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IN THE FEDERAL HIGH COURT  
HOLDEN AT ABUJA NIGERIA  
ON THURSDAY THE 22<sup>ND</sup> DAY OF OCTOBER, 2015  
BEFORE THE HONOURABLE  
JUSTICE A. ABDU-KAFARATI  
JUDGE

SUIT NO. FHC/ABJ/CS/611/2013

BETWEEN:

FEDERAL INLAND REVENUE SERVICE

..... PLAINTIFF/APPLICANT

AND

- |   |   |                            |
|---|---|----------------------------|
| 1. AES NIGERIA BARGE LIMITED<br>2. ATTORNEY - GENERAL OF THE FEDERATION<br>3. LAGOS STATE GOVERNMENT<br>4. POWER HOLDING COMPANY OF NIGERIA PLC | } | DEFENDANTS/<br>RESPONDENTS |
|---|---|----------------------------|

JUDGMENT

This judgment is in respect of two processes, to wit;

- (1) The plaintiff's Amended originating summons dated 11<sup>th</sup> day of February, 2015 and filed on 12<sup>th</sup> day of February, 2015
- (2) The 1<sup>st</sup> defendant's Notice of Preliminary Objection dated 12<sup>th</sup> day of November, 2013.

The 2<sup>nd</sup> - 4<sup>th</sup> defendants did not file any process.

The Amended Originating Summons poses three questions for determination as follows:-

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*Prepare a notice of Appeal*  
*21/10/16*

- (a) Whether the ICC Arbitral Tribunal members sitting in London consisting of MAKHDOM ALI KHON S.A VAN VECHTEN VEEDER QC and HON. JUSTICE SAMSON ODEMWINGE UWAIFO (JSC) Rtd in the ICC case No.15 575/VRO Between AES NIGERIA LTD and (1) FEDERAL REPUBLIC OF NIGERIA, (2) LAGOS STATE GOVERNMENT (3) POWER HOLDING COMPANY NIGERIA PLC has the jurisdiction to determine the dispute arising from the validity and constitutionality of tax exemptions granted under the Power Purchase Agreement (PPA) and the taxation of the 1<sup>st</sup> defendant by the Federal Inland Revenue Service which jurisdiction is conferred on the Federal High Court by section 251 of the constitution of the Federal Republic of Nigeria 2011 (as amended)
- (b) Whether the said ICC Arbitral Tribunal has the jurisdiction to enter a valid award in the dispute between the defendants (Parties in the ICC Arbitration) pertaining to the taxation of the 1<sup>st</sup> defendant which will have a binding effect on the plaintiff capable of limiting the plaintiff from the performance of its statutory duty and function of revenue collection and administration of the entire tax statutes in force in Nigeria, such

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as to entitle the plaintiff to seeks reliefs being sought in this suit.

- (c) Whether upon a proper reading of section 251(1) (b) and (c) of the constitution of the Federal Republic of Nigeria 1999 as amended the dispute between the Defendants (Parties in the ICC Arbitration) pertaining to the validity and constitutionality of tax exemptions granted under the Power Purchase Agreement (PPA) is not within the exclusive jurisdiction of the Federal High Court and thereby rendering the partial Award dated 17<sup>th</sup> day of October, 2011 and the entire purported Arbitral proceedings unconstitutional null and void ab initio.

If the answer to question 1 and 2 above are in negative and question 3 is in the affirmative, then the plaintiff seeks reliefs 1 – 9 as contained on the face of the originating summons.

In support of the Amended originating summons is an affidavit of 21 paragraphs. Attached to the affidavit in support are four exhibits marked as Exhibits FIRS 1 – FIRS 4, 6 and 7 respectively. It also filed a further affidavit of 18 paragraphs and is dated 2<sup>nd</sup> day of April, 2014.

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Attached to the further affidavit is one exhibit marked as Exhibit 12. It also filed a further and better affidavit of 11 paragraphs. Attached to it is Exhibit 12.

In support of all the affidavits the plaintiff filed a written address which was adopted on its behalf as its oral argument.

In opposition to the Amended originating summons the 1<sup>st</sup> defendant filed a counter-affidavit of 19 paragraphs. It is dated 24<sup>th</sup> day of February, 2014. Attached to the counter-affidavit is exhibit AA1.

In support of the counter-affidavit is a written address.

In response to the 1<sup>st</sup> defendants' written address the plaintiff filed a reply on points of law dated 2<sup>nd</sup> day of April, 2014.

The 3<sup>rd</sup> and 4<sup>th</sup> defendants through their respective counsel told the court that they are not opposing the originating summons.

In addition to the counter-affidavit filed in opposition to the Amended originating summons the 1<sup>st</sup> defendant filed a Notice of Preliminary

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Objection dated 12<sup>th</sup> day of November, 2013. The 1<sup>st</sup> defendant is praying for an order dismissing or striking out the plaintiff's suit for gross abuse of the process of court.

The grounds for this application are:

1. The claims in this suit concern a foreign arbitration award arising out of an arbitration in England. There has never been a dispute that the seat of the arbitration is in England and even now the plaintiff does not suggest otherwise in its papers as filed in this suit before this court. Pursuant to the FRN agreement in the power purchase Agreement dated 30<sup>th</sup> day of June, 2000 and the New York convention on the Recognition and enforcement of Foreign Arbitral awards as ratified and adopted in Nigeria under the Arbitration and conciliation Act, Cap.A18, Laws of the Federation of Nigeria, 2004, this court does not possess the requisite jurisdiction to hear and determine an action seeking to nullify the arbitral proceedings or set aside the Award dated 17<sup>th</sup> day of October, 2011 made by the ICC Tribunal in London; as same is only subject to the exclusive jurisdiction of the courts of England.

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2. The suit was not commenced by due process of law.
  3. The case is grossly, fundamentally and incurably defective
  4. The claims in this suit which are premised on the power purchase Agreement dated 30<sup>th</sup> day of June, 2000 are statute barred.
  5. The suit constitutes a gross abuse of the process of court as same was instituted in bad faith and to the irritation and annoyance of the 1<sup>st</sup> defendant.
  6. This suit as presently constituted amounts to an improper use of the process of court to interfere with the due admonition of justice.
  7. This suit is not properly constituted as the plaintiff is an agency of the Federal Government which has been sued by the plaintiff through the office of the Attorney-General of the Federation who is the 2<sup>nd</sup> defendant in this case.
  8. This court lacks the competence and the requisite jurisdiction to entertain this case as presently constituted.

In support of the preliminary objection is a written address which was adopted on behalf of the 1<sup>st</sup> defendant as its oral submissions.

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In reply to the 1<sup>st</sup> defendant's Notice of Preliminary Objection the plaintiff filed a written address dated 4<sup>th</sup> day of December, 2013.

The 1<sup>st</sup> defendant filed a reply on points of law in answer to the plaintiff's written address.

This is the summary of the processes filed by the plaintiff and the 1<sup>st</sup> defendant.

I will treat the 1<sup>st</sup> defendants' Notice of preliminary objection first as it touches on the issue of jurisdiction. The main issues for determination in the 1<sup>st</sup> defendant's application are:

- (1) Whether this court has jurisdiction to entertain the plaintiff's suit.
- (2) Whether the challenge to the validity of the Power Purchase Agreement (PPA) which was made and came into effect on the 30<sup>th</sup> June, 2000 is not caught by statute of limitation, thereby rendering the cause of action in this case statute-barred.

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- (3) Whether this suit is properly constituted having regard to the fact that the plaintiff which is an agency of the Federal Government FGN has commenced this suit against the 2<sup>nd</sup> defendant the constitutional party in all actions by or against the Federal Republic of Nigeria/Federal Government of Nigeria.
- (4) Whether this suit constitute abuse of court process having regard to the issues which are both before the ICC Tribunal and this court.

I have considered the arguments of both parties as contained in their respective written submissions.

It is trite that in determining the issue of jurisdiction it is the plaintiff's claim that the court will consider.

The plaintiffs claim are as follows:

- (3) A declaration that the determination of the 1<sup>st</sup> defendant's claim by way of partial award dated 17<sup>th</sup> October, 2011 and/or final award dated 30<sup>th</sup> November, 2013 made by the ICC Tribunal is unconstitutional, illegal null and void and of no effect.



- (4) A declaration that the continued proceedings or further proceedings before the ICC Tribunal is unconstitutional, illegal null and void and of no effect.
- (5) A declaration that the determination by way of partial award of the tax dispute arising from the PPA and pertaining to any claim arising therefrom infringe the right of the plaintiff to access and collect taxes and generate revenue for the Federal Republic of Nigeria.
- (8) An Order by this court setting aside the partial Award dated 17<sup>th</sup> October, 2011 and the final Award dated 30<sup>th</sup> November, 2013 made by the ICC Tribunal same being unconstitutional, illegal, null and void ab initio.
- (9) An order restraining the defendants by themselves, servants, agents or counsel from continuing with or purporting to take any benefit from or abiding by any obligations or rights no matter howsoever described or arising from the arbitral proceedings before the ICC Tribunal or partial award dated 17<sup>th</sup> October, 2011 and/or final Award dated 30<sup>th</sup> November, 2013, any other award or order made thereto.

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The preamble to the Arbitration and conciliation Act, Cap. A18 Laws of the Federation 2004 provides:-

"An Act to provide a unified Legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the convention on the Recognition and Enforcement of Arbitral Awards (New York convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration".

I would also like to refer to the last part of paragraph 23.3.5 of the Power Purchase Agreement (PPA) exhibits FIRS1 attached to the plaintiff originating summons.

The said paragraph reads:

"The parties further expressly waive to the fullest extent permitted by applicable law, any right to challenge an award by the Arbitrators anywhere outside the place of Arbitration agreed herein".

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It should be borne in mind that the place of Arbitration under the Power Purchase Agreement PPA is London as agreed by the parties. By the provisions of clause 23.3.1 of the PPA "all disputes shall be finally settled by binding arbitration under the Rules of Arbitration of the International chambers of commerce (the ICC Rules) then in effect". By clause 23.3.2 of same the place of Arbitration shall be London, England.....

By these provisions the parties have expressly agreed that the ICC rules will govern the arbitration and they also agreed that London, England shall be the place for arbitration between them.

Article 4 of the New York convention which has become part of Arbitration and conciliation Act provides that;

"Recognition and Enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that (e) the award has not yet become binding on the parties or has been set aside or suspended

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trustee, a personal representative, an assignee or any other party".

It is not in doubt that the plaintiff herein is an agency of the Federal Government of Nigeria which entered into the PPA in exercise of its sovereignty.

Although the case of Express Petroleum was decided by a court of coordinate jurisdiction, I am persuaded by the decision in refusing the line of argument of the learned senior counsel for the plaintiff.

I therefore agree with the position taken by the learned counsel for the 1st defendant this court by virtue of clause 23.3.5 of the PPA and the preamble to the Act and section 53 thereof has no jurisdiction to entertain this action. The plaintiff should have approached the court, in England which has the jurisdiction by virtue of the parties' agreement.

The next issue is that of limitation. In treating this issue the 1st defendant is under the misconception that the plaintiff is challenging the validity of the PPA. From the Amended Originating Summons the

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plaintiff is challenging the partial award made by the ICC Tribunal on 17<sup>th</sup> October, 2011 and the final award made on 30<sup>th</sup> November, 2013.

By the provisions of sections 7 and 11 of the limitation Act, the limitation period for any action founded on simple contract is six (6) years while any action founded on a contract under seal is twelve years.

In all cases this suit that was instituted 9<sup>th</sup> September, 2013 is less than six years. I am therefor of the view that the action is not statue barred (assuring this court has no jurisdiction in the matter).

The next point for determination is whether this suit is properly constituted, the plaintiff (an agent of the Federal Government suing the Attorney General of the Federation).

If should be noted that the Attorney - General of the Federation stands in for the Federal Republic of Nigeria/Federal Government of Nigeria in any action in court. The plaintiff suing the Attorney - General is like it is suing the Federal Republic of Nigeria. The revenue the plaintiff is

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collecting it is doing so on behalf of the Federal Government and so does not make sense to sue Federal Government in this suit. I hold the view that this scenario is not proper in law. To that extent I agree that the suit is not properly constituted as to parties.

Having come to the conclusion that this court has no jurisdiction to entertain the action herein and also that the suit is not properly constituted I do not need to go into the last issue and the merit of the case. Suffice it to say that the suit ought to be struck out and same is hereby struck out for want of jurisdiction and competence.

*A. Abdulkafarati*  
**A. ABDU-KAFARATI**  
**JUDGE**

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Parties absent.

Miss Anuoluwapo Hundeyin for the Plaintiff

Mr. Ayokunle Adesomeju for the 1<sup>st</sup> defendant

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Date *28/10/15*

*Ben Molo Kura*  
*Registrar*