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COMMUNITY COURT OF JUSTICE,
ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO

TRIBUNAL DE JUSTIÇA DA COMUNIDADE,
CEDEAO

No. 10 DAR ES SALAAM CRESCENT,
OFF AMINU KANO CRESCENT,
WUSE II, ABUJA-NIGERIA.

PMB 567 GARKI, ABUJA
TEL/FAX:234-9-5241595/ 5240780
Website: www.eccj.net

COMMUNITY OF WEST AFRICAN STATES (ECOWAS),

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY 16TH OCTOBER, 2008,

SUIT NO: ECW/CCJ/APP/01/07 — RULING NO. ECW/CCJ/RUL/04/08

BETWEEN

1. DR. EMMANUEL AKPO — 1ST PLAINTIFF
2. DR. MORENIKE AKPO — 2ND PLAINTIFF

AND

3. G77 SOUTH SOUTH HEALTH CARE DELIVERY PROGRAMME; — 1ST DEFENDANT
4. THE REPUBLIC OF SIERRA LEONE. — 2ND DEFENDANT

BEFORE THEIR LORDSHIPS

HON. JUSTICE DANSINE .K. DONLI — PRESIDING JUDGE

HON. JUSTICE AWA DABOYA NANA — MEMBER

HON. JUSTICE SUOMANA DIRAROU SIDIBE — MEMBER

Assisted by Athanase Athanon Esq — Court Registrar

COUNSEL TO THE PARTIES.

Mr. Femi Wewe holding the brief for Mr. Rotimi Odu for the Plaintiffs;

Mr. J. G. Taidi appearing with Miss A. L Asekhauno for the 1st Defendant;

No Representation for the 2nd Defendant;

RULING

PARTIES

1. The defendants in the substantive suit namely: 1st Defendant- G77 South South Health Care Delivery Programme and 2nd Defendant- the Republic of Sierra Leone filed this preliminary objection.

2. The plaintiffs in the substantive case namely, the 1st plaintiff- Dr. Emmanuel Akpo, and the 2nd plaintiff- Dr (Mrs) Morenike Akpo, made their combined responses to the preliminary objection.

Facts of the case

3. The Plaintiffs who filed the substantive suit stated that as Medical Doctors based in Jos -Plateau State in Nigeria, were employed by the 1st defendant, to perform their professional services for the 2nd defendant, in Sierra Leone, a Member State of ECOWAS. They were employed as documented by an agreement between the plaintiffs and the 1st defendant dated 6th May 2005. Before the said employment, the 1st and 2nd defendants entered into an agreement on 22nd of May 2003 for the 1st defendant to source funds from Donors in order to provide medical services for the 2nd defendant. As evident by the dates of the two agreements, they were signed separately and the plaintiffs produced same in court. In this first agreement, paragraph 20 (xx) produced the following terms concerning arbitration:

"Disputes arising from this Agreement shall be tabled for Arbitration through Diplomatic channels"

4. The Plaintiffs in pursuance of the agreement proceeded to Sierra Leone- the 2nd defendant from May 2005 until 27th July 2006 when the 1st defendant, according to the Plaintiffs, illegally terminated their appointments based upon certain facts stated therein in their pleadings. Even though there were divergent pieces of views in respect of the said facts that led to the severance of their relationships, it was evident that the plaintiffs were served with letters that their services were terminated.

5. Also in the substantive suit the plaintiffs claimed the following reliefs:

i) A declaration that the unjustified and inhuman treatment of the plaintiffs by the defendants under the G77 South South Health Care Delivery Programme as provided in the agreement signed between the 1st defendant on one hand and the plaintiffs on the other hand is illegal and a violation of the plaintiffs fundamental Human rights, under the African Charter on Human and Peoples' Rights contrary to the Universal Declaration of Human Right Law 1948.

ii.) A declaration that purported termination of the Plaintiffs' appointments is illegal and a breach of contract;

iii) N2, 708,000,000 (two billion, seven million and eight thousand Naira only) as special and general damages against the defendants, jointly and severally.

6. The Plaintiffs in their pleadings averred that by a meeting held on 1st August, 2005 by the Nigeria Medical team deployed to the 2nd defendant under the agreement with the 1st defendant showed that the terms of their contracts were not fulfilled which caused them to suffer from several damaging treatments including an allegation of facts that inadequate facilities were provided which were violations of their human rights.

7. Pertaining to their conditions of service with the defendant, the plaintiffs stated that they were publicly humiliated, disgraced and insulted, which bordered on their personal integrity including false accusations and allegation levied against them and their Country - Nigeria.

8. Further more, they received two letters of termination of appointments, served on them- (plaintiffs) by the 1st defendant, on the ground of purported breach of contractual agreement. Also in

their reply, they denied the abandonment of their duty posts but promised to return to the 2nd defendant to continue the performance of their duties as provided for in the agreement. When the latter was not achieved, the plaintiffs lodged the substantive claims whereby they sought the various particulars of reliefs set in their application.

9. Having been served with the suit, the defendants entered a conditional appearance and filed a notice of preliminary objection on the grounds that the suit so filed by the plaintiffs should be dismissed because the court lacked jurisdiction.

Legal Arguments

10. Learned Counsel to the 1st defendant, Mr Taidi contended that the application by the plaintiffs was not justiciable on the grounds that the agreement contained an arbitration clause. He proffered these details:

> *i) That the agreement giving right to this relationship between the parties before this Court provides for all dispute to be subjected to arbitration.*
>
> *ii) That the plaintiffs are only entitled to the claims in arbitration proceedings if at all proved.*
>
> *iii) That this Court lacked jurisdiction to try this suit and sought the following particulars of relief for striking out for want of jurisdiction and such further orders that the Court may deem fit to make in the circumstance.*

11. He contended that for this Court to assume jurisdiction in a matter, it must satisfy itself that certain conditions as highlighted in the case of MCFOY v. U.A.C. (1961) vol. 3 All E.R 116 and the

decision in the Nigerian Supreme Court case of OREDOYIN V. AROWOLO (1989) vol. 4 N.W.L.R pt 114 page 172 at 187, are applicable.

12. He emphasized the preconditions for assuming jurisdiction as follows:

i) Whether the subject matter of the case is within the jurisdiction of the Court

ii) Whether the Court is properly constituted that is in terms of number and qualification of judges

iii) Whether the case was initiated by due process of law. That is whether any condition precedent to instituting the case has been fulfilled

iv. Whether there is any substance in the case which prevents the Court from exercising jurisdiction.

13. He submitted further that these four conditions must co-exist conjunctively before the Court could exercise jurisdiction. He referred the Court to the case of OKONKWO V. I.N.E.C & 2 ors (2006) Vol. 2 E.P.R page 94 at page 184) and urged the Court to hold that in assuming jurisdiction, the four conditions must be met. He submitted that on the Authority of Alhaji Banigaa Budu Nuhu V. Alhaji Isola Are Ogele (2003) S.C.N judgment vol. 12 page 158 at 299, this Court is entitled to look at all the records that are before it.

14. He contended that by implication, all documents filed by the plaintiffs are before the court. He referred to the plaintiffs document headed 'an agreement between South South Health Care Delivery Programme and the Republic of Sierra Leone.' He particularly referred to paragraph 20 page 5 of that agreement and reiterated that the foundation of the agreement and relationship between the plaintiffs and defendants did not show anywhere that the transaction can be brought before the Court.

15. He referred to a document annexed to the application and dated 14th July, 2006 and contended that the plaintiffs were aware that all

disputes arising from their relationships with the defendants are subject to arbitration through diplomatic channels. He urged the Court to also hold that the condition precedent to this Court assuming jurisdiction did not fall within the ambit of matters that this Court can adjudicate upon.

He referred the Court to the Black' s Law Dictionary 8th edition on definition of arbitration and submitted that this Court as presently constituted does not meet the requirements of an arbitration panel. He referred the Court to the case of N.N.P.C.V LUTIN & ANOR (2006) vol. 14 W.R.N page 121 at 170 lines 15 – 20 where the Justices of the Supreme Court of Nigeria held that where an arbitration clause is contained in an agreement, it would exclude courts from determining disputes between the parties in respect of same and also on the said principle is the case of Bent Worth Finance Nigeria limited, Appellate Courts landmark case vol. 1 page 410, 432. Also, an Australian case of Trident General Insurance Company Ltd v MacNeice Bros, Property Ltd (1988) vol. C.L.R page 107,

17. He emphasized that the provision of an arbitration clause enjoyed strict compliance except waived by the parties in that agreement, and on this principles he referred to the case of ROYAL EXCHANGE ASSURANCE V. BENT WORTH FINANCE NIG. LTD, reported in Appellate Courts Landmark cases vol. 1 page 419 at 432.

18. He submitted that the parties have chosen to settle their disputes through Diplomatic channels and as a general rule, when parties freely enter an agreement, such parties cannot wilfully rescind from that agreement. He referred to OWAH UNIC CONSULTANTS V. CHEVRON NIG. LTD. (2006) vol. 2 W.R.N page 167 at 195 to 196.

19. He contended that the plaintiffs after having submitted to arbitration, they cannot rescind from it and this Court is enjoined to be reluctant in assuming jurisdiction on matters arising from

Agreements between parties that contain arbitration clause especially if the Court has not been appointed as arbitrator. He urged the Court to strike out the case for lack of jurisdiction.

20. On the other hand, Learned Counsel to the Plaintiffs, Mr. Wewe opposed the objection on the following grounds, that there is a maxim in International Law to wit Pacta Tertis Nec nocent nec prosunt (only parties to an agreement or Treaty are bound by that document), and that the agreement is between the 1st defendant and 2nd defendant and the plaintiffs cannot benefit there from and cannot be prejudiced by the operation of the said agreement.

21. He stated that in accordance with paragraph 20 of the said agreement the plaintiffs are not diplomats, and cannot use diplomatic means in settlement of their disputes.

22. The second ground has to do with the fact that the letter written 6 months before the proceedings, by the chambers of his Learned friend, Counsel to the 1st defendant sort settlement out of Court.

23. Learned Counsel to the plaintiffs submitted that the right to seek redress from the Court is a fundamental Human Right and that after trying all channels of peaceful settlement without avail, the only right opened to them was access to this court. He contended that it became natural on the part of the aggrieved person to seek redress in a Court of law especially when one of the defendants is a Government body albeit the 2nd defendant.

24. He submitted that parties are bound by the terms of their agreement and that only such parties are bound and not other parties. He reiterates the fact that the right to seek redress from the Court is fundamental and should not be taken away from the plaintiffs. He submitted that the contract the plaintiffs sought to enforce is not collateral to the agreement between the defendants.

25. He relied on the agreement annexed to the substantive case on pages 18 - 20 and the agreement between the 1st and 2nd defendants on pages 10-14 to submit that since the plaintiffs were not parties to the agreement containing the arbitration clause, the arbitration cannot bind them as to oust the jurisdiction of the Court from adjudication on the suit they filed.

26. He submitted that the Court cannot apply extraneous matters to an agreement to determine the intention of the parties and relied on Nnaji v. Zakhem (2006) All FWR Pt 330 page 1021; Friday U. Abologu v. Shell Petroleum Development Company of Nigeria (2003) 6 SCNJ 262.

27. On points of law, Learned Counsel to the 1st defendant, Mr Taidi stated that he needed time to reply on points of Law especially when his learned friend sought to exempt his client- the plaintiffs from the agreement which was the basis of this preliminary objection.

28. Learned counsel to the 1st defendant submitted on point of law, that the agreement containing the arbitration clause binds the plaintiffs through the exceptions to the doctrine of privity of contracts.

29. He submitted that by that doctrine collateral contracts are exceptions to privity of contract and the agreement of the plaintiffs and the 1st defendant which contained no arbitration clause is a collateral contract and is subsumed by the said arbitration clause in the other agreement which is the main contract from which the plaintiffs derived benefits regarding their contract.

30. Moreover, Learned Counsel to the plaintiffs responded and agreed that the issue of collateral Contract is an exception to the rule of privity of contract as raised by counsel to the 1st Defendant but contended that the agreement between the plaintiffs and the 1st defendant was not a collateral contract to the agreement between the 1st and 2nd defendant. In his conclusion, he contended that diplomatic

channels of arbitration are not opened to the parties but only Member states/ countries to Countries and that as the plaintiffs are not Countries, the channel of diplomatic settlement cannot apply in this case and urged the Court to discountenance the preliminary objection which is not provided for under Article 35 of the Rules of Court.

Consideration of the Arguments

31. The argument and legal authorities raised by both Counsels of the parties to the preliminary objection have been read thoroughly as to avail the Court of all the issues relating to the resolution of the preliminary objection thereto.

32. It is trite law that for the Court to assume jurisdiction before it, all the preconditions stated in the authorities cited particularly the cases of McFoy v UAC supra, Oredoyin v Arowolo INEC and ors (supra) must be met. In that regard and in all fours with those authorities relating to the said preconditions, are the cases of Madukolu v Nkemdilim (1962) 2 SCN LR 341 and applied in Tukur v Government of Taraba State (1997) 6 NWLR (part 510) at page 577 paragraphs F - H in the latter, it was held that:

> *"the case was not initiated by due process of law as laid down in the Rules of that Court. The proceedings before it were a nullity see madukolu and ors v Nkemdilim (1962) 2 SCNLR 341; (1962) All NLR 587 ..."*

33. Apart from the above cases it was also emphasized in AG (Fed.) v Sode (1990) INWLR, (part 128) page 500 at 42 paragraphs (g) where the Court stressed that the exercise to adjudicate on a matter will be futile where Court has no jurisdiction because the proceedings no matter how well articulated will result to a nullity.

34. Still on jurisdiction it is a well established principle of law that since the issue of jurisdiction is fundamental, it is relevant to determine it at the first opportunity whether there is jurisdiction because it will be manifestly absurd to suggest that the court proceeds with the taking of lengthy evidence of the parties to a suit where it appeared that the whole suit would be a nullity and the prerequisites of the subject matter of the case would not be within the jurisdiction of this court.

35. The 1st defendant raised the fact that the document between the 1st and 2nd defendants contained the arbitration clause which is the ground for ousting the jurisdiction of this Court.

36. On the other hand the plaintiffs are of the view that the agreement between the 1st and 2nd defendants are not binding on them as the substantive matter on violation of human rights which the Court has competence to adjudicate upon is part of the claim.

37. There is no doubt that the agreement between the 1st defendant and the 2nd defendant contain the said arbitration clause, which provides for the resolution of dispute arising from it through diplomatic means.

38. However, it is also clear that the 1st defendant entered into an agreement of employment with the 1st and 2nd plaintiffs for service to be rendered to the 2nd Defendant, the Republic of Sierra Leone.

39. The Agreements mentioned above become imperative for consideration, herein and Paragraph 20 (xx) of the 1st and 2nd defendants' agreement provided for arbitration through diplomatic channels.

40. The clear intendment of the above paragraph is that disputes will be resolved through Arbitration by diplomatic channels. As always the general rule for construction of statute of documents is

that words should be given their natural and ordinary meaning. However, where such application would lead to ambiguity of the intendment of the makers the rules of interpretation should be resorted to. See Afolabi Olajide v FRN (infra) at page 34 where this court resorted to the canons of interpretation as expatiated by Parke J in R vs Banbury (inhabitants) 1834 1 A and E 36 at 142, thus;

> *"the rule of construction is to intend the legislature to have meant what they actually expressed."*

41. Still on this point, Lord Green M R. stated,

> *"there is one rule of construction for statutes and other documents. It is that you must not imply anything in them which is inconsistent with the words expressly used."*

42. As stated in Afolabi Olajide' s case (supra), in rules of construction of statutes, words in the enactment should be given their ordinary and natural meaning as generally used and they have been ordinarily understood the day after the statute was passed. When the words of a statute are given their ordinary precise and natural meaning there is hardly any necessity to resort to any principles of interpretation.

43. However, where the ordinary and natural meaning is meaningless, the court would resort to the intention of the makers of the document and give the words a purposive interpretation as the rules of interpretation are resorted to when the literal meaning of the words of a document would be obtruse or ambiguous as the case of Olajide Afolabi vs F.R.N supra.

44. Thus, the binding effect or nature of the said Agreement between the parties in the instant case, such an agreement binds the parties and the parties alone. Whereas the second agreement between the plaintiffs and the 1st Defendant made no provision for arbitration

clause, the first agreement, made provision for an arbitration clause which was produced in court by the 1st and 2nd plaintiffs.

45. The question of the exceptions to the rules of contract raised by Learned Counsel to the 1st defendant needs to be considered. He relied on Trident General Insurance. Co. Ltd vs McNiece (1988) vol. 165 C.L.R. Commonwealth Law Report at page 107, to buttress his stance that the arbitration clause binds the parties to it.

46. Learned Counsel to the plaintiffs submitted that the court cannot go outside the agreement between the parties to find their intention because the court would be said to be redrafting the agreement for them. He relied on Nnaji v. Zakhem (2006) All Federation Law Report (part 330) page 1021; Friday Abalogu vs. Shell Dev. Pet. Co. of Nigeria (2003) 6 SCNJ 262.

47. It seems that the whole law which emerges before the Court relating to written contract is that it binds the parties thereon as stated also in the case of Oshin and Oshin Ltd v Livestock feed Ltd (1997) 2 NWLR (pt. 486) page 162. In the first agreement entered into by the 1st and 2nd defendants on one hand and the second agreement on the other by the plaintiffs and the 1st defendant, the terms of those agreements bind the parties thereon. Strictly speaking, according to the words the parties have themselves written and acknowledged unless there is evidence that they intended different meaning, their words stand. See Aouad v Kesmiwani (1956) SCNLR 83, where it was stated that the agreements signed by parties bind them.

48. In the instant case, the Plaintiffs and the 1st defendant signed the second contract which was a contract of service to be performed at the 2nd defendant as medical doctors.

49. As was submitted, the arbitration clause if properly interpreted meant that any dispute relating to the 1st and 2nd defendants shall be resolved through diplomatic arbitration. Learned counsel to the

plaintiffs submitted that only member states can settle disputes through diplomatic channels and that the plaintiffs enjoy no diplomatic status.

50. Having dealt with the two crucial issues of the arbitration clause and the binding effect of contracts, we turn to consider the issue of jurisdiction. The 1st defendant objected to the adjudication of this suit on the basis of lack of jurisdiction. Does this Court have jurisdiction to hear this matter?

51. In cases where there is an arbitration clause in an agreement, the settlement of such a dispute arising on such agreement must be by arbitration. However the matter before the Court was suggested in the pleadings of the plaintiffs to rest on violation of human rights. In article 9(5) of the Protocol of the court as amended, jurisdiction is vested on in a matter relating to violation of human rights committed in any member state of ECOWAS. For this court to be seised of jurisdiction, the pleadings must disclose such violations. The examination of pleadings as filed discloses that the grievances of the plaintiffs centered on alleged breach of contract and violations of human rights.

52. This case raises an interesting and very important point about access to justice by Community citizens and the jurisdiction of the Court.

53. The case put forward on behalf of the defendants which facts are not disputed by the other side, is that the plaintiffs who are medical doctors were employed by the 1st defendant to perform services in the 2nd defendant. It was not in dispute that such arrangements were documented in an agreement signed by the plaintiffs and the 1st defendant one part and another agreement signed by the 1st defendant and the 2nd defendant on the other part.

54. Having shown the ambit of the relationship of the parties and what they relied upon to challenge the Court' s jurisdiction to adjudicate on this case, and the submission of both learned Counsels on the matter, it is pertinent to examine the contracts and the arbitration clause in order to decide on jurisdiction.

55. In some of the Nigerian cases relied upon by learned Counsel to the 1st defendant, which this Court intends to be persuaded by the reasoning in those decisions by virtue of the combined effect of Article 19 (1) of the Protocol of the Court and Article 38 of the Statute of the International Court of Justice, whereby the court is enjoined to consider and appreciate the decisions and teachings of the most highly qualified Publicists of various Nations and the phrase judicial decisions which covers decisions of both national and international courts of Justice, the court holds the same views stated therein regarding those legal questions. In further support of the stance of the court is the position of I.C.J. in I.C.J. Reports (2002), page 3, at 24 where the Court referred to both national and international judicial decisions, on matter of jurisdiction. Also see the case of Moore v Taylor (1934) 2 W.A.C.A. 43 at page 45, where the Privy Council on the question of jurisdiction declared thus:

> *"It is quite true that their Lordships as every other Court, attempt to do substantial justice and to avoid technicalities, but their Lordships like any other court are bound by statute law, and if the statute law says there shall be no jurisdiction if a certain event, has occurred, then it is impossible for their Lordships or for any other Court to have jurisdiction"*

56. It seems very clear that the Court cannot exercise its jurisdiction even in serious violations if there is a feature in the case ousting the exercise of the court' s jurisdiction. See also the Nigerian Case of Madukolu v. Nkemdelim (supra) as stated by Brairamian Jsc.

57. Both learned Counsels are agreeable on this position of the principles of law but each differed in respect of whether this court has jurisdiction or not.

58. The question of jurisdiction cannot be divorced from the subject matter of the suit before the Court and the documents thereon. In that regard, it is necessary to consider the reliefs lodged in this Court by the plaintiffs. In the main, the plaintiffs action is based on violation of their human rights by the defendants in that they were subjected to inhumane conditions and treatment contrary to Article 5 of the African Charter on Human and Peoples Rights, a charter that is subsumed in the Revised Treaty 1993 of the Economic Community of West African States (ECOWAS) being the grundnorm of the Community' s Framework.

59. Article 5 of the said Charter provides for the protection of the citizens from violation of their human rights and as alleged by the plaintiffs regarding their alleged violations by the defendants, whereby they indicated such violations in their application thus:

> *"unjustified and inhumane treatment of the plaintiffs by the defendants under the G77 South South Healthcare Delivery Programme as epitomized in the agreement signed between the defendants on one hand and the defendants and the plaintiffs on the other hand."*

60. On the application of Article 35 of the Rules cited by the learned counsel to the plaintiffs, the court holds that same is irrelevant to

the determination of the instant application in that Articles 87 and 88 support an application of his nature.

61. On the issue of the alleged human rights violations, Art. 9 (4) of the Protocol of the Court as amended states that:

> *"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"*

62. In the instant case, the violation was said to have occurred in Sierra Leone, a member state of the Community. As to the question of access to this Court, Article 10 of the Protocol of the Court as amended grants access to individuals on application for relief for violation of their human rights.

63. By the above stated provisions individuals or Community citizens whose human rights are violated in any Member State of ECOWAS has access to this Court and the Court in turn has jurisdiction to hear the matter to its logical conclusion as the justice of the case demands.

64. Justice of a case which includes the Rule of Law postulates that the parties to any dispute shall be heard in a fair and proper administration of laws in the matter before the court.

65. With that principle in mind, the Court is duty bound to have in focus that the complaint of the plaintiffs belonged to the realm of human rights violation which the Court has jurisdiction over. The whittling down of such grievous allegation must be on the just cause only, which is the golden rule of practice of this Community Court.

66. Tidying up all the ends and issues, the premier concern which was argued on both sides vehemently is jurisdiction and its components. It is therefore pertinent and essential to the just determination of this

case that emphasis must be geared towards a number of elements that are characteristics of an exercise of jurisdiction. The authorities cited by both Counsels have persuaded this court to hold in like manner that a court is competent when it is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and the case comes before the court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction. See Afolabi Olajide v FRN (2004) ECW/CCJ/04 at pages 65 - 66 paras 32.

67. The thorny question is whether any feature in the case prevents the Court from exercising jurisdiction. The feature in the instant case relates to the arbitration clause which stated that in case of dispute, the matter shall be settled by arbitration through diplomatic channel. The plaintiffs stated that the clause was not in their contract agreement with the 1st defendant and did not apply to them because it was between the 1st and 2nd defendant and that there was privity.

68. Learned Counsel to the 1st defendant argued that the doctrine of privity of contract did not apply because of the rule to the exception of privity. Learned counsel argued that the contract between the 1st defendant and the plaintiffs was a collateral contract and by the rule of the exception of privity of contract, the arbitration clause binds them (the plaintiffs). He further argued that the plaintiffs produced both agreements including the one between the 1st and 2nd defendants containing the arbitration clause.

69. Learned counsel for the plaintiffs emphasized that the rule of privity of contract wherein, only parties to an agreement may access it in court and derive damages from its breach applied in the case.

70. From the legal point of view it cannot be denied that the plaintiffs were offshoots of the agreement entered into by the 1st and 2nd defendants. The view is taken pursuant to the fact that their contract of employment with the accrued benefits was as a result of the contract by the 1st defendant to solicit funds for health for the 2nd defendant. That being the case, the contract between the 1st and 2nd defendants became the main contract and that of the plaintiffs and the 1st defendant, the collateral contract.

71. The definition of collateral contract in the Business Dictionary.com states:

> *"Secondary, subordinate or supplementary item accompanying a primary item"*

72. Following the above definition, it is apparently unambiguous that the contract between the plaintiffs and the 1st defendant is collateral to the main contract between the 1st and 2nd defendant. On collateral contract, it was explained that a collateral contract is a contract where the consideration is the entry into another contract, and co-exists side by side with the main contract. See the case of Heilbut, Symons & Co v Buckleton (1913) A.C.30 wherein the court held inter alia that, "…It is collateral to the main contract but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract."

73. It is trite that a contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law and have binding effect. See Black Law Dictionary 7th Edition page 318.

74. However, collateral contract is a side agreement that relates to a contract, which, if unintegrated, can be supplemented by evidence of the side agreement. See also Black Law Dictionary 7th Edition page 319.

75. As to the privity of contract, the doctrine of privity means that a contract cannot as a general rule, confer rights or impose obligations arising under it on any person except the parties to it. See Dunlop Tyre Co v Selfridge (1915) AC 847 and Tweedle v Atkinson (1861) 1 B & S 393

76. In Dunlop Tyre Co v Selfridge supra, the plaintiffs sold tyres to Dew & Co, wholesale distributors, on terms that Dew would obtain an undertaking from retailers that they should not sell below the plaintiffs' list price. Dew sold some of the tyres to the defendants, who retailed them below list price. The plaintiffs sought an injunction and damages. The action failed because although there was a contract between the defendant and dew, the plaintiffs were not a party to it and 'only a person who is a party to the contract can sue on it as per Lord Haldane.

77. In Tweedle v Atkinson supra - the fathers of a husband and wife agreed in writing that both should pay money to the husband adding that the husband should have the power to sue them for the respective sums. The husband' s claim against his wife' s father' s estate was dismissed, the court justifying the decision largely because no consideration moved from the husband.

78. From the above authorities the two principles of privity and consideration have been solidified but distinct.

79. The exceptions to the rule of privity are namely:

(a) Collateral contracts

(b) Agency

(c) Trusts

(d) Restrictive covenants

(e) Statutes and

(f) Remedies of contracting parties as illustrated in these cases– Shanklin Pier v Detel Products (1951) 2 KB 854; Scruttons Ltd v Midland Silicones Ltd (1962)AC 446; Les Affreteurs Reunis v Leopold Walford (1919)AC 801; Tulk v Moxhay (1848) 2 Ph 774; Jackson v Horizon Holidays (1975) 1 WLR 1468

80. The first concerns the instant case which has been considered above. Collateral contract which is in the instant case between the plaintiffs and the 1st defendant, the agreement that contained the arbitration clause binds not only the 1st and 2nd defendants but the plaintiffs.

81. It must be stressed that even though the arbitration clause binds the plaintiffs it is necessary to interpret it if it is absurd. This Court has mentioned that where a clause is ambiguous, the rule of interpretation applies. In the case of Afolabi Olajide vs Federal Republic of Nigeria, supra, at paragraph, 38 page 67, the Court held thus:

> *"Apart from absurdity that the expounding of the legislation may produce in applying the literal rule, it may be contradictory and inconsistent therefore the aid of the rule will apply"* . See Mitchell v Torup (1766) Park 227 at 213.

82. To this Court, it does matter what type of arbitration that the parties bargained for, But, in construing the document, the Court would adopt the purposive meaning which is to adopt a situation whereby the dispute will be settled in a manner as near as possible to what the parties indicated. Even though diplomatic arbitration may not

be what the plaintiffs wished for they are bound by the terms unless it will lead to absurdity.

83. The general principles of construction of documents is relevant in the instant case that the Court is bound to give the operative words their simple and ordinary grammatical meaning so as to be able to discover the intentions of the makers of the document. See Argumentation and Interpretation in Law by D.N.MacCormick 1993 6 Ratio Jurits 16 at 22 and Cross on Statutory interpretation 3th Edition:

> *"Thus, an 'ordinary meaning or grammatical meaning does not imply that the Judge attributes a meaning to the words of a statute independently of their context or of the purse of the Statute, but rather that he adopts a meaning which is appropriate in relation the immediately obvious and un researched context and purpose in and for which they are used."*

84. In the instant case, the intention of the parties by creating the agreement with the arbitration clause inserted therein that when a dispute arises from the transaction same shall be settled through diplomatic arbitration process is no doubt an intention that the matter be settled through arbitration. What type of arbitration did the parties contemplate on? Is it commercial arbitration or diplomatic arbitration; does the latter include individuals? The court with a Community Courts jurisdiction must always apply a suitable method of interpretation of either statute or documents in international law set up as to opt for one that will settle the dispute to finality and do justice to the parties. Consequently, this court holds that purposive method of interpretation is the one that will do justice to the instant case.

85. The plaintiffs in their claim relied on Articles 5, 6, 7, 13, 15 and 24 of the African Charter on Human and Peoples Rights and the Universal Declaration of Human Rights. The preamble of the said African Charter inter alia provides:

> *"that the African States Members recognized on one hand, that fundamental human rights stem from the attributes of human beings which justified their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights affirmed their adherence to the principles of human and peoples' rights....."*

86. With these in mind, it is the conviction that an allegation of violation of human rights is a matter outside the realms of diplomatic arbitration being one that will have the force of law especially individuals who are not diplomats per se are involved. Diplomatic arbitration is not stricti juris but ought to be interpreted with liberal explanations when non diplomats are involved. Why this legal position?

87. The legal definition of 'diplomatic arbitration caused the court a lot of concern because of its absurdity. As already explained above in this case, where the provision of a statute or clause in documents is absurd and devoid of precise legal meaning, the court will apply the purposive interpretation as to give effect to it as best as it can. In the instant case, the words in question, i.e, and 'diplomatic arbitration' appeared to be absurd in mixed parties suit and may produce anomalous consequences. In the case of Maltass v Maltass 1844)

and reported in Law of Treaties by McNair, Dr Lushington made some observations on a conception not so well settled thus:

> *" little indeed was known or thought of domicile, in the legal sense of the term in those early times i.e. 1675 and it applied the sense circumstance which was not in the contemplation of the parties to arrive at a just decision of the matter. As was stated in that case, that all these reasons appear to me to operate most strongly in favour of liberal and extended construction of the treaties and that 'the contracting parties never contemplated the anomaly which a contrary construction would lead to...'*

88. It may at this point be of relevance to note that the court in Maltass case quoted above opted for liberal and extended construction of the treaties which is now prevalent in adjudication in this age. Following suit this Court is persuaded to apply the same method in interpreting the provision just like in the cases referred above. It is apposite to recall that the principle of law that cannot be jettisoned is that justice must be done in each case by considering the claims of both parties and being convinced in the instant case, this court adopts a liberal interpretation and gives the widest scope to the language of the treaties/documents that are ambiguous, in order to embrace within them all the objects intended to be included which would make them clear.

89. For the reasons stated above, the court holds that even though the exception to the concept of privity of contract applied, the nature of the claims bordering on human rights made it impossible of implementation in the process of diplomatic arbitration as raised by the plaintiffs' counsel. It is also the view that diplomatic channels of arbitration are not opened to individuals that are non diplomats but only member states and/or countries and that as the plaintiffs are not Countries/diplomats, the channel of diplomatic settlement cannot apply in this case.

90. However, does that vest the powers to adjudicate on the main subject matter on this court? The main suit contained reliefs in respect of violation of human rights and the matter concerning termination of appointments of the plaintiffs by the 1st defendant. A relief concerning termination of contract of employment is within the ambit of reliefs in the national court of member state. Even though Article 9 of the Protocol of the Court provides that this Court has competence to adjudicate on dispute relating to the following:

> *'f) the Community and its officials;' and Article 10 of the said Protocol which provides for access to the Court, made it possible for only staff of the Community institution to file action before the court in respect of the termination of their appointments after the staff member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations.*

91. The above provision does not bring into focus the action by the plaintiffs in respect of the alleged termination of their appointments. In that respect this court holds that the subject matter of dispute in the instant case is of mixed grill while the allegation on human rights violation is within the ambit of the

Court' s jurisdiction, the second allegation in respect of the termination of the plaintiffs' appointment is outside this court' s jurisdiction, even though the parties did not specifically addressed the court on it. The question now is whether the reliefs can be severed?

92. It is a well established principle of law that where the reliefs contained a subject matter beyond the jurisdiction of a court, the matter becomes incompetent for the court to adjudicate upon with the only option of striking out same. In the case of Gbagarigha vs. George (2005) 1NWLR pt (953) p.163 where the court held that where the heads of claim of a plaintiff includes reliefs within the jurisdiction of the trial court and reliefs outside the jurisdiction of the court, the correct procedure in law is to allow the court with jurisdiction to try all the heads of claim to hear and determine the claim.

93. In adopting the said procedure to the instant case the reliefs the applicants are seeking for are embodied in the application and one of the reliefs relate to breach of contract of employment. In pursuance of the provision of Article 9 (f) of the Protocol of the Court pertaining to master servant relationship, the said relief cannot fall within the jurisdiction of this court. The said provision provides that, 'The Court has competence to adjudicate on any dispute relating to the following: '…… (f) The Community and its Officials;'

94. The Community is defined in the Revised Treaty of ECOWAS as follows _ 'Community' means, the Economic community of West African States referred under Article 2 of the Treaty. As to which of the parties have access to this court in respect of the said matter in question, Article 10 (e) of the said Protocol made it evidently clear that staff of any Community institution, after the staff member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations….' It is apparent from the application lodged at the Registry of the court that the applicants

who are medical doctors are not staff of any community institutions of ECOWAS. Consequently the court holds that the plaintiffs are not staff strictly speaking as specified in the said Article 10 (e) of the said Protocol as to have locus standi to seek redress in this Court for the relief of breach of contract of employment.

95. There is no doubt that the right to challenge a measure before the courts is the corollary of the rule of law but this is not to say that the principle of the rule of law is applied without giving consideration to the subject matter in the reliefs, as to whether that particular court has jurisdiction over that subject matter or not.

96. For the foregoing reasons and authorities referred to above, this court declines jurisdiction and competence to hear and adjudicate on the particulars of the relief relating to the breach of contract of employment which is within the jurisdiction of national courts. The provision of the said Protocol gave no such authority over that subject matter to this court except on human rights violations and the other matters specified thereto.

97. Consequently the Court holds that it has no jurisdiction in this matter.

DECISION

98. For the foregoing reasons given this ruling, the preliminary objection is hereby sustained and the suit is struck out accordingly.

Costs

99. Cost is awarded in the sum of 400 US Dollars accordingly.

THIS DECISION IS DATED 16th OCTOBER, 2008 AND DELIVERED IN PUBLIC IN ACCORDANCE WITH THE RULES OF THE COURT.

HON. JUSTICE HANSINE N. DONLI	PRESIDING	.....
HON. JUSTICE AWA DABOYA NANA	MEMBER	.....
HON. JUSTICE SOUMANA DIRAROU SIDIBE	MEMBER	.....

Presiding Judge ..... Court Registrar .....