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/2146/17

BETWEEN:

REV. ENGR. JOSEPH AKPAN……PLAINTIFF

AND

VISTA SERVICES LIMITED……DEFENDANT

JUDGMENT

The fact of this case as presented by the Plaintiff is that he is the owner of a 5-Bedroom detached duplex with a 2-Room Self-contained Boy's quarters situate at Plot 1231, Yalinga Street, Wuse II, Abuja. That the premises was let out to the Defendant Company (for the benefit and occupation of its CEO) sometimes in 2009 at a rental value of N6,000,000.00 (Six Million Naira) annually. The Defendant at that point made an upfront payment of N12,000,000.00 (Twelve Million Naira) to cover two years tenancy period. The Plaintiff has alleged, with respect to subsequent tenancy years, that the Defendant is a rent defaulter thereby subjecting the

Plaintiff to difficulties in recovering subsequent rents after the initial upfront payment. That the Defendant's last rent expired on 04/11/2015 leading to the service of notice to renew on the Defendant company. That the Defendant later made installmental payments totaling N1,000,000.00 (One Million Naira) and ignored the outstanding balance despite repeated demands.

By a writ of summons filed on 9th June, 2017 the Plaintiff claim against the Defendant as per paragraph 18 of the statement of claim as follows:

(1) A declaration that the Tenancy Landlord-Tenant relationship between the Plaintiff and the Defendant had been determined by effluxion of time upon the expiration of the Defendant's tenancy on 19th October, 2015.

(2) An Order of this Honourable Court directing the Defendant to deliver up vacant possession of the 5-Bedroom Detached Duplex together with the 2-Room Self Contain Boys Quarters with its appurtenances situate at Plot 1213, (also No. 14), Yalinga Street, Wuse II, Abuja which it held of the Plaintiff thereof as a tenant the tenancy agreement having been determined by operation of law/effluxion of time on 19th October, 2015.

(3) An Order of this Honourable Court directing the Defendant to put the premises in a habitable and tenantable condition by way of repainting and redecoration before vacating the premises in accordance with clauses (f) and (k) of the existing tenancy agreement dated 24th February, 2013 between the parties.

(4) Arrears of rent of N7,000,000.00 (Seven Million Naira) only being the unpaid balance of rent for the year ending 20/10/2015 to 19/10/2016.

(5) Mesne profit at the rate of N1,000,000. 00 (One Million Naira) only per month for the use and occupation of the premises by the Defendant from 20th October, 2016 until possession is delivered.

(6) Cost of this suit.

The Defendant did not initially put in any process. At the plenary the Plaintiff personally testified as PW1 on 10th November, 2017. Miss Azibasuam Afagha Esq who appeared for the Defendant applied for an adjournment on the ground that the counsel handling the matter is not available. The application was opposed by Mr. Anthony Agbonlahor Esq of counsel to the Plaintiff on the ground that Miss Afagha Esq has no right of audience as the Defendant has not filed

any memorandum of appearance. Counsel also submitted that Miss Afagha did not indicate that she was holding brief for anybody when she announced appearance. That the application for adjournment is simply a ploy to delay the timeous hearing and determination of the matter. In her response Miss Afagha stated that:

> **"We are not delaying this matter. The Defendant is making arrangement to pay the debt."**

The Court upheld the submission of the Plaintiff's counsel and foreclosed the Defendant. PW1 was accordingly discharged. However the Defendant brought an application for leave to regularize its position. The application was moved and granted on 16/01/2018 thereby properly placing before the Court the 12-paragraphs statement of defence filed by the Defendant on 15/11/2017 which attracted a corresponding reply from the Plaintiff. The 11-paragraphs reply to statement of defence was filed on 12/12/2017. The PW1 was accordingly recalled for cross-examination on 20th March, 2018. Miss Afagha upon conclusion of cross-examination of the PW1 and the close of the case for the Plaintiff applied for a date for defence.

When the matter came up for defence on 14/05/2018 Miss Afagha of counsel to the Defendant informed the Court that parties are exploring windows of settlement. But Mr. Agbonlahor stated that

there is nothing as such. In any case the Court adjourned for report of settlement/defence. On 26/06/2018 Miss Afagha reported to Court that settlement has broken down and stated that she has no objection to hearing the matter on the merit. Nevertheless the said Defendant and its counsel did not appear in the subsequent sittings of the Court leading to the foreclosure of its defence on the application of counsel to the Plaintiff.

The Plaintiff filed his final address on 29/01/2019 and the record of the Court revealed that it was served on the Defendant on 05/02/2019 but the Defendant did not file any process by way of reply on points of law. In his final written address Mr. Agbonlahor identified one issue as arising for determination, to wit:

> **"Whether the Plaintiff has proven his case as to be titled (sic) to the reliefs contained in his writ of summons and statement of claim in view of the unchallenged evidence led before the Court."**

In his written address Plaintiff's counsel submitted that the evidence of the Plaintiff is unchallenged. He cited the case of **IYERE VS BENDEL FEED & FLOUR MILL LIMITED (2009) 3 WRN 139 AT 175, LINE 20 TO 25**. That on the preponderance of evidence in line with Section 135 of the Evidence Act the Plaintiff has established his

case on the strength of the uncontroverted and unchallenged evidence of the PW1. On this point called in aid the following cases:

1. **ORJI VS DORJI TEXTILE MILLS (NIG) LIMITED (2010) 5 WRN 32;**
2. **AITIEGBEMILIN VS RTAG (NIG) LIMITED (2012) 44 WRN 120; and**
3. **ABIOLA VS ALAWOYE (2007) 39 WRN 177.**

As a take off point I must state that the Plaintiff whose principal claim is declaratory in nature has a higher burden in such circumstances to establish by cogent evidence his entitlement to his claim despite the fact that the defendant did no lead evidence in support of his defence. See **NYEMSO V. PETERSIDE & ORS (2016) LPELR- 40036 (SC)** where Kekere-Ekun, JSC has this to say:

> **"The law is that where a party seeks declaratory reliefs, the burden is on him to succeed on the strength of his case and not on the weakness of the defence (if any). Such reliefs will not be granted, even on admission."**

See also:

1. **DUMEZ LTD V. NWACHOBA (2008) 18 NWLR (PT.119) 361; and**
2. **UCHA V. ELECHI (2012) 13 NWLR (PT.1317) 230.**

After a dispassionate consideration of the testimony of the Plaintiff who testified as PW1 and the facts elicited from him under cross-examination I find the following points established:

(1) That the last rent paid by the Defendant expired on 19th October, 2015. See exhibit JA2 which is titled "Notification of expiration of tenancy.

(2) That there was an upward review of the rental value of the demised property from N6,000,000.00 to N8,000,000.00. See again paragraph 2 of exhibit JA2. See also the testimony of the PW1 under cross-examination to that effect.

(3) That the Defendant made subsequent payment of N1,000,000.00 in three installments of N500,000.00, N400,000.00 and N100,000.00 respectively. See exhibits JA6, JA6A, JA9 and JA9A.

(4) That statutory notices were served on the Defendant. See exhibit JA7 (i.e. Quit notice) and exhibit JA8 (i.e. Notice of owners' intention to recover possession).

What has played out here is that the Defendant who failed to defend this suit has not led any iota of evidence to displace the evidence of the Plaintiff that the Defendant's rent expired on 19th October, 2015

and all he has received thereafter from the Defendant is the sum of N1,000,000.00 paid in three installments.

Although the Defendant filed statement of defence, it failed to lead any evidence in support. The law in situations like this is as ably stated by Mr. Agbonlahor of counsel to Plaintiff when he referred the Court to the case of **ARABAMBI VS ADVANCE BEVERAGES INDUSTRIES LIMITED (2006) 8 WRN 1 AT 35** where Muhktar, JSC stated thus:

> **"The law is clear and settled that pleading is not synonymous with evidence and so cannot be construed as such in the determination of the merit or otherwise of a case. A party who seeks judgment in his favour is required by law to produce adequate credible evidence in support of his pleadings, and where there is none then the averments in the pleadings are deemed abandoned."**

I also find the case of **AREGBESOLA & 2 ORS VS OYINLOLA & 2 ORS (2011) 1 WRN 33 AT LINES 20 TO 25** cited by counsel quite useful, to wit:

> **"Pleadings, not being human beings have no mouth to speak in Court. And so they speak through**

witnesses. If witnesses do not narrate them in Court, they remain moribund, if not dead at all times and for all times, to the procedural disadvantage of the owner."

Having failed to adduce any evidence in support of its pleadings the law is that the statement of defence filed on behalf of the Defendant is deemed abandoned and the evidence led by the Plaintiff remained uncontroverted and unchallenged.

I agree with the learned Counsel that the law is settled that Courts are at liberty to act on unchallenged evidence where the adverse party had the opportunity but failed to convert same. See **ODUNSI V. BAMGBALA (1995) 1 NWLR (PT.374) 641** where it was stated that:

"The law is also settled that where evidence is led by a party to any proceedings as in the instant case and it is not challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the proceedings to accept the unchallenged evidence before it".

See also:

1. **FASEUN V. PHARCO (NIG.) LTD. (1965) 2 ALL NLR. 216 AT 220;**

2. **NWABUOKU V. OTTI (1961) 2 SCNLR 232; (1961) 2 ALL NLR. 487;**

3. **ASAFA FOOD FACTORY LTD V. ALRAINE NIGERIA LTD (2002) 5 S.C (PT.II) 1.**

In this case I have carefully reviewed the totality of the evidence led by the Plaintiff and I am satisfied that the Plaintiff has satisfied the legal burden for the declaration sought.

Accordingly I find merit in relief 1 which is for a declaration that the tenancy relationship between the Plaintiff and the Defendant had been determined by effluxion of time effective from 19th October, 2016. The relief is granted.

In granting this claim I must remind the Plaintiff that having admitted that he received the sum of N1 Million from the Defendant as part-payment for rent after the expiration of the 2014/2015 tenancy year (which was determined on 19/10/2015) it goes without saying that a fresh tenancy relationship has emerged between parties. Accordingly the tenancy relationship between parties was determined on 19/10/2016 and not 19/10/2015 as wrongly stated by the Plaintiff. The Plaintiff was fully conscious of this point in the presentation of his claim. To facilitate ease of understanding relief 4 is set out below:

"Arrears of rent of N7,000,000.00 (Seven Million Naira) only being the unpaid balance of rent for the year ending 20/10/2015 to 19/10/2016."

This now takes me to relief 2 which is for an Order of this Honourable Court directing the Defendant to deliver up vacant possession of the 5-Bedroom Detached Duplex together with the 2-Room Self Contain Boys Quarters with its appurtenances situate at Plot 1213, (also No. 14), Yalinga Street, Wuse II, Abuja which it held of the Plaintiff thereof as a tenant the tenancy agreement having been determined by operation of law/effluxion of time on 19th October, 2015. This relief is no doubt consequential in nature. It follows as day follows the night that having held that the Defendant's tenancy has been determined by effluxion of time the Plaintiff is entitled to the his reversionary right of possession. I therefore grant the claim as prayed.

The 3rd relief is for an Order of this Honourable Court directing the Defendant to put the premises in a habitable and tenantable condition by way of repainting and redecoration before vacating the premises in accordance with clauses (f) and (k) of the existing tenancy agreement dated 24th February, 2013 between the parties.

This claim is customarily referred to as end of term obligation. I have considered this claim and I form the view that it is not proved.

There is neither pleading nor evidence to support this claim. Exhibit JA1 is the only tenancy agreement tendered by the Plaintiff and it covered a term certain which is the 2013 to 2014 tenancy year. The agreement for 2015/2016 tenancy year which is the last contractual tenancy year between parties was not tendered. And there is nothing before the Court to suggest that the 2013/2014 tenancy agreement is relevant to this issue. In essence there is no foundation for the grant of this relief which is not tied to any concrete pleadings or evidence before the Court. The claim is refused and dismissed for want of merit.

The next relief is for arrears of rent of N7,000,000.00 (Seven Million Naira) only being the unpaid balance of rent for the year ending 20/10/2015 to 19/10/2016. I have carefully considered this relief and it is clear to me that the claim represents the outstanding balance due to the Plaintiff from the 2015/2016 rent after payment of N1 Million Naira. On this point I have held elsewhere above that the evidence before the Court indicated that the Defendant made three instalmental payments totaling N1 Million as part-payment for the tenancy year in issue leaving an outstanding balance of N7 Million. This claim is in order and accordingly granted.

The fifth relief is for mesne profit at the rate of N1,000,000. 00 (One Million Naira) only per month for the use and occupation of the

demised premises by the Defendant from 20th October, 2016 until possession is delivered. I have considered this relief and it would appear that the Plaintiff is claiming a cumulative annual rent of N12 Million as opposed to the last rent of N8 Million per annum paid by the Defendant.

Now, the measure of mesne profit is dependent on the fact and circumstances of each case. But in all cases it is the fair or actual value of the use and occupation of premises during the period the defendant held over the property. This principle of law was effectively laid to rest when the Supreme Court in **AYINKE V. LAWAL (1994) 7 NWLR (PT.356) 262** (per Iguh, JSC) held *inter alia* as follows:

> **"The point must be stressed that the plaintiff in an action for loss of use and occupation of premises is not bound to use the rent payable during the tenancy as a measure for the rate of mesne profits. The law is that while rent is liquidated and operative during the subsistence of a tenancy, mesne profits are unliquidated and only start to run when the tenancy expires and the tenant holds over. Mesne profit are generally calculated on the yearly value of the premises and a landlord is certainly not bound to use the rent payable during the tenancy as a yardstick in his determination of mesne profits. Where the rent**

represents the fair value of the premises, mesne profit shall be assesses at the amount thereof, but where the real or actual value of the premises exceeds the reserved rent, then of course, mesne profits are assessed at such higher rate."

From the clear principle of law enunciated above I have no doubt in my mind that the Plaintiff is legally permitted to claim mesne profit in excess of the last rent paid by the Defendant if it is shown that the rental value of similar properties where the demised premises is located has appreciated. On this note I have carefully scanned the pleadings and evidence of the Plaintiff for facts in support of such improvement but it would appear that there is nothing to support such conclusion. The failure of the Plaintiff to support this claim with evidence has left the claim doubtful and unsustainable. If that be the case, the only reasonable option opened to the Court is to award mesne profit on the template of the last rent paid by the Defendant. That is the safest approach given the facts and circumstances of this case. Accordingly I award mesne profit in favour of the Plaintiff in the sum of N666,666.66 (Six Hundred and Sixty-Six Thousand, Six Hundred and Sixty-Six Naira, Sixty Kobo) per month on the basis of the last rent of N8 Million paid by the Defendant.

The final claim of the Plaintiff is for cost of this suit. This claim is vague and non-descriptive. Furthermore, it is not supported by the

pleadings before the Court. It is therefore speculative and liable to be and is hereby refused and dismissed for want of merit.

At the end of the day the case of the Plaintiff succeeds in part and for the avoidance of doubt I make the following Orders:

(1) I declare that the tenancy relationship between parties has been determined by effluxion of time on 19th October, 2016.

(2) An Order is hereby made directing the Defendant to deliver vacant possession of the 5-Bedroom Detached Duplex together with the 2-Room Self-Contained Boys Quarters with its appurtenances situate at Plot 1213, (also No. 14), Yalinga Street, Wuse II, Abuja which it held of the Plaintiff as tenant since 19th October, 2016.

(3) The Defendant is hereby Ordered to pay to the Plaintiff arrears of rent in the sum of N7,000,000.00 (Seven Million Naira) only being the unpaid balance of rent for the year ending 20/10/2015 to 19/10/2016.

(4) Mesne profit in the sum of N666,666.66 (Six Hundred and Sixty-Six Thousand, Six Hundred and Sixty-Six Naira, Sixty Kobo) only per month for the use and occupation of the premises is awarded against the Defendant effective from

20th October, 2016 and in favour of the Plaintiff until possession is delivered.

(5) Reliefs 3 and 6 are refused and dismissed for want of merit.

SIGNED
HON. JUSTICE H. B. YUSUF
(PRESIDING JUDGE)
28/05/2019