

IN THE HIGH COURT OF LAGOS STATE  
HOLDEN AT LAGOS JUDICIAL DIVISION  
BEFORE HONOURABLE JUSTICE (MRS) A.M. NICOL-CLAY  
SITTING AT COURT 21, LANDS DIVISION, IGBOSE, LAGOS  
TODAY THURSDAY 24<sup>TH</sup> JUNE, 2010

SUIT NO.: LD/1668/2009

BETWEEN:

ZUMAX NIGERIA LIMITED

} CLAIMANT

AND

FIRST INLAND BANK PLC

} DEFENDANT

I BERENIBARA FOR THE CLAIMANT/RESPONDENT AYODEJI

JOLAOSHO FOR DEFENDANT/APPLICANT

RULING DELIVERED

RULING

The Defendant/Applicant by a Notice of Preliminary Objection dated the 12<sup>th</sup> day of November 2009 which is brought pursuant to Order 39 Rules 1(1)(2) of the High Court of Lagos State Civil Proceedings Rule 2004, Section 240 and 241(1)(2)(C) of the Constitution of the Federal Republic of Nigeria 1999, Section 54 of the Evidence Act, CAP E14, LFN 2004 and under the inherent jurisdiction of the Court as follows:

An Order of this Honourable Court dismissing this Suit in its entirety.

And for such further or other Order(s) as the Honorable Court may deem fit to make in the circumstances.

The grounds upon which the preliminary objection is raised is as follows:

- a. This Honorable Court has no appellate jurisdiction to renew its own final judgment in Suit No LD/115/2005.
- b. The consent Judgment entered in suit No: LD/115/2005 is a final Judgement and it can only be set aside on appeal by an appellate Court and not by this Honourable Court:
- c. This Honourable Court is functus officio in respect of Suit No: LD/115/2005.
- d. The Claimant is constitutionally precluded from instituting any appeal or any Court proceeding to review the judgment of this Court entered with the consent of parties without first seeking the leave of Court:
- e. This action is caught by the doctrine of estoppel per res judicata as:
  - i. The Claimant's indebtedness to the Defendant which has already been decided by the judgment of the Court in Suit No: LD/115/2005 is the subject matter of the instant suit:

**CERTIFIED TRUE COPY**

- ii. The parties in Suit No: LD/115/2005 are similar with the parties in the instant suit. As such, the Claimant is estopped from instituting this action in respect of the same subject matter.
- iii. This suit is an abuse of court process as it was initiated for the collateral purpose of relitigating or reviewing a matter which has already been decided by this Honourable Court.

In support of the application is an 8 paragraphs affidavit with 4 exhibits attached and a Written Address, A Further Affidavit was also filed of 5 paragraphs.

The Claimant/Respondent filed a 17 paragraphs Counter Affidavit and a written Address, to which the Defendant/Applicant filed a Reply on points of Law.

Moving the application, both Learned Counsel adopted their written submissions.

I have carefully considered the application before me together with the affidavit in support, the attached exhibits, the Written Address filed, the further affidavit, the Counter affidavit filed and the written Address, the Reply filed on points of Law, After a Careful consideration of the above I have this to say:

It is the argument of the Defendant/Applicant that this Honourable Court in Suit No LD/115/2005 on July 15<sup>th</sup> 2005 entered a consent judgment between the Claimant and the Defendant on the account of the Claimant's indebtedness and in view of the Supreme Court's decision in

THE HONDA PLACE V GLOBE MOTORS LTD (2005)14 NWLR PT 945, 306

That a consent judgment is a final judgment that this Court does not possess appellate or superiority jurisdiction over its own decision, Learned counsel to the Defendant/Applicant also referred to the case of

VULCAN GASES LTD V G.F IND AG (2001) 9 NWLR PT 719, 649 that the proper order to make was a dismissal.

Learned Counsel to the Defendant/Applicant also submitted that the Claimant by this action seeks several declarations to the effect that it has fully liquidated its indebtedness contrary to the judgment of the Court in S No LD/115/05 that the Court was estopped by the doctrine of estoppel per rem judicata from entertaining this matter.

Learned Counsel referred to the case of

AJIBOYE V ISHOLA (2006) 13 NWLR (PT 998) 628 AT 643 and submitted that the parties to the Suit are the same, the judgment in Suit No LD/115/2005 dealt with the issues of the Claimant's indebtedness to the Defendant, that the reliefs sought in paragraph 52(a)(b)(c)(d)(e)(f)(g)(h)(i)

**CERTIFIED TRUE COPY**

& (k) and facts/issues were decided in Suit No LD/115/2005 that the only option was to appeal the decision of the Court.

It is the contention of the Claimant/Respondent that the Applicant did not grant the Claimant's application for a restructure of the facility as deposed by the Claimant but cancelled the offer.

That the Claimant did not know it's actual indebtedness as the Applicant failed to disclose the true facts, the various in flows of money to the Claimant's account are recovered in the course of receivership.

Responding to the arguments canvassed by the Defendant/Applicant on the issues raised, Learned Counsel to the Claimant/Respondent submitted that where there is issue of fraud leading to the entry of consent judgment, the said judgment cannot be final as recognized by the same Supreme Court in : VULCAN GASES LTD V G.F IND AG (2001) 9 NWLR PT 719, 649

And the argument of Defendant/Applicant's counsel that the option open to the Claimant/Respondent to go to Court of Appeal was not tenable the consent judgment was obtained by fraudulent misrepresentation and as such a nullity and would be challenged by way of fresh action.

On issue of estoppel, Learned Counsel submitted that such consent judgment obtained by fraud cannot act as estoppel against a fresh action and that the Court was not functus officio.

In the further affidavit filed the Defendant/Applicant averred that it made full and frank material disclosures on the monetary in flows in course of Receivership they worked hand in hand.

In its Reply on points of Law, Learned Counsel submitted that the consent judgment by nature is a final decision founded on the mutual agreement of the parties and the established constitutional procedure for reviewing it under Section 241(2) of the 1999 Constitution is the process of appeal.

The position of the Law is that the elements necessary for determining issue estoppel are same parties in previous and current cases, whether issues are material to the cause of action in the previous and in latter cases, whether issues are the same and whether it had been resolved in the earlier case.

See the case of

ALHAJI ODUMOSU & ANR V OLUWOLE & ANR (2004) FWLR (PT91) 1628, 1654

Thus a party raising a plea of estoppel per rem judicatem is in fact urging the Court before which it is raised, not to consider the issues in the case a new the issues having been previously adjudicated upon by a competent Court. Thus the doctrine of estoppel per rem judicatem or issue estoppel are

**CERTIFIED TRUE COPY**

commonly employed as a defence to an action, that is a shield and not a sword.

See also

DIKE –OGU V AMADI (2008) 12 NWLR PT 1102

In this instant case I have carefully considered the circumstances in which the consent judgment was given a consent judgment is a judgment the provisions and terms of which are settled and agreed to by the parties to the action and that due effect to be given to it by the Court's, it is a final judgment and being so it cannot be set aside by the Court that gave the judgment.

But it will be interfered with in situations involving fraud, misrepresentations and non disclosure of material facts, lack of proper authority or a mutual mistake, in such circumstances a Court of Law and equity would not hesitate to intervene after being duly satisfied that the consent judgment was obtained illegally and proceed to take necessary steps and set it aside.

See the case of

EGEMOLE V OGUEKWE (2008) 12 NWLR PT 1101, 531 AT 533-534.

The Claimant in this case averred that to know its loan status it commissioned a firm of auditors, Peter Edojarogba & Co auditor's to obtain it statement of account from the Defendant and reconcile the statement of account with the Defendant, that the Defendant in spite of Claimant's confirmation of auditor's mandate failed and refused to release their documentation as requested by the auditor's instead it wrote to Chief Kingsley Okafor a guarantor of the facility stated that the facility had matured.

Sequel which receivers were appointed and the Defendant failed to make full disclosures and hand over the statement of account to the Receivers/Managers and in course of the Receivership it received several contract offers their the Claimant had persistently requested for its Statement of Account and that whilst receivership was in place some of its vessels were demolished.

It further averred that Terms of Settlement was signed by both parties on the belief that was still indebted to the Defendant and concluded its indebtedness to be pegged to N150,000.00 it executed Terms of Settlement and 4 months after, the Defendant forwarded a copy of interim report of the Receivers/Managers as well as the audited report that this triggered a query by Claimant as to why it was not released prior to the execution of the agreement.

**CERTIFIED TRUE COPY**

It referred to the sums of money in excess of the Defendants claim and that the Defendant's had been fraudulent in presenting different figures at different quarters and by Statement of Account No 01010200000026 the Defendant had received and collected sums of money to the tune of N239,851,098.93 this was not disclosed by the Defendant, if it had provided the statement of account it would not have executed the Terms of Settlement dated 23/05/05, all these were denied by the Defendant.

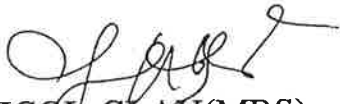
I have also carefully considered the affidavit in support of the application by the Defendant, it is my view that there is evidence of fraudulent misrepresentation, concealment of facts affording the Claimants/Respondent grounds for setting aside the consent judgment this matter is not caught by estoppel and the Claimant is seeking to do this by this fresh action.

Accordingly, this Notice of Preliminary hearing fails and is accordingly dismissed.

I make no order as to costs.

Dated this 24<sup>th</sup> day of June 2010.

**CERTIFIED TRUE COPY**

  
A.M NICOL-CLAY (MRS).  
JUDGE.  
24/6/2010.

*25 John of ... John*

*#1000000 for Certificate*

**CERTIFIED TRUE COPY**

*[Signature]*  
**ADENIYI H. S.**  
S/REGISTRAR I

