Arbitration and Conciliation Act 1988 (Section 5): Pinning the Nigerian Courts to the Era of Demurrer

Khafayat Yetunde Olatinwo
Ll.M(Common Law), Ll.B(Hons)(Ilorin),pnm(Abuja)
Lecturer, Department of Law
College of Humanities
Management and Social Sciences
Kwara State University
Malete, Kwara State
Nigeria.

Abstract

A legal contrast it would seem where there exist two provisions of law which are complete opposite especially where the two provisions has to work together. That would be the case with the provision of section 5 of the Arbitration and Conciliation Act 1988 demanding the application of a procedure in the same Court (High Courts) that has abolished that same procedure (Demurrer) by its procedural rule. The essence of this paper is to examine the various provisions of the High Rules on pleadings in lieu of demurrer and Sections 5 Arbitration and Conciliation Act in order to determine its workings in the judicial system. The paper further suggests how the conflict can be resolved with recommendation.

Key Words: Arbitration, Strike-out, Demurrer, High Court Civil Procedure Rules, Abolished, Nigerian Courts.

1. Introduction

Demurrer proceeding was an integral part of the judicial procedure in Nigeria Courts until its abolition in the various High Courts (Civil Procedure) Rules, if not for any reason, it is to fasten and smoothen the wheels of justice without any unnecessary delay often perpetrated by legal practitioners and litigants in their so called manoeuvring the Law. By it abolition, the *free will* given to lawyers to delay actions by bringing objections upon objections based on technicalities or mere procedural irregularities have been handicapped and the clog put in the wheel of justice has been cleared.

Ironically, Arbitration and Conciliation Act 1988 by it provision[1] still insist on the practice of demurrer in High Courts where a matter subject of arbitration is referred to the Court. It is pertinent to review the concept of demurrer and its abolition in the various High Court Rules, however, this paper would limits itself to the High Court (Civil Procedure) Rules of Lagos State, Kano State and the Federal High Court.[2]

2. Concept of Demurrer

The concept cannot be concluded to be extinct as would be discussed later, it can only be described as an archaic practice which exist in the Courts to the extent that a Party i.e the Defendant is allowed, even though the content of the statement of claim is true, to claim that the matter cannot be sustained or heard by the Court as a result of the provision of a statue, Law or Rule in which case, the Defendant is precluded from filing his own Statement of Defence to the Claim. Demurrer does not afford the court the opportunity to consider the pleading of the parties because pleadings have not been joined before the objection is raised. Only that it is presumed that the Defendant admits the truth of the Statement of Claim but the concept often play to the advantage of the Defendant as he may see the end of an action against him without even making an answer to claim.

---

1 See Section 5

2 By section 57 of Arbitration and Conciliation Act 1988 the court that has jurisdiction to hear matter, subject of litigation are High court of a state, the High court if the federal capital territory, Abuja or the Federal High Court.

According to Obadina J.C.A, in ***Ajao V. JMDB*** "the plea of demurrer is therefore a procedure whereby a Defendant brings an application raising objection to the competence of the court before a Statement of Defence is filed.[3] Where demurrer avails the party pleading it, the action may be terminated and where it fails the party often the Defendant would be ordered to file its own Statement of Defence.[4]

Reasons adduced by the pro demurrer for the continuous practice is that it saves time and the Court would not belabour itself by going into the merit of the case. In ***Trustee of the Nigerian Railway Corporation Pension Trust Fund V. Isiah Okunmade Aina***[5] Per Lewis observed thus on the concept.

> "*The whole basis of a demurrer is in effect to short circuit the action and by a preliminary point of law show that the action founded on the unit and statement of claim cannot be maintained once a person has pleaded however, the time for demurrer is passed and he cannot then in our view, under the rules of court seek to raise by way of a preliminary objection what he should have done earlier under the rules of court by demurrer*"

Therefore a Defendant is allowed to raise objection by way of Motion on Notice without joining issues with the Plaintiff by way of filing his Statement of Defence. See ***Parlos chiladakis V. The owners of M.V Rino***[6]

2.1. Abolition of Demurrer by Various High Court Rules

"No demurrer shall be allowed"

The above is often the magical provision in the first rule of every Order of the High Court (Civil Procedure) Rules abolishing demurrer. Even though the procedure still remains an integral part of the Legal System as would be discussed later it has been scrapped by all States in the Federation. ***Okafor V.A.G Anambra State***[7] ***& Ernest Ojukwu***

Amongst the states that have abolished demurrer in the High Court (Civil Procedure) Rules include Lagos , FCT Abuja, Kano and the federal High Court.

Order 16 Federal High (Civil Procedure) Rule scrapped demurrer proceedings in the following words.

Rule 1. "*No demurrer shall be allowed*"

Rule 2. " *A party shall be entitled to raise by his pleadings any point of law and any point so raised shall be disposed of by the judge who tries the cause at or after the trial A point of law so raised may by consent of the parties or by order of the court or a judge in chamber on the application of either party, be set down for hearing and disposed of at any time before the trial. If in the opinion of the court or a judge in chambers the decision on the point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set off, counter-claim, or reply therein, the court or judge in chambers may thereupon dismiss the action or make such other order therein as may be just".*

The above provision is in *pari materia* with the various provisions of the High Court Rules on the abolition of Demurrer.[8] By this provision, a Defendant no longer enjoys demurrer, he is however not barred from raising objections. A Defendant who, upon been served with a statement of claim, wishes to raise objection can only do so by his pleadings. He is therefore required to file his Statement of Defence and then state his objections in the statement of claim so filed. The Defendant is however not precluded from filing a separate application on objection afterward as long as he had done so initially in his pleading.

---

3 [2006] All FWLR (Pt. 302) 19 at 49 CA

4 (2006)ALL FWLR (PT 302)19 AT 49 CA

5 Suit No S.C 105/1968 (1970) 1 All NLR 283 at 287

6 (1987) 3 NSC 120 at 122.

7 (2005) All FWLR (Pt. 274) 252 SC

8 See order22 Lagos State High Court (Civil Procedure) RULES, Order 24 Kano State High Court (Civil Procedure) Rules, and Order 24 High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules

Such point of objection can be set down for hearing before going into the trial proper by the consent of both parties. It is therefore desirable that parties allow the hearing of the objection at the close of pleading or shortly afterwards where the hearing of the objection before trial or at the beginning of the trial would be decisive of the whole litigation.[9]

The supreme court in ***Ajilowura V. Disu***[10] held thus (on the on objection as to jurisdiction):

> *"… although the issue of locus standi goes to jurisdiction which can be raised any time since demure was abolished under the rules of court under consideration, a defendant raising the locus standi must first file his statement of defence bringing a motion to have the suit struck out."*

A vivid explanation of the concept of pleadings in lieu of demurrer was given in the case of ***Mobil Producing Unlimited V. Uwemedimo***,[11] on the interpretation of the then Order 24(1) Federal High Court Civil Procedure Rules 1999 established proceeding in lieu of Demurrer in the stead of demurrer the court outline the following[12]

- The rule contemplates that parties to the must have filed and exchanged their pleadings and the Defendant, in his pleadings, must have taken out legal grounds or questions capable of, or intended to, defeat the plaintiff's statement of claim.
- The Defendant may also, in his Statement of Defence, attack the Statement of Claim on legal grounds or may otherwise apply to have any issue set down for trashing out in a trial
- There has to be an application by the objecting party to set down the matter for summary hearing pursuant to having a summary judgement without full-scale hearing
- Such application has to be supported by an affidavit verifying the facts; and at least one of the paragraphs of such affidavit must state that in the applicant's belief, his opponent has, in spite of his pleadings, disclosed no reasonable cause of action or defence, as the case may be[13]

Haven discussed the concept of demurrer and its abolition by the various by the various High Court rules one may want to conclude that demurrer does not exist anymore in Nigeria's legal practice, however, such conclusion would be wrong as there are still laws that is consist of provisions similar to demurrer proceeding. Example of such provision is what this paper intends to address and this is section 5 of the Arbitration and Conciliation Act 1988.

2.2. *Demurrer under Section 5 of the Arbitration and Conciliation Act 1988*

The Arbitration and conciliation Act (ACA) 1988 is inspired by the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1988[14]. The provision of this section is in *pari materia* with the provisions of section 5 of Arbitration and Conciliation Act 1958.[15] One of the purposes of its enactment was to implement Nigeria's Treaty obligations under the *Convention on the Recognition and Enforcement of Foreign Awards*. The Act[16], amongst its other provisions, attempts to control judicial intervention and one of such control can be inferred from the provisions of the Act on stay of proceedings pending arbitration[17]. This Act is the current legal regime regulating Arbitration practice and procedure in Nigeria. Under Section 5, for a party to apply for stay of proceedings he must do so before the return date, that is, the date on which the Defendant first appears in court in answer to the writ of summons. He should announce that he does not desire to deliver pleadings and that he wants time to move the court for stay of proceedings.[18]

---

9 Utuks V. Nigeria Ports Authority (2005)13 NWLR PT943
10 (2006) ALL FWLR (PT333) 1613
11 (2006) All FWLR (Pt 313) II6 CA. Calabar Division
12 Akpata E., (1997) The Nigerian Arbitration Law in Focus. West African Book publishers Limited, Lagos, Nigeria: p.23
13 See also Ntuks V. N.P.A
14 Nigeria is a signatory to the Convention (the New York Convention on the Recognition and Enforcement ofForeign Arbitration Awards of 1988)
15 CAP. 13 Laws of Federation of Nigeria 1958
16 The Arbitration and conciliation Act (ACA) 1988
17 See Sections 4 and 5
18 Nir (Nig.) Ltd. -VS- El-Assad [1971] All NLR 172

This appears to be in conflict with the provisions of the High Court Civil Procedure Rules of various states which have abolished Demurrer and introduced *proceeding in lieu of demurrer*.[19] Under the new proceedings in lieu of demurrer, the rules entitles a party to raise by his pleadings any point of law and any point so raised which may be disposed of by the trial judge before, at or after the trial. At this junction, the question that comes to mind is; whether coming under the new proceeding in lieu of demurer would not constitute a waiver to seek stay?

The retention of the concept Demurrer in the Act can be found in the provision of section 5 which provides that:

> ***"(1)*** *If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.*
>
> ***(2)*** *A court to which an application is made under subsection (1) of this section may, if it is satisfied-*
>
> > ***(a)*** *that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and*
> >
> > ***(b)*** *that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings."*

It would not be an entirely wrong assumption if it is concluded that this provision is borne out of an attempt of the maker of the Act to limit Courts intervention in any arbitration proceeding, however, this attempt would go a long way in causing heated submissions in Law Courts on the fact that demurrer has been abolished by the various High Court Rules. Having the current position on demurrer practice in Courts at the back of our mind, a cursory look at the provision cited above would reveal that Act still insist on demurrer practice despite is abolition. A party who finds himself in a situation under rule 1 (cited above) is in contrast not required to file any pleadings (Statement of Defence) before bringing an application to stay proceeding which has been initiated against him by another party. An application under this rule is no doubt an objection to the jurisdiction of the court to hear a matter subject of an arbitration which is contradictory to the holding of the Supreme Court in ***Ajilowura V. Disu*** (Supra).

It is pertinent to note that the essence of abolishing demurrer in the various High Court Rules is so that the merit of the matter be considered along with the objections on point of law so raised. This is also in line with the wordings of Mukhtar Jsc in ***Ajilowura V. Disu*** (Supra) as follows:

> "it is premature at this stage for the defendant to raise an issue of law while they have not yet filed their statement of defence in which they are enjoined by law to raise that issue of law first before filing an application to set that down for hearing before trial ***"***

It is therefore obvious that the provision of Section 5 contradicts what is contained presently in the Rules. Unlike the provisions set out earlier, a Defendant who, haven been served with a statement of claim intends to raise objection on point of law for stay of proceeding is not required to file his Statement of Defence before raising such objection. Hence in the instant case, issues would not have been joined to afford the Court the opportunity to delve or consider the merit or substance of the case.[20] The Defendant is mainly required to enter appearance whether conditioner or not before joining issues with the plaintiff.

It is believed that there is a rationale for the abolition of demurrer and replacing the provision with proceeding in lieu of demurrer. Why then do we still have laws containing similar provision thereby taking the court[21] back to the achaic practice it most want to do away with?

---

[19] See Order 22 Lagos, Order 22 Abuja and Order 24 Kano, Order 26 Rule 1Kwara State, among others.

[20] This may lead to dismissing a case that has merit based on the objection that could arise from mere technicalities

[21] It is noteworthy that Courts under Section 57 Arbitration and conciliation Act 1988 means the High Court of a state, the High Court of the federal capital territory, Abuja or the federal high Court.

In ***Dagash V. Bulama***[22] Oghuagu JCA on the issue of pleadings (Statement of Defence or Reply as the case may be) to raise point of law held thus:

> "*It is firmly settled that a preliminary objection or preliminary point of law could be raised even after filing and exchange of pleadings…Thus a preliminary objection on point of law challenging the validity of the institution of a suit or petition as in the instant case leading to the appeals, it is now firmly settled could only be determined at the initial stage by reference to the pleadings, particularly, the statement of claim or the petition as in the instant case."*

It is apt to point out at this juncture that subsection (1) is in two folds. (a) The first is that a party who intends to raise the objection is required to do so after but before delivering pleadings. (b) the second situation is that such a party should not have taken any step in the proceeding. The question of what then would amount to taking steps in this circumstance is worth analysing.

3. Taking Steps under Section 5 Arbitration and Conciliation Act 1988

Since Section 5 provides that party who intends to take advantage of an arbitration clause in a contract must do so before taking any steps in an action, it is clear that coming under the new proceeding in lieu of Demurrer would amount to waiver of right to stay. Party seeking for a stay must also ensure that the subject matter of the Arbitration agreement is arbitrable by the Laws in Nigeria.[23] The essence of timely objection is to prevent it from being deemed as a waiver of the right to stay. This can be inferred from the provisions of the Act which provides thus:-

> *"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 non compliance within the time limit provided therefore shall be deemed to have waived his right to object to non compliance."*[24]

The Couirts has held in plethora of cases as to what constitutes step taking in a proceeding that will constitute waiver. Some of these cases will be examined.

In ***Enyelika -VS- Ogoloma***,[25] the court held that by entry of conditional appearance and filing of an application for extension of time within which to file and serve his Statement of Defence and subsequent filing of preliminary objection to the suit contending that the respondents had failed to comply with the condition precedent for the institution of a court action. The trial court dismissed the application on the ground that the applicant had already taken steps in the action and deemed to have waived his right to arbitration. The appellant being dissatisfied appealed to the Court of Appeal. The appeal was dismissed and the court held thus:

> *"An application seeking a stay of proceeding to enable parties refers to arbitration is not granted as a matter of course. For such an application to be granted, the applicant must have taken no step in the proceedings. If a party makes any application whatsoever to the court, even though it be merely application for time, he takes a step in the proceedings."*[26]

Also in ***Wuraola -VS- Northern Assurance***,[27]where the Defendant filed a Statement of Defence instead of asking the court to stay proceedings against him and refer the matter to arbitration, the court held that failure of a party to take advantage of an arbitration clause by filing a Statement of Defence amounts to waiver of the clause.

---

22 (2004)14 NWLR (PT892)144 AT 252. PAR E-H

23 Section 35 Arbitration and Conciliation Act provides thus: "this Act shall not affect any other law by virtue of which certain disputes: (a)may not be submitted to arbitration, (b) may be submitted to arbitration only in accordance with the provisions of another law"

24 Section 33 Arbitration and Conciliation Act

25 [2009] ALL FWLR [Pt. 453] P. 1335 @ 1342, paras. F-H

26 See also Kano State Urban Development Board -VS- Franz Construction Co. Ltd [1990]21 NCLR [PT 2] 339, [1990]4 NWLR [PT 142]

27 [1966] N. COMM.LR 129. See also Chijoke E., (1996) 'The Recognition and Enforcement of Arbitration Agreement and Award in a New Legal Environment: The Case of Nigeria' in 'Essays on Contemporary Legal Issues. Auto-Century PUB-Coy-Ltd, Enugu. Pp. 173-174

Timing under section is like that in the nature of demurrer whereby time to make the application is very vital. It must be made before issue is joined by the parties, that is, before filing of the Statement of Defence and before taking any further step apart from the service of the writ and Statement of Claim on the Defendant/Respondent.[28]

4. Conclusion

Evidently it cannot be said that the legal practice has gotten rid of the archaic practice of demurrer entirely as discussed in this paper. Demurrer practice would still be accepted and revisited any time a Statutory provision (not Rule) demands for its application. It is therefore resolved that the High Court, despite its provision on the abolition of Demurrer, would still allow the practice in the following situation:

4.1. Special Provision

Just like the provision of Section 5 Arbitration and conciliation Act under consideration, where there is a special provision demanding for the application of a procedure in the like of demurrer, the Court would unavoidably overlook its provision on proceeding in lieu of demurrer and allow an objection on point of Law to be taken despite the absence of a statement of Defence or reply as the case may be.

4.2. Conflicting Provision of a Statute and Rule

The general rule in the legal parlance applies here. Hence, where the provision demanding for the application of demurrer practice is that of a Statute, then the provision of such statute is more superior and prevails over the rule abolishing demurrer.

4.3. Order 29 Federal High Court Rules 2009

A party is also at liberty to hide under the various provisions of the High Court Rules on preliminary objection which allows a Party to contest jurisdiction without pleadings after entering a conditional appearance.[29] The applicability of this provision under the Second leg of section 5 may further raise conflict as the filing of the conditional appearance would be held to amount to taking step.

It is therefore recommended that in order to avoid such legal and academic rancour between the provision of a Rule and Statute on what either of the provision has abolished, the following phrase could be adopted at the beginning of the provision;

> "Except otherwise provided by the provision of any Law or Statute"

[28] Trustee of the Nigerian Railway Corporation Pension Trust fund v. Isiah okunmade aina Suit no S.C 105/1968 (1970) 1 All NLR 283 at 287

[29] See the case of Wherem V. Emereuwa (2004)13 NWLR (Pt 890)398 at 419 par C-F