a striking out of the application for recognition and enforcement of the arbitral award.

This application is hereby struck out.

HON. JUSTICE NJIDEKA K. NWOSU-IHEME
[JUDGE]

Appearance of Counsel:

1. B. B DAUDU with A.A Oni for Applicant
2. M. J. NUMA SAN with Emmanuel C. Sogo for Respondent