IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

(APPELLATE DIVISION)

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

ON THE 15TH DAY OF DECEMBER 2016 APPEAL NO. FCT/HC/CVA/134/15

BEFORE THEIR LORDSHIPS:

HONOURABLE JUSTICE FOLASADE OJO (PRESIDING JUDGE)

HONOURABLE JUSTICE D. Z. SENCHI - (JUDGE)

BETWEEN:

O.S. EPHRAIM OLUWANUGA — APPELLANT

(Trading under the name and style of O.S. EPHRAIM OLUWANUGA & CO.)

AND

A.O. OLORI-AJE — RESPONDENT

(Trading under the name and style of A.O. OLORI-AJE & CO.)

JUDGMENT

OJO, J, Delivering the Judgment of the Court.

The appellant as plaintiff in the District Court, Abuja instituted an action against the respondent. Judgment in the Suit was delivered on the 13th of August, 2015. Dissatisfied with that decision, the appellant with leave of Court filed an appeal against same. The notice of appeal contains four grounds. The grounds of appeal without their particulars are *as follows:*

GROUND ONE:

That the judgment of the learned trial judge making an order of non-suit in respect of the matter cannot be supported by the evidence adduced by the appellant against the respondent.

GROUND TWO:

The learned trial judge erred when he failed to award to the applicant the sum of N984,010.00 (Nine Hundred and Eighty Four Thousand and Ten Naira) which the learned trial judge acknowledged to have been proved and established in evidence by the appellant though lesser than the amount claimed when he held that:

> *"It is only in Exhibit P5 which is a document dated 20th August, 2013 that a complete breakdown of the then latest indebtedness of the defendant to the plaintiff is clearly stated in the total sum of N984,010.00. Sadly, the plaintiff is not asking for the N984,010.00 which is very clear and categorical as to how the said sum was arrived at."*

> *GROUND THREE:*
>
> *"The learned trial judge failed to properly examine Exhibit D2, a letter of demand dated the 21st day of February, 2014 wherein the appellant demanded for the sum of N1,125,548.00 and thereby occasioned a miscarriage of justice when he held that "there was no details about how the plaintiff arrived at that figure".*

> *GROUND FOUR:*
>
> *The learned trial judge erred by non-suiting the matter when he held that:*
>
> *"There is no doubt that the defendant is indebted to the plaintiff. The defendant has admitted same in evidence but has disputed that the amount as claimed by the plaintiff in their plaint note is what he owes the plaintiff.*

But the defendant has not stated how much he owes the plaintiff. Maybe it is not the duty to do." and thereby occasioned a miscarriage of justice to the appellant.

The reliefs sought from this Court are as follows:

"1. An order of the High Court of the Federal Capital Territory, Abuja setting aside the judgment of His Worship, Ubani Tony Chukwuemeka of the Senior District Judge, Wuse Zone 2, Abuja delivered on the 13th day of August, 2015 in Suit No. CV/1406/2014.

2.

a. An order of the High Court of the Federal Capital Territory, Abuja entering judgment in favour of the appellant in the sum of N1,250,540.00 (One Million, One Hundred and Twenty Five Thousand, Five Hundred and Forty Naira) representing the outstanding balance and arrears of rent and service charge which the respondent owes the appellant from 2009 till the time the respondent handed over possession of same to the appellant.

b. An order of High Court of the Federal Capital Territory, Abuja entering judgment in favour of the appellant in the sum of N984,010.00 (Nine Hundred and Eighty Four Thousand and Ten Naira) representing the amount which the learned trial judge acknowledged to have been proved and established in evidence by the appellant."

The appellant was granted leave to depart from the rules of this Court in the compilation of the record of appeal. At the hearing the appellant's counsel adopted and relied on the appellant's brief of argument

dated 13/5/16 which was filed on the same day. The respondent who had notice of the hearing of the appeal was absent and not represented.

Appellant's counsel in the appellant's brief of argument distilled three issues for determination to wit:

1. *Whether the learned trial judge was right in ordering a non-suit taking into consideration substantial evidence placed before the Court in respect of the plaintiff's claims (distilled from Grounds 1 and 4).*
2. *Whether having regard to the evidence placed before it the plaintiff was able to prove its claim on the preponderance of evidence, N1,125,548.00 (One Million, One Hundred and Twenty Five Thousand, Five Hundred and Forty Eight Naira, (Distilled from Ground 3).*
3. *Whether the learned trial judge erred in law in refusing to award the sum of N984,010 (Nine Hundred and Eighty Four Thousand and Ten naira) to the plaintiff after finding the plaintiffs has been able to prove same (distilled from ground 2).*

ISSUES NO 1 & 2:

The appellant's claim before the lower Court is as follows:

"a. An order directing the defendant to forthwith pay to the plaintiff the sum of N1,125,548.00 (One Million, One Hundred and Twenty Five Thousand, Five Hundred and Forty Eight Naira) only being the outstanding balance and arrears of rent and service charge owed the plaintiff by the defendant from 2009 till the 20th day of February 2014 in respect of the sublet portion of the plaintiff's office space measuring 21.58 square metres situate at City Plaza, left wing, 3rd floor, Plot

596, Ahmadu Bello Way, Garki II, Abuja directly adjoining the applicant's office.

b. 10% interest on the judgment sum from the date of judgment until the final liquidation of the judgment sum.

c. N500,000 (Five Hundred Thousand Naira) only, as cost for this action."

See page 7 of the Transcript Record of Appeal. The respondent at the proceedings in the lower Court did not deny owing the appellant but his defence was that his indebtedness was not up to the amount claimed. The judgment of the trial Court is at pages 87 - 89 of the record of appeal. The trial Court in it's judgment found the respondent indebted to the appellant but was of the view that the appellant failed to prove the amount claimed. He therefore made an order of non-suit. The Court at page 89 of the record held as follows:

"In the light of the above, I see that the plaintiff has some claimable reliefs but has been unable to effectively present same to my satisfaction. I shall give the plaintiff another opportunity by making an order of non-suit in respect of this suit. And I hereby do so accordingly."

Appellant's counsel in his brief of argument submitted that the appellant led sufficient oral and documentary evidence at the trial Court to substantiate it's claim and was therefore entitled to judgment. He submitted that the respondent admitted his indebtedness and the appellant proved the amount owed vide the various correspondences between the parties which were tendered during the trial. He urged us to hold that the appellant proved his case by preponderance of evidence and discharged the evidential proof placed on him by law and as such entitled to judgment.

The law is settled that he who asserts that he is owed money has the duty to prove the amount claimed. See S.B.N. PLC VS CROWN STAR & CO. LTD (2003) 6 NWLR Pt. 815 Pg 1. The appellant therefore had the duty to prove by preponderance of evidence the amount claimed as debt owed him by the respondent. It is further the law that an admission of a transaction is not an admission of the amount allegedly owed. See ADDAX PETROLEUM DEVELOPMENT (NIG.) LTD (2010) 8 NWLR Pt. 1196 Pg. 278. It follows therefore that even though the respondent as defendant admitted owing the appellant arrears of rent and service charge, the appellant still had a duty to prove the amount claimed particularly as same was disputed by the respondent.

The appellant called a sole witness who testified as P.W.1 at the trial. Her evidence in chief is at pages 35 - 36 of the record. She tendered ten letters in evidence.

Her evidence is as follows:

"My name is Tawiah Haggar. I am the practice manager of O.S. Ephraim Oluwanuga & Co. (the plaintiff). I attend to Court matter. I see to the day to day activities of the firm. I handle the correspondences. I know the defendant. The plaintiff is the tenant with Strategic Properties. Strategic Properties manage the plaza. The plaintiff occupies a space at the 3rd floor at the plaza. Because the space was too big for the plaintiff, the plaintiff subleted a portion of it to the defendant. The size is approximately 21.68M2 which makes the defendant our tenant. The tenancy commenced 16th December 2008. The defendant upon commencement of the tenancy paid 2 years rent but failed to pay the service charge for the 2nd year. The rent is based on square metre. Subsequently the defendant defaulted in payment and we served them several letters which were

duly acknowledged but did not respond to. I can identify the letters. The defendant acknowledged and they are on our letter head. These are the letters."

The Court admitted the letters in evidence and marked them as Exhibits P1 - P10 respectively.

P.W.1 concluded her evidence as follows:

"I want the Court to ask the defendant to pay us our outstanding rent and 10% of the judgment sum. That is all."

Above is all the evidence adduced by the appellant at the trial Court in support of his claim. No oral evidence was given in support of the appellant's claim of N1,125,548.00.

The trial judge in his judgment at page 88 of the record held as follows:

"I have gone through the written address of the defendant as well as that of the plaintiff and the issues the counsel for the parties have raised thereon. I have equally gone through the process filed, especially the plaint note and placed it side by side with the evidence of the plaintiff since it is on the plaintiff that lies the burden to prove a matter before the onus shifts to the defendant. There is no doubt that the defendant is indebted to the plaintiff. The defendant has admitted same in evidence but has disputed that the amount as claimed by the plaintiff in their plaint note is not what he owes the plaintiff. But the defendant has not stated how much he owes the plaintiff maybe it is not his duty to do so, because he who asserts must prove.

The plaintiff on his part has claimed that the defendant is indebted to him to the sum of 1,125,548.00. The plaintiff counsel, Mr. Gbenga Olagundoye has, while cross examining

D.W.1 tendered Exhibit D2 a copy of a Notice of owners intention to recover premises dated 21st February, 2014 wherein a demand for the sum of N1,125,548.00 was made. But that was all about that. There are no details about how the plaintiff arrived at that figure."

We have gone through the various correspondences tendered in evidence which are various letters of demand and we find that they contain various figures being claimed as arrears of rent and service charge due to the appellant from the respondent. The sole witness of the appellant did not give evidence on how the figures were arrived at. She also did not explain the differences. Appellant's counsel in his brief of argument gave an analysis of how the various sums in the letter of demand escalated. The sole witness did not give such evidence. Appellant's counsel cannot give evidence in his address. It would appear to us that the submission of counsel is that the trial judge ought to have in the seclusion of his chambers gone on a clandestine voyage of discovery and investigative mission in the recess of his chambers and come to a conclusion on the differences in the appellant's documents. That is not the duty of a trial Court. It was the duty of the appellant to relate his documents to specific parts of his claim and not dump them on the Court as he did and expect it to go on a voyage of discovery. The law is that a Court acts on hard facts and evidence and not on speculation and conjectures. See R.E.A.N. PLC VS. ANUMNU (2003) 6 NWLR Pt. 815 Pg. 52 at pages 117 - 118 Paras. H - A.

Upon a consideration of the evidence adduced by the appellant both oral and documentary we cannot fault the finding of the Lower Court that the appellant did not prove his claim of N1,125,548.00 and we so hold.

Was the lower Court right to have made an order of non-suit? Section 65 of the District Courts Act Cap. 495 Laws of the FCT provides as follows:

> *"65. Every judgment and the order of the Court shall except as provided by this act or any other written law, be final and conclusive between the parties; but the Court shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given entitling either the plaintiff or defendant to judgment."*

A non-suit simply implies giving the plaintiff another opportunity of proceeding in the same suit against a defendant. It is the exercise of discretion of a Court to relieve a plaintiff who has not totally failed to prove his claim on the merit. An order of non-suit decides nothing in respect of the matter in dispute between the parties but merely terminates the suit leaving the claimant at liberty to start his case *de novo*. See ODUOLA VS. NABHAN (1981) 5 SC 197, OKPALLA VS. IBEME (1989) 2 NWLR Pt. 102 Pg. 208 and ANODE VS. MMEKA (2008) 10 NWLR Pt. 1094 Pg. 1. The lower Court having found the respondent indebted to the appellant but that the amount claimed was not proved had the power to make an order of non-suit in that circumstance and we so hold. The law is settled that an appellate Court would not interfere with the exercise of discretion of a lower Court except same was exercised illegally or arbitrarily. See AHWEDO EFETIROROJE & ORS. VS. HIS HIGHNESS ONOME OLEPALEFE II (1991) 5 NWLR Pt. 193 Pg. 517 and IMONIKHE VS. A. G. BENDEL STATE (1992) 1 NWLR Pt. 248 Pg. 296.

We are of the firm view that the circumstances for making an order of non-suit were present in the case before the trial Court and hold that the Court was not in error when it made the order of non-suit.

We resolve issues one and two against the appellant.

ISSUE NO. 3.

Whether the learned trial judge erred in law in refusing to award the sum of N984,010 (Nine Hundred and Eighty Four Thousand and Ten Naira) to the plaintiff after finding the plaintiff has been able to prove same.

Arguing this issue learned counsel to the appellant submitted that the trial Court having made a finding that the appellant proved the sum of N984,010.00 ought to have entered judgment in his favour in the said sum. He submitted that the Court had the power to award a lesser amount to the claim where proved. He craved in aid of his submission the case of BENGA VS. BENUE STATE JUDICIAL SERVICE COMMISSION (2005) ALL FWLR Pt. 321 Pg. 1327.

The finding of the trial Court on the sum of N984,010 is contained at page 88 - 89 of the record. It reads thus:

> *"The plaintiff on his part has claimed that the defendant is indebted to him to the sum of N125,548.00. The plaintiff's counsel, Mr. Gbenga Olagundoye has, while cross examining D.W.1 tendered Exhibit D2, a copy of a Notice of owner's intention to recover premises dated 21st February, 2014 wherein a demand for the sum of N1,125,548.00 was made. But that was all about that. There are no details about how the plaintiff arrived at this figure.*
>
> *It is only Exhibit P5 which is a document dated 20th August, 2013 that a complete breakdown of the then latest indebtedness of the defendant to the plaintiff is clearly stated in the total sum of N984,010.00. Sadly, the*

plaintiff is not asking for N984,010.00 which is very clear and categorical as to how the said sum was arrived at. P.W.1 on her own part did not help matter (sic), since she did not give any breakdown of the total sum of N1,125,548.00. There is no evidence in support of this total figure which is being claimed by the plaintiff. Moreover, the defendant has denied same as spurious, while admitting that he is indebted to the plaintiff but not as the one before the Court which he claims is exaggerated. It is not for the Court to fill in the gaps between the detailed sum of N984,010.00 and the unexplained or not detailed sum of N1,125,584.00. That is the job of the plaintiff."

It is clear from the above that the Court gave reasons for coming to the conclusion that the appellant did not prove his claim and was not entitled to judgment. It held it found Exhibit P5 to contain a breakdown of the latest indebtedness of the respondent and not that the appellant proved the sum of N984,010.00. That the sum of N984,010.00 stated in Exhibit P5 was more detailed and particularized in comparison to the sum of N1,124,548.00 cannot mean that the claim of N984,010.00 was proved as the appellant would want us to hold. It is definitely not so. We find no error on the part of the trial judge when he refused to award the sum of N984,010 in favour of the appellant. We cannot fault his reasoning and we resolve this third issue against the appellant.

Having resolved all the issues against the appellant, this appeal ought to fail. This appeal fails and it is dismissed in it's entirety.

HON. JUSTICE FOLASADE OJO
PRESIDING JUDGE
15/12/2016

HON. JUSTICE D. Z. SENCHI
HON. JUDGE
15/12/2016

Godsglory Iteghie for the Appellant.