IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDING AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF

SUIT NO: FCT/HC/CV/4119/13
BETWEEN:

MR. OKO EMMANUEL ABOYI……PLAINTIFF

AND

MTN NIGERIA COMMUNICATION LIMITED……DEFENDANT

JUDGMENT

The Plaintiff in this case is the owner and occupier of House 135 Phase 111 situate in Gwagwalada within the Federal Capital Territory. The Defendant on the other hand is a network provider engaged in telecommunication business with registered address at No. 4 Aromire Street, Ikoyi, Lagos and has Abuja office at Plot 2784 Shehu Shagari Way, Maitama, Abuja.

The facts of this case as told by the Plaintiff is that the Defendant paid him the sum of N400,000.00 (Four Hundred Thousand Naira) sometimes in 2007 to be allowed part of his plot to install a substation behind the Plaintiff's house to enable it monitor transmission through radio transmission antenna. That he agreed to

this but contrary to his expectation the Defendant installed a gigantic object right behind his house which has occasioned grave inconveniences and some health hazard to him, his house and members of his family. The Plaintiff has also alleged that all efforts to make the Defendant address the situation proved abortive.

The claims of the Plaintiff against the Defendant which are founded on tort of trespass and nuisance are couched in paragraph 16 of the statement of claim as follows:

1. An Order of the Court mandating the Defendant to dismantle its mast mounted in the Plaintiff's premises and remove same therefrom.
2. An Order of Court directing the Defendant to return the Plaintiff's land to the state it was before the mast was mounted thereat.
3. An Order of Court mandating the Defendant to pay the sum of One Hundred Million Naira (N100,000,000.00) Only as General and Exemplary damages for the encroachment and resultant nuisance.
4. An Order of Court compelling the Defendant to pay the Plaintiff the cost of disbursements and appearance fees associated with this action.

5. And for such further or other Orders as this Honourable Court may deem fit to make in the circumstances of this suit.

The facts of the case as presented by the Plaintiff is that sometimes in 2007 the Defendant without his consent or permission unlawfully erected a telecommunication mast otherwise known as Base Transceiver Station (BTS) and other facilities such as generating sets, and surface diesel storage tank on a portion of his land close to his residential house resulting in oil spillage, smoke and noise pollutions to the household as well as radiation from the mast with its attendant health hazard to the family.

The Plaintiff complained to the Defendant several times to abate the nuisance to no avail.

The Defendant denied the claims of the Plaintiff. Pleadings were exchanged and the matter proceeded to trial.

Four witnesses testified for the Plaintiff and at the end of his case one witness was called by the Defendant. At the close of the case the parties filed their final written addresses to support their respective stands. These addresses were adopted at the plenary.

In the address filed by Ogechi Ogbonna Esq on behalf of the Defendant, four issues were submitted for determination thus:

1. Whether from the facts and circumstances of this suit the Plaintiff has established his case to be entitled to the reliefs sought before this Honourable Court.
2. Whether the Defendant is liable in nuisance.
3. Whether the Plaintiff mitigated the alleged damages, assuming but without conceding that the Plaintiff suffered any damages caused by any alleged thing pertaining to the Defendant.
4. Whether the Plaintiff is entitled to an Order directing the Defendant to pay costs, disbursements, and appearance fees associated with this action.

On the other hand Lilian Ojimma Esq for the Plaintiff identified three issues as arising for the determination of the case. They are:

1. Whether the evidence of DW1 is not rendered inadmissible for being hearsay?
2. Whether the defendant's use of the Plaintiff's land measuring 52.325m in mounting its mast, Generating sets, and diesel storage tank, without the Plaintiff consent are not (sic) acts of trespass?
3. Whether the presence of the Defendant's mast, Generating sets, and diesel storage tank on the plaintiff's residential

premises and their resultant effect on the premises do not constitute nuisance?

I have carefully read and considered the facts of this case and the evidence lead at trial and it is my humble view that for brevity, and the need to maintain some balance I have elected to adopt issue one raised by the Defendant as it can sufficiently determine the focal point in this case.

It is my view and rightly so that this issue would comfortably subsume issues 2 to 4 in the Defendant's written submission as well as issues 2 and 3 of the Plaintiff's issue for determination.

In that case issue one in the written address filed on behalf of the Plaintiff would be taken as a preliminary point. This approach is informed by the fact that if the Court arrives at a conclusion that the evidence of the DW1 is an inadmissible hearsay, there would be no need to reckon with it in the determination of this case and the Court would ignore it.

At the end of the day the preliminary point to be determined is:

> **"Whether the evidence of the DW1 is not rendered inadmissible for being hearsay? and the main issue would be:**

"Whether from the facts of this case and the evidence led, the Plaintiff has established his case to entitle him to the reliefs sought"

PRELIMINARY POINTS

It has been argued by the learned counsel to the Plaintiff that the evidence of the DW1, who testified as the only witness for the Defendant is hearsay and therefore inadmissible in law. His submission is predicated on the fact that when the DW1 testified he told the Court that he was on posting to Kano when the disputed space was rented from one Isah Akwanga and that when asked under cross examination he stated that he was told about the transaction by his colleague.

Learned counsel cited Section 37 of the Evidence Act which defines "Hearsay" evidence and Section 38 of the Evidence Act which makes hearsay inadmissible. It was the contention of counsel that the evidence of the DW1 does not fall under the exceptions to the Rule in Section 38 as contained in Sections 39 to 50 of the Evidence Act. Learned counsel also relied on the cases of **DOMA VS INEC (2012) 13 NWLR (PT. 1317) 297; and OSHO VS STATE (2012) 8 NWLR (PT. 1302) 243** to buttress her point.

The response of Ogechi on this point is that the argument of the learned counsel to the Plaintiff has overlooked the fact that there exists an official position upon which the DW1 came by what transpired in 2007 in Abuja. Ogechi drew the attention of the Court to paragraph 1 of the DW1's written evidence where he testified that he is a Safety Health and Environment Coordinator in MTN Nigeria Communication Limited at Kano Regional Office and by virtue of his position conversant with the facts deposed to therein. She argued that the cases of Osho (Supra) and Doma (Supra) relied upon by the learned counsel to the Plaintiff are good authorities for what they say but are inapplicable to the circumstance of this case where the witness came in possession of the facts deposed therein in the course of his work. On this point counsel cited the case of **UDO VS STATE (2016) 12 NWLR (PT. 1525) 1 to 25** to the effect that decision of the Court are only good authority to the facts and circumstances of the case in contention.

On this point I have taken time to read the testimonies of the DW1 over and over again and it appears to me that Ms Lilian Esq is wrong and Ogechi is right. From the outset of his testimonies the DW1 made it clear that he became possessed of the evidence which he gave before the Court in his capacity as a Safety Health and Environment Coordinator of the Defendant Company.

Also under cross examination he told the Court that he visited the site in dispute severally in the past and gave evidence about what he saw on site. He gave copious evidence about the cracks on the Plaintiff's property and Plot 134 adjoining the Plaintiff's property. Similarly he gave evidence about the condition and situation of the disputed site which in my view was derived from what he saw when he visited the site. There could be part of his evidence which are not reliable if they relate to his interaction with Plaintiff or any other party when the agreement was entered into but definitely such evidence does not become an inadmissible hearsay.

On this ground, it is my view that the testimony of the DW1 before the Court is not hearsay and therefore admissible. I overrule the learned counsel to the Plaintiff.

SUBSTANTIVE ISSUE

Whether from the facts of this case and the evidence led, the Plaintiff has established his claims to entitle him to the reliefs sought?

As a take off point I must remind the plaintiff that he has the burden to establish its entitlement to the claims before the court. It is now settled law that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which

he asserts must prove that those facts exists. The burden is on the plaintiff who asserts.

On this point of law see Section 131-133 of the Evidence Act, 2011 and the following cases:

1. **ELIAS V. DISU (1962) 1 SCNLR 361;**
2. **UNIVERSITY PRESS LTD V. I. K. MARTINS NIG. LTD (2004) 4 NWLR (PT.654) 584; and**
3. **DALHATU V. A-G, KATSINA STATE (2008) ALL FWLR (PT.405) 1651.**

Now the claim of the Plaintiff is rooted in the torts of trespass and nuisance. His evidence before the Court is that he purchased House 135, Phase III, Gwagwalada, Abuja-FCT during the sale of Federal Government non essential properties. That the Defendant without his consent and approval entered the land and mounted a huge communication mast on part of his land which posed some health hazard to him and members of his family. All efforts to get the Defendant to remove the mast proved abortive. To drive home his case the Plaintiff tendered the following documents:

1. Aso Savings and Loans Plc offer of mortgage loan to the plaintiff dated September 1, 2006-exhibit EA1.

2. Plaintiff's Solicitors' letter dated 3rd May, 2013 requesting the defendant to dismantle its mast-exhibit EA2.
3. Exhibit EA3 dated 8th May, 2013 is proof of service of exhibit EA2.
4. Exhibit EA4 series are photographs of the plaintiff's house and the mast in dispute.
5. The Letter of Offer made by the FCT Minister to the plaintiff and dated 1st September, 2005 is exhibit EA5.
6. The receipt for the payment of the purchase price of the offer made to the plaintiff is exhibit EA6.
7. Exhibit EA7 is Environmental Impact Assessment Report (EIAR) on the plaintiff's house dated 27th October, 2014.
8. Finally exhibit EA8 is survey plan of plot 134 and 135, Phase III, Gwagwalada, FCT-Abuja.

The Defendant did not deny the existence of the mast but claimed that the land in dispute belonged to one Isa Akwanga Ajegana measuring 15m x 15m (225 square meters) which was taken on lease from the said Isa Akwanga Ajegana for purposes of erecting its Base Transceiver Station (BTS). The Defendant denied any negative interference with the plaintiff's property on account of its Base Transceiver Station. It also stated that the cracks in the Plaintiff's

property was occasioned by structural defects and not as a result of the proximity between its generator and the Plaintiff's house as other parts of the Plaintiff's house not close to the defendant's generator also manifest similar cracks. The defendant also denied allegation of health hazard arising from the proximity of its mast to the plaintiff's house. The following documents were tendered by the Defendant to support its defence:

1. Re: Offer of Lease addressed to Isa Akwanga Ajegana dated 29th August, 2007 marked as exhibit D1.
2. Payment for Lease dated 29th December, 2007 admitted as exhibit D2(A).
3. Photocopy of Guidelines on Technical Specifications for the Installation of Telecommunications Mast and Towers issued on 9th April, 2009 admitted as exhibit D3.

However, the following document sought to be put in evidence by the Defendant were rejected for failing the test of admissibility. The documents are:

1. Environmental Impact Statement and Certificate dated 14th November, 2009 and issued in favour of the Defendant by the Federal Ministry of Environment-Exhibit D1 rejected.

2. A document similar to exhibit D1 but dated 1st July, 2004 was rejected and marked as exhibit D2(A) rejected.

3. BTS Report prepared by Abubakar Ahmed Danladi dated 21st June, 2016 (exhibit D3 rejected).

The learned Counsel to the Defendant has argued that the Plaintiff in this case is claiming title to land and in the circumstance ought to lead cogent evidence to establish his title. That exhibit EA 5 (photocopy of offer) tendered by the Plaintiff not being a Certified True Copy ought to be expunged as same is inadmissible. Reliance was placed on Sections 89(e), 90(c), 102 and 104(1) of the Evidence Act, 2011 and the following cases:

1. **OKONJI V. NJOKANMA (1999) 14 NWLR (PT.638) 250; and**
2. **OGBORU V. UDUAGHAN (2011) 2 NWLR (PT.1232) 538 AT 578**

The response of Miss Lilian on this point is that the Plaintiff is not in dispute with the Defendant over title to Plot 135 Phase 111, Gwagwalada which he bought and resides. That the claim of the Plaintiff is rooted in trespass to his land and that he does not need to prove title to sustain the claim. According to her all that the Plaintiff needs to prove is exclusive possession of the land in question and the slightest entry on the land without the consent or authority of

the Plaintiff by a party who cannot show a better title to the land. On this principle of law, learned counsel cited the following cases:

1. **YAKUBU VS IMPRESIT BAKOLORI PLC (2011) 6 NWLR (PT. 1244) at 185;**
2. **GBEMISOLA VS BOLARINWA (2014) 9 NWLR (PT. 1411) 24 at 26 paragraphs A to B;**
3. **NDUKUBA VS IZUNDU (2007) 1 NWLR (PT. 1016) 432;**
4. **OKOKO VS DAKOLO (2006) 14 NWLR (PT. 1000) 401; AND**
5. **ACMEL NIG LTD Vs FBN PLC (2014) 6 NWLR 158 as well as OGUNYADE VS OSHUNKEYE (2007) 15 NWLR (PT. 1057) 218** where the Supreme Court held:

> "**Trespass to land is only concerned with the possession of the land and not ownership or title. In the instant case the applicant's issue of non production of the original conveyance by the respondents was clearly irrelevant since the respondent's claim was based on trespass of land in question."**

I have considered the argument of parties on this point including the authorities cited and I form the view that from the pleadings filed upon which issues were joined by the parties, the question of title of the Plaintiff to Plot 135 Phase 111, Gwagwalada did not arise. The

issue of whether the Plaintiff was in exclusive possession of the disputed property or the immediate neighbor of Mr Isah Akwanga the Defendant's alleged landlord, is not in doubt.

In dealing with the function of pleading **COKER JSC in ATOLAGBE VS SHORUN (1985) 1 NWLR (PT. 2) 350 at 360** stated thus:

> **"The primary function of pleading is to define and delimit with clarity and precision the real matter in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court would be called to adjudicate between them. It is designed to bring the parties to an issue on which alone the Court will adjudicate between them... A party is bound by his pleading and cannot go out of it to lead evidence or rely on facts which are extraneous to those pleaded."**

That being the case the request of Ogechi Esq for the Plaintiff to establish his title to Plot 135 is a request which fall outsides the claims of the Plaintiff. Since the claim of the Plaintiff is predicated on trespass to his land what the law require him to prove is:

(1) That he is in exclusive possession of the alleged property;

(2) That the Defendant has entered the land; and

(3) That the entry is unlawful and without his consent.

See:

1. **SEHINDEMI VS GOV. LAGOS STATE (2006) 10 NWLR (PT. 987) 1;**
2. **YUSUF VS KEINSI (2005) 13 NWLR (PT. 943) 554 and**
3. **OGUNYADE VS OSHUNKEYE (2007) 15 NWLR (PT. 1057) 218.**

Before the Court the Plaintiff has led evidence that he acquired the property from the Federal Government and resides there with his family. He testified that the Defendant paid him N400, 000. 00 (Four Hundred Thousand Naira) sometimes in 2007 to be allowed part of his plot to install a substation behind the Plaintiff's house to enable it monitor transmission through radio transmission antenna. He testified that he agreed to this but contrary to his expectation the Defendant installed a gigantic object right behind his house. He also testified that part of his land occupied by the Defendant is about 52.325 meters.

The DW1 who testified for the Defendant identified the Plaintiff as neighbor to the Defendant's landlord.

I therefore do not have doubt that the Plaintiff has established exclusive possession of Plot 135 Phase 111 Gwagwalada.
The next point which would now engage the attention of the Court is whether the plot on which the Defendant installed its mast and all its accessories partly belongs to the Plaintiff.

The Plaintiff has lead evidence to demonstrate that part of the space occupied by the Defendant belong to him. In his evidence through the PW3 a certified surveyor it was stated that the space occupied by the Defendant measures 94.2 square meters. That out of this space 52. 325 square meters belong to the Plaintiff. A site plan showing the boundary between the Plaintiff and the adjoining Plot 134 and part of the Plaintiff's plot was tendered and admitted as exhibit EA8. This piece of evidence was not challenged. In the same way the PW4 who resides in Plot 134 and a daughter to the Defendant's alleged landlord also testified that part of the land occupied by the Defendant belong to the Plaintiff.

Learned counsel to the Plaintiff has drawn my attention to the evidence of the DW1 the only witness to the Defendant where he stated under cross examination that part of the space occupied by the Defendant belong to the Plaintiff and that the space was rented from him.

Mrs Ogechi has presented a double prong argument on this point. The first is that the Plaintiff having failed to prove title has not proved that the Defendant occupied part of his land and secondly that from pleadings and evidence led by the Plaintiff it is clear that the Defendant is on the plot with the permission and consent of the Plaintiff. That Plaintiff who has pleaded as such is bound by his pleaded facts. The case of **OLUKAYODE Vs ADESANYA (2014) 12 NWLR (PT. 1422) 52,** was called in aid.

I have read the pleadings filed by parties and I agree that truly Plaintiff pleaded and lead evidence that the Defendant came onto the plot with his permission. The submission of the learned counsel for him that no consent was given is at variance with pleadings. Such submission does not go to anything.

I think that what is in issue is that after the Defendant came into the property it caused to be erected an object not contemplated by the Plaintiff. It is at this point that Plaintiff withdrew its consent to the presence of the Defendant on the land. The Plaintiff gave reasons as the nuisance and danger posed by the mast for the decision to withdraw consent.

On the first leg of her argument she submitted that the entire space occupied by the Defendant was rented from Isah Akwanga. She relied on exhibit D1 which is headed "offer for lease of space at

Phase 3 Gwagwalada FCT, Abuja." The relevant portion of the document is to the effect that a space of 225 square metres is leased from Isah Akwanga for a period of 10 years beginning from 1st September, 2007 to 31st August, 2017 at an annual fee of N833, 333. 00 amounting to N8, 333, 333. 30. Reliance was also placed on exhibit D2 and D2(a). These are the cheques made payable to Isah Akwanga Ajegana.

The learned counsel to the Plaintiff has attacked the admissibility of exhibit D1 on ground that it was marked at the top "without prejudice." In other words her contention is that the document was wrongly admitted in evidence. The case of **FAWEHINMI VS NBA (NO2) (1989) 2 NWLR (PT. 105) 558; and ACMEL NIG LTD VS FBN (2014) 6 NWLR (PT. 1402) 158** were called in aid.

The response of the learned counsel to the Defendant on the admissibility of exhibit D1 is that the benefit of the phrase "without prejudice" is in favour of the Defendant and that by tendering the document the Defendant has decided to waive the benefit which in any case was not objected to by the Plaintiff when it was tendered.

It would appear to me that Mrs. Ogechi has got the concept of the phrase "without prejudice" wrong. The phrase when used in a document simply means without loss of any rights in a way that does not harm or cancel the legal right or privilege of a party. The

phrased when used offers protection to both parties to the transaction and not the Defendant alone.

See **ACMEL NIGERIA LIMITED & ANOR Vs FBN PLC & ORS (Supra)**

However it is not correct that the document is not admissible in the circumstance of this case. The law is that for a document marked "without prejudice" in a transaction between parties to be excluded in evidence it must be sought to be used in a case between the parties to the transaction and not when it is used in a case involving a third party. The Supreme Court made an illuminating explanation of this in the case of **NWADIKE & ORS VS IBEKWE & ORS (1987) 4 NWLR (PT. 67)** 718 where it held:

> **"I will now deal with the point raised as regards exhibit D to the effect that since exhibit D was written without prejudice it cannot be used in evidence in this case. My answer to this point would appear in my view to be found in the following passages from Phibson on Evidence 12th edition dealing with admissibility and non admissibility of offers made without prejudice and of letters and other communications written without prejudice. The passage I have in mind**

would be found at pages 295 and 296 articles 279 and 280 of this book. "Offers without prejudice". Offers of compromise made expressly or impliedly "without prejudice" cannot be given in evidence against a party as admissions..., Letters and other communications however are only protected when there was a dispute or negotiation pending between the parties and the letters were bona fide written with a view to its compromise... And protection applies only in the same action not between them and third persons but letters and negotiation between solicitors are inadmissible against themselves as well as against their clients."

It is clear from the above that the appellant being third parties to exhibit D cannot claim any protection under it by reason of the fact that it was written without prejudice. "

The above scenario is very similar to the situation at hand in that the Plaintiff against whom the Defendant intends to use the document is not a party to the transaction leading to the document.

Based on this, I affirm the admissibility of exhibit D1 in evidence to show that the Defendant leased a space of 225 square metres from Isah Akwanga. However this is not the end of the matter. The Court must proceed further to determine whether this space is part of the Plaintiff's land.

Now the Plaintiff has tendered a site plan (exhibit EA8) which shows that about 52.325 metres of the total land occupied by the Defendant belongs to the Plaintiff. This document was tendered without objection and no questions were asked under cross examination to debunk the integrity of the document.

In the same way the DW1 the sole witness for the Defendant gave evidence under cross examination that part of the Plaintiff's plot which the Defendant occupies was rented from him.

On the account of the foregoing I agree that the Defendant's project was erected partly on the Plaintiff's land. Furthermore the Plaintiff got his counsel to write a complaint to protest the installation and the resulting nuisance to the Defendant in 2013. This letter was tendered in evidence without objection from counsel to the Defendant. No response was received by the Plaintiff from the Defendant to suggest that it was contesting the fact that its facilities were installed on the Plaintiff's land. I therefore do not have

difficulty in agreeing that the Defendant is partly on the Plaintiff's land.

In my view the fact that there was a discrepancy relating to the evidence on the volume of space occupied by the Defendant is immaterial in the face of the overwhelming evidence of occupation.

Now that am through with this point the next point is whether the presence of the Defendant on the land amount to trespass. My answer is emphatic yes. This is because although the Plaintiff freely gave the space to the Defendant, the use to which the Defendant has put the space is outside the contemplation of the Plaintiff. Even if the Plaintiff consented to the entry of the Defendant on the land as has been argued by Ogechi in her written address the moment the consent was withdrawn the presence of the Defendant becomes unlawful and amount to trespass.

See **GRAINS PRODUCTION AGENCY VS EZEGBULEM (1999) 1 NWLR (PT. 587) 339.**

Evidence of withdrawal of such consent is the protest letter written in 2013 to the Defendant by the Plaintiff's counsel which the Defendant received and ignored. The conduct of the Defendant in relation to this letter (exhibit EA2) gives credence to the testimony

of the Plaintiff that he had been protesting from the beginning and never acquiesced the activities of the Defendant on his land.

On this account I must hold as I should that the Defendant is in trespass of the Plaintiff's land. In coming to this conclusion I am fortified by the decision of the Supreme Court per Idigbe JSC in **OKAGBUE VS ROMAINE (1982) 5 SC P 133** where the law was stated thus:

> "**An invitee to premises is invited to use the premises for the purpose for which he is invited or permitted to be there. If he exceeds the area of invitation or permission he becomes in law a trespasser."**

See also **LORD ATKIN in HILLEN & PETTIGREW VS ICL ALKALI LTD (1936) AC 65 at 69**; and also the West African Court of Appeal decision in **BANIGO VS BANIGO (1942) 8 WACA 148 at 151.**

Having reached a decision that the Defendant is a trespasser to the Plaintiff's land it becomes easy for one to grant the 1st relief sought by the Plaintiff.

In addition by the evidence led by the Defendant in exhibit D1 the tenancy it entered with Alh. Isah Akwanga ended since 31st August, 2017. That lease agreement has not been renewed. It means that by

whichever way one look at it the Defendant has no business remaining on the land.

Accordingly the 1st relief sought by Plaintiff is granted and the Defendant is hereby ordered to remove the entirety of its structures on the Plaintiff's land within one month, beginning from today.

I also grant the second relief which requires that the Defendant should return the space used to its previous state by eliminating all alterations on the land.

The Plaintiff is also claiming the sum of N100,000,000.00 as general and exemplary damages for the encroachment and resultant nuisance.

Now on this claim I must restate the fact that having held that the Defendant is liable in trespass it's obligated to pay damages to the Plaintiff even in the absence of actual damage to the property and so in respect of award of damage for trespass there can be no difficulty.

See **ATAYI VS JOLAOSHO (2004) 2 NWLR (PT. 856) 89 and UBA PLC VS SAMBA PETROLEUM CO. LTD (2002) 16 NWLR (PT. 793) 361.**

What remains for me to consider is whether the Defendant is liable for damages allegedly caused to the soil in the premises and other forms of nuisance which the Plaintiff has been going through.

Presenting argument in respect of the Plaintiff's claim for nuisance the learned counsel submitted that the presence and effect of the mast, generating set and diesel storage tank on the Plaintiff's premises has subjected him and members of his family to devastating hardship for which the Plaintiff is entitled to damages. Counsel referred the Court to the case of **HKSF VS AJI BAWA (2008) 7 NWLR (PT. 1087) 531** which defines nuisance as an act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of a right. See also **OLUWANIYI VS ADEWUNMI (2008) 13 NWLR (PT. 1104) 383.** Learned counsel gave particulars as the noise from three big generating sets, smoke causing pollution in the premises which sometimes cause stains on properties and vibration which has caused cracks on the Plaintiff's wall. Counsel drew the attention of the Court to the testimony of the Plaintiff as PW1 and exhibits EA4(a), EA4(c) and EA7 as well as exhibit EA8 which discloses the proximity of the installation to the building.

In her response to the learned counsel to the Plaintiff on the issue of nuisance Mrs Ogechi argued that the Plaintiff to succeed need to

succeed on proven facts. That there is contradiction in the evidence of PW1 and PW3 on the distance between the generators, and the cracked wall. On this account she argues that the evidence on the cause of the cracks on the wall should be ignored as the Court cannot pick and choose. She cited **AZUBUIKE VS DIAMOND BANK (2014) 3 NWLR (PT. 1393) 116.** She also argued that the evidence of PW2 in the environmental impact report tendered as exhibit EA7 is not admissible as the document was not signed by him. She further argued that the evidence of the medical condition of the Plaintiff and members of his family are merely speculative as he is not a Medical Doctor. It was her contention that the facts alleged by the PW2 in exhibit EA7 were not pleaded and therefore do not go to any issue in dispute between parties. Learned counsel also passed series of strictures on the evidence of the PW2.

Now evidence of the PW2 is mainly contained in exhibit EA7 which was titled Environmental Impact Assessment Report on House 135 Phase 111 owned by Mr. Aboyi O. E prepared on the 27/10/2014 by Dr. Adeyanju. This document was not signed. I agree with Mrs. Ogechi that an unsigned document is not admissible in evidence. The statement of the law is that if such document is admitted inadvertently during trial the Court should ignore it and not rely on it in the determination of the case as it is a worthless document.

See **WAKIL VS BUBA (2016) 13 NWLR (PT. 1529).**

In **BRIGHT & ORS VS IWUOHA (2018) LPELR 43 758** the Court of Appeal Enugu per Bolaji Yusuf (JCA) in considering the effect of an unsigned document held as follows:

> **"I have examined exhibit "A" titled Investigation Report addressed to the Headquarters Enugu Zonal Office. It has the name of Thomas Kadiri. It is not signed by anybody. It is trite law that an unsigned document is a worthless document which cannot be countenanced by the law. Authorities abound that an unsigned document is not only worthless, it is inadmissible. Where it is admitted it attracts no weight or probative value at all."**

See amongst the plethora of authorities on this principle: **OMEGA BANK VS OBC LTD (2005) SCNJ 150; and AIKI VS IDOWU (2006) 9 NWLR (PT. 984) 47 cited and relied upon in NWOSU NORTH & SOUTH ENTERPRISES LTD & ANOR VS NIGERIA INTERNATIONAL LTD AND INDUSTIRES (2014) LPELR 234 25** where **ALAGOA JCA** (as he then was) held:

> **"That where a document which ought to be signed is not signed its authenticity is in doubt. "A" having not been signed is worthless and ought not to have been relied upon by the Court below. The document confers no benefit on the appellant. It has no probative value and cannot be used to resolve any question in controversy between the parties."**

On the strength of the foregoing authority I agree that exhibit EA7 is worthless as it was not signed and therefore does not confer any probative value to the case of the Plaintiff in this case.

I have considered the arguments agitated before the Court by the respective counsel and considered the evidence led, it is undisputed that the Defendant has a gigantic mast on the disputed space of about 39 metres height. That there were three generating sets and a diesel storage tank as revealed by exhibit EA4 to EA4 (c) - the photographs of the scene which was tendered by the Plaintiff without objection. The generators are in constant use at all times and they produce noise. The claim of the Defendant that the noise levels are within approved limit was not proved before me. The Defendant alleged in its pleadings that the installation was carried out in compliance with the Guidelines issued by the Nigerian

Communication Commission (NCC) with respect to the distance required to be observed to adjoining premises. This fact was not proved before me. The said Guideline is not before me as the one tendered and rejected was issued only in 2009 two years after the installation. It is therefore not applicable.

In the same way the site survey and various permits which the Defendant allegedly obtained were not tendered. The law is that pleadings is not evidence. Therefore if a fact is pleaded and no evidence is led in support such fact is deemed to have been abandoned and such fact is taken as not proved.

See **OKPOKO COMMUNITY BANK VS IGWE (2013) 12 NWLR (PT. 1316) 167; and OSADIM VS TAIWO (2010) 6 NWLR (PT. 1189) 155 at 181 to 182** paragraph H-B ably cited by counsel to Plaintiff.

On the account of this, I must hold as I should that the Defendant did not observe any safety standard in erecting the mast in the Plaintiff's premises and did not obtain relevant permits. The Plaintiff has given evidence that the vibration from the generating sets mounted by the Defendant has caused cracks on his wall. This was corroborated by the DW1 who in his evidence told the Court that he visited the site and saw the cracks, several of them on the Plaintiff's house and the adjoining house. I believe the evidence of the Plaintiff that the cracks

were caused by the vibration from the generating set mounted by the Defendant.

There is no doubt that a continuous vibration over a period of time in such a proximity as demonstrated before the Court is the effect of the cracks. It is also common knowledge that when a generator is in use it releases smoke no matter how regularly it is serviced and that such smoke is bound to pollute the immediate air.

I also hold that whether or not the noise level coming from the generator is low it amount to nuisance given the fact that the presence of the Defendant in the compound is not welcomed. I have also looked at the pictures tendered and it is clear from the surrounding land that there is oil spill which by its nature is injurious to the soil and the environment. As a matter of fact in exhibit EA2 which is a letter written by the learned solicitor to the Plaintiff to the Defendant in 2013 all these abnormalities were mentioned. The Defendant received this letter but did nothing to abate the nuisance. To the Defendant it was a matter of what can he do! To me the fact that the Defendant who admitted receiving exhibit EA2 did not reply to deny any of the issues raised in it means that the Defendant was aware of the issues complained of.

The argument of Mrs Ogechi that the Plaintiff acquiesced the nuisance and or trespass does not impress me as it cannot be true.

The Plaintiff testified that all along he had been protesting through the Defendant's workmen who come to the site and the Defendant never called any of them to deny this.

At the end of the day and from the conduct of the Defendant the trespass is intentional with intend to harass and oppress the Plaintiff as if to say might is power.

All the much ado about the contradiction in the testimonies of the witnesses for Plaintiff especially between the PW1 and PW3 are unfounded. All the witnesses are to the effect that the generators were installed close to the Plaintiff's house, the difference in the exact distance notwithstanding. Such differences are mere discrepancies and not contradictions as they do not affirm the opposite. The authorities cited by Lilian on this point are quite apt.

At the end of the day I find the claims for nuisance resulting from noise generated from the Defendant's generators and the fumes/smoke proved.

I also find the allegation of oil spillage from the sets causing damage to the soil by degradation also established.

The Plaintiff is claiming the sum of N100,000,000.00 for general and exemplary damages for trespass and nuisance resulting in trauma which the Plaintiff is going through daily.

In the presentation of this head of claim I have observed that the plaintiff's counsel has merged both general and exemplary damages under one head of claim. It is trite law that the two damages have distinct character and may only be awarded under different circumstances. For the avoidance of doubt, the law is settled that general damages may be awarded without the luxury of pleading specific particulars and leading cogent evidence in support.

See: **UNION BANK OF NIGERIA PLC V. AJABULE & ANOR (2011) LPELR-8239 (SC)** where Mohammed, JSC has this to say on this point of law:

> **"It is settled law that general damages are always made as a claim at large. The quantum need not be pleaded and proved. The award is quantified by what in the opinion of a reasonable person is considered adequate loss or inconvenience which flows naturally, as generally presumed by law, from the act or conduct of the Defendant. It does not depend upon calculation made and figure arrived at from specific items."**

See also:

1. ODULAJA V. HADDAD (1973) 11 S.C. 357;

2. **LAR V. STIRLING ASTALDI LIMITED (1977) 11-12 S.C. 53; AND**
3. **OSUJI V. ISIOCHA (1989) 3 N.W.L.R. (PT. 111) 623.**

On the other hand exemplary damages may only be granted in exceptional situations such as where the conduct of the Defendant smacks of cruelty and high handedness. In **NDLEA V. OMIDINMA (2013) 16 NWLR (PT.1381) 589** it held was held thus:

> **"Exemplary damages may be awarded in the situation where:**
>
> **(a) any action by the servants of government is oppressive, arbitrary or unconstitutional;**
>
> **(b) the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the Plaintiff; and**
>
> **(c) when exemplary damages is expressly authorized by statute"**

See also the opinion expressed in **Jowitts Dictionaries of English Law, 2nd Edition, Volume 1 at Page 545** where exemplary damages was defined as follows:

> **"Exemplary or punitive or vindictive damages are damages given not merely as pecuniary compensation for the loss actually sustained by the plaintiff, but also as a kind of punishment to the defendant, with the view of preventing similar wrongs in future, as in actions for malicious injuries, fraud, oppression, continuing nuisances, etc."**

Furthermore, in **JOSEPH ODOGU V. ATTORNEY-GENERAL OF THE FEDERATION (1996) 6 NWLR (PT.456) 506** the law was re-echoed by Ogundare, JSC as captured below:

> **"Exemplary damages are usually awarded whenever the Defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like."**

See also: **ELIOCHIN (NIGERIA) LIMITED & ORS V. MBADIWE (1986) 1 NWLR (PT.14) 147; (1986) ANLR 1.**

Flowing from the foregoing background and taken into consideration the conduct of the Defendant in this case which is no doubt reprehensible I hold as I should that the Plaintiff has made out a strong case to warrant the award of exemplary damages. For the avoidance of doubt the Plaintiff has sufficiently demonstrated through the evidence already evaluated in this Judgment that the Defendant has been on his land without authorization for more than ten years. This is clearly a cruel, arbitrary and oppressive conduct. The fact that the Plaintiff has severally complained to the Defendant's site workers without any positive response also suggest a case of highhandedness on the part of the Defendant. This point is fortified by the fact that upon the receipt of Exhibit EA2 detailing the Plaintiff's complaint and protest over the Defendant's facility in dispute the Defendant conveniently ignored the said letter of protest as if to say that it is a law unto itself. In such situation the Court cannot pretend not to see the level of oppression meted out to the Plaintiff by the Defendant. If that be the case the Court has a duty to send out a strong signal that no individual or corporate citizen is above the law of the land. On this note I award exemplary damages in sum N10,000,000.00 (Ten Million Naira) Only against the Defendant and in favour of the Plaintiff.

The last relief is for an Order of Court compelling the Defendant to pay the Plaintiff the cost of disbursements and appearance fees associated with this action.

I have carefully considered this head of claim and with all due respect to the learned counsel to the Plaintiff I form the view that it is speculative and unsupportable. The Court cannot speculate on cost of disbursement and appearance fees. The claim is therefore refused and dismissed.

At the end of the day the Plaintiff's case succeeds except on the last leg of his claim. For the avoidance of doubt, I make the following Orders:

1. I Order that the Defendant dismantle and remove from the Plaintiff's land within thirty (30) days from today its mast mounted in the Plaintiff's premises without valid authorization from the Plaintiff.
2. I Order of the Defendant to return the Plaintiff's land to the state it was before the mast was mounted thereat.
3. I award exemplary damages in the sum of Ten Million Naira (N10,000,000.00) Only against the Defendant and in favour

of the Plaintiff for trespass and the attendant nuisance occasioned by the Defendant's facilities.

4. Cost of disbursements and appearance fees associated with this action claimed by the Plaintiff is refused and dismissed.

Signed
Hon. Justice H. B. Yusuf
(Presiding Judge)
28/06/2019