ABDULLAH IILIYASU V. RAMAT POLYTECHNIC MAIDUGURI: DEFECTIVE AFFIDAVITS, VALIDITY OF BOND AGREEMENT AND THE RIGHT TO RESIGN*

Abstract

The case under review is a decision of the National Industrial Court in which some technical and legal issues arose on the admissibility of defective affidavits, the validity of the bond agreement in this case and the employee's right to resign. With the aid of applicable statutory provisions and relevant case law, the paper x-rayed the submission of parties as well as the decision of the Court and found that the judgment is to a very large extent, in line with extant law and legal principles but failed to sufficiently address the issue on the validity of the bond as raised by the defendant.

Keywords: Bond, Right to resign, Study leave, Witness' statement on oath

Introduction

The case[1] under review was an action instituted at the Kano division of the National Industrial court by the claimant, being an employee of the defendant, as a result of disputes which bordered on the enforcement of the terms of a bond contract entered into by the claimant in favour of the defendant. The fact of the case was that the defendant granted the claimant study leave with pay for his doctoral degree in Usman Dan Fodio University, Sokoto in 2009, as well as Tetfund sponsorship to the tune of 1.5 million naira. As part of the conditions for the offer the claimant signed a bond in which he pledged to serve the defendant for a period of two years upon completion of his studies. After commencement of his study in Sokoto, the claimant secured another admission at the *Universiti Putra* Malaysia and notified the Defendant of his new admission but the latter did not respond to same. In spite of the lack of response from the defendant, the claimant abandoned Sokoto for Malaysia. Nonetheless, the claimant sent progress report to the Defendant while undertaking his study at University Putra Malaysia. Claimant did not resume in 2014 upon completion of his Ph.D. but continued to receive salary until it was stopped in July 2016. The claimant resigned his appointment with the Defendant in March 2017, with effect from April 2017, but the defendant refused to accept the resignation of the claimant on the ground that the claimant was bonded to serve it for a period of 2years upon the completion of his PhD programme, and therefore refused to process the claimant's retirement benefit, that is, pension and gratuity. Meanwhile, the claimant denied signing any bond for his study in Malaysia as a result of which he instituted the suit against the defendant in which he sought for an order of Court declaring his resignation valid and directing the defendant to accept it. He also sought payment of salary arrears from January 2016 to April 2017 as well as the processing of his gratuity and payment of pension when due.

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The defendant also counter claimed and sought, among others, for a declaration that the change of University of study by the claimant without the approval of the Defendant was a breach of the terms of his study leave; and an order directing the claimant to refund to the defendant all salaries and allowances paid to him by the Defendant from December, 2010 till December, 2015.

In its judgement, the court held that although the defendant was right to have refused to consider the resignation of the claimant, the right of the claimant to resign was absolute and ordered the defendant to accept the resignation letter. It also ordered the defendant to pay the gratuity of the claimant and to process his pension as at when due. On the counter claim, the Court refused to make any pronouncement on the prayer of defendant for a declaration that the change of study by the claimant from the Usman Dan Fodio University Sokoto Universiti Putra, Malaysia without the approval of the Defendant was a breach of the terms of his study leave. It however ordered that the Claimant refund the 1.5 million naira TETFUNDscholarship fund as well as the salaries it received from the defendant from 2014 to April 2016 when the defendant stopped paying.

With the aid of applicable statutory provisions, relevant case law and, of course, the facts of the case, this paper will do an analysis of the case by reviewing the major issues which lie at the heart of the decision of the Court. The issues as identified are as follows:

1. Whether the defendant had a valid witness' Statement on oath in support of his pleading in view of the provisions of the Oaths Act and the Evidence Act.
2. Whether the bond remained valid and continued to regulate the rights and obligations of the parties in spite of the change in Institution of study by the Claimant.
3. Whether the Claimant had an unfettered right to resign in view of the circumstances of the case or alternatively, whether the defendant had a right to reject the Claimant's resignation in the circumstances, that is, the right to resign.

The issues identified above would be fully discussed under the heading of admissibility of defective affidavits, validity of contract and the right to resign respectively.

1. Admissibility of Defective Affidavit/ Statements on Oath

Affidavits are statements of fact voluntarily made on oath before a person authorized by law to administer oaths.[2] Statements on oath usually take the form of an affidavit and contain the depositions detailing the testimony of witnesses in support of pleadings. Section13 of the Oaths Act states the form which an affidavit/ statement on Oath should take, as well as the persons authorized to administer it. It states thus:

> "It shall be lawful for any commissioner for oaths, notary public or any other person authorized by this Act to administer an oath, to take and receive the

[2]E Ojukwu and C Ojukwu, Introduction to Civil Procedure (3rd edn, Helen-Roberts 2009) 216

declaration of anyperson voluntarily making the same before him in the form set out in the First Schedule to this Act."[3]

Clearly deducible from this provision is the fact that, every witness' statement on oath must be in compliance with the form prescribed by the Oaths Act. The decision in the instant case brought to the fore the issue of the attitude of the National Industrial Court towards irregularity in the form of an affidavit, viz-a-viz s13 of the Oaths Act. The claimant argued that since there was no declaration in the defendant's witness statement on oath, the document was incurably defective and prayed the court to expunge it. It is pertinent to note that there are conflicting authorities on what should be the disposition of the court towards defective statements on oath. In the case of GTB Plc v Abiodun[4], the Court of Appeal held that statements on oath must be in strict compliance with the requirements of s13, stressing that non-compliance was not a mere irregularity that could be waived. Consequently, the respondent's statement on oath was held to be a bare declaration without effect**.** Whereas, in the case of Dasofunjo v Ajiboye[5], which was also cited by the defendant, the court took a different approach and treated non-compliance with s13 as a mere irregularity. It is very instructive to consider the provision of the Oaths Act itself with respect to irregularities in the form of an affidavit. It states under s4 (2) and (3) that:

"No irregularity in the form in which an oath or affirmation is administered or taken shall-

(a) Invalidate the performance of official duties, or

(b) Invalidate proceedings in any court, or

(c) Render inadmissible evidence in or in respect of which an irregularity took place in any proceedings.

(3) The failure to take an oath or make an affirmation, and any irregularity as to the form of oath or affirmation shall in no case be construed to affect the liability of a witness to state the truth."

It would appear that the Act itself attempts to forestall a situation whereby a litigant may have to suffer the consequences for the negligent omission of a lawyer or would lose a case solely on technical grounds. The National Industrial Court of Nigeria Civil Procedure Rules 2017 also adopt the same approach and allows the NIC to receive any sworn affidavit notwithstanding any defect or irregularity in form.[6]

It is trite law that a statement on oath becomes evidence once it is adopted by the witness in court, hence, the law of evidence would equally apply. Section 113 of the Evidence Act 2011 allows a Court to permit the use of an affidavit in spite of the fact that it is defective in form so long as the Court is satisfied that it had been sworn before a duly authorized person. The court

[3]Oaths Act LFN 2004, s13

[4](2017) LPELR -42551 (CA)

[5](2017) LPELR -42354 (CA)

[6]NICN Civil Procedure Rules 2017, Order 41 rule3 provides: "The Court may receive any Affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by mis-description of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a Memorandum to be made on the document that it has been so received."

based its decision on this provision of the Evidence Act and held that it was satisfied that the deposition was sworn before a duly authorized person and therefore treated the defect as a mere irregularity. It is commendable that the NIC did not emphasize technicalities to the detriment of dispensation of justice, attitude of which should be encouraged in our Courts.

2. The validity of the bond contract

In order for any contract to be described as valid, it must comprise of five ingredients namely: offer, acceptance, consideration, intention to create legal relations and capacity to contract,[7] and where anyone of these five ingredients is missing, a contract so formed cannotbe said to be valid.[8]In the instant case, all elements of a valid contract were present in the bond agreement. Nonetheless, Claimant argued that he was not in any way bonded with respect to his study in Malaysia because the bond that had been executed was with respect to his study at Usman Dan Fodio University. The defendant, on the other hand, stated that it was not aware of any change in Institution by the Claimant, alleging that the Claimant had abandoned his study at Usman Dan Fodio University and had proceeded to Malaysia without the approval of the defendant. The assertions and denials which ensued between parties with respect to the application of the bond actually raised a question about the validity of the bond for the purpose of the study of the Claimant in Malaysia which the Court ought to have answered. This became a more difficult question because under the bond, the Claimant agreed to serve the Defendant for two years "after the completion of my PhD programme at Usman Dan Fodio University". It was upon this premise that the defendant had argued that the claimant had changed its Institution, and invariably the terms of the bond, without approval from it; the claimant on the other hand claimed that he had notified the defendant, and decided to proceed to Malaysia when no response was forthcoming from the defendant.

It is the opinion of the paper that the Court ought to have made a pronouncement on this question because the case of the Defendant rested largely on it, and was thus very germane to the resolution of the dispute between parties. How were the rights and liabilities of the parties affected by the Claimant's decision to change his institution of study after the bond contract had been duly executed by parties? The Court ought to have provided an insight into this.

Be that as it may, this review will make an attempt at reading the mind of the Court in answering the question of whether or not the bond entered into for the study at Usman Dan Fodio University could validly be said to cover for the study at *Universiti* Putra Malaysia.

It is pertinent to note that in spite of the claim of the defendant to being unaware of the claimant's movement to Malaysia, the defendant did not deny the receipt of the progress report sent to it by the claimant during his study at Malaysia, and in spite of that, it kept paying the salaries. Hence, it could not effectively deny that it was not aware of the claimant's change in institution. But does that invalidate bond? If anything, the Claimant was the party in breach of

[7]Danboyi v Badooh (2018) LPELR-46202 (CA), Okugbule &Anor v Oyagbola & Ors (1990) 4 NWLR (Pt 147) 723

[8]BFIG v BPE (2008) All FWLR (Pt. 416) 1915; Bilante International Ltd. V. NDIC (2011) LPELR – 78 (SC)

the terms of the bond when he changed his institution, allowing him to rely on that change as a ground for invalidating the bond and to excuse himself from the consequences of the bond would have made him to benefit unduly from that breach. In the case of Emmanuel Olamide Larmie v DPMS Ltd,[9] the court held that when parties enter into an agreement in writing, they are bound by it. In that case, the court further stated that:

> "The law is trite regarding the bindingness of terms of agreement on the parties. Where parties enter into an agreement in writing, they are bound by the terms thereof. This court, and indeed any other court, will not allow anything to be read into such agreement, terms on which the parties were not in agreement or were not ad-idem"

Based on the foregoing, this paper considers that there was nothing in the overt or implied actions of the defendant that showed that it had intended to alter the terms contained in the bond, hence, the terms of the bond agreement remained enforceable, regardless of whatever action either party decided to take unilaterally.

Assuming without conceding that the bond was invalidated by the change in Institution of study, it also would have invalidated the study leave with pay which was earlier approved by the defendant based on the initial admission. If it was not wrong for the claimant to proceed to Malaysia for his study on the ticket of a study leave with pay that was approved for his Ph.D. at Sokoto, it would also not be out of place to demand that the claimant be held liable to fulfilhis obligation under the bond, regardless of which University from which he eventually acquired his Ph.D. In other words, if the claimant reckoned the study leave as being valid for Malaysia, he ought to have reckoned the other terms to be valid as well, otherwise, he should have started the process of application for study leave all over again, he cannot pick and choose. Furthermore, notwithstanding the fact that the bond was with respect to the Sokoto admission, for the mere fact that the claimant continued to draw salary showed that he intended to be bonded because there was another option of study leave without pay, for staff who did not want to be put under bond, which the Claimant could have elected.

3. The Right of an Employee to Resign

The right to terminate an employment contract is a right exercisable by both the employer and the employee upon one giving of the requisite notice of intention to do so to the other party.[10] The claimant gave the appropriate thirty day notice of resignation to the defendant as required by law, but the defendant refused to accept it, hence, the judgement addressed extensively the issue of the validity of the claimant's resignation. The learned Judge elaborated on the right of every employee to resign, and noted that this right was absolute at common law as this marked the difference between voluntary service and slavery, but that exceptions also existed. The court held that the defendant was right to have refused to consider the resignation of the claimant given the circumstances of the case. However, the court also went ahead to hold that

[9](2005)18 NWLR (Pt. 958) 438
[10]S.11(1) Labor Act, cap L1, LFN 2004

the resignation of the Claimant was proper and ordered the Defendant to accept it. Nonetheless, a letter of resignation does not need to be accepted in order to become effective. This was the decision in the case of Yesufu v Gov of Edo State[11] where the court stated that resignation does not have to be formally accepted before it becomes effective. While this fully represents the position of the courts, there is need todistinguish the facts in Yesufu v Gov of Edo Stateand that of the instant case. In Yesufu's case, the only requirement which the claimant had to fulfil was to give a 6 month notice of resignation which the defendant had waived. The Claimant thus resigned, only for him to turn round to say that his resignation had not taken effect because the defendant had not formally accepted it. The court held that the requisite notice was for the benefit of the defendant and not for the claimant. Since, the defendant had waived it, non-fulfilment of that requirement could not have kept the claimant in the service of the defendant; whereas in the instant case, the defendant (employer) had not waived its right under the bond, and was demanding that the condition precedent to the resignation of the claimant (employee) be fulfilled. In the case of *WAEC v Oshionebo*[12] the court held that accompanying a letter of resignation is the right to immediately withdraw the service automatically without any benefit, subject to payment by the employee of his indebtedness to the employer. In fact, in the notorious case of *Benson v Onitiri*,[13] the court stated that "there is a right to resign an office unless there is a reason or reasons to show that the holder of the office cannot. Citing *WAEC v Oshionebo*[14]and *Benson v Onitiri (*supra) the learned trial Judge in the case of *Dr Alafiyatayo Akinola v Waziri Umaru Federal Polytechnic*[15]stated that "what these authorities never meant or never said is that an employment stands terminated the day the employer receives the notice of resignation in all cases irrespective of any legal impediment." The court observed that that were circumstances under which a notice of resignation would not determine an employment contract namely when the required length of notice is not given; when the notice of resignation is intended to be used to escape the likely outcome of an on-going investigation or, as in the instant case, where the employee is under a valid contractual obligation not to resign the service of theemployer for a given period of time and he tenders a resignation letter within that specified frame of time.

In the instant case, the Ramat Polytechnic Scheme of Service and the bond were the two documents/instruments upon which the Court ought to base its decision in determining the rights and obligation of the parties. In the bond, the claimant pledged to serve the defendant for a minimum period of two years upon completion of his studies, failing which he would be liable to refund all monies invested in his training by the defendant, including all salaries paid. Meanwhile, the Defendant's Scheme of Service which regulated the conditions of service for its staff made the signing of a bond a condition precedent for approval of study leave. In the bond agreement, the Claimant specifically agreed to serve the defendant upon completion of his study leave, failing of which, he would be bound to refund all the expenses incurred on his

[11](2001) FWLR (Pt. 60) 42
[12](2006) 12 NWLR (pt 944) 258
[13](1960) SCNLR 177 at pp.189-19
[14]supra
[15]SUIT NO. NICN/SK/03/201

training including salaries. The terms were clear and explicit and there was no proof whatsoever by the claimant that he was under any form of duress when he agreed to the terms of the bond. The attitude of the courts to contracts was highlighted in *Enemchukwu v Okoye &Anor*[16] where the court held that:

> "when contracts are voluntarily entered into by parties, they become binding on them, based on the terms they have set out for themselves. It is trite that where there is a valid contract agreement, parties must be held to be bound by the agreement and its terms and its conditions"

Needless to say, the bond executed by the claimant in favour of the defendant was a contract between both parties. It is therefore difficult to see under which law, rule, exception or principle the honourable Judge based his decision that the resignation of the claimant was proper. It is the opinion of the paper that, although the claimant had an absolute right to resign, the way and manner in which the right was sought to be exercised as well as thecircumstances prevailing made the resignation rather improper. In *Overland Airways Ltd v Captain Raymond Jam*[17]where the National Industrial Court considered the issue of the validity of training bonds, the court held that where the terms of the a training bond were reasonable, they enforce those terms freely entered into by parties. It further held that the training bonds which required the defendant to continue in the service of the claimant for thirty-six months and twelve months respectively, upon the completion of his training were not unreasonable. Thus, the court ought to have considered the reasonableness of the bond between the claimant and the defendant and on that note should have enforced its terms. The NIC took such a position in the recent case of *Dr Alafiyatayo*[18]with almost similar facts, when it held that the notice of intention to resign given by the claimant was invalid and that he could only exercise his right to resign after serving the term specified in the bond. It is opined that the bond ought to have been held to be an impediment to the exercise of the right of the claimant to resign, that right would only be activated when the claimant refunded all sponsorship sums, including all salaries received from the date of the commencement of the study leave to the date the salary was stopped.

Given the circumstances, the order of court asking the claimant to refund to the defendant 1,500,000 million naira TETFUND scholarship and all salaries paid to him from 2014 (when he completed his PhD programme and was expected to resume) to April 2016 when his salary was stopped was insufficient. In essence, by overlooking all the salaries paid to the claimant while his study leave lasted, it meant that the court did not view the study leave with pay as a form of sponsorship. The ideal order, in line with the decision in *Dr Alafiyatayo*[19]would have been that the claimant should defer his resignation till after two years of serving the Defendant, or alternatively refund both the TETFUND scholarship sum as well as all salariespaid to him from the commencement of his study leave in 2009 up until April 2016 when the defendant stopped paying his salary.

[16](2016) LPELR-40027 (CA). Also
[17](Unreported) suit no: NICN/LA/597/2012
[18]Supra note 11
[19]Ibid

CONCLUSION

In the course of reviewing the case which forms the subject matter of this paper, admissibility of defective affidavits/witnesses' statement on oath was considered *i*n the light of Oaths Act, s4(2)(3) and Evidence Act, s113 as well as the NICNCPR, Order 41 rule 3. Although in the light of some previous Court of Appeal decision, the judge could have applied his discretionary powers either way. It is laudable that the judge held that he was satisfied that the defendant's witness' deposition was sworn before a duly authorised person and thus treated the defect as a mere irregularity. The Court, by so doing, deemphasized technicalities and focused rather on the dispensation of justice. This attitude should be encouraged in our Courts.

On the issue of validity of the bond with specific regard to the study of the claimant in Malaysia, notably, the Court refused to make any pronouncement regardless of the fact thatch the case of the Defendant was, largely, rested on it. The question of how the rights and liabilities of the parties were affected by the Claimant's decision to change his institution of study after the bond contract had been duly executed was left unattended. The Court ought to have provided an insight into this for future guidance. Nonetheless, it is the view of the paper that the rights and obligations of the parties arising from the bond agreement were not altered by the Claimant's decision.

In conclusion, the third issue considered the right of an employee to resign and also highlights the plight of many employers when employees refuse to honour the terms of bond agreements. Employers know that an organization is only as strong and efficient as its employees and therefore make efforts to invest in the capacity development of their staff. It isusually supposed to be a win-win situation- while the employee benefits from the training in terms of personal development, the employer benefits from the services rendered by the employee as a return on his investment in training of the staff. The facts of the case present a situation in which an employee (claimant) returned from training largely sponsored by his employer, only to tender letter of resignation, leaving the employer (Defendant) to lick his wounds while counting his losses. In order to forestall this unpleasant situation, employers make use of the instrumentality of bond. However, the bond notwithstanding, the Court held that the resignation of the Claimant who had failed to honour the bond he had signed before being sponsored by the defendant for training was proper because he had the right to resign. It was thus held that the resignation of the claimant was appropriate.

The decision in this case should definitely be a source of concern for every employer looking to invest heavily in the capacity development of its staff. Particularly in academic institutions, this may affect the chances of young researchers who are desirous of securing career advancement opportunities overseas which would require the financial commitment of their employers in one way or the other. It is opined that he right to resign is absolute but can be impeded, hence, the paper recommends that the National Industrial Court should view bond agreements as normal commercial contracts and prioritize their enforcement, after ascertaining that terms contained in them are reasonable.