

**LAW** *pavilion*

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**ELECTRONIC  
LAW REPORTS**

**OGBUNEKE SONS AND**

**COMPANY LTD. v. ED**

**& F MAN NIGERIA LTD. & ORS.**

**(2010) LPELR-4688(CA)**

**COURT OF APPEAL**

**(OWERRI JUDICIAL DIVISION)**

**OGBUNEKE SONS AND COMPANY LIMITED v. ED &  
F MAN NIGERIA LIMITED & ORS**  
**CITATION: (2010) LPELR-4688(CA)**

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**In The Court of Appeal  
(Owerri Judicial Division)**

On Monday, the 5th day of July, 2010

**Suit No: CA/PH/408/2005**

**Before Their Lordships**

ABUBAKAR JEGA ABDUL-KADIR  
HELEN MORONKEJI  
OGUNWUMIJU  
MOJEED ADEKUNLE OWOADE

Justice, Court of Appeal  
Justice, Court of Appeal  
Justice, Court of Appeal

**Between**

OGBUNEKE SONS AND  
COMPANY LIMITED

**Appellants**

**And**

ED & F MAN NIGERIA  
LIMITED  
ED & F MAN COCOA  
LIMITED  
THE COCOA  
ASSOCIATION OF

**Respondents**

## **RATIO DECIDENDI**

### **1 INTERPRETATION OF STATUTE - SECTION 51(1) OF THE ARBITRATION AND CONCILIATION ACT, 1988:**

Interpretation of section 51(1) of the Arbitration and Conciliation Act, 1988, and the implication thereof

"Section 51(1) provides thus: "An arbitration award shall, irrespective of the country in which it is made, be recognised as binding, and subject to this Section and Section 32 of this Act, shall, upon application in writing to the court, be enforced by the court." Before, the 1988 Arbitration and Conciliation Act, registration was a condition precedent to recognition and consequently the binding force of an arbitral award, But now, more particularly under the provision of Section 51(1) of the Act, irrespective of the country in which the award was made, it becomes binding and recognised as soon as it is made. The position of the Law is as stated by the learned Authors, J. Olakunle Orojo and M, Ayodele Ajomo, in the book Law and Practice of Arbitration and Conciliation in Nigeria at page 304 that: "Before the Arbitration and Conciliation Decree 1988, the two methods of

enforcing foreign awards were by registration under the Foreign Judgments (Reciprocal Enforcement) Act, and under the New York Convention, 1958. Section 2 and 4 of the Foreign Judgments (Reciprocal Enforcement) Act provide, in effect, that a foreign award maybe registered in the High Court at any time within six years after the date of the award if it has not been wholly satisfied and if at the date of the application for registration, it could be enforced by execution in the country of the award. With the Decree, there is no need for registration, for Section 51 makes it clear that such an award shall be recognised as binding and shall be enforced by the court on application. In relation to the present case, the interesting implication of the provision of section 51(1)of the Arbitration and Conciliation Act 1988, is that a foreign award remains binding, without any requirement of registration and even before an application in writing for enforcement is made to the court." Per Owoade, J.C.A. (Pp.9-10, Paras. C-E) - [read in context](#)

**MOJEED ADEKUNLE OWOADE, J.C.A. (Delivering the Leading Judgment):** This is an appeal against the judgment of J. T. Tsoho, J., delivered on 11th March, 2005 at the Federal High

court, Umuahia Judicial Division holden at Umuahia. The appellant as applicant before the

**A** Federal High Court filed an originating Motion on Notice on 27/7/2001 pursuant to Section 48 of the Arbitration and Conciliation Act, Cap. 19 LFN 1990, Orders 20 Rule 15 and 23 Rule 5 of the Federal

**B** High Court (Civil Procedure) Rules, 2000 as well as Section 36 of the Constitution of the Federal Republic of Nigeria, 1999. The Appellant's/Applicant's Motion on Notice before the

**C** lower court sought an order of court setting aside four International Arbitration Awards obtained in London on 15th June, 2001 by the 2nd respondent against the applicant, namely: Arbitration Award No. AA03930, Arbitration Award No. AA03931,

**D** Arbitration Award No, AA03932 and Arbitration Award No AA03933, all between the applicant and the 2nd respondent with the 3rd respondent as the institutional arbitrator.

**E** The ground of the appellant's/applicant's application were as follows:

**F** "(i) That the applicant at all material times had no arbitration agreement with the 2nd respondent, nor any of the respondents for that matter.

(ii) That the applicant did not enter into any of the purported contracts with any of the respondent which were purportedly made subjects of the said arbitrations.

**G** (iii) That the applicant, not having any arbitration agreement with the 1st and 2nd respondents did not therefore choose the 3rd respondent as an Institutional Arbitrator, and also did not choose

London as venue for any purported arbitration nor the 3rd respondent as arbitrators of his choice.

A (iv) That the said awards were obtained by mis-presentation of facts and fraud.

(v) That the arbitrations and the awards thereof are against public policy in Nigeria, and

B (vi) That the subject of each of the above mentioned arbitrations was/and is not a subject for arbitration under the Nigerian Law."

C The salient facts of the case are as follows. Sometime in December, 2000, the

Appellant/applicant supplied a total of 250 metric tones of cocoa beans to the 1st and 2nd respondents at the cost of \$774 per metric tone.

D When the 1st and 2nd respondents received the supply in London and weighed same in accordance with their oral agreement, they put the weight at 236.919 metric tones. Based on the respondents

E weighing of the supply, the 1st and 2nd respondents paid 98% of the total value of the supply but have failed to pay the outstanding balance of 2%, which they, the 1st and 2nd

F respondents admitted by their credit note to be \$12,523.65 in favour of the appellant/applicant. However, rather than paying up the appellant's outstanding balance the 1st and 2nd respondents decided to procure the four arbitration awards now  
G being questioned.

In his Judgment (Ruling) the learned trial Judge agreed with the position taken by the

appellant/applicant that the four awards are not valid because the 3rd respondent was ab initio denied of jurisdiction due to the absence of an enforceable contract between the parties. But added at pages 190 - 191 that:

"In the present case, there is no doubt that the letter from the 2nd respondent's solicitors (Exhibit L) dated 3rd July, 2001 prompted the applicant to institute this action. This said Exhibit "L" is a demand letter cum notice to commence legal action, which emanated from the 2nd respondent's solicitors to the applicant, based on the arbitral awards by the 3rd respondent. There is no mention in Exhibit "L" that the awards have been registered in Nigeria before being sought to be enforced against the applicant. Such evidence has not been furnished in this suit, even by the applicant. But it follows that if the awards are not registered, they cannot be enforced and hence there is no basis for the institution of this action. The applicant's action in the circumstances is anticipatory and cannot stand. On this premise, the applicant's Originating Motion on Notice is hereby struck out."

Dissatisfied with the judgment (Ruling) the appellant/applicant filed a Notice of Appeal containing two(2) grounds of appeal before this Court on 17th April, 2005 Appellant's Brief of Argument dated 4/5/06 was filed on 12/5/06. The appellant also secured the order of this Honourable court on its motion dated 17/10/06 and filed on 18/10/06 that this appeal be heard and determined

based on the appellant's brief of argument for the failure of the respondents to file their brief of argument in this appeal.

A Appellant formulated two (2) issues for determination in this appeal:

B "1. Whether in view of the provisions of Sections 48, 51(1) and 52(1) of the Arbitration and Conciliation Act 1988 of Nigeria, the lower court was right in holding that the awards in issue must be registered first before an action to set them aside can be maintained and granted by the court.

C 2. Whether from the facts of this case and the relief claimed the lower court was right in holding that to the extent that the four awards in issue had not been registered in Nigeria that the applicant/appellant's suit was anticipatory and therefore could not stand."

D The appeal shall be determined with a sole issue namely.

E "Whether from the facts of the case and the relief claimed, the lower court was right in holding that the awards in issue must first be registered before an action to set them aside can be maintained and granted by the court."

F On this issue, learned counsel for the appellant submitted that before the enactment of the Arbitration and Conciliation Act 1988, it was mandatory in order to recognize and/or enforce foreign arbitral award that such an award must be registered either under the foreign Judgments (Reciprocal Enforcement) Act then Cap 152 1990 or



the New York Convention, 1958. But that since the coming into effect of the Arbitration and Conciliation Act, registration is no longer required because Section 51 of the Act provides that award shall be binding and enforceable by the court upon an application.

Counsel submitted that, to set aside an arbitral award, one does not need to wait until the award is registered. That, there is a difference between setting aside, recognition or enforcement. And that, under the provisions of Section 48 and 52 of the Arbitration and Conciliation Act, an aggrieved party in an arbitration may take steps to apply either for setting aside of the award or for the court to refuse recognition or enforcement of the award. In both cases, enforcement is made a separate issue altogether and not a precondition for applying for either setting aside or recognition of award.

Counsel submitted that what is in issue in this case is not the enforcement of the awards but simply the setting aside of the awards. That Section 51(1) of the Act provides that the award is binding irrespective of the country in which it is made. Finally, that, from the vices inherent in the purported four awards, it is obvious that the awards were not validly made and therefore null and void. In such circumstances, said counsel, the court will set aside the awards. He referred to the cases of *SAVOLA LIMITED vs. SONUBI* (2000) FWLR (Pt.12) 1952 at 1953 - 1954, *Jubilee Coffee Roasting Co. vs London Corp, Ltd* (1958) 2 All ER 411.

A In deciding the sole issue in this appeal it is clear that the learned trial Judge fell into error when he agreed with the appellant/applicant that the awards were invalid but refused to set aside on the ground that the appellant's action was anticipatory because the awards had not been registered.

B Truly, and as was pointed out by the learned counsel for the appellant, the requirement of registration before recognition is not contained in the provision of Section 51(1) of the Arbitration and Conciliation Act 1988. Section 51(1) provides thus:

C "An arbitration award shall, irrespective of the country in which it is made, be recognised as binding, and subject to this Section and Section 32 of this Act, shall, upon application in writing to the court, be enforced by the court."

D  
E Before, the 1988 Arbitration and Conciliation Act, registration was a condition precedent to recognition and consequently the binding force of an arbitral award, But now, more particularly under the provision of Section 51(1) of the Act, irrespective of the country in which the award was made, it becomes binding and recognised as soon as it is made. The position of the Law is as stated by the learned Authors, J. Olakunle Orojo and M, Ayodele Ajomo, in the book Law and Practice of Arbitration and Conciliation in Nigeria at page 304 that:

G "Before the Arbitration and Conciliation Decree 1988, the two methods of enforcing foreign awards were by registration under the Foreign Judgments

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(Reciprocal Enforcement) Act, and under the New York Convention, 1958. Section 2 and 4 of the Foreign Judgments (Reciprocal Enforcement) Act provide, in effect, that a foreign award maybe registered in the High Court at any time within six years after the date of the award if it has not been wholly satisfied and if at the date of the application for registration, it could be enforced by execution in the country of the award. With the Decree, there is no need for registration, for Section 51 makes it clear that such an award shall be recognised as binding and shall be enforced by the court on application."

In relation to the present case, the interesting implication of the provision of section 51(1)of the Arbitration and Conciliation Act 1988, is that a foreign award remains binding, without any requirement of registration and even before an application in writing for enforcement is made to the court.

It is clearly, therefore not necessary that an award be registered before a court can grant an application to set it aside, more especially, if as in this case the award was not based on any Contractual agreement between the parties on any form of arbitration. And, also because there was no enforceable contract between the parties.

The sole issue is resolved in favour of the appellant. Having so resolved, the appeal is meritorious and it is accordingly allowed. The prayer of the appellant/applicant for an Order of

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court setting aside the under-listed four International Arbitration Awards obtained in London by the 2nd Respondent against the applicant, namely. Arbitration Award No AA03930, Arbitration Award No. AA03931, Arbitration Award No AA03932 and Arbitration Award No. AA03933, all between the applicant/appellant and the 2nd respondent with the 3rd respondent as the institutional arbitrator is hereby granted.

**ABUBAKAR JEGA ABDUL-KADIR, J.C.A.:** I have had the privileged of reading the Judgment just delivered by my learned brother Owoade, JCA, and I am in total agreement that the Appeal is meritorious.  
I hereby allow the Appeal. I abide by all the consequential Orders made in the lead Judgment.

**HELEN MORONKEJI OGUNWUMIJU, J.C.A.:** I agree.

**Appearances**

Okey Amechi, Esq.

**For Appellants**

**For Respondents**



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POWERED BY:

