

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE NYANYA JUDICIAL DIVISION
HOLDEN AT NYANYA ON THE 26TH DAY OF FEBRUARY, 2019
BEFORE HIS LORDSHIP, HON. JUSTICE U. P. KEKEMEKE
SUIT NO.FCT/HC/CV/038/18

COURT CLERK: JOSEPH ISHAKU BALAMI & ORS.

BETWEEN:

MIC-MART SOLUTIONS LTD.....CLAIMANT

AND

THE NIGERIA POLICE FORCE.....DEFENDANT

JUDGMENT

The Claimant's Writ of Summons and Statement of Claim dated 21/04/17 and filed the same date against the Defendants is for the following:

- (1) An order of this Court for the Defendants to pay jointly and severally to the Plaintiff the sum of N9,560,000.00k being the contract sum of Contract No. Lot: F002738 which the Claimant executed for the Defendants.
- (2) For the sum of N4,258,381.49 being the amount paid on the loan of N8 Million by the Plaintiff between 07/09/11 (being 28 days after the end of the Defects liability period)

and 03/01/13 (being the date the Claimant finally paid off the loan) which arose as a result of the breach of contract by the Defendants by their failure/refusal to pay the Plaintiff within the time agreed.

- (3) 10% interest on the judgment sum from the date of judgment until the judgment sum is fully paid.
- (4) Cost of the action.

The Writ of Summons, Statement of Claim and all other Originating Processes were served on the Defendants on the 12th day of May 2017. The Defendants were further served with a Hearing Notice. They failed, refused and or neglected to file an appearance and a Defence to the action. The Claimant opened her case and called one witness in proof thereof.

The Claimant states orally that he is Joseph Eze. That he lives at Lugbe. That he is a business man. He remembers deposing to a Witness Statement on oath on the 21/04/18. He adopted same as his oral evidence. In the said Written Statement on Oath, he states as follows:

1. That he is the Project Officer of the Claimant and has knowledge of the facts leading to the indebtedness of the Defendants to the Claimant.

That sometimes in 2010, the Defendants advertised and invited tenders from reputable companies across Nigeria for reactivation of 1 No. Existing Borehole and construction of 1 No. Additional Borehole with overhead tanks (2000 litres) including painting of the CP's Quarters in Uyo, Akwa Ibom State.

The Claimant bid for the award of the contract and went through the required processes as directed by the Defendants. The Defendants awarded the contract to the Plaintiff on 27/12/10 with reference No. NPF/FHQ/AKS/W/2010/0023. That Claimant accepted the offer and was made to execute an agreement with the Defendants. The Plaintiff immediately mobilized to site and commenced work. Claimant completed the work to the satisfaction of the Defendants and duly informed the Defendants and they issued Claimant with an Interim/Completion Certificate. The Claimant also issued the Defendant with a Certificate of Practical Jobs Completion.

That Claimant is entitled to payment 28 days after being issued with the Practical Job Completion Certificate. That Claimant has not been paid for the work she did for the Defendants which contract sum is N9,560,000.00. That Plaintiff took credit facility in the sum of N8 Million from First Bank of Nigeria Ltd to ensure that she executed the contract within the time stipulated by the Defendants at an interest rate of 18% per annum, processing fee of 0.25% per annum and management fee of 1.75% monthly. That the loan was to be paid on 28/06/11 which was within the period the contract was to be executed and payment made by the Defendants.

The Defendants were aware that the Claimant took the facility from the bank. The bank wrote the Defendants informing them of the Claimant's application for credit facility and requested for confirmation of the contract and account domiciliation letter. The Defendant duly wrote to the bank confirming both the award of the contract ensuring that the payment of the contract sum is domiciled in the account.

That when the Defendants failed/refused to pay the contract, the Claimant caused the bank to write the Defendants appealing for payment as non payment will have a negative impact on the Plaintiff's account. The Defendants also replied through the bank promising payment but they failed to pay. The Claimant sourced for money elsewhere and paid the loan as the interest on the facility kept increasing to the tune of N12,258,381.49 being principal sum and interest. That the operative account number of the Claimant with the bank is 2017100670 while the loan account is 4576210001441. However, when the loan facility expired, the bank restructured the loan account severally and assigned account numbers 457621001823, 457121001830 and 4576210001885 at different times to the Claimant's account.

That Plaintiff made several demands on the Defendants for the payment of the contract sum but the Defendants have refused/neglected to pay. That Claimant subsequently instructed Okechukwu Edeze Esq. (Solicitor) to formally demand payment for the contract sum vide a letter but Defendants failed, refused and or neglected to pay. The Claimant tendered Exhibit A – A6. They are:

- (1) The offer letter titled “Award of Contract”.
- (2) Agreement dated 27/02/11.
- (3) Interim/Completion Certificate.
- (4) Certificate of Practical Job Completion.
- (5) Offer letter from First Bank.
- (6) Account Statement.
- (7) Letter from Plaintiff’s Counsel.

The Defendants failed, refused and or neglected to cross-examine and enter their Defence despite an adjournment to enable them do so. The Defendants were further served with hearing notices.

The Plaintiff adopted his Final Written Address dated 16/07/18.

He raised two issues for determination:

- (1) Whether the Plaintiff has made out a case entitling her to the payment of the contract sum.
- (2) Whether the Plaintiff is entitled to award of damages claimed.

On issue 1, Learned Counsel submits that the Claimant has made out a case entitling her to the payment of the contract sum. That the failure/refusal of the Defendants to defend the action when they have opportunity to do so amounts to admission of the claim.

On issue 2, Learned Counsel submits that Claimant is entitled to the award of the damages claimed. That Defendants breached a term of the contract when they failed to pay her as and when due in line with the contractual agreement. That the Defendants know about the credit facility and the interest thereon. That the sum of N4,258,381.49k paid by Claimant in excess of what she would have paid as interest on the loan is a direct consequence of the breach of contract by the Defendants. Learned Counsel urges the Court to find that the Plaintiff has proved her case.

I have read the evidence and considered the Written Address of Counsel.

In ***ITAUMA VS. AKPEIME (2000) LPELR – 1557 (SC)***

The Supreme Court held “..... *in civil cases, the burden of proof is not static while the burden of proof initially lies on the*

Plaintiff, the proof of rebuttal of issues which arise in the course of proceedings may shift from Plaintiff to Defendant vice versa”.

The Supreme Court further held *in NWAVU & ORS VS. OKOYE & ORS (2008) LPELR – 2116 SC* thus “the burden of proof is on the party who alleges the affirmative. The burden of proof lies on the party who will fail in the case where no evidence is given. Although the burden of proof is generally on the Plaintiff, it is not invariably so. There are instances in an adjectival law where the burden of proof shifts to the Defendant. It depends on the state of the pleadings.

In proof of the Claimant’s case, he called one witness and tendered Exhibit A – 6.

I have read Exhibit A, the letter of award dated December 27th 2010.

Exhibit A1 - The contract agreement between Claimant and Defendants.

The interim/completion certificate titled Nigeria Police Building Project – Exhibit A2.

The Certificate of Practical Job Completion Exhibit A3.

The First Bank letter of credit facility Exhibit – A4.

Statement of Account of Claimant – A5.

Exhibit A6 – Demand Notice.

The Exhibit A1 is the contract between the Claimant and the Defendant. The position of the law is that where a Defendant as in this case fails to file defence, he the Defendants are deemed to have admitted the claim. The Supreme Court echoed this position in *OKE VS. AIYEDUN (1986) LPELR – 2427 SC*.

When it held:

“it is a principle of pleading that that which is not denied is deemed to have been admitted and if a Plaintiff filed a Statement of Claim and the Defendant failed or refused to file a Statement of Defence in answer thereto he clearly will be deemed to have admitted the Statement of Claim leaving the trial Court with no choice but to peremptorily enter judgment for the Plaintiff...”

Although this case is undefended, I have perused the contract agreement Exhibit A1. It is executed by parties and the terms are binding on them. In paragraph 35 of the Exhibit A1 is an Arbitration clause. It states:

“Provided always that in case of any dispute or difference shall arise between the employer or his Architects/Supervising Officer on his behalf and the contractor, either during the progress or after the completion or abandonment of the works as to the construction of this contract or as to any matter or thing of whatever nature arising thereunder or in connected therewith,... then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or failing agreement, a person to be appointed in accordance with Section 6 of the Arbitration Act Chapter 13, of the laws of the Federation of Nigeria ...

- (2) Such reference except on article 3 and 4 of the Article of Agreement, or on the questions whether or not the issue of an instruction is empowered by these conditions, whether or not a certificate under Clause 32 and 33 of these conditions shall not be opened until after practical

completion or alleged practical completion of the works
etc.

The law is also settled that the mere fact that a dispute is of a nature eminently suitable for trial in a Court is not a sufficient ground for refusing to give effect to what the parties have by contract expressly agreed to.

So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause. The Court ought to give due regard to the voluntary contract of parties by enforcing the arbitration clause as agreed by them.

See OWNERS OF THE M.V. LUPEX VS. NIGERIAN OVERSEAS CHARTERING & SHIPPING LTD (2003) LPELR 31 95 SC.

I have carefully scrutinised the arbitration clause. I have taken time to underline the very relevant sections. It is plain, clear and unambiguous. The parties intend any dispute of whatever nature during or after the execution of the contract to refer to an arbitration.

See AGWUNA VS. A.G. FEDERATION & ANOTHER.

In the circumstance of this case, the arbitration clause in Exhibit A1 oust the jurisdiction of this Court. This Court therefore lacks jurisdiction to entertain this case.

The case is therefore dismissed.

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HON. JUSTICE U.P. KEKEMEKE
(HOH. JUDGE)
13/02/19