

**IN THE HIGH COURT OF JUSTICE OF OYO STATE
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN**

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION AND
CONCILIATION ACT (CAP. A18) LFN 2004 AND THE RULES THEREUNDER,
AND UNDER THE OYO STATE HIGH COURT (CIVIL PROCEDURE) RULES LAW
2010

SUIT NO:M/763/18

BETWEEN:

AKMA SIGNATURE HOTEL & SUITES

APPLICANT/RESPONDENT

AND

INFINITI SECURITY SERVICES LIMITED-RESPONDENT/OBJECTOR

NOTICE OF PRELIMINARY OBJECTION

DATED THIS _____ DAY OF _____ 2019

**O. MARX IKONGBEH ESQ., MCIArb(UK)
ESTHER PIUS EKONG (MISS) [SIGNED]
RESPONDENT'S COUNSEL**

**EVERLAW ASSOCIATES
"THE BROOK", [GROUND FLOOR], JEMKO VILLA,
NO. 4, ALIADE CLOSE, BY NIG. ARMY WELFARE LTD,
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ADDRESS FOR SERVICE WITHIN JURISDICTION

C/O ESTHER PIUS EKONG

ANTHONY AKPAN & CO.

NO. 87, SALVATION ARMY ROAD

ADAMASINGBA, IBADAN. <08031811259>

ASSESSMENT & STAMPS



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BROUGHT PURSUANT TO:

1. SECTION 6(6)(b) OF THE 1999 CONSTITUTION (AS ALTERED);
 2. SECTION 37 OF THE COMPANIES AND ALLIED MATTERS ACT (CAP. C20) LFN 2004;
 3. ORDER 13 RULE 2 OF THE OYO STATE HIGH COURT (CIVIL PROCEDURE) RULES LAW, 2010; AND
 4. UNDER THE INHERENT JURISDICTION OF THE COURT
-

TAKE NOTICE that the Honourable Court will be moved on day of 2019 at the hour of 9 O'Clock in the forenoon or so soon thereafter as Counsel on behalf of the Respondent/Objector can be heard praying the Court for the following Orders:

1. **AN ORDER** of Court striking out the Originating Summons in this matter and accordingly dismissing the action in its entirety



Or in the alternative;

2. **AN ORDER** of Court striking out the action of the Applicant.
3. For such Order or Further Orders as the Court may deem fit to make in the circumstances.

Grounds Upon Which this Preliminary Objection is Brought:

1. The Applicant has not placed the necessary facts before this Court to enable the Court to consider and grant the reliefs sought.
2. The Applicant is a non-juristic person, not being an incorporated limited liability company nor a registered Business Name under the Companies and Allied Matters Act nor granted corporate personality or any other form of juristic personality to maintain this action.
3. The Applicant being a non-juristic person lacks the capacity to enter into an Arbitration Agreement.
4. The Respondent named on record is a non-juristic person and the matter cannot proceed without an amendment to reflect the proper party.
5. The Applicant has adopted the wrong procedure in commencing this action under the Rules of this Court as it ought to be commenced by a Motion on Notice and not an Originating Summons in accordance with the Rules of this Court.

DATED THIS _____ DAY OF _____ 2019

O. MARX IKONGBEH ESQ., MCI Arb (UK)



ESTHER PIUS EKONG (MISS) [SIGNED]
RESPONDENT'S COUNSEL

EVERLAW ASSOCIATES
"THE BROOK", [GROUND FLOOR], JEMKO VILLA,
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FOR SERVICE ON:

THE APPLICANT
C/O HIS COUNSEL,
YOMI OGUNLOLA
YOMI OGUNLOLA & CO.
No. 34, FELELE RAB ROAD,
FELELE, IBADAN.
08037176505



**IN THE HIGH COURT OF JUSTICE OF OYO STATE
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HOLDEN AT IBADAN**

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION AND
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SUIT NO:M/763/18

BETWEEN:

AKMA SIGNATURE HOTEL & SUITES

APPLICANT/RESPONDENT

AND

INFINITI SECURITY SERVICES LIMITED-RESPONDENT/OBJECTOR

AFFIDAVIT IN SUPPORT OF NOTICE OF PRELIMINARY OBJECTION

I **Mr. Philip Agi** Male, Christian, Nigerian Citizen, of Everlaw Associates, "The Brook", [Ground Floor], Jemko Villa, No. 4, Aliade Close, Garki 2-Abuja, do hereby make oath and state as follows:

1. I am a Counsel in the firm of Everlaw Associates, the Counsel to the Applicant in this matter.
2. I have the consent of the Applicants and my employer to depose to this affidavit.
3. I have the consent of my employer to depose to this affidavit.
4. I was informed by Marx Ikongbeh Esq., the lead Counsel to the Respondent/Objector at about 12 noon on Friday, 7 June 2019 at our office in the course of briefing me to depose to this affidavit and I believe as follows:



- i. He has studied the Originating Summons and affidavit in support filed by the Applicant/Respondent and it has failed to set out facts that are necessary to aid this Court in considering this action. Particularly, the Applicant did not establish the validity of the appointment of the Arbitrator in accordance with the law and the agreement of parties.
- ii. He has conducted a diligent search on the Companies database of the Corporate Affairs Commission hoisted at the website <<http://publicsearch.cac.gov.ng/comsearch/>> and the Applicant/Respondent is not listed either as a limited liability Company or a registered Business Name.
- iii. The Applicant/Respondent is therefore a non-juristic person and lacks the capacity and *locus* to maintain this action.
- iv. The Applicant/Respondent being a non-juristic person also lacks the capacity to enter into an Arbitration Agreement.
- v. The Respondent/Objector's corporate name is Infinity Security Services Limited as entered on the contract subject matter of this suit and not "Infiniti Security Services Limited" which was sued in the Originating Summons filed by the Applicant/Respondent. "Infiniti Security Services Limited" as sued is a non-juristic personality and cannot be sued.



vi. The Applicant/Respondent adopted the wrong procedure in commencing this action under the Rules of this Court as they took out an originating Summons instead of a Motion on Notice.

vii. The action is wholly incompetent.

5. That it will be in the interest of justice if this objection is upheld and the matter dismissed.

6. That I depose to this affidavit conscientiously believing the contents to be true in accordance with the Oaths Act.

DEPONENT

SWORN to at the High Court of Oyo State

Registry this..... day of 2019

BEFORE ME

COMMISSIONER FOR OATHS

**IN THE HIGH COURT OF JUSTICE OF OYO STATE
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**WRITTEN ADDRESS IN SUPPORT OF NOTICE OF PRELIMINARY
OBJECTION**

1.0 Introduction

1.1 The Applicant/Respondent filed this action by way on an Originating Summons seeking the recognition and enforcement of an Arbitral Award entered on 3 August 2018 at the Oyo State Multi-Door Court House (OYSMDCH) coram Mr. Dele Akinmusuti who sat as Sole Arbitrator.

1.2 The Respondent/Objector upon considering the Applicant/Respondent's processes has discovered that they suffer a number of fatal deficiencies hence the filing of the present Notice of Preliminary Objection seeking for the dismissal of this suit *in limine*.

2.0 Grounds for Objection

2.1 My Lord, this objection has been brought on the following 5 grounds, *viz*:



- i. The Applicant has not placed the necessary facts before this Court to enable the Court to consider and grant the reliefs sought.
- ii. The Applicant is a non-juristic person, not being an incorporated limited liability company nor a registered Business Name under the Companies and Allied Matters Act nor granted corporate personality or any other form of juristic personality to maintain this action.
- iii. The Applicant being a non-juristic person lacks the capacity to enter into an Arbitration Agreement.
- iv. The Respondent named on record is a non-juristic person and the matter cannot proceed without an amendment to reflect the proper party.
- v. The Applicant has adopted the wrong procedure in commencing this action under the Rules of this Court as it ought to be commenced by a Motion on Notice and not an Originating Summons in accordance with the Rules of this Court.

2.2 The summary of the facts supporting this objection as deposed to in the supporting affidavit are to the effect that the Applicant/Respondent failed to place the necessary facts to enable this Court consider and grant this application as they presumably want to dodge disclosing the gross irregularities surrounding the appointment of the Arbitrator in this matter.



- 2.3 The facts deposed also establish that the Applicant/Respondent is not a juristic person and lacks the capacity to enter into an arbitration agreement or to bring an action as they have sought to do.
- 2.4 And to make matters worse, the Respondent on record in the suit is a non-juristic person as the Applicant/Respondent failed to name the Respondent/Objector properly in the suit.
- 2.5 The facts also disclose that the Applicant/Respondent flouted the provisions of the Rules of this Court that mandate an action such as the present one ought to be brought by a Motion on Notice and not an Originating Summons.
- 2.6 Based on these grounds, we will be calling for the Court to dismiss this action for gross incompetence.

3.0 **Issues for Determination**

- 3.1 Arising from the 5 grounds on which this objection is hinged, we submit that 3 issue arises for the just determination of this objection namely:

Issue 1: *Whether Applicant/Respondent has adduced the necessary facts to enable the Court consider this application?*

Issue 2: *Whether this suit is properly constituted in terms of the locus and the capacity of the parties before the Court?*



Issue 3: What is the right procedure for taking proceedings to seek recognition and enforcement of an arbitral award?

3.2 We shall presently argue these issues in sub-headings for ease of appreciation.

4.0 Arguments

Issue 1: Whether Applicant/Respondent has adduced the necessary facts to enable the Court consider this application?

4.1 On the relevant facts to be established before a Court when recognition and enforcement of an award is sought, the Court of Appeal after reviewing the provisions of Section 31 of the ACA held in the case of **Clement C. Ebokan v. Ekwenibe & Sons Trading Company**¹

In an application to enforce an award, the plaintiff must prove:

1. The making of the contract which contains the submission.
2. That the dispute arose within the terms of the submission.
3. **That Arbitrators were appointed in accordance with the clause which contains the submissions;**
4. The making of the award; and
5. That the amount awarded has not been paid: See Christopher Brown Ltd. v. Genossenschaft etc. (1953) 2 All ER 1039 at 1040.

[Emphasis mine]

¹ (2000) LPELR-6808(CA) Per Oguntade, J.C.A. (P. 11, paras. B-E)



4.2 The Court went further to unearth one of the mischiefs behind the stipulation that the Applicant ought to prove the valid appointment of the Arbitrators when my noble Lord held:

The only aspect upon which the lower Court would appear to have expressed a reservation as to the matters that the appellant needed **to establish was in connection with the number of Arbitrators who sat on the case.** Clause 17 of the agreement of parties provided:

"17. Any dispute or question in connection with the partnership of this agreement shall be referred to a single arbitrator under the provision of the Arbitration Act or any statutory modification or re-enactment thereof for the time being in force". The lower court in its ruling at page 258 expressed a displeasure that more than one person sat on the arbitration panel.

[Emphasis mine]

4.3 Just as in that case, the issue of the number of Arbitrators is germane but the Applicant/Respondent realizing that the error of the composition of the Arbitral Tribunal would come to the Courts attention suppressed that fact from the Court.

4.4 We submit that a failure to establish that the **Arbitrators were appointed in accordance with the clause which contains the submissions** is fatal to the Applicant/Respondent's Originating Summons and we urge the Court to so hold and dismiss or strike out this action *in limine*.



Issue 2: *Whether this suit is properly constituted in terms of the locus and the capacity of the parties before the Court?*

4.5 We submit that this action is dead-on-arrival because both parties are non-juristic person and cannot sued or be sued. Even more fatal is that the lack of juristic personality robs the Applicant/Respondent of the capacity to even enter into the arbitration agreement that gave rise to this case *ab initio*.

4.6 The name of the Respondent/Objector is "Infinity Security Services Limited" and not "Infiniti Security Services Limited" that has been sued. The law is trite that a Company's name for the purpose of maintaining an action cannot deviate from its name as presented on its certificate of incorporation.²

4.7 The Applicant/Respondent have themselves to blame for this negligent oversight, having had the opportunity of seeing the Respondent/Objector's correct name on the contract underlying this transaction, they still chose to sue another name.

4.8 But even more fatal to the Applicant/Respondent's case is the non-juristic status of the Applicant/Respondent who is neither an incorporated Company nor a registered Business Name without the vires to contract, to sue or to be sued. This deficiency makes this case incurably bad and fit only for dismissal as nothing can be done to cure the lack

² **Umar v. White Gold Ginnery Nigeria Ltd** [2007] 7 NWLR (Part 1032) 117 @ 150 per Ariwoola JCA where my Lord held that: any deviation from the name in the certificate of incorporation of a company is fatal either to the suit or to the debenture.



of capacity to enter the arbitration agreement in the first place.

4.9 In the case of **Engineer Emmanuel Chukwuemeka Okeke v. Nnamdi Azikiwe University Teaching Hospital**³the Court of Appeal was confronted with this conundrum in an Arbitral matter, my Lords reestablish the basic position of law which is that a non-juristic party cannot contract nor sue.

4.10 But however, on the peculiar facts of that case, the Court considered that since the case was one of misnomer and moreover it was the Respondent who was guilty of supplying its wrong name that was now seeking to profit from its own default, the Court held that it was a liable as a juristic person and made the order enforcing the arbitral award.

4.11 The Court however made it clear that where a party was non-existent ab initio, then it cannot be termed a mere matter of misnomer. The Court held as follows:

I have to say that it is not the specific name under which is a person sued that decides whether or not the person is a juristic person. What determines that issue is **whether or not a natural person exists who bears that name or a similar name or had in fact hitherto bore that name.**

[Emphasis mine]

4.12 So the question here is whether any juristic entity exists, known as "Akma Signature Hotel & Suites" that entered into the contract underlying this suit and also brought this suite under a erroneous name.

³ (2018) LPELR-43781(CA) Per OGUNWUMIJU, J.C.A. (Pp. 10-16, Paras. A-E)



4.13 The answer is an emphatic no! No such entity exists and therefore the principle of misnomer is inapplicable and thus the suit cannot be saved by the substitution of a juristic personality since none existed when the underlying contract was made.

4.14 And neither will the postulations of **Okeke v. Nnamdi Azikiwe University** avail the Applicant/Respondent here as the Applicant/Respondent is the guilty party who ought not to be allowed to benefit from its wrongful actions of contracting and suing without taking the pain to obtain legal personality or nominate a juristic personality to represent it.

4.15 In the final analysis, we urge the Court to resolve this issue in our favour and dismiss the Applicant/Respondent's case as it is incurably bad and cannot be salvaged.

Issue 3: *What is the right procedure for taking proceedings to seek recognition and enforcement of an arbitral award?*

4.16 The Rules of this Court expressly makes provision for an application for recognition and enforcement of an arbitral award. Order 39 Rule 4 headed "Motion on arbitral award" provides comprehensively for the procedure to be adopted sub-rule 1 in specifying a Motion on Notice as the appropriate process provides:

Every **motion on notice** to set aside, remit or **enforce an arbitral award** shall state in general terms the grounds of the application and where any such motion is founded on



evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.

4.17 In stark disobedience of this clear provision, the Applicant/Respondent filed an Originating Summons and purported to bring its application under Order 3 Rule 8 of the Rules of this Court which provides the requirements for filing an Originating Summons. However, Rules 5 & 6 of the same order which are headed "Proceedings which may be begun by Originating summons" sets out the type of proceedings which can be conducted by Originating Summons.

4.18 The Rules provide in *extenso*:

5. Any person claiming to be interested under a deed, Will, enactment or other written instrument may apply by Originating Summons for the **determination of any question of construction arising under the instrument** and for a declaration of the rights of the persons interested.

6. Any person claiming any legal or equitable right in a case **where the determination of the question whether he is entitled to the right depends upon a question of construction of an enactment**, may apply by Originating Summons for the determination of such question of construction and for a declaration as to the right claimed.

4.19 As can be gleaned above Originating Summons is reserved for cases where the declaration of a right is hinged on the determination of questions arising from a document. Hence Rule 8 mandates that the form of an Originating



Summons shall be in forms 3,4 and 5 with necessary variations.

4.20 Looking at Forms 3,4 & 5 annexed to the Rules of Court, a distinctive feature of the forms are that they demand the litigant to endorse the questions the Court is called upon to answer on the face of the Originating Summons.

4.21 While we concede that forms annexed to the Rules of Court can be modified, we submit that such modification cannot in the case of an Originating Summons remove the requirement for endorsing the questions that the Court is called upon to answer as that is the very essence of Originating Summons proceedings.

4.22 In addition, we submit that looking at the purport of recognition and enforcement of an arbitral award, it is wholly unsuitable for Originating Summons proceedings since the Court is not called upon to construe the contents of the Arbitral Award, the use of Originating Summons would therefore be a negation of this special procedure.

4.23 Turning to the Applicant/Respondent's Originating Summons in this matter, it immediately reflects the improper use of Court process. The purported Originating Summons bear no questions for the Court to answer on the face of it and is such a deviation from Form 3 that it cannot be held to be in compliance with the Rules.

4.24 We urge the Court to strike out the Originating Summons filed by the Applicant/Respondent as it is an abuse of Court process.



5.0 **Conclusion**

5.1 In conclusion, we urge the Court to resolve the issues in our favour and uphold our preliminary objection and accordingly dismiss this matter *in limine*.

5.2 We are most grateful for the kind indulgence.

DATED THIS _____ DAY OF _____ 2019

O. MARX IKONGBEH ESQ., MCI Arb (UK).
ESTHER PIUS EKONG (MISS) [SIGNED].
RESPONDENT'S COUNSEL

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