

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA – ABUJA**

**BEFORE HIS LORDSHIP: JUSTICE SALISU GARBA
COURT CLERKS: FIDELIS T. AAYONGO & OTHERS
COURT NUMBER: HIGH COURT TWO (2)
CASE NUMBER: FCT/HC/CV/2782/2017
DATE: 27TH FEBRUARY, 2019**

BETWEEN:

ELVEN CONTINENTAL LIMITED - PLAINTIFF

AND

JEHATA NIGERIA LIMITED - DEFENDANT

Claimant represented by Edward Adeolu while the Defendant absent.

N.S. Egbaje for the Claimant.

Chidike Iheukwumere for the Defendant.

Claimant's Counsel – The matter is for judgment and we are ready to take same.

J U D G M E N T

This action was initially commenced under the Undefended List Procedure but was subsequently transferred to the general cause list.

And by a writ of summons and statement of claim dated 10/4/2018 the claimant claim against the Defendant as follows:

1. An Order mandating the Defendant to pay the claimant the sum of N10,000,000.00 (Ten Million Naira) being the

investment sum pursuant to the Memorandum of Agreement dated the 16th of June, 2014.

2. An Order mandating the Defendant to pay the claimant the sum of N88,000,000.00 (Eighty Eight Million Naira) only being the return of investment accrued for 44 months so far pursuant to the Memorandum of Agreement dated the 16th of June 2014.
3. An Order mandating the Defendant to pay the sum of N3,000,000.00 (Three Million Naira) only being the outstanding balance from the interest free facility of N6 Million.
4. An Order mandating the Defendant to pay all amounts calculated by the court as monthly return of investment from the said investment sum as at the time of the judgment of this case.
5. An Order mandating the Defendant to pay 10% post judgment interest on the total judgment sum accruable to the Claimant until the entire sum is paid.
6. Any other order(s) or cost this Honourable Court may deem fit to make.

In prove of this claim, the Claimant filed 21-paragraph statement of claim dated 10/4/16 and called a sole witness.

Mr. Edward Adeolu, a Director in the Claimant's company testified as the sole witness PW1. In his evidence-in-chief, he adopted a 24-paragraph witness statement on oath dated 10/4/18 as his

evidence-in-chief; the said PW1 statement on oath is accordingly adopted as forming part of this judgment.

The gist of the PW1's evidence is that sometimes in 2014, the Defendant requested the claimant to provide her with the sum of N10 Million only to enable her execute a particular contract with agreement to pay back the above sum latest within 3 months (90 days) and the claimant did as requested. That from the terms of the contract entered between the parties, the Defendant is expected to pay the claimant the sum of N2 Million as return on the investment on monthly basis but the Defendant failed to keep to the terms as agreed.

It is also the evidence of PW1 that beside the N10 Million facility given to the defendant, the Defendant also appealed to the claimant to lend her the sum of N6 Million as interest free facility which the claimant also did. That after several demand from the PW1 to the Defendant to pay back the N10 Million and the accrued N2 Million monthly being return on the investment as well as the N6 Million interest free facility, the Defendant failed to comply as agreed.

The PW1 further stated that the Defendant eventually pay the claimant the sum of N3 Million out of the N6 Million interest free facility, leaving a balance of N3 Million.

That as at 31/3/2018, the Defendant is indebted to the claimant as follows:

Principal sum of the facility (N10 Million) return on investment for 44 months at N2 Million per month is N88 Million, interest free facility N3 Million bringing the total to N101` Million only.

In the cause of PW1's evidence-in-chief, the following documents were admitted in evidence as Exhibits.

1. Certificate of incorporation dated 3/3/2017 – Exhibit A.
2. Memorandum of Agreement dated 16/12/14 – Exhibit B.
3. Letter dated 16/12/14 – Exhibit C.
4. Letter dated 21/5/2015 – Exhibit D.
5. Letter dated 11/7/17 – Exhibit E.
6. Letter dated 17/7/17 – Exhibit F.
7. Letter dated 21/7/17 – Exhibit G.
8. Letter dated 21/7/17 – Exhibit H.

PW1 urged the court to grant the claimant's claim.

Under cross-examination of PW1 by the Defendant's counsel, the PW1 stated that the money the Claimant gave the Defendants was an investment that he signed Exhibit B.

PW1 further stated that the Plaintiff was not part of the contract awarded by the Brighton University, New Karu.

That the claim of N88 Million was based on simple arithmetic. Exhibit D was written to the Defendant for the recall of the loan as at that date. The sum of N88 Million is the interest on the loan granted. The interest was based on the date of agreement (Exhibit B). The interest on the N10 Million is for N2 Million monthly.

No re-examination, PW1 was discharged and that is the case for the claimant.

In defence of this claim, the Defendant filed 12 paragraph statement of defence filed on 24/4/18 and called a sole witness. Mr. Jameel Jammal testified as the DW1.

In his evidence-in-chief, he adopted a 14-paragraph witness statement on oath dated 25/4/18 as his evidence.

In paragraph 3 of the said statement on oath, the witness admitted paragraph 1 – 4 of the statement of claim.

In paragraph 4, the DW1 stated that paragraph 5 of the statement of claim is true in part and further stated that the N10 Million was merely for mobilization to site of the building project at Bingham University, New Karu on behalf of Tombeth Technical Systems Limited.

The DW1 further stated that the Defendant was unable to met up with the term of the agreement between the parties because the said building project was terminated due to force *majeure* i.e. frustrated by forces beyond the Defendant's control; a third party influence was responsible for its termination. See paragraphs 5 and 6 of the DW1's statement on oath.

In paragraph 12, the DW1 stated that contrary to the Plaintiff's averment in paragraph 21 of the statement of claim, the Plaintiff is well aware of the fact that the Defendant is already seeking redress in court against his contract employer in Suit No. FCT/HC/CV/1219/15 in High Court 36 at Apo, Abuja.

Under cross-examination of DW1 by the Claimant's counsel, the DW1 stated that he got custody of N10 Million from the claimant that the claimant is entitled to N2 Million monthly in respect of Exhibit B. The DW1 also confirmed that N6 Million interest free facility was given to him and that the Defendant is supposed to pay back the principal and interest to the Plaintiff.

The DW1 further stated that the Defendant's total indebtedness to the Plaintiff as at 21/5/15 was not N42 Million. In Exhibit F paragraph 4 Page 2 the defendant requested for 90 days waiver since the 17/7/17 till date is more than 90 days and the Defendant did not pay the money. That it was the act of God that made Tombeth Technical Systems Limited not to comply with the payment of the money they are owing them.

The witness further stated that there is possibility on the Defendant getting back their money from Tombeth Technical Systems Limited as they are trying to go back to work.

No re-examination, the DW1 was discharged and that is the case for the defence.

The Defendant's counsel filed a 10-page final written address dated 5/7/2018 wherein counsel submitted a sole issue for determination, thus:

“Whether on the basis of the evidence adduced or presented in this case, the Plaintiff has been able to prove his case so as to be entitled to the reliefs sought”

On this sole issue, it is the submission that the claims of the Plaintiff cannot be sustained given the state of oral and documentary evidence before the court.

It is submitted that the principal and guiding document regulating the contract between the parties is Exhibit B – Memorandum of Understanding. Clause (a) (1) of Exhibit B clearly stated the purpose for which the investment sum of N10 Million was required by the defendant.

It is settled law that parties are bound by their agreement and even the court cannot re-write the parties agreement. See DALEK (NIG) LTD v OMPADEC (2007) 7 NWLR (Pt 1033) 402.

It is the contention of the Defendant that its viability to repay all the monies owed the Plaintiff was due to the occurrence of a force majeure event which frustrated performance of the contract thereby making it impossible to execute and earn expected profits from which the repayment were to be made. Court is referred to the cases of DIAMOND BANK LTD v UGOCHUKWU (2008) 1 NWLR (Pt 1067); A.A. MALIK v KADURA FURNITURE & CARPETS COMPANY LTD (2016)LPELR – 41308 (CA).

It is submitted that the Defendant was unable to perform any/or execute the building contract because the contract was terminated due to a 3rd party influence which was an unexpected event.

It is admitted by the defendant that the investment sum was received but the issue is the unassailable fact that the money was

not a loan but an investment and for some unexpected reasons beyond the control of the Defendant, the contract for which the money was made became a subject of a force majeure event. Court is urged to dismiss the claimant's claim.

On the other hand, the Claimant's counsel filed a 10-page final written address dated 26/7/18 wherein counsel formulated two issues for determination:

1. Whether the claimant has adduced cogent and sufficient evidence to establish her case before this court so as to warrant the reliefs as contain in the writ of summons and statement of claim.
2. Whether this Honourable Court can avail the defendant her reliefs/defence even when no single evidence has been tendered in defence of her case before the court.

On Issue 1, it is the submission that the Claimant was fulfilled the basic requirement of proving her case before this Honourable Court, particularly against the backdrop of the content of Exhibit B (the Memorandum of Understanding) which is the main piece of evidence establishing a contract between the claimant and the Defendant. Court is urged to give effect to the contract terms in Exhibit B. See cases of ADIELE IHUNWO v JOHNSON IHUNWO & ORS (2013) 8 NWLR PT 1357, Page 550 at 555; DALEK NIG LTD v OIL MINERAL PRODUCING AREAS DEVELOPMENT COMMISSION (2007) 7 NWLR Pt 1033, Pg 402.

It is submitted that the claimant has established her case before this court considering all the documentary and oral evidence placed before the court to warrant the grant of all reliefs before the court. Court is urged to grant the reliefs of the claimant.

On Issue 2, it is the submission that the Defendant has not established any material evidence before this court to warrant the dismissal of the claimant's case. Court is referred to Section 131(1) of the Evidence Act.

It is submitted that the Defendant claimed the contract between her and the claimant was frustrated due to force majeure; a claim that has not been supported by any piece of evidence before this court; more so, the circumstance painted by the defendant does not in any way fall close to or within the realm of force majeure. See ATTORNEY GENERAL OF CROSS RIVERS STATE v ATTORNEY GENERAL OF THE FEDERATION & 1 OR (2012) 16 NWLR Pt 1327 Pg 425 at 439.

It is the contention that the Defendant's claim that they have been intimating the claimant with information about their inability to comply with Exhibit B verbally, is all false as there is no single correspondence from the Defendant intimating the claimant of the issues she alleged facing, rather, it has been the claimant who kept writing to her to pay the amount due to her pursuant to Exhibit B. The Defendant never called any other witness to corroborate her claim of communicating with the claimant orally. This leaves the court in the realm of speculation as to the authenticity of the evidence of the Defendant.

On the issue of damages, it is submitted that the claimant has sufficiently established the fact that the defendant has made her to suffer so much damages as a result of not keeping to the terms of the contract between them. See SAIDU AHMMED & ORS v CBN (2013) 2 NWLR Pt 1339 Pg 530 ratio 4. Court is urged to enter judgment for the claimant.

In the oral reply on points of law, the defendant's counsel submitted that the written address of a counsel cannot replace the evidence of the witness(es) and that parties are bound by their pleadings. See NIGER CONSTRUCTION LTD v OKUGEBEMI (1987) LPELR Pg 1993; T.S.K.J. NIG LTD v OJOCHEN NIG. LTD (2018) LPELR Pg 4494.

I have carefully considered the processes filed evidence of witnesses and submission of learned counsel on both sides, this case as it stands poses no complexity. From the evidence adduced by PW1 and DW1, it is not in doubt that the Claimant did advanced the sum of N10 Million to the Defendant for investment with agreement to be repaid within 3 months alongside an interest of N2 Million on monthly basis as contained in Exhibit B. It is also not in dispute that the claimant paid the sum of N6 Million interest fee facility to the Defendant from which N3 Million has been refunded and left a balance of N3 Million standing. The DW1 corroborated this fact under cross-examination when he stated as follows:

“I got custody of the said N10 Million. The Plaintiff is entitled to the payment of N2 Million monthly in respect of Exhibit B”

The DW1 went on to state as follows:

“I confirmed that N6 Million interest free facility was given to me. The Defendant is supposed to pay back the principal sum and interest to the Plaintiff”

Also in paragraph 1.13 of the Defendant's final written address the Defendant's counsel admitted the fact that the investment sum was received by the Defendant. The only defence of the Defendant for not keeping with the agreement in Exhibit B was that for some unexpected reasons beyond the control of the Defendant; the contract for which the money/investment was made became a subject of a force majeure event.

The question that readily comes to mind is whether from the evidence adduced, could it be said that a force majeure even occurred to make it impossible for the Defendant to perform the contract it had with a 3 party (Tombeth Technical Systems Limited).

It is trite law that he who assert must prove. See Section 131 Evidence Act.

The Defendant contended that the contract between her and the claimant was frustrated due to force majeure. However, the Defendant failed to proffer any material or sufficient evidence to back up its claim/contention.

In paragraph 5 of the Defendant's statement of defence, it states that its inability to keep to the terms of the agreement even after he mobilized to site, was because the said building contract job

was terminated due to force majeure i.e. frustrated by forces beyond the Defendant's control; a third party influence was responsible for its termination.

However, there is no evidence before this court to support the above averment. The Defendant failed to call any witness to corroborate its contention neither did it tender any document/termination letter before this court showing that the said contract it had with the 3rd party for which he received the sums of money from the Plaintiff, was impossible for it to execute.

Force majeure has been construed in plethora of authorities as events or circumstances beyond the control of the party charged with non-compliance and this include acts of war, public disorder, theft and of God, fire, extraordinary floods, stinkers, or any law, regulations, order of directives prohibiting work by any relevant government body. See the cases of DIAMOND BANK LTD v PRINCE ALFRED AMOI UGOCHUKWU (2008) 1 NWLR Part 1067 Pg 1 at 28 Paras B – F; R.M.A & F.C v U.E.S. LTD (2011) 9 NWLR Pt 1252 Pg 379 at 418 Paras E – G; A.G. OF CROSS RIVER STATE v A.G. OF THE FEDERATION & 1 OR (Supra).

Under cross-examination of DW1, he stated that “the word “force majeure” means act of God. It was the act of God that made Tombeth Technical Systems Limited not to comply with the payment of the money they are owing us”. On another breath, he state as follows:

“There is possibility on us getting back our money from Tombeth Technical System Limited as they are trying to go back to work”

It is without doubt that the above testimony of the DW1 cannot constitute or amount to frustration of contract or force majeure.

In the light of the above, I hold that the Defendant has failed to prove the defence of force majeure, I so hold.

Now, the claimant's sole witness PW1 testified before this court how he made several oral and written demands to the Defendant for the claimant's outstanding money. This can be seen clearly from Exhibits D, E, F, G and H being correspondence from the claimant. In determining when the monthly interest of N2 Million will stop running, it is pertinent to reproduce Exhibit D as follows:

“21st May, 2015

**The Chief Executive Officer,
Jehata Nigeria Limited
Plot 900 Regent Close
Mabushi District,
Abuja**

RECALL AND TERMINATION OF LOAN ADVANCEMENTS

We write to inform you of the termination and recall of the Ten Million naira (N10,000,000.00) loan advanced to you on 13th June 2014 and its repayment in full with the accrued interest which stands at Twenty-Six Million Naira (N26,000,000.00) as at date thereby bringing the total due to Thirty-Six Million Naira (N36,000,000.00) only.

We also demand for the payment of the Six Million Naira (N6,000,000.00) advanced to you at no interest.

The company wants the two loans with the accrued interest which now stand at Forty-Two Million Naira (N42,000,000.00) only be paid on or before Friday 29 of May 2015.

The Company has no intention or decision to further roll over the loan/facility and therefore want this demand notice be honoured.

The decision to recall the loans is borne out of the need for the company to urgently meet its operational challenges and external obligors within the time frame of our creditors.

We trust that you will understand the needs of this unusual circumstance of our company and make good the intentions of this demand.

We assure you as always the values of our shared vision and relationship as we count on your understanding.

**Yours Sincerely,
Eddy Layton (Elven) Ventures Limited
(Sgd)
Chikwendu Ogbonnaya Ph.D
Executive Director, CS & D**

From the above letter, it is clear that the Claimant did in fact terminated the contract it had with the Defendant on 21/5/2015 and demanded for the total sum of N42 Million being the indebtedness of the Defendant to it.

It is in evidence before this court, that out of the N6 Million free interest facility given to the Defendant by the Claimant, the Defendant had refunded the sum of N3 Million leaving a balance of N3 Million.

By a simple arithmetic calculation subtracting N3 Million from N42 Million leaves you with the sum of N39 Million.

In conclusion, I am of the considered view that the claimant has proffered credible evidence to warrant the judgment of this court in its favour.

Accordingly, judgment is entered in favour of the Claimant against the Defendant as follows:

1. The Defendant is mandated to pay the Claimant the sum of N10,000,000.00 (Ten Million Naira) being the investment sum pursuant to the Memorandum of Agreement dated the 16th of June, 2014.
2. The Defendant is mandated to pay the Claimant the sum of N26 Million (Twenty Six Million Naira) only being the return of investment accrued from 16th June, 2014 to 21st May 2015 when the Claimant terminated its contract with the Defendant.
3. The Defendant is mandated to pay the sum of N3 Million (Three Million Naira) only being the outstanding balance from the interest free facility of N6 Million.
4. 10% post judgment interest on the total judgment sum of N39 Million is awarded to the Claimant against the Defendant from the judgment date until same is finally liquidated.

(Sgd)

**JUSTICE SALISU GARBA
(PRESIDING JUDGE)
27/02/2019**

Claimant's Counsel – We thank the court for the judgment.

Defendant's Counsel – We thank the court for the judgment.

(Sgd)

JUSTICE SALISU GARBA

(PRESIDING JUDGE)

27/02/2019