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CASE DIGEST

PARTIES TO A CONTRACT CANNOT SIDESTEP THE JURISDICTION OF THE COURT

TOF ENERGY COMPANY LIMITED & 2 ORS v. WORLDPAY LLC & ANOR
Court Of Appeal
(Lagos Division)

(DANIEL-KALIO; SIRAJO; AFFEN, JJ.CA)

Sometime in August 2018, two American companies – 1st Respondent [WorldPay LLC] and 2nd Appellant [TOF Energy Corporation] entered into a Bank Card Merchant Agreement ("BCMA") as "processor" and "merchant" respectively, with Clause 23 of the agreement (which deals with "Choice of Law: Jurisdiction. Venue") designating "the State and Federal Courts in Cincinnati Ohio or Hamilton County, Ohio as the exclusive forum with respect to any action or proceeding arising out of, or in any way relating to this Agreement or pertaining in any way to the relationship between Merchant and Processor".

The 1st Respondent alleged that it fell victim to wire transfer fraud perpetrated by the 2nd Appellant through the direction and at the instance of the 3rd Appellant, as transactions processed through the 2nd Appellant's account (as 'merchant' under the BCMA) were found to be fictitious; and that part of the proceeds of fraud was traced from the 2nd Appellant's account at Standard Chartered Bank, New York, USA, to the 1st Appellant's two accounts domiciled with the 2nd Respondent in Lagos, Nigeria. Upon becoming aware that $4,920,500 was transferred into the 1st Appellant's accounts domiciled in Nigeria, the 1st Respondent contacted the 2nd Respondent and furnished details of the [alleged] fraudulent conversion and tracing of funds into the 1st Appellant's accounts and urged the 2nd Respondent not to disburse the funds or deal with the accounts until further notice as the 1st Respondent intended to initiate appropriate legal proceedings in respect thereof. Sequel to this, the Respondent fled an affidavit of urgency, motion ex parte for interim injunction and motion on notice for interlocutory injunction.

In response to this, the Appellants and 2nd Respondent filed their Statement of Defence, on certain grounds, and on these grounds urged the lower Court to dismiss the 1st Respondent's suit. In a considered ruling, the lower Court dismissed the Appellants' motion and assumed jurisdiction to entertain and determine the suit.

Dissatisfied by the decision of the lower Court, the Appellant by a Notice of Appeal appealed to the Court of Appeal. One of the issues for determination is *Whether the learned trial Judge was right in holding that the choice of Ohio State Courts, United States of America as the venue for the resolution of disputes as stipulated in Clause 23 of the Bank Card Merchant Agreement cannot ousts the jurisdiction of the High Court of Lagos State to entertain the suit and consequently holding that the trial Court has the jurisdiction to entertain this suit?*

Learned Counsel for the Appellants argued that a fundamental issue of territorial jurisdiction that must first be resolved is implicated when the venue in which a cause or matter may be tried is raised, insisting that the proceedings are null and void and of no effect when a cause or matter which falls within the jurisdiction of one State is heard and determined in another State vide **Onyeama v. Oputa (1987) 3 NWLR (Pt. 60) 259 at 293**. He contended that the suit herein is premised on the BCMA between the 1st Respondent and the 2nd Appellant and the alleged claim of fraudulent conversion cannot be established without placing reliance on the BCMA which is said to be the source of funds purportedly converted fraudulently, insisting that the 1st Respondent and 2nd Appellant are companies registered and carrying on business in the US whilst the 1st Appellant is a Nigerian company, and that neither the 1st and 3rd Appellants nor the 2nd Respondent are parties to the BCMA which is to be performed in the US; that by Clause 23 of the BCMA, it is the State and Federal Courts of Ohio, USA that has territorial jurisdiction over disputes ensuing from the BCMA which was neither entered into nor expected to be performed in Nigeria nor do the parties thereto have their registered offices in Nigeria or carry on business in Nigeria. Learned Counsel further contended that parties are bound by contracts freely entered and the court is not at liberty to re¬write the same for them and that the institution of proceedings in Nigeria by an American company (such as the 1st Respondent) in respect of a dispute which has its origins in the US constitutes forum shopping. He finally submitted that whereas the 1st Respondent could lodge a criminal complaint with relevant law enforcement authorities in Nigeria which may initiate criminal prosecution in respect of alleged proceeds of fraud traced to bank accounts domiciled in Nigeria, the High Court of Lagos State lacks jurisdiction to entertain the civil claim herein.

Learned Counsel for the 1st Responded contended that the jurisdiction of the lower court was not ousted or impaired by the BCMA between it and the 2nd Appellant, citing **Sonnar v. Nordwind (Owners of the N.V. Norwind) (1987) 4 NWLR (Pt 66) 520, (1987) LPELR-3494 (SC) at 42 - 43**, he posited that choice of jurisdiction or forum selection does not derogate from the jurisdiction of the courts of this country; that, in any event, specific reliefs are sought against all the Defendants, including the 1st and 3rd Appellants as well as the 2nd Respondent which are not parties to the BCMA and cannot be bound by its terms and conditions, including the forum selection clause thereof, and that the funds subject matter of the suit is within the territorial jurisdiction of the High Court of Lagos State, which is the proper forum for the resolution of all issues in controversy between all the parties. He cited Adesola v. Abidoye (1999) 14 NWLR (Pt. 637) 28 and pointed out that the Appellants have not provided any contrary authority on the question of whether parties can by their contract remove the jurisdiction vested by the Constitution in our courts.

Counsel for the 2nd Respondent contended that contrary to the Appellants' submissions, the Supreme Court held in **Arjay Limited & Ors v. Airline Management Support Ltd (2003) 5 SCM 17** that the territorial jurisdiction of a Court can be determined by where the contract in question was made or where the contract is to be performed or where the Defendant resides, which is in sync with Order 2 Rule 3, High Court of Lagos State (Civil Procedure) Rules 2012, and that the 3rd Appellant (who is the alter ego of the 1st and 2nd Appellants) resides within the jurisdiction of the Court. Counsel further maintained that parties cannot through clauses in a contract divest the court of its jurisdiction and that notwithstanding that the maxim *"pacta sunt servanda*" is recognized in Nigeria, the Agreement is sullied by fraud, misrepresentation and illegality and there is no consensus ad idem between the parties.

In resolving the issue, the Court held that:

The object of an exclusive choice of forum clause (such as Clause 23 of the BCMA) is that the parties have opted to derogate from the jurisdiction of other courts in which the dispute could otherwise have been taken cognisance of. The usual context of the plea of foreign jurisdiction is that whereas the defendant contends that the jurisdiction before which he is being sued has been chosen against, the claimant insists on invoking the jurisdiction of the court whose jurisdiction is said to have been derogated from. In principle, the question of whether a court has jurisdiction to adjudicate is a matter of public law. A *fortiori,* the question of whether a court has jurisdiction to adjudicate in circumstances in which parties have chosen the forum for resolving their disputes is likewise a matter of public law.

The point to underscore however is that contracting parties do not have untrammeled liberty to denude the court of jurisdiction conferred on it by the Constitution or statute by their private treaty [see SONNAR v. NORDWIND supra, **just as they cannot donate jurisdiction** to a court that lacks it. An agreement on jurisdiction is therefore not a sufficient basis for derogation from the jurisdiction of the court in which an action has been commenced in defiance of the agreement of parties. But a court which finds that the parties have made an agreement to derogate from the jurisdiction it otherwise has will, as a matter of judicial discretion rather than strict law, give effect to that agreement unless there is strong cause to the contrary. It would seem that such 'strong cause' will include a situation where third parties not bound by the agreement are necessary parties in the suit, or where the claim falls within the exclusive jurisdiction of the non-chosen forum or where there is inability to sue in the chosen forum for reasons beyond parties' control such as the recent global lockdown or where there is need to protect the weaker party in the bargain, such as employees and consumers… **In Sonnar v. Nordwind supra as in Nika Fishing Co. Ltd v. Lavina Corporation** supra, the party seeking to enforce the foreign jurisdiction clause in the respective bills of lading filed an application for stay of proceedings, but not an objection to the court's jurisdiction. Presenting a plea of foreign jurisdiction by way of an objection to the undoubted jurisdiction of the court (as the Appellants did in the case at hand) is a fatal defect that would torpedo an otherwise gallant attempt at enforcing a forum selection agreement. It being so, the Appellant's plea (projected as an objection to jurisdiction) was dead on arrival, and the lower court cannot be faulted for protecting and asserting its undoubted jurisdiction on the strength of *SONNAR v. NORWIND* supra and dismissing the objection without further ado.

Issue resolved in favour of the Respondents

Rotimi Seriki, SAN with Toyin Abidoye, Esq., for the Appellant

Abimbola Atitebi, Esq., with Olufemi Oyewole, Esq., for the Respondent

This summary is fully reported at (2022) 4 CLRN