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The Rule Barring the Use of Demurrer Proceeding, Whether Amounts to Denial of Party's Legitimate Right to Raise Objection Touching on the Jurisdiction of the Court.

Abubakar Shehu Ahmad-Tijani Esq^{*}

ABSTRACT

The paper explains and clarifies some discrepancies arising from concept, nature and application of the term demurrer and jurisdiction as regards the competence of a suit and power of a court to hear and determine the said suit. While some lawyers are mindful of the fact that demurrer has long been abolished by the rules of courts, some are still unmindful of this salient fact. But by the time one is acquainted the current position of our law in respect of the meaning, nature and application of demurrer particularly with regard to the Kwara State High Court (Civil Procedure) Rules, 2005. The paper also answers the question as to whether the abolition of demurrer affects the right of a party to challenge the jurisdiction of a court to hear and determine a particular case.

INTRODUCTION

To some legal practitioners, once pleadings have been filed in court of law by the plaintiff and the defendant, the court is obliged to hear and determine the plaintiff's suit based on evidence and can only dispose of the suit upon a determination of the evidence so heard. There is also a misconception held by some counsel that once a writ of summons and statement of claim have been filed by the plaintiff, the defendant cannot challenge the competence of the suit and/or jurisdiction of the court to hear and determine the plaintiff's suit unless and until the defendant has filed his statement of defence and then raise the preliminary objection in his pleading. It is worthy of note that the issue of demurrer cannot be equated with the issue of jurisdiction of court as they are not the same, although, in Kwara State (like some other states in the country) demurrer has been totally abolished, therefore, to some extent, the defendant need not file pleading before he can challenge the competence of the plaintiff's suit or the jurisdiction of the court to entertain same.

DEFINITION AND NATURE OF DEMURRER

The word "Demurrer" is derived from a Latin word called "DEMORARI" or from a French word called "DEMORER" meaning to wait or to stay.¹ Blacks Law Dictionary, 7th Edition defines Demurrer as a pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer. In *Moyosore v. Govt, Kwara State* the Court of Appeal, (Ilorin Division) has this to say:

"Demurrer" originated from the Latin word demorari or the French demorrier meaning to wait or stay proceedings by not filing a statement of defence but relying on the statement of claim that it disclosed insufficient material or was self-defeating to entitle the plaintiff or claimant to reliefs sought in the suit and urging the court to dismiss or strike out the suit in limine on the insufficiency of the statement of claim in favour of the defendant without calling on the defendant to join issues with the claimant by filing a statement of defence and offering evidence".

In the case of Nigeria Deposit Insurance Corporation (N.D.I.C.) v. Central Bank of Nigeria, Uwaifo, JSC held inter-alia that:^{vi}

"In demurrer, the plaintiff must plead and it is upon that pleading that the defendant will contend that accepting all the facts pleaded to be true, the plaintiff has no cause of action, or, where appropriate, no locus standi."

Similarly, in the case of UMARCO (NIG) PLC V. JOFABRIS & ASSOC. LTD,^{vii} Chukwuma Eneh, JCA, relying on the Supreme Court decision in the case of LASISI FADARE & ORS V. A.G. OYO STATE^{viii} held that even though a defendant agrees that all the facts stated by the plaintiff in his statement of claim are true, the defendant believes that the suit is not maintainable against him by relying on salient point(s) of law and without necessarily filing any defence. From the foregoing, it can be deduced that in demurrer proceedings:

- (a). The plaintiff must have caused the writ of summons to be issued by the Registrar of the court.
- (b). The plaintiff must have filed his statement of claim.
- (c). The defendant may concede that the facts pleaded by the plaintiff in his statement of claim are true.
- (d). Despite paragraph (c) above, the defendant relies on point of law to contend that the plaintiff's suit is incompetent, for instance, that the plaintiff has no reasonable ^{cause} course of action against the defendant or that the plaintiff lacks requisite locus standi etc.
- (e). The defendant, before filing his pleadings, but upon receipt of the plaintiff's writ of summons and statement of claim may file a motion on notice praying the court to strike out and/or dismiss the plaintiff's suit without any answer upon questions of fact being required from him.
- (f). For the purpose of such a motion on notice/application, the defendant shall be taken as admitting the truth of the plaintiff's allegations and no discussion of questions of facts shall be allowed.
- (g). The court on hearing the motion on notice/application, shall either strike out/dismiss the plaintiff's suit or refuse the defendant's application and order the defendant to answer the plaintiff's allegation of facts by filing his statement of defence.

See the case of HORIZON FIBRES (NIG.) PLC V. M.V. BACO LINER^{ix}.

DEFINITION AND NATURE OF JURISDICTION

"Jurisdiction" has been defined as follow by the Black's Dictionary on page 855.

- (a). A government general power to exercise authority on all persons and things within its territory.
- (b). A court's power to decide a case or issue a decree.
- (c). A geographical area within which political or judicial authority may be exercised.
- (d). A political or judicial subdivision within such an area.

According to BBC English Dictionary, P.632, "Jurisdiction" is the power that a court of law or someone in authority has to carry out legal judgment or enforce laws.

There are plethoras of judicial authorities on the connotation of the term "Jurisdiction" out of which I will refer to a few.

Tobi, J.S.C. in Inakoju v. Adeleke^x held that jurisdiction is the foundation upon which a court of law can stand to hear and determine any suit brought before it, otherwise, its proceedings, no matter how well and brilliantly conducted will be null and void *ab initio*. See also the cases of Gafar v. Govt. Kwara State^{xi} (Onnoghen JSC); Omotunde v. Omotunde^{xii} & Iwuagolu v. Azyka^{xiii}.

SOURCE OF JURISDICTION OF COURT

The genesis of every court can be traced to the statute creating the court as it is not the rules of court that clothes it with jurisdiction. See the case of *ONUORAH V. K.R.P.C. LTD.*^{xv} Where the Supreme Court has this to say: "It is clearly not the rules of court that vest jurisdiction in the court but that rather the statute creating the court".

In *Gafar v. Govt. Kwara State* (supra) at p.403 Onnoghen JSC stated that it is the statutes that create a court that confers it with its jurisdiction and not the rules of the court.

INGREDIENTS OF JURISDICTION

On ingredients of jurisdiction of court, the competence of the court to entertain or adjudicate on a case is involved. Thus, it is essential for a court to determine the issue *in limine* to avoid embarking on an exercise in futility. Any determination in the absence of jurisdiction is a nullity, no matter how well conducted. Therefore, a court can only exercise jurisdiction when:

- (a) It is properly constituted as regards number and qualification of members of the bench, and no member is disqualified for one reason or another.
- (b) 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
- (c) The case comes before the court by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. See the case of *Opara v. Amadi*.^{xvi} See also the cases of *Maishanu v. Manu*^{xvii}, *Madukolu v. Nkemdilim*^{xviii}, *Odofin v. Agu*^{xix} & *Iwuagolu v. Azyka*^{xx}.

DETERMINANTS OF JURISDICTION

The issue of jurisdiction of a trial is determined in any particular case by the claim of the Claimant/Plaintiff as contained or adumbrated in the writ of summons and the statement of claim. This implies that it is the claimant's/plaintiff's claim and not the defendant's denial or statement of defence that determines the jurisdiction of the court. Consequently, where the writ of summons and statement of claim disclose reasonable cause of action, the court, unless precluded by other statutory provisions, can exercise jurisdiction. The following judicial authorities are in support of this submission *Balogun v. Ode*^{xvii}; *Ogbuagu JSC v. Iwuagolu v. Azyka* (supra) at 628, para H, *Anya v. Iyayi* (1993) 7 NWLR (PT.305) 290; *A.G. Kwara State v. Warah* (1995) 7 NWLR (PT.405) 120, *Onuorah v. Okeke* (2005) 10 NWLR (pt.932) 40; *Adeyemi v. Opeyori* (1976) 9-10 SC 31, *C.G.G. (Nig.) LTD. v. Ogu* (2005) 8 N.W.L.R. (pt. 927) 366.

When Issue of Jurisdiction can be raised?

Although no court is expected to arrogate to itself a jurisdiction where it has none, where any court assumes jurisdiction knowing definitely that it has none, a party to the suit or parties to the suit can raise the issue of competence and/or jurisdiction of the court at any time before judgment is entered or delivered by the court. To this greater extent, issue of jurisdiction can also be raised at any time on appeal even for the first time at the Court of Appeal or the Supreme Court. See *Unilorin v. Adeniran*^{xviii}. See also *Iwuagolu v. Azyka* (supra) at 628, paras G-H; *Usman Dan Fodio University v. Kraus Thompson Organisation Ltd* (2001)15 N.W.L.R. (pt.736) 305; *N.D.I.C. v. C.B.C.* (supra) at p. 88

In *Moyosore v. Govt., Kwara State*^{xix}, the Court of Appeal expressly stated that:

"It has become part of jurisprudence that a defendant has right to raise any issue bordering on the jurisdiction of a court to try a cause or matter at any time, even on appeal, without let or hindrance.

It is also our Law that the court has a duty to hear and dispose of any such challenge of its jurisdiction first before going into the merit(s) of the substantive matter. The logic for this lies in the fact that where a court lacks jurisdiction to hear and entertain a suit,

whatever it does in the case will amount to sheer waste of time and nullity, no matter how well the case must have been conducted".

Therefore, objection to jurisdiction can be taken, whether or not pleadings have been exchanged in the case. The rule barring the use of demurrer cannot be stretched to deny a party who has genuine and legitimate objection touching on the jurisdiction of court, the right of ventilating his grievance, even without exchange of pleadings, where the raising of such objection, if sustained is capable of disposing of the whole action. In distinguishing a demurrer from issue of jurisdiction, issue of jurisdiction is more fundamental than demurrer proceeding. It does not always follow that pleading must be requisite to raising the issue of jurisdiction. Jurisdiction is a compelling necessity and a prerequisite to the consideration of the demurrer proceedings.

DISTINCTION BETWEEN DEMURRER AND JURISDICTION

It would be manifestly absurd to suggest that a court is bound to proceed with the hearing of a particular case by taking lengthy evidence of the parties to the suit where it appears that the whole suit could be decided upon the writ of summons and/or statement of claim without any evidence being called. Where there is a point of law which if decided in one way or the other, is going to be decisive of the litigation, advantage ought to be taken by making use of the facilities afforded by the rules of court to have it disposed off as early as possible. This is to save the time and costs of the litigants as well as the precious time of the court.

The High Court (Civil Procedure) Rules of Kwara State, 2005 provides that:

NO DEMURRER SHALL BE ALLOWED: *see Order 26 Rule 1 therein. Meaning that demurrer proceeding has been abolished.*

Order 26 of the Rules further states that:

2. *Any party shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the judge before or at the trial.*
3. *If, in the opinion of the Judge the decision on the point of law substantially disposes of the whole action, or of any cause of action, ground of defence, set-off, counter claim, or reply therein, the Judge may thereupon dismiss the action or make such other order therein as may be just.*
4. *The Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexations, the Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.*

Going by the above provisions of the rules of court, it is arguable that even though demurrer proceedings have been abolished under the Nigerian Civil Procedure, a point of law which if determined would put an early end to a clearly bad case, which ultimate end would be a dismissal or failure, could be raised *in limine*. The Rules also permits (that despite the abolition of demurrer proceedings), a defendant who has filed his pleadings is allowed to include therein a provision, which if taken, will put an end to the entire suit.

Alternatively, a point of law touching the issue of jurisdiction of the court to determine any particular case can be raised by the defendant who has not filed any pleading in the suit. The defendant is allowed to do this as soon as he becomes aware of any irregularity that can affect the jurisdiction of the court to hear the plaintiff's suit as constituted. It may be on the writ of summons served on him or statement of claim or upon any available relevant material before the court.

Order 4 Rule 2(1) & (2) of the Rules provides:

2(1)-An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order

therein shall not be allowed unless it is made within a reasonable time and before any party applying has taken any fresh step after becoming aware of the irregularity.

(2) Any application under sub-rule (1) may be made by summons or motion on notice, and the grounds of objection shall be stated in the summons or notice of motion.

The above provisions establish beyond per adventure that in proceedings in lieu of demurrer, the points of law are raised by way of an application on notice by the defendant and if the points of law so raised in the application concerns or pertains to objection to jurisdiction of the court, it must be heard first before taking any further proceedings in the suit notwithstanding that:

- (a). The defendant has not filed his pleadings
- (b). The only document before the court is writ of summons; or
- (c). The documents before the court are the writ of summons and statement of claim; or
- (d). The evidence has been received by the court in the case see N.D.I.C. V. CBN (supra) at p.89, UWAIFO, JSC held that it is wrong to contend that a Defendant cannot raise an objection to the jurisdiction of a court until after the statement of claim has been filed. The Defendant can do so immediately he received the writ of summons or any order available court processes. See also Arjay Ltd. v. A.M.S. Ltd.^{xx} See also the case of A.G. Kwara State v. Olawale (1993) 1 NWLR (pt.272) 645.

In N.D.I.C. V. CBN (supra), the Supreme Court stated further at pages 89-90 that:-

"The tendency to equate demurrer with objection to jurisdiction could be misleading. It is a standing principle that in demurrer, the plaintiff must plead and it is upon that pleading that the defendant will contend that accepting all the facts pleaded to be true, the plaintiff has no cause of action or where appropriate, no locus standi. See also Egbuziem v. Egbuziem (2005) 4 NWLR (pt.916) 488 at 499 paras D-F; 500 B & D-E. C/A; Williams v. Wilimas (1995) 22 NWLR (PT. 375) 1; Akpan v. Utin (1996) 7 NWLR (PT.463) 634"

HISTORY AND NATURE OF DEMURRER

The historical background of demurrer proceeding has been succinctly stated in the case of MOYOSORE V. GOVT., KWARA STATE (supra) particularly at page 286, paras B-E as follows:

"The history and range of demurrer was amply stated by the Supreme Court in very recent case of JFS Investment Ltd. v. Brawal Linne Ltd. & Ors. (2011) 17 W.R.N.1 at pages 22- 23, (2010)18 N.W.L.R. (pt.1225)495 at 523-542 paras C-F (Per the lead judgment of Adekeye, J.S.C.)as follows : "Demurrer procedure as embodied in section 27 of the old Federal High Court Rules, 1976 was a device used in the Maritime Industry to enable a party to litigation to short an otherwise, what would have been a lengthy trial by raising an important defence which would have the effect of disposing of the case. The practice grew whereby a defendant Who is served with a writ immediately filed a demurer application and the bill of lading clipped onto the motion paper without an affidavit exhibiting same, in order to draw the attention to the contents of the bill of lading in respect of the claim. The court would automatically deliver its ruling thereafter."

The procedure by way of demurrer is not only archaic and time wasting, it is a product of English Rules of eighteenth century whereby formulary system reigned. The English Courts have done away with it but it appears some parts of the country still adhere to it. The Uniform High Court Rules and the recent High Court Rules of Kwara State wisely did away with demurrer. It is in the interest of efficient and timeous dispensation of matters in court to allow parties to join issues and the defendant, without directly pleading law but facts can raise issues that will dispose of the matter without hearing evidence on matters like limitation of action, immorality, public policy, laches etc in the statement of defence.

THE GENESIS OF ABOLITION OF DEMURRER PROCEEDINGS

There is need to state briefly, the genesis of abolition of demurrer proceedings in our court. Demurrer is an archaic procedure, though it is still extant in some parts of the country. In demurrer proceedings, the defendant alleges that even if all the facts averred in the statement of claim are true, the action cannot be sustained either due to illegality (e.g. sharing of assets criminally acquired) or public policy (e.g. gaming and lottery already banned and frowned upon in some states) or by failing to give required notice of intention to sue (when such notice is statutorily required) or when the right to sue had lapsed due to effluxion of time (e.g. limitation law or Act) or absence of *locus standi*, or lack of reasonable cause of action, just to mention few. See the case of *A.G. EKITI STATE V. DARAMOLA*^{xxi} where the Supreme Court held that the trial court was right when it dismissed the plaintiff's action having found that the plaintiff lacked the *locus standi* to institute the action.

In demurrer proceedings, once a demurrer is filed, the statement of claim remains untraversed. See the case of *OKAFOR V. A.G. ANAMBRA STATE*^{xxii}. Furthermore, the motion on demurrer should be filed before issues are joined by the parties. Demurrer will not be allowed if parties have joined issues and have exchanged their pleadings the matter must at this stage proceed to trial. See *Okafor v. A.G. Anambra State (supra)*, *Gold Coast and Ashanti Electrical Power Development Corporation v. A.G. (1937) 3 WACA 215* and *Odivo v. Obor (1974) 1 All NLR (pt.1) 436*.

However, in an objection to the jurisdiction of court, a defendant can challenge the jurisdiction of court at any time he perceives that the court lacks requisite jurisdiction to entertain the plaintiff's suit. He can do this before or after joining issues with the plaintiff. He can even raise the issue of jurisdiction for the first time on appeal, even for the first time at the Supreme Court. See *ARJAY LTD. V. A.M.S. LTD.*^{xxiii} See also *GOV. IMO STATE V. AMUZIE (2009) 13 NWLR (PT.1157) 34 AT 68 PARAS D-F*.

This is a great development in our judicial system and it constitutes a radical change and improvement on the abolition of demurrer proceedings. This procedure is more economical and it ensures that justice is not only done to parties but that justice is seen to be done in all its ramifications. See *OKAFOR V. A.G. ANAMBRA STATE (supra)* particularly at page 222, paras D-F where BELGORE, JSC (as he then was) held *inter-alia* that the procedure by way of demurrer is not only archaic and time wasting, it is a product of English Rules of eighteenth century, whereby formulary system reigned. The English courts have done away with it since long time ago. It is in the interest of efficient and timeous dispensation of administration of justice in our courts of law to allow parties to join issues. thereafter, the defendant, without directly pleading law but facts, can raise issues that will dispose of the matter without hearing evidence on matters like limitation of action, immorality, public policy, *laches*, cause of action, *locus standi* etc in the statement of defence.

RECOMMENDATION

It is my humble recommendation that lawyers, especially the practicing lawyers should endeavour to familiarize themselves with the current rules of courts, law reports and materials on principle of practice and procedure to enable them meet up with the challenges in the legal practice. Otherwise, a good case may be thrown out on technical ground while a bad case may end with success if care is not taken. Practicing lawyers need to acquaint themselves with the differences between demurrer proceeding and issue of jurisdiction and they ought to make use of the

development in our rules of court to the effect that demurrer has been abolished in the rules of almost every court in Nigeria in order to save time, energy, cost and other valuable resources.

A defendant has the right to ask the court to strike out a case or to dismiss it at the earliest opportunity by filing a notice of preliminary objection or a motion on notice supported by an affidavit. He would state the grounds upon which the court can put an end to a case for lack of competence, without filing any defence or without calling any witness to adduce evidence. If the objection is meritorious enough, the case will be struck out or dismissed. This will save him the rigour of filing statement of defence, the witness statement on oath, the list of the witnesses to be called at the trial, the list of documents to be relied upon, the pre-trial conference session, examination-in-chief, cross examination and re-examination, etc. this will save the precious time of the court, the counsel and the parties. However, it is not always necessary to file an affidavit in support of motion on notice or preliminary objection to challenge the jurisdiction of court where the ground of the objection is premised on point of law or where there is enough materials before the court upon which the court can judicially and judiciously pronounce on the preliminary objection. See the case of *A.N.P.P. V. I.N.E.C* (2005) All FWLR (pt.254) 971 at 990 paras B-D and *Nika Fishing Ltd. V. Lavina Corp.* (2001) 16 NWLR (Pt.740) 556 at 569

The NBA in each state should organized workshop, retreat programme and seminar to educate counsel on the meaning, nature and application of demurrer, the effect of its abolition and the alternative procedure provided by the rules of court in place of demurrer.

CONCLUSION

Demurrer Proceedings, before it was abolished in England and even in Nigeria, was found desirable and in deed very necessary to preserve some forum of objection on point of law to avoid endless prolongation of trial in court with its attendant great expenses. Therefore, where a defendant conceives a point of law which he was persuaded would put an end to the case of his adversary, he was at liberty to raise it *in limine*, urging the court to strike out and/or dismiss the plaintiff's action without filing a defence or calling evidence. The rationale for the procedure in lieu of demurrer which is adopted by the Kwara State High Court (Civil Procedure) Rules, 2005 is to save valuable time and money of the litigants and the courts. Per MBABA, J.C.A. expressed his view on the reason (s) for abolition of demurrer of demurrer proceeding in the case of *MYOSORE V. GOVT., KWARA STATE* (supra) when his Lordship held that:

I believe this was meant to check or curtail the usual tendency by the defence to resort to bunny traps and ambushing to abort trial of matters on their merit, by relying on technicalities to deny the claimant the hearing of his case on the merit. And often times, the technical Justice which the defendant secures by aborting the trial on merit becomes a mere temporary relief which only delayed the trial of the substantive matter, and when the technical justice is set aside, on appeal, the parties go back to square one after spending all the time and resources pursuing shadows. That is why the Law would require such a point of Law, which the defendant has, which is Capable of disposing of the case in limine, if raised and sustained, to be pleaded in the statement of defence, and properly raised, thereafter, for the Judge to dispose of, either before the trial or at the trial. Of course, that would give the claimant proper notice of the point of law/defence raised, and will also ensure that the case is heard on it's merits, as the penchant of the law now is to go for substantial justice and not enthronement of rules of technicalities to abort Justice."

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