IN THE SUPREME COURT OF NIGERIA 'HOLDEN

AT ABUJA ■

ON FRIDAY, THE 7TH DAY OF JUNE, 2019 BEFORE THEIR

LORDSHIPS

MARY UKAEGQ PETER-OPILI	JUSTICE, SUPREME COURT
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	JUSTICE, SUPREME COURT
AMIRU SAMUSI	JUSTICE, SUPREME COURT
E3EMBI EKO	JUSTICE, SUPREME COURT
UWANI MUSA ABBA AJI	JUSTICE, SUPREME COURT

SC, 85.1/2014

BETWEEN:

MR. CHARLES MEKWUNYE SK2gE£B£EBEEI5 APPELLANT

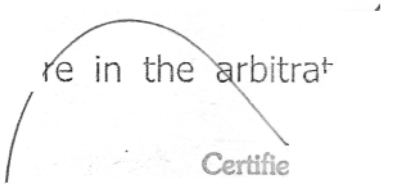
AND

MR, CHRISTIAN IMOUKHUEDE ESgEESEBBSBSS RESPONDENT

J U D G M E N T

fDELIVERED BY UWANI *MUSA* ABBA AJI, JSC.)

The Respondent as Applicant took out an Originating Motiop against the Appellant for an order setting aside the arbitral aw 14/5/2007 by Mrs. Olusola Adegbonmi which sought for;



1. *AN ORDER of this Honourable Court setting aside the*

arbitral award made on the 14th of May, 2007 by the 2nd Respondent (MRS. OLUSOLA ADEGBONMIRE) in the arbitral proceedings: IN THE MATTER OF AN ARBITRATION BETWEEN CHARLES MEKWUNYE AND CHRISTIAN IMOUKHUEDE on the grounds set out in the Schedule hereunder.

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It is the fact that the Appellant as landlord and the Respondent as tenant entered into a Tenancy Agreement containing an arbitration clause charging the parties to resort to arbitration in the event of any dispute arising therefrom. The notice of arbitration was served on the Respondent and the proceeding carried out, thereinafter the Appellant sought to enforce the arbitral award of 14/5/2007 in Suit No; M/225/2007. During the pendency of the Suit, the Respondent by an Originating Motion in Suit No: M/323/07 sought for the setting aside of the arbitral award. In the consolidated Suits, Suit M/225/2007 was struck out. In Suit No: M/323/07, the trial court refused to set aside the arbitral award, wherein the decision was against the Respondent who appealed to the lower court. The lower

court unanimously allowed the appeal and set aside the arbitral

proceedings, hence this appeal.

The Appellant vide a Notice of Appeal, formulated 5 Grounds of appeal with their particulars for the determination of this appeal. In arguing the appeal, the Appellant formuiated 5 issues for the determination of the appeal in his Appellants' brief with the Reply thus:

1. *Whether the lower court was right when it failed to consider the unchallenged evidence on record and the provisions of section 33 of the Arbitration and Conciliation Act, Cap A18, Laws of the Federal Republic of Nigeria, 2004 when it found the Notice of Arbitration invalid? (Ground 3.1)*
2. *Whether the lower court was right to have given the Arbitration Agreement between the Appellant and the Respondent a literal interpretation which led to manifest absurdity? (Ground 3.2)*
3. *Whether the lower court was right when it held that two parties to the arbitration agreement must have a say in the appointment of the arbitrator without recourse to the express agreement between the Appellant and the Respondent conferring the power to appoint an arbitrator on a third party? (Ground 3.3)*

4. *Whether the arbitrator misconducted herself by delegating her duties to the Law Firm of So!a Ajijota & Co? (Ground 3.4)*

5. *Whether the lower court has jurisdiction to set aside the arbitral award? (Ground 3.5)*

The Respondent on the other hand in his brief formulated 5 issues for the determination of the appeal as follows:

1. *Whether the conditions precedent to the initiation of, the Arbitration Proceedings were fulfilled by the Appellant taking into consideration the express provisions of Article 3(3) of the first Schedule to the Arbitration and Conciliation Act CAP A18, LAWS OF THE FED ERA TION OF NIGERIA,, 2004. (Ground 1).*

2. *Whether the lower court was right in law in holding that that the agreement to refer to arbitration is unenforceable in law. (Ground 2).*

3. *Whether the failure to notify or inform the Respondent as to the appointment/recommendation of Mrs. Olusola Adegbonmire as an arbitrator vitiates the said appointment of the Arbitrator. (Ground 3).*

4. *Whether the arbitrator mis-conducted herself in respect of the arbitration proceedings. (Ground 4)*

5. *Whether Mrs. Olusola Adegbonmire was ever appointed as an arbitrator. (Ground 5).*

The parties adopted their Brief and asked this Honourable Court for judgment in their favour.

Having gone through the records and the evidence therein, this appeal shall be considered on the issues formulated by the learned Counsel to the Appellant. Issues 4 and 5 shall be taken together.

There is however the 19-page Reply Brief filed on 27/4/2018 by the Appellant supposedly on "new issues raised" in the Respondent's brief of argument. Having gone through it, it appears to be but a hoax and a dupery since I could not spot any new issues in the Respondent's brief responded to. A reply brief is not another chance for the Appellant to rebuild and re-invigorate his argument or case. A reply brief merely comes to contend any fresh or new issue of law raised by the Respondent in his brief, which was not captured or anticipated in the Appellant's brief, and if not explained, can mislead the appellate Court, to the prejudice or

detriment of the Appellant; See the case of OGUANUHU & ORS ¥S

CHI EG BO KA (2013) LPELR - 19980 SC. There is therefore no need to consider the reply brief of the Appellant.

ISSUE 1:

Whether the lower court was right when it failed to consider the unchallenged evidence on record and the provisions of

. section 33 of the Arbitration and Conciliation Act, Cap A18, Laws of the Federal Republic of Nigeria, 2004 when it found the Notice of Arbitration invalid?

On this issue, it is submitted by the learned Counsel to the Appellant that by the provision of section 33 of the Arbitration and Conciliation Act, 2004, and Article 30 of the Arbitration rules, the Respondent has waived his right to any non-compliance to valid notice of arbitration and sundry issues when he did not object timeously to it. He also relied on ODUA INVESTMENT CO. LTD V, JOSEPH TAIWO TALABI (1997) 10 NWLR (PT.523) 6. He argued that notwithstanding the above, the lower court was wrong to hold that there was non-compliance with section 3(3) of the Arbitration Rules since the conditions in the said Rules are not exhaustive

and may depend on circumstances of the case which can be inferred into. He cited in support UNITY LIFE & FIRE INSURANCE CO, LTD V. I. B.W.A (2001) 7 NWLR (SIC) AT 625. He prayed that this issue be resolved in the Appellant's favour.

It is riposted by the learned Counsel to the Respondent that by the use of the word "shall" in Article 3 of the Arbitration Rules, the Arbitration Notice of 5/8/2005 given to the Respondent falls short of the mandatory requirements to be valid. He relied on C.N. ONUSELOGU ENT, LTD V. AFRIBANK (NIG) LTD (2005) 12 NWLR (PT.940) 587, Again, that there was never a referral to arbitration as the condition precedent was not fulfilled by the Appellant and there would be no need to read another document since the provisions of the Rules are mandatory. He relied on CITY ENG. (NIG) LTD V. N.A.A (1999) 11 NWLR (PT.625) 76, He equally argued that the Respondent did not waive his right to object to the arbitration proceedings as decided in KANO STATE URBAN DEVELOPMENT BOARD V. FANZ CONSTRUCTION CO. LTD (1990) 6 SC 103, He asked that this issue be resolved in favour of the Respondent.

The issue herein borders on the non-compliance with the notice of arbitration served upon the Respondent by the Appellant. The bone of

contention herein is not that the notice was not served but that there is non-compliance or fulfilment with some clauses and conditions envisaged by the Rules. Article 3(1), (2) and (3) provide as follows:

1= The party Initiating recourse to arbitration...shall give notice to the other party...a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date in which the notice of arbitration is received by the Respondent.

3. The notice of arbitration shall include the following:

A) A demand that the dispute be referred to arbitration ••

B) The names arid address of the parties

C) A reference to the arbitration clause or the separate arbitration agreement that is involved

D) A reference to the contract, out of or in relation to which the dispute arises

E) The general nature of the claim and an indication of the amount involved, if any

F) The relief

6) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

The said notice of arbitration dated 5/8/2005 is contained at page 17 of the records and for the sake of clarity, is reproduced infra:

NOTICE OF ARBITRATION

Notice is hereby given in accordance with clause 3(c) of the tenancy agreement between the undersigned as Landlord and your goodselves as tenants dated 14th July, 2003 in respect of the property known and described as IB, Kolawole Ashimi Street, Ogudu GRA, Ogudu, and your refusal to comply with terms of the agreement and your holding over the property from me, I have applied to the President of the Chartered Institute of Arbitrators, London; Nigeria Branch to appoint an arbitrator to resolve the dispute that has arisen between us. See attached. Thank you.

It is the argument of the Respondent that the conditions in Article 3(3) of the Arbitration Rules, especially clauses/conditions (e) and (f) were not complied with being mandatory condition precedents to be fulfilled to confer jurisdiction for commencement/initiation of agitrajtioo p^ceedings.

registrar

In the above Article 3 of the Arbitration Rules, the condition ° . * precedent for commencement/initiation of arbitration proceedings is the

issuance of notice of arbitration to the other party as clearly stipulated by Article 3(1) above. The commencement date is deemed to be the date the notice is served and received by the other party. Notices are recognized procedural provisions. They give the defendant breathing time so as to enable him to determine whether he should make reparation to the

plaintiff. See Per OLABODE RHODES-VIVOUR, J.S.C in UGWUANYI V. NICON INSURANCE PLC (2013) LPELR-20092(SC).

As far as I am concerned, the notice of arbitration dated 5/8/2005 has activated the"condition precedent required. Having received the notice of the arbitration proceeding that was to come up, he cannot feign ignorance of the general nature of the claim and an indication of the amount involved, if any and the relief or remedy sought as contained under (e) and (f) in Article 3(3) of the Arbitration Rules. Moreover, the Appellant in the said notice made an "attachment" of every necessary document and information available and necessary for the use of the Respondent,

Furthermore, even where it is contended that the condition precedent was not fulfilled,

I make bold to state that there was substantial

compliance to it, to say the least. Substantial compliance means actual

compliance in respect to the substance essential to every reasonable

objective of the Statute. It means that a Court or Tribunal should determine whether the Statute has been followed sufficiently so as to carry out the intent for which it was adopted. The doctrine of substantial compliance permit the overlooking of technical failure that does not

amount or constitute a substantial deviation from the intendment of the

statute. The question of what constitutes a material departure from a statutory requirement, or the question of whether requirements have been satisfied inevitably raises the question of degree. See Per MUSDAPHER, JSC in BUHARI V, INEC & ORS (2008) LI>ELR-814(SC).

In the instant appeal, can it be said that there was no notice of arbitration to the Respondent. The answer is in the negative. The said notice of 5/8/2005 was acknowledged and responded to by the Respondent at page 18 of the record without objection to the paucity or insufficiency of conditions (e) and (f) of Article 3 (3) of the Arbitration Rules. Why then is the Respondent basing his issue or contention on non-compliance with condition precedent to the initiation of the arbitration

proceedings as if he was not served? I think that he is oniy clinging to some technical strings.

The service of the arbitration notice on the Respondent is akin to service of pre-action notice. This court has therefore in F Ik F FARMS NIG. LTD. V. *fMPC* (2009) 12 NWLR (1155) 387 @ 401, by Tobi, ISC, that the right to be served with a pre-action notice does not fall within the category of rights which cannot be waived. I do not think it is correct law to say that a party cannot waive his right in ail matters affecting jurisdiction of the Court. I do not want to go that far or to that extreme. On the contrary, it is ideal to consider each case on its own merits and not as a blanket principle of law to be applied across the board to all cases affecting or relating to jurisdiction.

In the present appeal, the Respondent after being served with the notice protested and challenged the arbitration but eventually withdrew same. In fact, at page 44 of the record when the 2nd meeting resumed on 31/3/2006, *"Mr. Baiogun withdrew his challenge to the arbitration and the preliminary meeting proceeded as per the agenda set for the meeting...*

He who stands on the-law must follow the law. Since the Respondent

relies on the provision of Article 3 of the Arbitration Rules, he must also be bound by section 33 of the Arbitration and Conciliation Act. Section 33 of the Arbitration and Conciliation Act, provides as follows:

A party who knows-

(a) that any provision of this Act from which the parties may not derogate; 'or

(b) that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non- compliance within the time limit provided therefore shall, he deemed to have waived his right to object to the non- compliance,

It is indisputably demonstrated by the Respondent that he waived the right to challenge and object to any irregularity and non-compliance to the commencement of the arbitration proceeding. The concept of waiver presupposes that a person who is to enjoy a benefit or who has the choice

of two benefits is fully aware of his right to the benefit, or where he has a

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choice of two, he decides to take one but not both. The waiver must be clear and unambiguous like allowing all evidence to be taken or even decision given before challenging the hearing. It will then show that the party, deliberately refused to take advantage when it availed him. Such failure to take advantage of a right must be so clear that there will be no other reasonable presumption than that the right is let to go. See Per CHRISTOPHER MITCHELL CHUKWUMA-ENEH, J.S.C in UGWUANYI V. NICON INSURANCE PIC (2013) LPELR-20092(SC). Per SULEIMAN GALADIMA, J.S.C in the preceding case added that (a) The waiver must be clear and unambiguous; and (b) That the appellant clearly failed to take advantage of his right in the circumstances. These two requirements must co-exist so as to conclude that the Respondent has deliberately refused to take advantage of the waiver. This was exactly the case herein. The Respondent having waived his right to any irregularity or non-compliance (if any), which I have not seen, cannot eat his cake and have it. This issue is resolved in favour of the Appellant.

ISSUE 2:

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Whether the lower court was right to have given the Arbitration Agreement between the Appellant and the Respondent a literal interpretation which led to manifest absurdity?

It is submitted herein that the lower court's strict interpretation of clause 3(c) of the Tenancy Agreement in respect of appointment of an Arbitrator worked out absurdity. That courts may fall back to the intention behind the words and look for other evidence from, the transactions as decided in ADETOUN OLAPE3I V. MB PLC (2007) LPELR-160. He urged that this issue be resolved in his favour.

It is rejoined by the Respondent's learned Counsel that terms of agreement must be valid to be enforced. That by Clause 3(c) of the Tenancy Agreement, the body/organization to be appointed as Arbitrator is nonexistent, hence unenforceable; and parties are bound by their contract as decided in LARMIE V. DPMS LTD (20050 18 NWLR (PT.958) 474. He urged for the resolution of this issue in his favour.

Where the intention of the parties to a contract are clearly expressed in a

document, the court cannot go outside the document in search of other documents not forming part of the intention of the parties. See Per TOBI, JSC in NNEJI V. ZAKHEM COM. (MIG.) LTD (2006) LPELR-2059(SC).

Clause 3(c) of the Tenancy Agreement provided inter alia that "...*any conflict and/or disagreement arising out of these presents... shall be referred to a sole Arbitrator that shall be appointed by the President of the Chartered Institute of Arbitrators*, *London, Nigeria Chapter..."* The argument is that "the Chartered Institute of Arbitrators, London, Nigeria Chapter" is non-existent, making the referral to a non-existent body unenforceable. Indeed, parties are bound by their contract. However, where such terms or expression will not be absurd or is unambiguous, the intention of the parties is read into the contract. The Respondent has conceded to the fact that judicial notice has been taken that only 2 bodies of arbitrators exist in Nigeria which are: The Chartered Institute of Arbitrators, (CIArb)(UK), Nigeria Branch and Chartered Institute of Arbitrators of Nigeria. What is basically missing or misnomered or interchanged is "London" instead of "UK", which the trial court inferentially and literally interpreted, *"London is a city and not a country, reference to*

United Kingdom must be more correct." Can the fact that "London" was used and not "UK" necessarily mean and be inferred that it is a nonexistent body? I cannot imagine that. It is reasonably inferable that this was a misnomer or a mistake, which must be read to bring in the intention of the parties. How then do we determine the intention of parties in this matter? For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. These rules, however, are mfere presumptions and the law does permit parties to a contract to settle the point for themselves by any intelligible expression of their intention. See Per IGUH, JSC in AFROTEC TECHNICAL SERVICES (NIG) LTD V. MIA & SONS LTD & AN OR (2000) LFELR-219(SC). The pathological arbitration clause referred to and conceded by the Respondent's learned Counsel is more probable and likely the literal and the best interpretation to be given in this matter. Any other interpretation as given by the lower court will work out absurdity and antithetical to the intention of the parties.

Furthermore, the Respondent was a party to the Tenancy Agreement and read same before appending his signature or subscribing to be bound by same. If he knew and believed that "the Chartered Institute of Arbitrators,

London, Nigeria Chapter" was non-existent, why did he agree to be bound by same? A similar scenario reared up, wherein Per OGUNBIYI, JSC in AGBULE V. WARRI REFINERY & PETROCHEMICAL CO LTD (2012) LPE1.R-20625(SC), stoutly held and nailed the matter thus:

> "It goes without saying therefore that a defendant/respondent who did not protest against the name used and in fact filed processes using such interchangeably cannot now be heard to complain at this stage. This is because he is deemed to have waived his right and is therefore estopped from contending the contrary as rightly submitted by the learned appellant's counsel. The wroiiq use 'of the name did not overreach or put the respondent to any form of disdain in the absence of any earlier complaint thereof. The use of the name in my view is, at best a misnomer and which did not occasion any negative effect. This Court under its inherent powers has the jurisdiction *to* correct such inconsequential error which did not require any formal application to be made. A similar situation in the case of Afolahi & 2 Ors v. Adekunle *&* Anor. (1933) 8 SC 98 is In evidence wherein this Court in the lead judgment delivered by Aniagolu JSC approved the power of=r-^sd Trus Copy

> Court of Appeal to amend the capacity of a party without a forma! application... At pages 117 & 119 in particular, the learned jurist said:- "It is the duly of Court to aim at, and to do, substantial justice and to allow such formal amendments, in the course of the proceedings, as are necessary for the ultimate achievement of justice and the end of litigation. ...while recognizing that the Rules of Court should be followed by parties to a suit, it is perhaps necessary to emphasize that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in a whirligig of technicalities, to the detriment of the determination of the substantial issues between them..."

I agree with the interpretation given by the trial court and I stand by it. Since parties are bound by the terms of their contracts, they must also be bound by errors and mistakes they have condoned and waived.' The error having been condoned by the Respondent is part and parcel of their contract and shall be interpreted so by me. The cardinal principle of interpretation of documents is that parties are presumed to have intended what is contained in a document to which they have subscribed. See MAXIMUM INSURANCE COY. LTD VS. QWONIYI (1996) 1 MCLC

(NIGERIAN COMMERCIAL LAW CASES) (PT. I) 141 AT 145. This is

because, it is not the function of the Court to make a contract between the two parties or to rewrite the one already made by them, but it is the Court's duty to construe the surrounding circumstances including written and oral statements to effectuate the intention of the parties. See OMEGA BANK (NIG,) PLC V. QBC LTD. (2005) ALL FWLR (FT,249) 1965 at 1967. This issue therefore must tilt in favour of the Appellant.

ISSUE 3;

Whether the lower court was right when it held that two parties to the arbitration agreement must have a say in the appointment of the arbitration without recourse to the express agreement between the Appellant and the Respondent conferring the power to appoint an arbitrator on a third party?

It is contended by the Appellant's learned Counsel that by clause 3(c) of the tenancy Agreement and section 7 of the Arbitration and Conciliation Act, 2004, the parties had specified the appointment of a sole arbitrator by an appointing authority. That by the Appellant's letter of 5/8/2005, the

provisions of clause 3(c) of-the arbitration agreement was complied with.

He contended that the clause never contemplated that the parties must have a say in the appointment of an arbitrator and recourse to another mode of appointment was outside the ambit of the agreement. He settled that the lack of notice to the Respondent to appoint the arbitrator is not enough to set aside the arbitral award or that the Respondent has waived

his right. He relied on A.G RIVERS STATE v ODE (2006) LPELR-626.

Also that the sole arbitrator informed the Respondent of her appointment vide the letter of 9/1/2006. He urged that this issue be resolved in favour of the Appellant.

It is countered that the Respondent was not given any notice to the purported appointment of Mrs Olusola Adegbonmire contrary to the guiding principle that parties choose their judge and that of natural justice. He referred to NNPC ¥. LUTIN (2006) IP EUR 2024-SC. He requested that this issue be resolved in his favour.

It is trite that the court cannot make contract for the parties. Clause 3(c) of the Tenancy Agreement provided among others that "...any conflict and/or disagreement arising out of these presents... shall be referred to a sole Arbitrator that shall be appointed by the President of the Chartered

Institute of Arbitrators, London, Nigeria Chapter and the decision of the

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Sole Arbitrator shall be binding on the parties in accordance with the Arbitration and Conciliation Act..."

Similarly, at page 17 of the record, wherein the Appellant gave Notice of Arbitration to the Respondent, it was stated that "/ have applied to the President of the Chartered Institute of Arbitrators, London; Nigeria Branch to appoint an arbitrator to resolve the dispute that has arisen between us.

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See attached." The Respondent fully appeared to understand that they were on the same page of appointing a sole Arbitrator, when he responded to the Appellant's Notice of Arbitration at page 18 thus:

> *"However if you are still of the opinion that we should go to arbitration, I will be willing and ready to ask my Solicitors to make an Application to the Chief Judge of Lagos State to appoint <u>one</u> for us".*

The parties have clearly agreed to the appointment of a single or sole arbitrator by the above, Again, at page 26 of the record, the Appellant clearly "recommended" or "appointed" Mrs Shola Adegbonmire as the *"suitable person to arbitrate in the dispute between..."*Similarly, the said Mrs Shola Adegbonmire at page 27 of the record wrote to the Respondent

informing you of my appointment as Arbitfdtor ki We above matter..

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these went without raising any eyebrow from the Respondent that

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dissented to her appointment or the use of a sole arbitrator. Thus, I will he

not read any meaning into this again. This is also in consonance with the **Arbitration and Conciliation Act, especially section 7 thereof which provides that:**

> *7' Subject to subsection (3) and (4) of this section> the parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator (2) rynere no procedure is specified **under** subsection **(1)** of this sec tion-*
>
> *(a) in ine case of an arbitration with three arbitrators/ each party s/fa// appoint one arbitrator and the two thus appointed shall appoint the third so however that- (i) it a party fails to appoint the arbitrator within thirty days of receipt of a **request** to do so by the other party/ or (if) it the -yjtwo arbitrators faii to agree on the third arbitrator within &f£f4p%/r t\tfcirty days of their appointments, the appointment shall be made by the court: on the application of any party to ine*

arbitration ' t 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

Sections 8 and 9 equally contemplate and envisage the appointment of an arbitrator by the parties and the challenge procedure of such where there may be bias or partiality. Nonetheless, the Respondent having submitted himself to the arbitration, he cannot longer resile out of the decision simply because he is challenging the appointment of a sole arbitrator which he subscribed to. This issue is against the Respondent.

ISSUES 4 & 5:

Whether the arbitrator misconducted herself by delegating her duties to the Law Firm of Sola Ajilola & Co?

Whether the lov^ier court has jurisdiction to set aside the **arbitral award?**

Learned Counsel for the Appellant submitted that it is perverse and technical for the lower court to hold that the arbitrator misconducted herself by delegating her duty to another Law firm. He referred to ADEYEMI V, STATE (2014) LPELR-23G62. That the fact of changing her personal letter head to her official letter head did not suffice as delegation of her duty to a stranger or separate legal personality.

Furthermore on issue 5, he submitted that by sections 29 and 30 of the Arbitration Act, 2004, there was no proof by the Respondent for the setting aside of the arbitral award by the lower court. He prayed that the issue herein be resolved in his favour and to allow the appeal.

The Respondent's learned Counsel submitted hereunder that by the letter of 17/8/2005, it was for recommendation and not the appointment of Mrs. Olusola Adegbonmire. Similarly, that the Respondent did not appoint or ratify or accept the recommendation of Mrs. Olusola Adegbonmire as an Arbitrator. That the misconduct of Mrs. Olusola Adegbonmire range from falsehood to misrepresentation, fraud, bias and partiality contrary to section 9 of the Arbitration and Conciliation Act. Also that the person recommended was Mrs. Olusola Adegbonmire but the Law Firm of Sola Ajibola & Co. took over the proceedings which ^mounted. to unlawful

delegation of her authority contrary to section 30(1) of the Arbitration and

Conciliation Act. He also referred to the case of TRIANA LTD V. U.T.B. PIC (2009) 12 NWLR (PT.1155) 313. He prayed the resolution of this issue in favour of the Respondent and asked that the appeal be dismissed.

The litany of the complaints of misconduct by the Arbitrator as alleged by the Respondent range from use of letter headed paper of the law firm of the Arbitrator, lack of direct communication of her appointment

to the Respondent but through Alegeh & Co, the Arbitrator went through all the correspondences between the Appellant and the Respondent prior to the commencement of the arbitration, and failure to disclose, that she knew that the Appellant was a member of the Chartered Institute of Arbitrators contrary to Article 9 of the Arbitration and Conciliation Act.

One of the facts of misconduct by the Arbitrator herein is that Mrs. Olusola Adegbonmire falsified and misrepresented herself as the appointed Arbitrator when in fact she was only recommended, which recommendation was not ratified by the Respondent. By the letter of 17/8/2005 contained at page 26 of the record, the Appellant wrote thus:

consequences of his action or inaction. It is implied and inferable that the Respondent has herein accepted hook, line and sinker the recommendation or appointment of Mrs Shola Adegbonmire as the Arbitrator and the seamlessness of the whole conduct of the proceedings as free and fair without partiality or misconduct from the Arbitrator. The silence of the Respondent as the case may be and his subsequent involvement or participation in the proceedings serve as estoppel and waiver against him. Silence in the situation aforesaid leads to an irrefutable presumption'of admission by conduct or representation. This is implicit In the decision of Obaseki, JSC in JOE IGA & CO. V. CHIEF EZEKIEL AMKURI 4 ORS (1976) 11 SC 1. The Respondent's admission is clear and unambiguous. In WIEDE-MANN V. WALPOLE (1891) I.Q.B. 534 AT 532, Lord Esher, stated as a matter of general principle that: *"Now there are cases-business and mercantile cases - in which the Courts have taken notice that■ in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. So where merchants are in dispute, one writes to the other, 'but you promised me that you would do this or that,' if the other does not answer*

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. REGISTRAR

the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement"

The pith of this appeal revolves on the enforcement of the arbitral award made by the sole arbitrator affirmed by the Lagos State High Court which was later set aside by the Court below. The Appellant's grouse basically revolves on that. Generally speaking, arbitral award is regarded in legal parlance, as a final judgment on all matters referred to an arbitrator and as such Courts are enjoined to, as much as possible, uphold or affirm and enforce arbitral awards when being approached especially in view of the fact that parties had voluntarily resolved or agreed to submit to the jurisdiction of the arbitrator or arbitrators to resolve their dispute. In the instant case, the parties have voluntarily submitted to the jurisdiction of the arbitration by participating. However, under our laws, there are grounds on which arbitral award can be set aside. Some of these grounds include:- (a) Where the award is beyond the scope of the reference; (b) Where the arbitrator has misconducted himself and (c) Where the arbitral proceedings or award has been improperly procured. All these circumstances or conditions under which arbitral award can be set aside are provided in Sections 29 (2) and 30(1) of the Arbitration and

Conciliation Act, Cap. A18 Laws of the Federation of Nigeria as reproduced hereunder:-

> *"29. (2) The Court may set aside an arbitral award. If the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be , set aside. 30(1) Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the Court may on the application of a party set aside the award. (2) An arbitrator who has misconducted himself may, on, the application of any party be removed by the Court."*

In this instant case, the Respondent's reason for seeking the setting aside of the award is hinged on alleged misconduct on the part of the arbitrator. In the case of TAYLOR WOODROW (NIG) LTD V. SUDDENTSCHE ETNA-WERIKI GMBH (1993) 4 NWLR (PT. 286) 127 AT ,142“ 144 A-E, this Court gave insight on what amounts to misconduct of an arbitrator, especially in view of the fact that the Law/Act did not define what amounts to misconduct. In the said case, this Court held that act of misconduct entails the followings:- (1) Where the arbitrator

fails to comply with the terms, express or implied, of the arbitration

agreement; (2) When, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not to be enforced; (3) Where the arbitrator has been bribed or corrupted; (4) Technical misconduct such as where the arbitrator makes a mistake as to the scope of the authority conferred by the

agreement of reference. This, however, does not mean that every

irregularity of procedure amount to misconduct; (5) Where the arbitrator or umpire has failed to decide all the matters which were referred to him; (6) Where the arbitrator or umpire has breached the rules of natural justice; (7) If the arbitrator or umpire has failed to act towards both parties, as for example; (a) by hearing one party but refusing to hear the other; or (b) by deciding the case on a point not put by the parties. See Per AMIRU SANUSI, J.S.C in NITEL V. OKEKE (2017) LFELR~46284(SC).

In this instant case, I am not convinced that the Respondent has shown any act of misconduct as it was alleged or that the sole arbitrator, Mrs Shola Adegbonmire, failed to comply with the terms of the agreement, All these conditions were compiled with and rightly met by the soie arbitrator, in my humble opinion. On the award of N 1,000,000.00 being

estimated cost of repairs of the said property, N.108,333.33 for the Respondent holding over the property from July to September, 2003 and N246,982,00 being cost of arbitration contained at pages 50-51 made by the arbitrator in favour of the Appellant, are claims as required by law and evidential by the record. I am persuaded that the arbitrator was correct in awarding them.

This issue is similarly resolved in favour of the Appellant and the >

appeal succeeds. The judgment of the lower court delivered on 14/11/2014 is hereby set aside. Parties are to bear their own costs.

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JUSTICE, SUPREME COURJ

COUNSEL:

DR, CHARLES D. HEKWUNYE, ESQ, FOR THE APPELLANT,

EHIZOGIE ESEZQBGR, ESQ, FOR THE RE