3PLR – BENDEX ENGINEERING CORPORATION & ANOR. V. EFFICIENT PETROLEUM NIGERIA LTD

BENDEX ENGINEERING CORPORATION & BEN NWOSU

V.

EFFICIENT PETROLEUM NIGERIA LTD

COURT OF APPEAL

(ENUGU DIVISION)

CA/E/46/99

MONDAY, 13TH NOVEMBER

3PLR/2000/45 (CA)

OTHER CITATIONS

8 NWLR (Pt 715) 333

BEFORE THEIR LORDSHIPS:

SULE AREMU OLAGUNJU, JCA (Presided and Read the Lead Judgment)

JOHN AFOLABI FABIYI, JCA

MUSA DATTIJO MUHAMMAD, JCA

REPRESENTATION

B. Daudu, ESQ, SAN., with J. A. E. Onuorah, ESQ., and Miss U.N. Agomoh – for the Appellants

Dr. J. O. Ibik, SAN, ESQ. with M\ V. C. Ozuko. ESQ., – for the Respondent

MAIN ISSUES

PRACTICE AND PROCEDURE – ARBITRATION- Arbitrator – Appointment of-Procedure for under section 7(2) and (3) – Arbitration and Conciliation Act – When section 7(2)

and 93) applicable

PRACTICE AND PROCEDURE – ARBITRATION – Arbitrator – Appointment of-Ouster of right of appeal in respect of appointment under section 7(4), Arbitration and Conciliation Act – Scope of-How construed vis-à-vis constitutional right of appeal

PRACTICE AND PROCEDURE – APPEAL – Brief of argument – Respondent's brief-New point raised therein – Duty on appellant to file a reply brief-Failure so to do – Effect

PRACTICE AND PROCEDURE – APPEAL – Ground of appeal- Ground from which no issue arises – How treated

PRACTICE AND PROCEDURE – APPEAL – Issue for determination – Issue arising from an incompetent ground of appeal- Effect

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION -Arbitration and Conciliation Act, section 7(4) – Ouster of right of appeal thereunder against appointment of arbitrator – How

PRACTICE AND PROCEDURE – APPEAL – Right of appeal- Forfeiture of-Attitude of court thereto

MAIN JUDGEMENT

OLAGUNJU, JCA: (Delivering the Lead Judgment):

The appeal is against the ruling delivered on 11/12/98 by Kassim, J., of the Enugu Judicial

Division of the Federal High Court, appointing arbitrators at the instance of the respondent to look into the dispute between her and the appellants arising from an agreement between the respondent and the 1st appellant, the negotiation and execution of which the 2nd appellant facilitated.

The agreement was in pursuance of a business venture during the negotiation of which the 2nd appellant, who was based in the United States of America (U.S.) introduced the 1st appellant to Chief Enemour, the Managing Director of the respondent, for the purpose of exploring the possibility of establishing locally water processing and bottling technology, which is the specialty of the 1st appellant in the U.S. The culmination of the business exploration by the parties was the signing of a Joint Venture Agreement, Exhibit' A', leading to the incorporation on 18/4/96 of a company registered locally as 'Efficient Bendex Industries Ltd.' for the purpose of manufacturing and distributing bottled spring water, the concluding clauses of the agreement providing as follows:

” Arbitration

All disputes, controversies, differences which may arise between the parties out of or in relation of (sic) or in connection of (sic) this agreement or the interpretation, or construction of this agreement shall be settled in accordance with the rules of reconciliation and arbitration of the accordance (sic)

International Chamber of Commerce.

The award shall be final and binding upon both parties.”

It is common ground that two other agreements, viz Sales Agreement with Supplementary Agreement and Technical Management Agreement were also executed by the parties contemporaneously with the incorporation of the Efficient Bendex Industries Ltd. It is also common ground that on 1/2/96, the respondent, acting through a solicitor, wrote to the appellants, accusing them of breach of the Joint Venture Agreement and notifying them of repudiation by him of the Agreement and demanding nomination by the appellants within 15 days of an arbitrator to look into the dispute.

There was no reply to the respondent’s demands and on 11/5/98, the respondent filed an originating motion before the court below, praying the court to appoint an arbitrator to look into the dispute arising from the execution of their Joint Venture Agreement. The appellants raised a , preliminary objection to the joinder of the 2nd appellant and filed a counter- affidavit in opposition to the respondent’s application. The preliminary objection was overruled and the learned trial Judge granted the respondents prayer and appointed arbitrators. Against that order, learned Senior Advocate for the appellants filed 5 grounds of appeal, from which he formulated the following two issues in the appellants’ brief of argument:

“1. Whether the 2nd appellant, Ben Nwosu, can be said to be a proper party to the proceedings, in spite of his not being a party to any of the agreements, particularly Exhibit “A” and if answered negatively, whether his name should not have been struck off the proceedings?

2. From all the materials i.e. affidavit in support o respondent’s motion, Exhibits A – F, further and better affidavit placed before the Federal High Court, whether there was any factual or legal basis to have ordered arbitration and appointed arbitrators in the matter?”

Learned Senior Advocate for the respondent also framed three issues, the third of which is challenging the competence of the appellants’ 5th ground of appeal while, technically, issue two thereof is also challenging the 2nd ground of appeal and issue one in the appellants’ brief of argument formulated from that ground. I will examine the two objections later after I would have disposed of the preliminary objection to the competence of the ..appeal as a primary matter. Notice of the preliminary objection was given:

by the respondent on 17/11/99 in which the grounds for the objection were stated as follows: ‘

“(a) The ruling of the court below at pages 88 to 101 of the record appointing arbitrators in the above proceedings is not appealable. Section 7(4) Arbitration and Conciliation Act. Cap 19 Vol. 1, Laws of the Federation of Nigeria 1990.

(b) Appeal against any decision is tenable only if the right to do so is conferred by statute. .’

(c) The respondents acting by their counsel J. A. E. Onuorah , Esq. ” – holding brief of J. B. Daudu, Esq., SAN, nominated persons for appointment as arbitrators in the proceedings of the lower court on 11/12/98 – (page 115 of the record omitted)”.

Notice of the preliminary objection was also given in the respondent’s brief of argument but without offering any argument. However, in oral argument during the hearing of the appeal, learned Senior Advocate for the respondent made a brief submission that the essence of sub-section 7(4) of Arbitration and Conciliation Act is that in an application for arbitration the decision of the court to which the application is made is not appellable regardless of whether an appointment was made or the application was refused. Debunking the argument, Miss U. N. Agomoh, who adopted the brief filed by J. B. Daudu, Esq., SAN., for the appellants, contended that from the notice and grounds of appeal filed by the appellants and the issue formulated from the grounds, the appellants’ complaints are not based on section 7 of the Arbitration and Conciliation Act and urged the court to discountenance the objection by the learned Senior Advocate.

Notwithstanding the terseness of the submission of learned counsel for the appellants; there is some force in the argument whether the appellants’ complaints against the decision of the court below, as manifested by a union of the grounds of appeal filed and the issues formulated from the grounds, are about section 7 of the Arbitration and Conciliation Act to bring in the operation of sub-section 7(4) of the Act that makes the decision reached on certain matters to be non-appellable. This calls for an examination of the five grounds of appeal and the issues framed from them for determination as a set-off against section 7 of the Act with a view to highlighting the affinities between the issues raised by this appeal and non-appellable matters stipulated by section 7 of the Act.

Ground of appeal No.2 without the particulars complains about the joinder of the 2nd appellant in the action which is broadened out by ground 1 canvassing whether the learned trial judge came to a right decision in basing his finding about the joinder of that appellant on the joint Venture Agreement that had become spent at the time the respondent’s action was instituted. Ground 3 is taken up with the wrong construction of the arbitration clause in the Joint Venture Agreement as regards the applicable procedure for regulating the parties’ dispute leading to the court below ignoring the International Chamber of Commerce Arbitration Rules expressly mentioned in the

arbitration clause in the Agreement in preference for section 7 of the Act, which is not mentioned in the Agreement. Ground 4 complains about granting the respondent's reliefs on an inadequate evidence while the grouse in ground 5 is appointing arbitrators on the date the case was fixed for ruling on the matters earlier canvassed and not for appointment of arbitrators as the court below did.

On the related issues for determination, which must De framed from the grounds of appeal, issue 1 is canvassing whether the 2nd appellant can be said to be a proper party to the respondent's action at the court below, which is expressly stated by the appellants to be formulated from ground 2.

Issue 2 agitating whether there was any factual or legal basis for ordering appointment of arbitrators and for making the appointment is framed from grounds 3 & 4 on which ground 1 has a marginal impact.

Within the framework of section 7 of the Arbitration and Conciliation Act, whether a decision is appellable or not must be tested against sub- section 7(2) & (3) thereof by reference to which sub-section 7(4) delimits non-appellable matters. Sub-section 7(2) & (3) relates to the procedure for appointing an arbitrator where such procedure is not stipulated in the parties' agreement and did not provide the method of curing defaults arising from the conduct of the arbitration. The material parts of the two sub-sections read:

"(2) Where no procedure is specified under sub-section (1) of this section (a) in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third so however that:

(i) if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so by the other party; or

(ii) if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement;

(b) in the case of an arbitration with one arbitrator where the parties fail to agree on the arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement made within thirty days of such disagreement.

(3) Where, under an appointment procedure agreed upon by the parties:

(a) a party fails to act as required under the procedure; or

(b) the parties or two arbitrators are unable to reach agreement as required under the procedure; or

(c) a third party, including an institution, fails to perform any duty imposed on it under the procedure, any party may request the court to take the necessary measure, unless the appointment procedure agreed upon by the parties provides other means for securing the appointment.

(4) A decision of the court under sub-sections (2) and (3) of this section shall not be subject to appeal."

From the reading of those provisions, it is manifest that sub-section 7(2) deals with a situation where no procedure for appointing an arbitrator is specified in the parties' agreement while sub-section 7(3) covers a situation where under the appointment procedure agreed upon by the parties, there is default on the part of one of the parties or a third party to act or where the parties or two arbitrators fail to reach an agreement, in either event, an alternative formula to resolve the deadlock is provided. If those are the two types of decisions under the Arbitration and Conciliation Act from which an appeal to a higher court is barred, how far can the two issues formulated for resolution in the appellants' brief of argument reproduced above, be said to come within the ambit of the dispute for which sub-sections 7(2) & (3) of the Act provide a formula for resolution?

Issue I agitating the propriety of the joinder of the 2nd appellant in the action does not touch on the appointment procedure as the focus of that issue is whether one who is not a party to an agreement can be held to be a party to the dispute arising from the agreement. Issue 2, which is nebulous, traverses the whole gamut of the factors which the learned trial Judge took into consideration in exercising his discretion to appoint arbitrators. This is a far cry from a complaint about the procedure for appointing arbitrators laid down by sub-sections 7(2)& (3) of the Act to provide occasion for the invocation of sub-section 7(4) thereof.

True enough, sub-section 7(4) of the Arbitration and Conciliation Act renders non-appellable certain proceedings on the appointment of arbitrators, yet the provisions are explicit about the scope of the matters coming within its purview and is not intended as a blanket deprivation of the right of appeal on any matter touching on arbitration. Deprivation of the right of appeal is confined to the question of appointment procedure as specified in sub-sections 7(2) & (3) of the Act. Therefore, to invoke the provision of sub-section 7(4), the court must first be satisfied that the grounds of appeal and issues formulated from the grounds relate to appointment procedure as laid down by sub-sections 7(2) & (3) and not just matters that are peripheral to those specified therein.

The fact that learned counsel for the appellants nominated persons for appointment as arbitrators shortly after the court's ruling was delivered on 11/12/98, is particularly noteworthy as showing that any complaint touching on sub-section 7(2) of the Act cannot be made a ground of appeal since the parties had voluntarily agreed on the composition and membership of the arbitration, which the court endorsed. Similarly, the occasion for any of the contingencies envisaged by sup-section 7(3) not having arisen, a recourse to the provisions of that sub-section to satisfy the disqualification from appealing imposed by sub-section 7(4) is illusory and short-sighted.

The result is that the two limbs of section 7 of the Act which sub-section 7(4) thereof prescribed as conditions precedent to a disqualification from exercising any right of appeal having been shown not to be part of the appellants' complaint in this appeal, that sub-section is an empty shell for the purpose of disqualification from appeal on the decision of the trial court and its invocation as a preliminary objection to the competence of this appeal is hollow and a mirage.

In conclusion, let me say with emphasis that forfeiture of the right of appeal is a serious matter beyond the mere gambit of a preliminary objection as a daunting ploy calculated to stun an opponent as the right of appeal is a constitutional right: see Eze vs. Ejelonu (1999) 6 NWLR (Pt. 605) 134, 142 -143; and Ibrahim vs. Balogun (1999) 7 NWLR(Pt. 610) 254, 266. Without getting involved in doctrinal debate on the constitutional implications of sub-section 7(4) of Arbitration and Conciliation Act, which is outside the scope of this appeal, I feel impelled to note in passing the approach to the interpretation of legislation on the deprivation of right such as sub-section 7(4) of the Act. Particularly instructive is the principle that any legislative provision which seeks to deprive the citizenry of his rights, be they personal or proprietary rights, must be interpreted fortissime contra-preferentes, i.e. strict construction against the person relying on the power of deprivation.

See Belfo vs. The Diocesan Synod of Lagos (1973) 1 ALL NLR (Pt. 1) 247, 268; Erekuvs. Military Governor of Mid-Western State (1974) I ALL NLR (Pt. II) 163, 170 – 171; Peenok Investments Ltd. vs. Hotel Presidential Ltd. (1982)]2 SC],25 – 26; and Din vs. Attorney-General of the Federation (1988) 4 NWLR (Pt. 87) 147, 184 – 185.

Applying that principle to the interpretation of sub-section 7(4) of the Arbitration and Conciliation Act, the court must limit itself severely to the condition laid down by that sub-section, which is exclusion from appeal of only matters relating to procedure for appointing an arbitrator as specified by sub-sections 7(2) & (3) thereof, an occasion which can only arise where the grounds of appeal and the issues formulated from the grounds complain about such matters. The court cannot be cajoled to take liberties with the mere form of the prohibition to wander outside the matters defined by sub- section 7(4) as the limits of the matters expressly excluded from appeal. " Therefore, on the facts of this case and the applicable principles of law, objection to the competence of this appeal by learned Senior Advocate for the respondent is on a sticky wicket. It lacks merit and I overrule it.

As I noted earlier, learned Senior Advocate for the respondent challenged the competence of the 5th ground of appeal, contending that as no issue is formulated from that ground by the appellants it is, in law, deemed abandoned and he urged me to strike out the ground. Learned Senior Advocate for the appellants, who filed no reply brief, must be deemed to have conceded the point: see Rules 5 and 10 of Order 6 of the Court of Appeal Rules, 1981, and Okoye vs. Nigerian Construction and Furniture Co. Ltd, (1991)6 NWLR (Pt. 99)501, 533 – 534; and Popoola vs. Adeyemo (1992) 8 NWLR (Pt. 275) 1,32. hi any case, a careful perusal of the 2 issues formulated by the appellants and

their 5th ground of appeal shows that the complaint in that ground of appeal is not part of the 2 issues framed by the appellants, it has been held that a ground of appeal from which no issue is distilled is deemed to have been abandoned: see Atunrase vs. Phillips (1996) 1 SCNJ 145, 154; Josiah Cornelius Ltd. v. Ezenwa (1996) 4 SCNJ 124, 138; and Comex Ltd vs. Nigeria-Arab Bank Ltd. (1997) 4 SCNJ 38, 52. Therefore, I strike out ground 5.

Next is issue one in the appellants' brief of argument reproduced elsewhere in this judgment. It is formulated from ground 2 in the notice of appeal which, with the particulars of error, reads:

"2. ERROR IN LAW

The learned trial Judge erred in law when he failed to strike out the name of the 2nd appellant from the suit when it was clear that Exhibit "A", the joint venture agreement relied upon by the court in construing the arbitration clause, did not contain the said 2nd appellant as a party.

PARTICULARS OF ERROR

1. Clear submissions were made to the court below on the undesirability and unlawfulness of having the 2nd appellant as a party to the proceedings but the learned trial Judge failed to make a categorical pronouncement thereon.

1. It is apparent that the 2nd appellant was not a party to the defunct joint venture agreement and his name ought to have been struck out."

Arguing the issue which is later met by issue two in the respondent's brief of argument, learned Senior Advocate for the appellants began with a review of the objection raised at the court below to the joinder of the 2nd appellant against whom he argued that no cause of action was disclosed because he was not a party to the agreement between the respondent and the 1st appellant. In support of his argument, he reproduced the material part of the ruling of the learned trial Judge overruling the objection, holding that the 2nd appellant was properly joined in the action. He further reproduced the commencement and execution clauses of the Joint Venture Agreement between the 1st appellant and the respondent to test the finding of the court below which he submitted is perverse 'because it is not supported by any of the facts put before the court by the respondent'. He concluded that, it is settled law that only a person who is a party to an agreement can sue or be sued on it, citing in support the Supreme Court's decision in Kano State Oil and Allied Products Ltd. vs. Kola Trading Co. Ltd. (1996) 3 NWLR (Pt. 436) 244, 262, and the earlier decision of this court in Nigeria LFN Ltd. vs. African Development Insurance Co. Ltd. (1995) 8 NWLR (Pt. 416) 677,693, and urged the court to resolve the issue in the appellants' favour.

Replying, learned Senior Advocate for the respondent attacked the submissions made on behalf of the appellants on two prongs, viz (a) unilateral change of the title of the case in the notice of appeal and subsequent appellate processes and (b) incongruity

between the complaints in the ground of appeal and the particulars of error, on the one hand, and the issue formulated from the ground and the arguments proffered to substantiate the issues on the other.

On the change in the title of the cases, the learned Senior Advocate drew attention to the record of appeal, showing that from the inception of the case up to the ruling of the court below on 11/12/98 'Ben Nwosu', the 2nd appellant, was the 1st respondent in the action constituted by the respondent, as the appellant in the originating motion. But in the notice of appeal filed by the appellants and other processes filed subsequently, the order of the parties in the appeal was reversed by making Ben Nwosu, the 2nd appellant. On that alteration, the learned Senior Advocate submitted that unilateral reversal of the position of the parties in an action without an order of the court is susceptible to confusion and, therefore, improper. On the discord between the ground of appeal and the particulars of error and between the issue formulated for determination and the arguments offered to verify the issue, particularizing the conflict, the learned Senior Advocate contrasted the complaint in the ground of appeal, which is failure of the learned trial Judge to strike out the name of the 2nd appellant with the 1st particulars of error thereof which identified the complaint as failure of the learned trial Judge to make a categorical pronouncement on 'the undesirability and unlawfulness of having the 2nd appellant as a party to the proceedings'. The learned Senior Advocate who contended that the grouse of the appellants is the one contained in the 1st particulars of error submitted that as there is no scintilla of argument in the appellants' brief relating to failure of the court below to make a categorical finding or pronouncement on the matter, the complaint should be deemed to have been abandoned. He further referred to the submission by learned counsel; for the appellants that the finding of the court below that the 2nd appellant is a proper party to the action is perverse. This, the learned Senior Advocate contended, stands in antithesis to the complaint in ground 2 and submitted that as the argument raised in support of the issue formulated is not related to any complaint in the ground of appeal, the point canvassed goes to no issue and urged the court to strike out issue one in the appellants' brief of argument or discountenance the issue.

Again, the question of contrariety between the ground of appeal and the particulars of error on which the ground is founded and between the issue formulated from the ground and the arguments canvassed in support of the issue is a new point raised in the respondent's brief of argument.

Because of the importance of the new point on the competence of the ground of appeal and the issue formulated from the ground there ought to be a reply filed by the appellants. The appellants did not file a reply brief and must, therefore, be deemed to have conceded the new point raised in the respondent's brief of argument. See Rules 5 & 10 of Order 6 of the Court of Appeal Rules, 1981, and Okoye vs. Nigerian Construction and Furniture – Co. Ltd. (supra) and Popoola vs. Adeyemo (supra); Orah vs. Nyam (1992) 1 NWLR(Pt. 217) 279, 287; and Nyambi vs. Osadim (1997) 2 NWLR (Pt. I485) 1, 8.

On a practical plane, independently of the technical ambush in which issue one is caught, the contradiction between the ground of appeal and the 1st particulars of error thereof has confounded the complaint in that ground which becomes unintelligible. Since the essence of a ground of appeal is to define the complaint against the decision being appealed against, it is well- nigh impossible to comprehend what the exact complaint about the decision under review is, i.e. between the ground of appeal lamenting failure of the learned trial Judge to strike out the 2nd appellants name from the suit because he was not a party to the agreement giving rise to the dispute and the 1st particulars of error thereto protesting failure of the trial Judge to make a categorical pronouncement on the submission to him about 'the undesirability and unlawfulness' of retaining the 2nd appellant qua the 1st respondent as a party to the proceedings of the court below.

It must be stated as a general proposition that since an issue must be formulated from a ground of appeal representing the broad outline of the complaint against the decision being challenged, there must be a correlation between the two in the sense that the kernel of complaint in the ground of appeal must be mirrored by the issue formulated from the ground as the medium of dissecting and manifesting the entire plenitude of the complaint.

A situation in which the ground of appeal with the 2nd particulars of error is complaining of one thing and the 1st and main particulars of error which are supposed to amplify but must echo the ground are moaning about a different matter is an obvious discord that leaves the thread of the complaint in tatters.

From the babel of harangue in that ground of appeal, no intelligible issue can be formulated on the principle that where the factual basis of the ground of appeal does not exist, no issue can be formulated for resolution of the dispute: see Alakija vs. Abdullai (1998) 5 SCNJ I, 18. The same thing is also true of a ground of appeal that is enmeshed in factual discordance such as ground 2 of the present appeal in which the ground of appeal and the particulars that should be in tandem are at cross-purposes or, generally, where a ground of appeal is based on fallacious factual premise.

The corollary is that issue for determination in an appeal must arise from a competent ground of appeal such that where a ground of appeal is incompetent, the issue formulated from the ground is ipso jure, incompetent.

See Ayisa vs. Akanji(1995) 7 SCNJ 245,253; Ogoyi vs. Umagba(1995) 10 SCNJ 55, 62 – 63; Tsokwa Motors Nigeria Ltd. vs. Union Bank of Nigeria Ltd. (1996) 9 – 10 SCNJ 294, 299 – 300; Mark Kele vs. Nwerekere (1998) 3 SCNJ 84, 89; Shuaibu vs. Nigeria-Arab Bank Ltd (1998) 4 SCNJ 109, 118 – 119; and Agbaka vs. Amadi (1998) 7 SCNJ 367, 374.

In view of the foregoing, the objection of learned Senior Advocate for the respondent to the competence of ground of appeal No. 2 is well- taken. The ground is at variance with the 1st and main particulars of error thereof and, therefore, defective. I strike it out. I

also strike out issue one in the appellants' brief of argument, which is formulated from the defective ground of appeal. In consequence, the question of whether argument on the defective issue is antithetical to ground 2 of the appeal becomes superfluous.

But to indicate a clear leaning on the matter, I must express reservations about the contention of learned Senior Advocate for the respondent that the argument in the appellants' brief runs counter to the issue formulated from ground 2 because the complaint in the 1st particulars of error in that ground represents the correct opinion between the two versions. The contention is, with respect, based on a shaky premise. The conclusion that ground 2 is defective because it is at variance with the 1st and main particulars of error thereof does not offer a choice between the conflicting versions of the complaint against the decision on appeal, both of which are alike specious. Therefore, any inference about the correct version of the complaint based on a hunch or drawn a priori wilt be tantamount to speculation to which a judicial inquiry is allergic instance of juridical revulsion against which was manifested by Ivienagbor vs. Bazuaye (1999) 6 SWNJ 234, where the Supreme Court, Per Uwaifo, JSC, at pages 243 – 244, cautioned that. "…speculation is a mere variant of imaginative guess which, even where it appears plausible, should never be allowed by a court of law to fill any hiatus in the evidence before it."

A similar disapproval was expressed by the same court in Long- John vs. Blakk(1998) 5 SCNJ 68,89; and Orhue vs. NEPA (1998) 5 SCNJ 126,]40. By assuming that the main particulars of error in ground 2 represent the correct version of the conflicting complaint, learned Senior Advocate for the respondent was making a value judgment. That brings to nought his submission that the argument in the appellants' brief is inconsistent with ground 2 and the issue formulated from it~ a debate which, in the light of the conclusion reached on other material points, is superabundant.

On the change of title of the suit argued as an introductory part of issue two on pages 10 to 11 of the respondent's brief of argument, learned Senior Advocate for the respondent is also right that it is improper for the appellants to alter unilaterally the title of the suit between the conclusion of the case and the filing of the notice of appeal without leave of the court.

But that will leave none the wiser whether taking further steps in the appellate proceedings by the respondent after becoming aware of the irregularity before protesting may not amount to a waiver of the irregularity as exemplified by Onyekwe vs. The State (] 988) 2 SCNJ (Pt. II) 354, 359; and Saude vs. Abdullahi (]989) 4 NWLR (Pt.]]6) 387, and within the general principles enunciated in Ariori vs. Elemo (1983) 1 SCNLR 1; and Odu 'a Investment Co. Ltd vs. Talabi (1997) 7 SCNJ 600, 650- 65] & 654. Be that as it may, I uphold the objection of learned Senior Advocate for the respondent and by way of recapitulation, I strike out ground of appeal No. 2 and the issue for determination distilled from the ground. That leaves the appellants with only issue two for determination.

Learned Senior Advocate for the appellants, Mr. J .B. Daudu, crammed so many points into issue two, which he aptly described as 'an agglomeration of all the points raised in' grounds of appeal], 3 and 4, some of which are strained and away from the theme of the issue for determination, the kernel of which is 'whether there was any factual or legal basis to have ordered arbitration and appointed arbitrators in the matter'. I will examine the points in turn. On the particular agreement over which the dispute arose, Mr. Daudu attacked the finding of the learned trial Judge which he argued isolated for consideration the Joint Venture Agreement, to be contracted in subsequent references to 'JVA', when there are other agreements attached to the respondent's originating motion that are relevant and inextricably part of the application. He referred to the statements of law on the matter in vol. 2 of the 4th Edition of Halsbury s Laws of England, paragraph 522 thereof, that where a dispute is to be submitted for arbitration, the court must consider whether there is any valid agreement providing for reference to arbitration and whether the dispute before the court is within the scope of the agreement permitting a reference. He further referred to the scope of the JVA as formulated by him which he submitted is (a) for acquisition of foreign partner for the purpose of producing spring water, treatment and bottling and (b) to establish jointly with the foreign partner an indigenous company to be incorporated under the Nigerian law.

The learned Senior Advocate argued that with the establishment of 'Efficient Bendex Industries Ltd.', the purpose for which the JVA was created had been satisfied on the principle in Gunter Henck vs. Andre & Cie S. A. (1970) I Lloyd's Rep. 235. He further argued that 2 other agreements, the Technical Management Agreement and the Sales Agreement, entered into for the promotion of the joint venture, were between the 1st appellant and Efficient Bendex Industries Ltd. He submitted that as those agreements were entered into by Efficient Bendex Industries Ltd. and 'other organisations', it is the former company and not the respondent that should complain about any breach of or dispute arising from the agreement. The upshot of the arrangement, according to the learned Senior Advocate, is that the respondent has no locus standi to bring the application for appointment of arbitrators in buttress of which he referred to Ogbuchi vs. Governor of lmo State (1995) 9 NWLR (Pt. 417) 53,55, and Okafor vs. Asoh (1999) 3 NWLR (Pt. 593) 35,54 – 55 & 57.

Countering the arguments of Mr. Daudu, Dr. J. O. Ibik, learned Senior Advocate for the respondent, contended that the respondent's application for appointment of arbitrators is rooted in the JV A. referred to in paragraph II of the respondent's affidavit supporting the originating motion at the lower court. That point, he argued, is not denied in the appellants' counter- affidavit; that, on the contrary, the existence of the agreement is acknowledged by paragraph 3(i) of the, counter-affidavit. On the argument that the learned trial Judge erred in holding that only the JVA was relevant to the dispute on arbitration, the learned Senior Advocate submitted that the materiality of the other documents annexed to the respondent's motion paper must be determined solely by, the main prayer in the motion paper.

As regards the related points, he contended that it is erroneous to argue that the JV A. has outlived its purpose and, therefore, metamorphosed into Sales and Management Agreements because (,a-) no time-limit for the efficacy of the JVA is therein stated, (b)clause 4 of the agreement stipulates 3-year period in future for the refund of the loan therein envisaged, (c) clause 4: imposed on the 1st appellant responsibility for the selection, installation and commissioning of the water-bottling plant and (d) the Sales Agreement execute on 26/2/96 is a pre-incorporation agreement which is not binding on the Joint Venture Company incorporated on 18/4(96 as Efficient Bendex Industries Ltd.

On the question of Iocus standi, Dr. Ibik argued that since the JVA to which the respondent is a party still subsists and is not superseded by other agreements entered into by Efficient Bendex Industries Ltd. with others to which the respondent is not a party, the submission that the respondent has no locus standi to institute the action before the court below is erroneous.

He referred to the averments in paragraphs 17 and 26 of the respondent's affidavit on the misrepresentation which induced the execution of the JVA 1 and the respondent's outlay on the project to underscore the respondent's right under the contract and impliedly the right to seek a redress for any wrong arising from the agreement; more so, when the respondent has given to a clear notice to repudiate the agreement. On that score, the learned Senior Advocate dismissed reference to the decision in Okafor vs. Asoh (supra), as patently Inappropriate to the facts of the case on appeal.

The scope of the points canvassed by Learned Senior Advocate for the appellants about the control and span of life of the JVA that bounced back on the capacity of the respondent to institute an action on a dispute arising from the joint venture established by the JVA which has been elongated by the finer points of legalism put on the debate can be contained within a narrow compass. The argument of learned Senior Advocate for the appellants that the JVA had become spent and superseded by other agreements cannot withstand the logic of the rejoinder by learned Senior

Advocate for the respondent which settles the debate. The fact that no time limit is expressly set for the operation of the JVA is as potent as the loan commitment on the project and the 1st appellant's obligation to bring the venture into fruition by commissioning it both of which are contained in clauses 4 and 7 of the JVA Allied with these are the respondents' commitment under the agreement deposed to in paragraph 26 of the respondent's affidavit which is not controverted by the appellants. What with the theory of supersession of the JVA by subsequent agreements being peddled by the appellants that was deflated by showing that the more dazzling of those agreements was earlier in time than the incorporation of the Joint Venture Company.

The combined effect of these is that the appellants have not been able to discredit the finding of the learned trial Judge that the only document regulating the appointment of arbitrators under the transactions between the parties is the Joint Venture Agreement (JVA). On the hard bone of the law, very decisive is the submission of Dr. Ibik that the

materiality of the other documents 'annexed to the respondent's originating motion must be determined by the prayer in the motion paper. The respondent's prayer her originating motion is 'for an order appointing arbitrators for and on behalf of the applicant and respondents in the dispute which has arisen amongst them pursuant to the provisions of their Join Venture Agreement'.

The respondent, qua the applicant at the court below, having expressly indicated the nature of the relief she wanted from the court by no stretch of the imagination can tile filing of any document change or moderate that prayer. That being the law, all the talks about any other document attached to the motion paper superseding the JVA. as the basis of the respondent's relief is singularly absurd.

Since the argument that the respondent has no locus standi to institute the action on appeal is founded on the supposition that any agreement other than the JVA. might be regulating the dispute between the parties, a refutal of the premise on which the argument is based signals the collapse of that wobbly hypothesis. Therefore, there is no substance in the argument of the appellants that the finding of the learned trial Judge that the JV A. is the document controlling the appointment of arbitrators is erroneous and the corollary that the respondent has no locus standi to institute the action on appeal is baseless.

One other offshoot of issue two in the appellants' brief of argument is an oblique attack on the jurisdiction of the trial court, which does not come out clearly from the issue formulated by the appellants but one which must, nevertheless, be examined as a fundamental question touching on the authority of the court. The question is about the finding of the learned trial Judge on why he applied the provisions of section 7 of the Arbitration and Conciliation Act to the appointment of arbitrators in the face of the arbitration clause in the N A. which provides for the resolution of any dispute arising from the Agreement by 'the Rules of Reconciliation and Arbitration of the International Chamber of Commerce'. As articulated on pages 11 & 12 of their brief. The appellants' complaints begin with the burden of producing a copy of the Rules placed on the appellants by the learned trial Judge when the respondent, who claimed that the Rules did not prescribe the procedure for appointment of arbitrators failed to produce the Rules.

From that point, the learned Senior Advocate moves to the substance of the application of the respondent, contending that the finding of the learned trial judge is wrong because the clear inference from the arbitration clause of the N A. is that since both parties agreed to be bound by those Rules, the Rules become a condition precedent to the enforcement of the clause in consonance with the statement of the law on the matter in paragraphs 505 & 545 of the 4th Edition of Halsbury s Laws of England.

He contended further that the arbitration clause being a term of the parties' contract, the party who is asserting that there is a dispute arising from the contract must establish the dispute only within the framework of the Rules stipulated in the Agreement in line with the principle in Baba vs. NCATC (1991) 5 NWLR (Pt. 192) 388,

413, that the terms of a contract are the guide for the interpretation of any question arising from the contract. On that premise, he submitted that failure of the respondent to establish that there is a dispute in the manner provided by the Rules or Reconciliation and Arbitration of the International Chamber of Commerce by producing the Rules rendered the respondent's action incompetent and that the court below is ipso facto, without jurisdiction to entertain the action. Replying, learned Senior Advocate for the respondent countered that the argument that the court cannot invoke its jurisdiction to appoint arbitrators without producing the Rules of Reconciliation and Arbitration of the International Chamber of Commerce is neutralized by the Arbitration and Conciliation Act sub-section 7(2) of which vested the court defined by sub-section 57(1) thereof with the power to appoint an arbitrator where no appointment procedure is agreed upon by the parties; similarly, where there is an agreement on appointment procedure but no appointment was made pursuant to the agreement, sub-section 7(3) of the Act also empowers the court to make an appointment. He referred to paragraphs 21 – 25 and 28 of the affidavit supporting the originating motion and Exhibits 'O' & 'E' thereto showing that the respondent invited the appellants to nominate an arbitrator but the appellants refused to do so. The learned Senior Advocate submitted that the jurisdiction of the trial court to entertain the respondent's application for appointment by court of arbitrators is unassailable and that sub-section 132(1) of the Evidence Act and the decision in Saba vs. NCATC (supra), relied upon by learned Senior Advocate for the appellants, are inapplicable on the facts of this case.

The core of the argument of learned Senior Advocate for the appellants that the respondent did not discharge the burden of proof that the Rules of Reconciliation and Arbitration of the International Chamber of Commerce do not contain procedure for appointment of arbitrators was grafted on hard facts about which there is a dilemma on what law could penetrate the hard layer of facts without first addressing what hardened the facts. It is common ground that no copy of the Rules in which the procedure for appointing arbitrators is to be found was produced at the court below.

The Rules are not part of the body of the laws of this country and the opinion of the learned trial Judge that the Rules do not belong to the class of subsidiary legislation which he could take judicial notice of was not faulted by the learned counsel. That is a situation that offered the prospect of examining an alternative to the Rules under our law or indulge in the fantasy of proving the Rules as a fact. The latter option upon which learned.

Senior Advocate for the appellants cashed in is full of dazzling technical intricacies that were not fully played out, leading to a misapprehension of the fine legal points that become in this appeal the pitfall in the thread of arguments ranged against the findings of the learned trial Judge.

To prove the Rules as a fact, learned Senior Advocate for the appellants is quite right that the burden of proof is on the one who asserts but he was out of step with the mechanics of discharging the burden. The respondent, as the applicant, at the court below, on whom the onus of proving the material part of the Rules rests, told the court

that the Rules do not lay down any procedure for the appointment of arbitrators. That is a statement of fact which must be disproved by the appellants who were contending the contrary and who had the burden of proving that the Rules contained provisions for appointment procedure. On a classic theory of the Law of Evidence, if the trial court believed the respondent's evidence that the operative Rules contained no provisions for appointment procedure as it appears the court did, the burden is shifted to the appellants to disprove that fact. That is, the way the 'evidential burden' of proving facts operates: see Elemo vs. Omolade (1968) NMLR 359,361; and Ugbo vs. Aburime (1994) 9 SCNJ 23, 39.

Therefore, for the appellants, who did not refute the respondent's evidence by producing any document to challenge the respondent's evidence on the ground that she produced no documentary evidence is like the pot calling the kettle black. It is self-serving. Being 'oath against oath' as far as the argument of the appellants runs, it is naive to appropriate to the submission the legal cliché 'he who asserts must prove' which on the principle of' shift of evidential burden' in the context of the finding of the learned trial Judge operates against the appellants. That is the limit to which the charade of proving the Rules as a fact can be carried assuming that there exists in the thinking of the parties at the time of signing the contract any Rules of the description given in the arbitration clause of the JVA., an assumption which is defied by the surrounding circumstances as it will become obvious anon. On the practical plane, the problem besetting the proof of the high- sounding but elusive 'Rules of Reconciliation and Arbitration of the International Chamber of Commerce' is that the knowledge of the Rules by either party is based on a mere assertion with no clear idea of what they stand for beyond the comprehension of the title by rote. This is evident from the jerky phraseology of the arbitration clause in the JVA. betraying the fact that the wording of the clause is the product of technical amateurism that is utterly devoid of craftsmanship. This is the major crack in the application to the decision on appeal of the principles of the law of contract by learned Senior Advocate for the appellants.

True enough, as the Senior Counsel for the appellants submitted express mentioning of the Rules to be applied in a contract makes the Rules to become a term of the contract by reference to which any dispute arising from ,the contract should be determined, yet that proposition of the law is valid only where that particular term of the contract is ascertainable and clear. But where the Rules stipulated as the term of a contract are elusive in the sense that they are not part of our municipal law or the type which the court is enjoined to take judicial notice of and no clear evidence of the material parts of the Rules is given by the parties taking opposite positions, the Rules as a term of the contract become an absurdity that must be disregarded for the purpose' of interpreting whether there is a dispute under the contract. Therefore, argument of the learned Senior Advocate that whether under the JVA. a dispute has arisen must be determined by the Rules as a term of the contract is inappropriate in the face of that term having been shown to be palpably nonsensical with the Rules as a frame of reference of the arbitration clause at large.

By insisting that the respondent must establish that there is a dispute under the Reconciliation and Arbitration, etc., Rules as a precondition for application for appointment of arbitrators, learned Senior Advocate for the appellants seems to place on the trial court an added but unnecessary burden of first looking for a slot for the dispute in the compartment of an appointment procedure under the Rules that are, at best, fanciful and hazy before determining whether there is an actionable dispute. The notion is a hangover from the primitive principle of ubi remedium, ibi jus, i.e. where there is a right, there is a remedy. By insisting on the court below following the Rules with which neither the court nor the parties are conversant, the court was placed in a legal and ethical dilemma of outright refusal to examine the respondent's prayer or to explore, as it did, the alternative course open it. If, instead of treading the cul-de-sac to which the unknown Rules led, the court fell back on the law that provides for that contingency. It is idle for the appellants to use as a springboard the Rules with which they are not familiar to launch a complaint about having a raw deal. It is hypocritical and a facile strategy.

Therefore, there is force in the argument of learned Senior Advocate for the respondent that the learned trial Judge acted within his powers by applying the Arbitration and Conciliation Act, a joint ambit of sections 57(I) and 7 of which vested him with jurisdiction to entertain the respondent's action for appointment of arbitrators; firstly, because the JV A. contains no comprehensive appointment procedure and, secondly, because the appellants who were put on notice by the respondent to nominate an arbitrator failed to do so. On those scores, the respondent is entitled to bring an action under sub-sections 7(2) and (3) of the Act for appointment of arbitrators and to overcome the appellants' opposition to the appointment.

Correspondingly, the court is by virtue of the two sub-sections empowered to entertain the action.

For the reasons canvassed variously on the derivative of issue two, there is no substance in the attack of the finding of the learned trial Judge on why he applied the Arbitration and Conciliation Act instead of the Rules of Conciliation and Arbitration of the International Chambers of Commerce.

Similarly, the argument of learned Senior Advocate for the appellants that the respondents action is incompetent and, by operation of law deprived the trial court of jurisdiction is, with respect, based on a misconception of the law.

On the core of the appellants' disputation ventilated in issue two, to wit, whether there was any legal or factual basis for the court below to have ordered arbitration or appointed arbitrators, learned Senior Advocate for the appellants postulated the decision of this court in Nigeria LNG. Ltd. vs. African Development Insurance Co. Ltd. (1995) 8 NWLR (Pt. 416) 677,692 – 693, as laying down 5 – point mandatory criteria which must co- exist before an order for appointment of arbitrators can be made. He submitted that the respondent did not satisfy two of the conditions namely (a) that 'the parties before the court are parties to the agreement or the transaction which compels

arbitration' and (2) that the arbitration sought is within the contemplation of the arbitration agreement or circumstances calling it'. Let me pause here to say that the first factor noted above has been settled by the conclusion reached on issue one and can, therefore, not be reopened.

In any case, the learned Senior Advocate reproduced the material part of the evaluation of evidence and finding of the learned trial Judge on whether there is a dispute between the respondent and the appellants, in which he came out with an affirmative answer that there was. On that finding, he submitted that the learned trial Judge failed to make a thorough examination of the affidavits and Exhibits 'to discern the existence or otherwise of a bona fide dispute', contending further that the respondent made 'bland general allegations of fraud and misrepresentation without producing particulars to support same'. This, he submitted, is against the principles laid down in Onamade vs. ACB Ltd. (1997) I NWLR (Pt. 480) 123, 142; and Savannah Ventures vs. WA.B. Ltd. (1997) 10 NWLR (Pt.524) 254, and concluded that 'the only reasonable conclusion open to the learned trial Judge was to have found that the allegations of fraud and misrepresentation made against the appellants were made mala fide'.

In his reply, learned Senior Advocate for the respondent contended that the decision in Nigeria LNG. Ltd. vs. African Development Insurance Co. Ltd. op. cit., proffered as the controlling authority on when an arbitration may be ordered cannot be a precedent for this appeal because of dissimilarity on facts of the two cases. He argued that whereas application in the present appeal is for the appointment of arbitrators simpliciter, it is vastly different from Nigeria LNG s case where a party to an on-going action applied for stay of proceedings and reference of the dispute to arbitration and as it later turned out the arbitration clause that was being agitated was not part of the sub-contract from which the action arose. In any case, the learned senior counsel{submitted that in the present appeal, the respondent has satisfied the two conditions in Nigeria LNG s case enumerated by the senior counsel for the appellants together with the 1st condition laid down in the case.

As regards the question of whether there was a dispute between the parties as a condition precedent to a reference of dispute to arbitration, A learned Senior Advocate for the respondent listed averments in the parties' affidavit from which inference of dispute between the parties can be drawn.

He referred to paragraphs 8 and 9 of the affidavit supporting the respondent's originating motion on allegation of misrepresentation inducing the execution of the JVA. which is not specifically denied by the appellants. He also noted averments in paragraphs 3(h) & (i) of the appellants counter-affidavit B as a tacit admission of differences between the parties over their contract. Noted also are paragraphs 2 1- 25 &28 of the respondents affidavit notifying the appellants that the respondent had repudiated the JVA. and inviting the appellants to nominate an arbitrator. The learned Senior Advocate submitted that from those averments, it cannot be gainsaid that there is a serious dispute between the parties over the JVA. calling for arbitration as provided in the Agreement.

Concerning the question of whether the learned trial Judge made a thorough examination of the controversy over the appointment of arbitrators, the learned Senior Advocate submitted that on the authority of the Supreme Court's decision in Kano State Urban Development Board vs. Fanz Construction Co. Ltd. (1990) 4 NWLR (Pt. 142) I, 32 & 33, the fundamental parameters within which the court is enjoined to exercise its discretion are defined by the following three factors:

(a) whether there is an arbitration agreement;

(b) whether the dispute alleged by the applicants falls within the nature of dispute contemplated in the agreement; and

(c) whether the parties have failed or neglected to appoint arbitrators to wade into the dispute.

I pause here to observe that it being common ground that there is an arbitration clause in the JVA. and the question of whether the parties failed or neglected to appoint arbitrators having been answered in considering a point earlier examined, the controversy calling for resolution on the basis of the above formula is narrowed down to the second question. The question has been canvassed by the appellants, who dismissed the respondent's complaints as worthless and bland general allegations of fraud and misrepresentation that are unsubstantiated and, therefore, made mala fide implying that the respondent's complaints against the appellants do not give rise to the type of dispute contemplated by the JVA.

On this limited point, learned Senior Advocate for the respondent dismissed the submission made on behalf of the appellants as wholly erroneous because the opening of the arbitration clause in the JVA. that 'all disputes, controversies, differences which may arise between the parties' in their natural and ordinary meaning and connotation, cover literally any dispute arising from the JVA. The learned Senior Advocate highlighted the nature of the dispute that may be referred for arbitration and the function of the court below In relation to application for appointment or arbitrators. He submitted that a dispute is still a dispute even where the allegation is denied and that the function of the trial court is to ascertain whether there is a dispute and whether the dispute is within the contemplation of the agreement i.e. the subject matter of the agreement. On the allegation of fraud and 'misrepresentation, he submitted that the function of the trial court is limited in nature and does not call for the establishment of the allegation which is the duty of the arbitral tribunal. The learned Senior Advocate concluded that the decision of the learned trial Judge is amply correct and justified as conforming to the principles governing an application for appointment of arbitrators drawing a line between the limited function of the court considering appointment of arbitrators and the wider duty of an arbitral tribunal that is empowered to go into the merit of the dispute between the parties.

The keystone of the appellants' disputation on this part of issue two is the bifurcated question of the factual and legal basis for the decision of the learned trial Judge and the mainspring for calling the decision into question is the allegation that the learned trial Judge did not examine thoroughly the affidavit evidence, including the documents before him.

The lapse, it is contended, led to his failure to notice with a view to examining critically whether there was a genuine dispute between the parties only for the resolution of which arbitrators could be appointed contrary to what the learned trial Judge did by appointing arbitrators to examine frivolous allegations by the respondent. I must begin with this primary arm of the question.

As against the argument on behalf of the appellants that examination of the evidence and finding of the learned trial Judge, on pages 99 – 100 of the record reproduced on page 9 of the appellants' brief of argument, did not fully review the evidence before the court, learned Senior Advocate for the respondent referred to the various parts of the affidavit evidence to debunk the appellants' contention. In particular, he referred to the allegations of fraud and misrepresentation inducing the signing of the JV A. and to the fact that the respondent had before the commencement of her action at the court below repudiated the JVA. and notified the appellants whom the respondent asked to nominate an arbitrator. The respondent's allegations and the appellants', reply thereto were examined by the learned trial Judge who, in the material part of his Ruling, at pages 99 – 100 of the record, concluded that:

"what comes out from the above averments of the applicant and the respondents is a dispute which one cannot dismiss as frivolous at this stage of the proceedings having regard to paragraph 28 of the affidavit in support, paragraph 12 of further , affidavit and paragraph 3(i) of the counter-affidavit…" A dispute is defined on page 424 of the 5th Edition of Blacks Law Dictionary as

"A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the others"

An appraisal of the extracts from the Ruling of the learned trial Judges reproduced above, which is the focus of the appellants' complaint shows that the learned trial Judge was dealing with a situation where the claims by the applicant were traversed by the respondents upon which he came to the conclusion that there was a dispute between the parties arising from the JVA. With the definition of a dispute as agitation by contending parties over a right, I am satisfied that the learned trial Judge came to the correct decision that there was a dispute between the parties where the respondent as the applicant made allegations against the appellants over some legal rights which the appellants denied.

The second arm of the question is concerned with whether the allegations of the respondent are false and made in bad faith and whether the allegations of fraud and misrepresentation against the appellants are not vitiated by the respondent's failure to

furnish the particulars of the allegations. Having regard to the nature and scope of inquiry about the appointment of arbitrators, those questions do not fall to be decided. Here, a line must be drawn between the function of a court invited to appoint arbitrators and the function of an arbitral tribunal. It is the province of the latter to go into the merit of the dispute that covers a wide range of issues, including whether the allegations were made in good faith and the illegal consequences of failure to give particulars of allegations made against the party. The function of the court before which application is made for appointment of arbitrators is confined to probing whether there is in fact a dispute between the parties arising from their agreement.

In this regard, particularly instructive is the synopsis of the scope of the jurisdiction of a court which is considering application for appointment of arbitrators distilled by learned Senior Advocate for the respondent from the Supreme Court's decision in Kano State Urban Development Board vs. Fanz Construction Co. Ltd. (supra), which brings out in bold relief the dividing line in the sphere of authorities in arbitration matters between the court and an arbitral tribunal. It posits that the court which is the preparatory stage of' forum identification' is not cloaked with any jurisdiction or duty to inquire into the sustainability or otherwise of the alleged dispute. Its function is restricted to the construction of arbitration clause in an agreement with a view to ascertaining whether the alleged dispute is within the contemplation of the agreement.

I agree with that resuming of the limitations of a court entertaining an application for appointment of arbitrators which is at the root of the problem raised by the appellants who failed to draw a line between the duty of the court which is called upon to appoint arbitrators and the function of an arbitral tribunal which is to examine the whole ramifications of the substantive dispute. Deliberations on whether to appoint arbitrators being the preparatory stage of forum identification, as learned Senior Advocate for the respondent submitted, are not amenable to a resolution of contentious matters such as allegations of fraud and misrepresentation. Similarly, the question of the motive for making allegations against the appellants, the genuiness of the allegations and the adequacy or otherwise of the particulars of the allegations and other matters touching on the merits of the dispute between the parties are beyond the compass of the court, which sole purpose' is to ascertain whether there was in fact a dispute between the parties arising from an agreement that makes arbitration as the primary forum for resolving the dispute. Nothing attests to this view more than the procedure of filing pleadings in the arbitral tribunal provided by Articles 18 to 20 and 22 of the First Schedule to Arbitration and Conciliation Act, Cap. 19 of the Laws' of Federation of Nigeria, 1990, that offers a wide scope for the ventilation of contentious matters pertaining to the substantive dispute which is not available for the limited purpose of appointing arbitrators.

From the above analysis, it is clear that the function of the court in original cause over arbitration matters being more of a 'referral' than an 'adjudication', the scope of the inquiry by the court cannot be more than the minimal satisfaction on the face of the evidence before it that there is a dispute between the parties on their agreement taking

as a frame of reference; the expression prima facie' as expounded in Ajidagba vs. Inspector-General of Police (1958) 3 FSC. 5,6; and Duru vs. Nwosu (1989) 4 NWLR (Pt. 113) 24, 40 – 41 & 48 – 49. In this context, that implies a finding by the court that there is ground for proceeding with an inquiry; this must be followed by 'proof' that leads to a conclusive answer that the dispute is established with a view to resolving it, which is the duty of the arbitral tribunal.

In sum, in arbitration matters, the dominion of the court in original cause is over the appointment of arbitrators in contrast with the arbitral tribunal whose preserve is the resolution of the dispute. It follows from that division of duty that it will amount to a downright usurpation of the authority of the arbitral tribunal and acting in excess of its own jurisdiction if the court should dabble into any matter touching on the merit of the dispute, limitations which, as expected, the learned trial Judge was fully aware of when in his Ruling he said, at page 100 of the record, that:

"It is not for this court to decide on such conflicting evidence, rather, by the terms of Exhibit A (i.e. the JVA.), it is the duty of arbitrators to do so."

That is perfectly in order to underscore the caution that the court whose function is the satisfaction that there is prima facie evidence of a dispute arising from the parties' agreement cannot take it upon itself to sift the merits of the dispute as by so doing, the court will be anticipating the prerogative of the arbitral tribunal. Thus, the strident criticism by learned Senior Advocate for the appellants of failure of the trial court to examine the merits of the dispute is misplaced. In legal strategy, it is a vindication of the warning in circumstances similar to the one in hand, by Tobi, JCA, against predisposition by counsel to engage in premature 'firing spree' in a milieu, where gun powder could prove to be expensive. see Ibe vs. Onuorah (1999) 14 NWLR (Pt. 638) 340, 349. On the facts of this case, a clever strategist is, in my view, one who conserves the gun powder during the hullabaloo of minor skirmishes for the encounter on the battlefield.

It is clear from the foregoing discussion of the two organs with judicial responsibility in arbitration matters, viz the court which is concerned with the appointment of arbitrators and the arbitral tribunal that has the responsibility to look into the dispute, that the winding and sinuous arguments by the appellants that the trial court did not examine properly the complaint leading to the appointment of arbitrators to look into the dispute between the parties are unfounded as one based on a misconception of the law about the roles of the two adjudicatory organs.

On the whole, the various points canvassed as a compendium of errors in issue two ill the appellants' brief of argument are woolly and without much substance. In consequence, I resolve the issue against the appellants. Issue one having been found to be incompetent and issue two ' having been demonstrated to be porous, I affirm the decision of Kassim, J., of the Enugu Judicial Division of the Federal High Court delivered on 11/1-2/98.

The appeal fails and it is dismissed. I award N5,000 costs against the appellants.

Appeal Dismissed.

FABIYI, JCA: I have read in advance the lead judgment just handed out by my learned brother, Olagunju, JCA. I agree with his reasons leading to the conclusion that the appeal lacks merit and should be dismissed.

I only need to further reiterate the point that a court entertaining an application to appoint arbitrators is only enjoined to see whether, prima facie, a dispute contemplated in the arbitration agreement between the contending parties has been established. Where it is depicted that there is a prima facie dispute and the parties failed or neglected to appoint arbitrators to wade into the dispute, the court will come in to help them out of the impasse. The case of Kano State Urban Development Board vs. Fanz Construction Co. Ltd cited by the Senior counsel for the respondent is directly in point. The arbitral tribunals then saddled with the responsibility of investigating, in detail, the dispute referred to it.

Without mincing words, I need to state it here that Kassim, J. properly appreciated the purport of his function in this matter. Having correctly established that a prima facie dispute contemplated in the arbitration agreement was established, he made the right order in my considered view.

He refused to be drawn into a melee of probing the dispute; trial of which falls within the province of the arbitral tribunal. I am at one with him.

For the above reasons and, of course, the fuller ones contained in the lead judgment, I, too, hereby dismiss the appeal. I endorse the consequential order relating to costs in the lead judgment.

MUHAMMAD, JCA: I had a preview of the lead judgment of my learned brother, Olagunju, JCA. I agree entirely that the appeal lacks merit.

I dismiss it too with the same costs as that in the lead judgment.

Cases Referred to in the Judgment:

Agbaka v Amadi (1989) 7 SCNJ 367

Ajidagba vs. Inspector-General of Police (1958) 3 FSC. 5

Alakija vs. Abdullai (1998) 5 SCNJ 1

Ariori vs. Elemo (1983) 1 SCNLR 1

Atunrase vs. Phillips (1996) 1 SCNJ 145

Ayisa vs. Akanji (1995) 7 SCNJ 245

Baba vs. NCATC (1991) 5 NWLR (Pt. 192) 388

Bello vs. The Diocesan Synod of Lagos (1973) 1 ALL NLR (Pt. 1) 247

Comex Ltd. vs. Nigeria-Arab Bank Ltd. (1997) 4 SCNJ 38

Din vs. Attorney-General of the Federation (1988) 4 NWLR (Pt. 87) 147

Duru vs. Nwosu (1989) 4 NWLR (Pt. 113) 24

Elemo vs. Omolade (1968) NMLR 359

Ereku vs. Military Governor of Mid-Western State (1974) 1 ALL NLR (Pt. II) 163

Eze vs. Ejelonu (1999) 6 NWLR (Pt. 605) 134

Henck VS. Andre & Cie S. A. (1970) I Lloyd's Rep. 235

Ibe vs. Onuorah (1999) 14 NWLR (Pt. 638) 340

Ibrahim vs. Balogun (1999) 7 NWLR (Pt. 610) 254

Ivienagbor vs. Bazuaye (1999) 6 SWNJ 234

Josiah Cornelius Ltd. v. Ezenwa (1996) 4 SCNJ 124

Kano State Oil and Allied Products Ltd. vs. Kofa Trading Co. Ltd. (1996) 3 NWLR (Pt. 436) 244

Kele vs. Nwerekere (1998) 3 SCNJ 84

Long-John vs. Blakk (1998) 5 SCNJ 68

Nigeria LFN Ltd. vs. African Development Insurance Go. Ltd. (1995) 8 NWLR (Pt. 416) 677

Nyambi vs. Osadim (1997) 2 NWLR (Pt. 485) 1

Odu 'a Investment Co. Ltd. vs. Talabi (1997) 7 SCNJ 600

Ogbuchi vs. Governor of Imo State (1995) 9 NWLR (Pt. 417) 53

Ogoyi vs. Umagba (1995) 10 SCNJ 55

Okafor vs. Asoh (1999) 3 NWLR (Pt. 593) 35

Okoye vs. Nigerian Construction and Furniture Co. Ltd. (1991) 6 NWLR (Pt. 199) 501

Onamade vs. ACB Ltd. (1997) I NWLR (Pt. 480) 123

Onyekwe vs. The State (1988) 2 SCNJ (Pt. II) 354

Orah vs. Nyam (1992) 1 NWLR (Pt. 217) 279, 287

Orhue vs. NEPA (1998) 5 SCNJ 126

Peenok Investments Ltd. vs. Hotel Presidential Ltd. (1982) 12 SC 1

Popoola vs. Adeyemo (1992) 8 NWLR (Pt. 275) 1

Saude vs. Abdullahi (1989) 4 NWLR (Pt. 116) 387

Savannah Ventures vs. WA.B. Ltd. (1997) 10 NWLR (Pt. 524) 254

Shuaibur vs Nigeria-Arab Bank Ltd. (1998) 4 SCNJ 109

Tsokwa Motors Nigeria Ltd. vs. Union Bank of Nigeria Ltd. (1996) 9 – 10 SCNJ 294

Ugbo vs. Aburime (1994) 9 SCNJ 23

Nigerian Statutes Referred to in the Judgment:

Arbitration and Conciliation Act, Cap. 19, Laws of the Federation of Nigeria 1990, sections 7 (20 (3) (4),57(1); Articles 18,19,20 and 22 of the First Schedule

Evidence Act, Cap. 112, Laws of the Federation of Nigeria 1990, section 132(1)

Nigerian Rules of Court Referred to in the Judgment:

Court of Appeal Rules 1982, Order 6, rules 5 and 10