

The Principle and Nature of Law of Contract in Nigeria: Formation of Binding Contract

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Abstract

The article considered the importance of a truly and legally binding agreement in mostly commercial transactions in Nigeria that would ultimately translate into such that the law would enforce. It sought to revisit case laws and statutes on the various commercial transactions in Nigeria. In writing the article secondary data drawn from books, case laws, statutes, unpublished materials and the internet were relied upon. The article's position is that actions do not arise from a base cause. A contract tainted with illegality or contrary to public policy cannot be enforced by the law courts in Nigeria. The illegality may be borne out of sheer ignorance or mere mischief. The law here guides against the misuse or misapplication of the formation of the various steps or stages obviously involved in the formation of a truly binding contract which the law can enforce giving the peculiarity of the Nigerian terrain.

Keywords: contract, commercial transaction, secondary data, stages, enforce, binding agreement

1. Introduction

A trend runs through the entire gamut of the law of contract, the central purpose been to impose a duty on parties to carry out their respective obligations under it, failing which a party who defaults or refuses to discharge his obligations under the contract will be liable for a breach of contract. What distinguishes a contract from a mere agreement' is the fact that if one of the parties fails to honour or discharge his promises the other party may take legal action. On the basis of the principle of law encapsulated in the maxim *ex turpi causa non-oritur* action, that is, an action does not arise from a base cause; a court does not generally enforce a contract or transaction tainted with illegality or contrary to public policy. It is apposite therefore to lay in vivid terms the principal and nature of law of contract especially as it affects the Nigerian business climate.

2. Defining Contract

A contract may be defined as an agreement enforceable by the law between two or more persons to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises (Keenan, 1997). Abiola Sees contract as simple an agreement made between two or more competent parties which the law will enforce. (Abiola, 2005)

Generally, at common law only a party to a contract or persons who are privy to a contract can sue and be sued on it. In other words, a stranger to a contract cannot sue or be sued on a contract even if it was made for his benefit or purported to give him a right to sue. In *Anuruba V. E.C.B Ltd* (2005, 10NWLR, pt.933). On 24th July 1995 one Nicholas Osuji entered in to a written agreement with the 1st respondent for the sale of a motor vehicle to the respondent for the sum of N100, 000 and the 1st respondent paid the sum of N70 00 to the seller. It was agreed between the seller and the 1st respondent that the letter would give possession of the motor vehicle to the appellant who would use same as a taxi in trust for the 1st respondent.

Simultaneously, the appellant took an overdraft of N100, 000 from the 1st respondent and it was agreed that the appellant would repay the overdraft and interest from the proceeds of his use of the motor vehicle as a taxi, and that upon full payment of the overdraft and accrued interest on or before January 31st 1996, the 1st respondent would pay the balance purchase of N30, 00000 for the motor vehicle and the appellant would acquire ownership of the motor vehicle. In furtherance to the agreements before the said Nicholas Osuji and the 1st respondent and the agreement between the motor vehicle and the 1st respondent, the motor vehicle and its documents were handed over to the appellant who started using the motor vehicle as a taxi. But after operating for about 4½ months, the

appellant was only able to pay only sum of N14, 200 into his account with the 1st respondent. Consequently, the 1st respondent took possession of the motor vehicle.

The appellant was aggrieved with the act of the 1st respondent and he sued the 1st respondent and the manager (the 2nd respondent) at the High Court, where he claimed the delivery of the motor vehicle or the sum of N300, 000 as its value, damages of N300, 000 for conversion of the motor vehicle, and the sum of N2, 000 per day from 7th December, 1995 till date of judgment in the suit.

The respondents, on their part, asserted that the appellant was not serious with the management of the motor vehicle and that they seized the motor vehicle when it became clear that the appellant would not be able to repay the overdraft granted to him in accordance with the term of the overdraft. They also denied that the motor vehicle was worth N300.000 or that the appellant suffered any damages.

At the trial the appellant admitted that he earned the sum of N28, 000 every two weeks from the use of the motor vehicle as a taxi, but paid only the sum of N14, 200 into his account with the 1st respondent.

In its judgment, the trial court held that although the agreement between the seller of the motor vehicle and the 1st respondent was made in favour of the appellant, there was no privity of contract between the appellant and the 1st respondent and, consequently that the appellant could not benefit from the contract or enforce it. The trial court also held that property in the motor vehicle remained in the 1st respondent and it was entitled to impound it at the time it did.

The trial court therefore dismissed the appellant's suit. It however, made what it called consequential order to the effect that the 1st respondent should not sell the motor vehicle until a given date in order to enable the appellant pay the balance sum owed to the 1st respondent. The appellant was dissatisfied with the judgment of the trial court and he appealed to the Court of Appeal, the court of Appeal dismissed the appeal and that generally, at common law, only parties to a contract or persons who are privy to a contract can sue and be sued on it. In other words, a stranger to a contract cannot sue even if it was made for his benefit, or purport to give him a right to sue. This is because such stranger has nothing to do with the offence and more importantly, because he did not give any consideration to the offeror. However, by notice of the equitable doctrine of constructive trust a party to a contract can constitute himself a trustee of rights under a contract for a third part and as such confer such third party with rights in the contract which are enforceable at equity

3. Contract Formation: Elements of Valid Contract

There are some basic under pins that ought to be present without which a contract cannot be binding or enforceable at law. These essential ingredients are: offer, acceptance, consideration intention to create legal relations and capacity to contract.

(a) Offer: An offer is an announcement of a person's willingness to enter into a contract. An offer is thus a proposition made by one party (Offeror) to another (Offeree) indicating his willingness to be contractually bound on certain terms provided that those terms are accepted by the other party. An offer may be made expressly or implied from the conduct of a party. It may be made to a particular person or in some cases, to the public at large, where the contract, which eventually comes into being, is a unilateral one; where there is a promise on one side for an act on the other. An offer can thus be made to the public at large. In *Carlill V. Carbolic Smoke Ball* (1893, 1QB256), the defendant company who was the manufacturer of a product named Carbolic Smoke ball advertised in a newspaper to the effect that it would pay \$100 to any person who used its product in a specific manner for a minimum of two weeks, and still catches influenza. The defendant further stated that it, had deposited a sum of \$1.000 at the Alliance Bank, Regency street to show our sincerity in the matter!! The plaintiff bought one of the products and used it as specified and still caught influenza. The plaintiff brought an action to compel the defendant to pay her the \$100. The defendant contended in its defense that the advertisement was a mere puff, a statement of confidence in their product and a promise in honour, which was not intended to create legal relations. That the advertisement was not an offer as it was impossible to contract with the whole world. The defendant was held liable to pay the plaintiff. The court held that the advertisement was not a contract with the world but a unilateral offer and that any one that performs the terms of the offer brings himself into a contractual relationship with the defendant.

An offer is distinguishable from an invitation to treat, for a proposition to amount to an offer but not a mere request, it must be definite, certain and unequivocal. Whilst an invitation to treat remains a mere offer to negotiate. In *Payne V Cave* (1919, 2KB) it was held that an advertisement stating that an auction will be held is not an offer but an invitation to treat. When the auctioneer commences and asks for bids from those attending, the bids are the

offer. A contract comes into existence when the auctioneer knocks down his hammer. Until the time any bidder who has not made up his mind to be bound may withdraw his bid.

A capable person must make the offer. In *Ajayi Obe V. Executive Secretary, Family Planning Council of Nigeria* (1957, SC, 24) the plaintiff was interviewed for a post in the defendant's establishment. The chairman of the interview panel (instead of the secretary) told the plaintiff that he had been offered the job but no letter of offer came from the secretary. It was held that there was no valid offer because a capable person did not make the offer. In *Olaopa V Obafemi Awolowo University* (1997, 7NWLR, pt.1354) with a view to erecting commercial building on that concession area in the education zone Ibadan, the respondent invited the appellant to a meeting where he was briefed to design how best to develop their acres of land in the concession area. Before a formal contract could be reached between the parties, the appellant made the design and delivered it together with the quantity survey to the respondent. He forwarded his claim for his fees for the first stage of the work. The respondent refused to pay. The appellant then commenced action at the High Court to recover this said sum. The respondents demanded that there was a contract between them. The court held that there was no contract between the respondent and the appellant.

(b) Acceptance: An acceptance is an unequivocal final expression by the offeree that he agrees to the terms of the offer as conveyed to him by the offeror. By acceptance of the offer, a contract is said to come into existence as it underscores the bilateral nature of a contract. In *Orient Bank (Nig) Ltd. V. Bilante International Ltd* (1997, 8NWLR, pt.515), the respondent a customer of the appellant bank applied for a loan of Eighteen Million Naira. The appellant made a formal offer of the loan in a letter containing all the terms. The letter was concluded with a statement kindly confirm the above agreement reached at today's meeting by signing and returning the duplicate of the letter

Rather, the respondent wrote another letter containing additional terms outside the terms contained in the appellant's letter. The Court of Appeal held that the respondent's letter constituted a counter offer. Acceptance must be absolute and unconditional. One important form of conditional assent is an acceptance subject to contract meaning that the parties do not intend to be bound until a formal contract is prepared and signed. A counter offer is a rejection of the original offer and has the effect of canceling the original offer. Where it appears that the offeree is merely asking something which is more in the nature of a question seeking further clarification or information before making up his mind his request for information will not destroy the offer. In *UBN V. Tejumola & Sons Ltd* (1983, 2NWLR, pt.179) the defendants offered to take a lease of the plaintiff's building for a period of 15 years at the vent of N215 per square meter. The letter was bolding headed "subject to contract" the plaintiff accepted the offer and specifically stated that the lease would commence in the 1st of May 1982. The defendant thereafter requested for several expensive renovations to the building, which were carried out by the plaintiff. The defendant later refused to go on with the transaction and contended that there was no contract. The Supreme Court held that there was no contract.

Counter offer if accepted by the original offeror, a contract may come into existence, this is in view, of the modern practice of making quotations and placing orders with conditions attached, so that the terms and conditions of the contract which may eventually be made may not be those which the original offeror put forward, since, these may have been changed as a result of battle of forms between the parties

Silence does not constitute acceptance. The offeree must indicate his assent either in words, in writing or by conduct. As a general rule a mere intention to accept does not constitute an acceptance. This rule is apposite as it prevents aggressive businessman from forcing others into contractual relation against their will. Where the mode of acceptance is not prescribed the mode of acceptance will depend on the offer and the surrounding circumstances. Thus an oral offer implies an oral acceptance. If the offer is by telegram, fax or e-mail then a prompt reply is implied and it is safer to reply by the same means. However, where the offeror has prescribed the mode of acceptance but does not insist on any that mode the rule at common law is that the offeree can accept by any mode that is either as fast or faster than the mode prescribed. Where the offeree adopts another mode of acceptance, he must be prepared to bear the risk of his acceptance not arriving as fast as it would have been if he had followed the mode prescribed. In *Afolabi v. Polymere Industries Ltd* (1967, ALLNLR), the plaintiff who was appointed as an agent of the defendant requested to a "please read study, carefully and sign the duplicate copy attached, signifying your agreement to all points as listed above and return at your earliest convenience for records". There was no evidence that the plaintiff ever returned the signed duplicate. It is held that there was no acceptance (Kerr, 2002).

4. Is Actual Communication of Acceptance Necessary?

It all depends on the offer. In a unilateral contract no actual communication of the fact of acceptance is normally required. Thus a unilateral contract is normally concluded on the completion of the relevant act.

In a bilateral contract if the offer expressly requires it, actual communication is necessary. In *Howell securities Ltd V. Hughes* (1974, 1WLR, 55) H offered to sell his house to HS. The offer took the form of an option “to be exercisable by notice in writing to H” H.S purported to exercise the option and accepted the offer. This letter never arrived. The court of Appeal held that there was no contract because the terms of the offer expressly required actual communication of the acceptance.

If the offer is silent as to be question whether actual communication is necessary a distinction is made between Instantaneous communications. Example a conversation between A and B face to face or on the telephone and delayed communication, the post and telegrams. In instantaneous communication, the general rule is that acceptance becomes effective only on actual communication to the offeror in delayed communication the general rule is that the contract is formed at the moment when a correctly addressed letter or telegram is properly posted or sent

Acceptance must precede termination of offer. An offer is capable of acceptance only before it terminated. An offer terminates in the following circumstance: (a) withdrawals are revocation in unilateral contracts. An offer may be withdrawn at any time before the offeree has started to perform the act of acceptance. In bilateral contracts, an offer may be withdrawn at any time before acceptance. To be effective, notice of withdrawal must as a rule be actually communicated to the offeree by the offeror or a reliable source. No distinction is made between instantaneous and delayed communication

(b) Rejection: An offer terminates if the offered rejects it provided that the rejection is actually communicated to the offeror. A counter offer thus operates as a rejection of the original offer

Consideration

At Common law, a promise not under seal is enforceable only if it is made in return for another promise or an act; whether a positive act or forbearance (Keith, 2002). It is part of a bargain. This requirement of quid pro quid; something for something is called consideration. Keith sees the expression as some benefit accruing to one party, or some detriment suffered by the other. Abiola defines the term as the “price” which one party pays for the promise or act of another side. Frederick Pollock sees it as: an act or forbearance of one part or the promise thereof is the price for which the promise of the other is bought and the promise thus given for value is enforceable. (Sagay, 2000)

In *Curie V. Misa* (1875, LR, 10) consideration consist of some rights, interests, profits or benefits accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other

Keenan opines that the definition of the term as adopted by the House of Lords in *Dunlop V. Selfridge* (1915, AC, 847) is preferred because it properly describes executed consideration by including acts and forbearances and executory consideration by referring to the fact that a promise to do something in the future also amounts to consideration.

If a bargain consists of mutual promises each promise is the consideration for the other. The contract is concluded as soon as the promises have been exchanged and the consideration is said to be executory, which simply means that the consideration to support each promise is another promise and not a performed; executed act. When the consideration is executory, the contract itself is bilateral in the sense that there are two promises for the law to enforce.¹ If the bargain consists of a promise in return for an act, the contract is concluded when the offeree has performed the act. There is thus only one promise to be enforced and the consideration for it is an act already completed. Hence the consideration is said to be executed and the type of consideration is called unilateral. Since liability is out-standing on only one side. Consideration as a basic rule is the fact that it must move from the promise. By this, it means that before a party can enforce a contract he must show that he has furnished consideration for the contract. Consideration must have some value in the eye of the law; it must be something of value, reasonably ascertainable and definite. (Clive, 1983)

In *Dunton V. Dunton* (1915, AC), a man promised his wife from whom he had just been divorced, an allowance of €6 every month, if she would conduct herself with sobriety and in a respectable orderly and virtuous manner. It was held that the wife had furnished consideration for his promise because she no longer owed him any duty to observe those stipulations Consideration must not be past. That is, an act or promise cannot constitute consideration if it took place before the promise, which it sought to enforce, and made. A past consideration is that consideration which has been completed or exchanged before the new promise was made. Past consideration cannot support a

contract. In *Akrnzua II Oba of Benin V. Benin Divisional council* (1957, WRNLR 1), the defendant requested the plaintiff to use his influence to persuade a timber company to release some timber forest area to the defendant as a gesture of good will. The plaintiff succeeded in persuading the timber company to release four forest areas to the defendant. Subsequently, the plaintiff requested that one of these areas should be released to him for his exclusive exploitation. The defendant readily acceded to this request. Subsequently, the defendant withdrew his consent. It was held that since the plaintiff had performed the service before the defendant agreed to grant him the exploitation of the forest, his consideration was past. The action was therefore dismissed. In *Re Mc Ardle*, (1951, 1ALL ER) a testator left a house jointly to his children. The wife of one of the children, who was living in the house with her husband, spent some money making improvements on the house later on, the other children jointly signed a document agreeing to pay her €448 for expenses in improving the house. It was held that the promise was not binding on the children. The wife had completed the works on the building before the promise to reply her was made, her consideration was therefore, past.

Once it has been established that a promise or an act amounts to consideration because, it is some detriment to the plaintiff or some benefit to the defendant the courts are not concerned with the fairness or adequacy of the consideration. It therefore becomes possible to sell one's car for N1.

5. Intention to Create Legal Relations

The law will not necessarily recognize the existence of a contract enforceable in a court of law simply because of the presence of mutual promises, it is necessary to establish also that both parties made the agreement with the intention of creating legal relations so that if the agreement was broken the party offended would be able to exercise legally enforceable remedies. Intention to create legal relations is viewed from the standpoint of whether the agreement is a social, domestic or commercial agreement. In domestic agreement like the case of *Balfour V. Balfour*, (1919, 2KB, 571), a husband who worked in Ceylon promised to pay his wife €30 when she had to stay in England for medical treatment. Akin (as he then was) said: it constantly happens that interspouse agreements occurs where there are mutual promises and where there is consideration but they are not contracts because the parties did not intend that they should be attended by legal consequences

Such a presumption may however be rebutted as where the parties expressly state their intention to be legally binding or where the contract is a clearly business nature. Moreover, if a husband and wife are separated their agreements must be treated like agreements between strangers. In *Merritt. V. Merritt* (1970, LWLR) M. who had deserted his wife agreed in writing to transfer the former matrimonial home into her sole name if she paid off the outstanding mortgage installments. When the wife had done so, M. refused to transfer the house but the agreement was held to be enforceable.

6. Commercial Transactions

The courts ordinarily presume the intent to create legal relation when it comes to commercial transactions. In *Rose & Frank Co V. Compton and Bros Ltd* (1923, CH.), it was provided in an agency agreement that this arrangement is not entered into as a former or legal agreement and shall not be subject to the legal jurisdiction in the law courts.

It was held that the agreement could not be enforced as the clause excluded the intention to create legal relations. In *Amadi V. Pool House Group & Nigerian Pools Co* (1966, 2ALL NLR.), the plaintiff who was a stacker claimed to have won a lump sum. The defendant successfully denied any liability by relying on an honours clause that the contract was not intended to be binding.

7. Conclusion

Having examined the essential elements of a valid contract in law. It is apposite to conclude by asserting that only persons of full age ordinarily called majors in Law have the full capacity to contract. Contract been an agreement between two or more persons, which the law can enforce. It is equally an established rule of law that contracts may be in writing, oral or even implied. Consequently, a contract between parties may be expressed by words or by an agreement in writing. Similarly, contract could be implied by the conduct of the parties as well as the fact that a contract may be subject to the terms that are implied by question or trade usage.

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