IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT LUGBE – ABUJA
ON, 20TH DAY OF NOVEMBER, 2019.
BEFORE HIS LORDSHIP:- HON. JUSTICE A. O. OTALUKA.

SUIT NO.:-FCT/HC/CV/0766/18

BETWEEN:

MR. EMMANUEL UZOMA:.....CLAIMANT

AND

1) NURNBERGER CONSULTING INTERNATIONAL LTD.
2) ANTHONY EZEKWUGO :…....DEFENDANTS

John Audu for the Claimant.
Emmanuel Okani with Ifeyinwa Williams for the Defendants.

JUDGMENT.

The Claimants commenced this suit against the Defendants by a Writ of Summons under the undefended list dated and filed on 29th January, 2018.

Following the hearing of Notice of Intention to defend filed by the Defendants, the Court made a ruling transferring by matter to the General Cause List on the 30th of April, 2018, and parties were ordered to file and exchange pleadings.

Consequently, the Claimant filed a Statement of Claim dated 6th June, 2018, and filed on 19th June, 2018, wherein he claimed against the Defendants as follows;

(a) The sum of N5,500,000.00 (Five Million, Five Hundred Thousand Naira) being advance rent paid by the Claimant to the Defendants for the lease of a shop at

Plot 1723, AdetokunboAdemola, Wuse II, Abuja, which the Defendants failed to give to the Claimant.

(b) 10% interest on the said sum of N5,500,000.00 (Five Million, Five Hundred Thousand Naira)from the date of judgment until the final liquidation of the said sum of money.

(c) The cost of this action.

The case of the Claimant, as per his statement of claim, is that on 3rd August, 2015, he entered into an agreement with the Defendants to rent a shop identified as Front Wing, Ground Floor, Shop No. 5, situate at Plot 1723,Adetokunbo Ademola, Wuse II, Abuja at the yearly rent of N5,000,000.00 (Five Million, Naira) for a two year term, making a total of N11,000,000.00 (Eleven Million Naira), inclusive of service charge of N500,000.00 (Five Hundred Thousand Naira) for each year.

That he paid the sum of N5,500,000.00 (Five Million, Five Hundred Thousand Naira) to the 1st Defendant on the 6th of August, 2015, to cover one year rent inclusive of service charge for the said period as agreed by the parties.

The Claimant stated that the shop was still under construction as at the time he made the said payment and that the expected date of his moving into the shop was 14th January, 2016. That by the said 14th January, 2016, the shop was still not completed and he still exercised patience, only to later discover that the shop was eventually completed in January, 2017 and had been let out to another tenant.

He stated that on account of the fact that the Defendants did not give him the shop as at when they were supposed to, he demanded severally, for the refund of his N5,500,000.00. that after repeated demands, the Defendants issued him a Zenith Bank cheque for N4,500,000.00 as part refund of the sum of

N5,500,000.00, which cheque, upon presentation to the bank for payment was dishonoured and marked “Acct not funded.” That being desirous of recovering his money, he engaged the services of a counsel to institute this action for which he paid the counsel the sum of N500,000.00 as part payment of professional fees of N1,000,000.00.

At the hearing of the case, the Claimant gave evidence for himself as PW1. He adopted his witness statement on oath wherein he affirmed all the averments in his statement of claim. He also tendered the following documents in evidence in proof of his case:

1. Offer of lease of shop dated 3rd August, 2015 – Exhibit PW1A.
2. Instant Payment Receipt dated 6/8/15 – Exh PW1B.
3. Photocopy of Zenith Bank cheque of N4.5m – Exh PW1C.
4. Lynks Solicitors Cash Receipt of N500,000.00 – Exh PW1D.

Under cross examination by the defence counsel, the PW1 told the court that the witness statement on oath which he adopted before the court was sent to him in Port Harcourt where he signed same.

He stated that when he received the offer letter, Exh PW1A, he called the 2nd Defendant and told him that he would make part payment and that he would pay the balance when the shop is completed, to which the 2nd Defendant agreed. When asked whether he is aware that the office space is still available for him, the PW1 stated that he is not aware; that when he went to see the Defendants,the 2nd Defendant told him that somebodyhad occupied the shop and then gave him the cheque of N4.5million.

In defence to the Claimant's action, the Defendants filed a Joint Statement of Defence dated 7th January, 2019, and filedon the 11th January, 2019. The Defendant's admitted that they entered into a contract of lease with the Claimant sometime in 2015 for the lease of a shop at a yearly rate of N5,000,000.00 (Five Million, Naira) for two years and the service charge of N500,000.00 for each year. That the total sum payable by the Claimant for the two years lease was N11,000,000.00, but instead of paying the N11,000,000.00, the Claimant paid only the sum of N5,500,000.00, which sum was not acceptable to the Defendants.

The Defendantsstatedthat the property was left fallow for one year, the Claimant refusing to take over same after failing to keep to the mutual agreement of the parties. They averred that the Claimant is still indebted to the 1st Defendant to the sum of N5,500,000.00 as the balance of the rent.

On 30th May, 2019, the 2nd Defendant, Anthony Ezekwugo gave evidence for the Defendants. Testifying as DW1, he adopted his witness statement on oath whereby he confirmed the averments in the Joint Statement of Defence.

Under cross examination, the DW1 told the court that he did not give possession of the shop to the Claimant because the Claimant did not pay the 2nd year's rent. He stated that the shop was ready for possession in December 2015 and that most of the tenants moved in between December, 2015 and early January, 2016.

The DW1 admitted issuing the cheque, Exh PW1C as part repayment of the money paid by the Claimant and stated that he issued the said cheque when the Claimant could not pay for the 2nd year and that he thereafter put the shop back in the market, but that until date, the said shop is still vacant. He

admitted that the cheque was dishonoured because his account was not funded.

At the close of evidence the parties filed and exchanged final written addresses.

In his final written address dated 7th August, 2019, and filed on 20th August, 2019, learned counsel for the Defendants, Emmanuel I. Okani, Esq. raised two issues for determination, namely;

a) Whether the Claimant's sole witness statement on oath can be relied on by this honourable court?
b) Whether the Claimant has proved his case as required by law?

In arguing issue one, learned counsel contended that the witness statement on oath of PW1 is fundamentally defective in substance, the same having been deposed to in the deponent's house in Port Harcourt and not before a commissioner for oath. He referred to Sections 109, 110, 111, 112 and 117 (4) of the Evidence Act, 2011 and the case of **Chidubem v. Ekenna (2009) All FWLR (Pt 455) 1672 CA.**

He argued that the PW1 having admitted under cross examination that the witness statement on oath was sent to him in Port Harcourt and that he signed same in his house, that the fact that same was not signed at the FCT High Court need no further proof. Learned counsel contended that Section 113 of the Evidence Act cannot avail the Claimant in the present circumstances as the defect in the affidavit is not in form but in substance.

Relying inter alia on **Chidubem v. Ekenna (supra),Buhari v. INEC (2008) 4 NWLR (Pt 1078) 546 at 608-609,** he posited that the presumption that may have be afforded by the

presence of the stamp of the commissioner for oaths on the said witness statement on oath, has been totally rebutted by the PW1 himself when he testified that he signed the document in his house in Port Harcourt. He further relied on **AlhajiAliyu v. Alhaji Bello Bulaki (2019) LPELR-46513 (CA)** and **Dr. Muhammad Ibrahim Onujabe&Ors v. Fatima Idris (2011) LPELR-4059 (CA)** to urge the court to expunge the Claimant's witness statement on oath from the records.

On issue two, on whether the Claimant has proved his case as required by law, learned counsel contended that the Claimant has failed to successfully prove his case as required by law, both by preponderance of evidence and on balance of probabilities. He referred to Sections 131, 132 and 133 of the Evidence Act, 2011 and the case of **Engr. Mustapha YunisaMaihaja v. Alhaji Ibrahim Gaidam& 2 Ors(2017) vol. 43 WRN 1 at 46** on the point that the onus of proof is on the Claimant.

Learned counsel contended that by the terms of the agreement between the parties as shown in Exhibit PW1A, the Claimant was required to pay the sum of N11m to the Defendants. He argued that the Claimant is in breach of the said agreement having paid only N5.5m to the 1st Defendant.

He further contended that by the Claimant's admission under cross examination, there is no agreement between the parties for the Defendants to pay the cost of this action.

Relying on **Ayoola v. Yahaya (2005) 7 NWLR (Pt 932) 122 at 140,** he posited that the pieces of evidence elicited under cross examination support the case of the Defendants.

He urged the court in conclusion, to dismiss the Claimant's case.

The learned Claimant's counsel, J.N. Egwuonwu, SAN, in his own Final written Address, also raised two issues for determination, to wit;

1. Whether the claimant has proved his case by preponderance of evidence before the court?
2. Whether the Claimant is entitled to the cost of this suit?

Proffering arguments jointly on the two issues, learned counsel contended that the evidence given by the PW1 in line with his pleading, and the documents tendered in evidence go to establish that the Defendants offered a shop to the Claimant; that the Claimant transferred the sum of N5.5m to the 1st Defendant, in respect of the shop, but the shop was not physically given to the Claimant, and that the Defendants attempted refunding the sum of N4.5m by issuing the cheque, Exhibit PW1C, which cheque was dishonoured for reason of the Defendants' account not being funded.

He posited that the standard of proof required in civil cases such as this is by the preponderance of evidence or balance of probabilities, and argued that the Claimant has adduced evidence in support of his pleadings thereby discharging the onus of proof on him. He referred to**Emeke v. Chuba-Ikpeazu (2017) 15 NNWLR (Pt 1589) 345 at 371, Cho-Chukwu v. A.G. Rivers State (2012) 6 NWLR (Pt 1295) 53.**

Learned counsel argued that rather than defending the Claimant's suit, that the case presented by the Defendants support the case of the Claimant. He contended that the evidence of the Claimant remained uncontroverted and that same was not discredited even during cross examination.He urged the court to accept the uncontroverted evidence of the Claimant and to enter judgment in his favour. He referred interalia to **INEC v. Action Congress (2009) 2 NWLR (Pt.**

1126) 524 at 604, Olohunde v. Adeyoju (2000) 10 NWLR (Pt. 676) 562 at 589.

He further referred to **Buraimoh v. Bamgbose (1989) 3 NWLR (Pt. 109) 352 at 366** on the point that the Claimant can rely on the Defendant's case which support his own case. To this end, he posited that paragraphs 3 and 5 of the Joint Statement of defence lend support to the case of the Claimant as sameare in line with the Claimant's pleadings in paragraph 4, 5 and 6 of his statement of claim.

It was further argued by learned counsel that having accepted the one year rent and taken benefit of same even when they claimed it was unacceptable to them, the Defendants are estopped from contending that the Claimant should pay them an additional rent of one year in the sum of N5,500,000.00. He argued that if indeed the one year rent was unacceptable to the Defendants, that they ought to have refused same ab initio or return same to the Claimant; which the Defendants failed to do.

Relying on **Gateway Holdings Ltd v. S.A.M. & T Ltd (2016) 9 NWLR (Pt 1518) 490 at 509,** he submitted that it is trite law that a man cannot benefit from transaction and turn around to contend that the transaction was illegal or unacceptable to him.

He contended further that the issuance of the cheque of N4.5million which was later dishonoured negates the contention by the Defendants that they demanded for the payment of the balance of N5.5million and that they requested the Claimant to come and take the shop.

Arguing further, learned counsel contended that there is a total failure of consideration for the N5.5million paid by the Claimant to the Defendants for which the Claimant received no benefit and that the Claimant is entitled to have the said money

refunded. He referred to **Dantata v. Muhammed(2000) 7 NWLR (Pt. 664) 176 at 199.**

On theclaim for 10% interest on the judgment sum until final liquidation, learned counsel referred the court to order 39 Rule 4 of the High Court of FCT, Abuja (Civil Procedure) Rules, 2018.

With respect to the alleged defectiveness of the Claimant's witness statement on oath, learned counsel contended that the cases relied upon by learned defence counsel to impugn the said witness statement on oath do not apply to the facts of this case. He referred to **Udo v. State (2016) 12 NWLR (Pt 1525) 1 at 25,** and argued that even though the witness statement on oath of the Claimant was alleged to have been signed outside the purview of the commissioner for oath, that there is no evidence before the court that the deposition was not made before the commissioner for oath who accepted the document and endorsed same, thereby satisfying the conditions of the law. He further referred to **SPDCN Ltd v. Amadi (2010) 13 NWLR (pt 1210) 82 at 142.**

It was further argued by learned counsel that all questions or answers elicited from a party during cross examination which are different from the issues or case made out by the parties in their pleadings go to no issue except the party relying on such issue amend his pleadings accordingly. That the issue of whether the Claimant deposed to the witness statement on oath before the commissioner for oaths is not one of the issue presented by the parties in their pleadings and for the Defendant to rely it, they ought to amend their pleadings accordingly. He referred to **Olomoshola v. Oloriawo (2002) 2 NWLR (PT. 750) 113.**

He further contended that the issue of failure to sign the witness statement on oath before the commissioner for oaths was not proved, and that even if proved, it amounts to an irregularity, which is a technical issue from which the courts have long moved away. He referred to **Famfa Oil Ltd v. A.G. Federation (2003) 18 NWLR (Pt 852) 453; Orija v. Akogun (2009) 11 NWLR (Pt.1684) 433 at 457; Obakpolor v. State (1991) 1 NWLR (Pt 165) 113 at 129.**

He argued that there was a substantial compliance with the provision of the Evidence Act when the commissioner for oaths accepted the witness statement on oath and endorsed same as proper thereby concluding the processes of filing of the Claimants Writ before the court.

Learned counsel contended further that even if the court discountenances the Claimant's witness statement on oath, that the Claimant is entitled to rely on the case presented by the Defendant which supports his case. He placed reliance on Exhibits PW1A, PW1B, PW1C and PW1D, and argued that by issuing Exhibit PW1C, the Defendants admitted owing the Claimant as there is no evidence that the parties entered into any other transaction other than as contained in Exhibit PW1A.

Relying on **Unity Bank PLC v. Denclag Ltd (2012) 18 NWLR (Pt.1332)293 at 337-338** to submit that a party is bound by his admission, and urged the court to enter judgment against the Defendants based on their admission.

In the determination of this suit, this court will adopt the two issues raised by learned defence counsel in his final written address, to wit;

1. Whether the Claimant's sole witness statement on oath can be relied on by this honourable court?

2. Whether the Claimant has proved his case as required by law?

Issue one:**Whether the Claimant'ssole witness statement on oath can be relied on by this honourable court?**

This issue arose from the answer elicited from PW1 by the learned Defendants' counsel under cross examination. The question and answer that brought about this issue proceeded as follows:

Defence counsel:

"Did you sign the signature in your lawyer's office or you signed in Port-Harcourt and sent them to Abuja?

PW1:

"It was sent to me in Port-Harcourt and I signed it."

On the strength of the above answer, the learned Defendants' counsel urged the court to strike out the Claimant's witness statement on oath for being incompetent having offended the provisions of the Evidence Act.

I have gone through the submissions of both learned defence and Claimant's counsel on this point. I agree with the postulations of the learned Defendants' counsel as regards the provisions of the law as they relate to oath taking.

The contention of learned defence counsel is that the answer given by the PW1 that he signed the Claimant's witness statement on oath in Port-Harcourt contradicts Section 117(4) of the Evidence Act, 2011 which provides that an affidavit, when sworn, shall be signed by the deponent in the presence of the person before whom it is taken. He argued that the Claimant's witness statement on oath is invalid, the same

having not been signed before a commissioner for oath. Part of the arguments of learned claimant's counsel(SAN) however, is that there is no evidence before the court to show that the said witness statement on oath was not afterwards taken by the PW1 before the commissioner for oaths to authenticate his signature.

Furthermore, it was contended by the learned claimant's counsel(SAN) to the effect that the commissioner for oath having accepted the document andendorsed same, it thereby raises the presumption of law that all due processes were complied with by the deponent. For this proposition, he referred the court to the authorities of **SPDCN Ltd v. Amdi (supra)** and**Apugo v. Nwoke (supra).**

The Section 117 (4) Evidence Act provides thus;

> ***"An affidavit when sworn shall be signed by the deponent or if he cannot write or is blind, marked by him personally with his mark in the presence of the person before whom it is taken."***

I am very well guided by the authorities of **Maduakolam Samuel Chidubem v. ObiomaEkenna&Ors (2008) LPELR-3913 (CA);**

> ***"… The fact that an affidavit purport to have been sworn in a manner hereinbefore prescribed shall be prima facie evidence of the seal or signature as the case may be …. The court may permit an affidavit to be used notwithstanding it is defective in form according to this Act, if the court is satisfied that it is has been sworn before a person duly authorised. The following provisions shall be observed by persons before whom affidavits are taken (f) the affidavit when***

sworn shall be signed ***by the witness or, if he cannot write, marked by him with his mark, in the presence of the person before whom it is taken…..where there is evidence that the depositions werenot sworn before a person duly authorised to administer oaths such depositions would be defective… I remember when I signed the depositions … I did not sign it before the commission for oaths …The requirement of the law is that the deposition oath must be signed in the presence of the person authorised to administer oaths… I therefore hold that the lower tribunal was correct when it discountenanced the written depositions of PW3, PW4, PW5 and PW6 for non-compliance with Section 90(f) Evidence Act…".*** (underlining mine).

Further in **OnyechiErokwu&ANor v. Jackson NwabufeErokwu (2016) LPELR 415 (CA)**Ogunwumiju, JCA held;

"… The law is that the deposition on oath must be signed in the presence of the person authorised toadminister oaths. In this case, the respondent upon cross-examination stated that when asked where he signed his statement on oath that, 'I guess in my counsel's chambers'. This to my mind presupposes that the document was not signed before a commissioner for oaths. …The impression conferred is that he signed it in the chambers of his counsel but a commissioner for oaths later attested to it. He simply did not sign it in the presence of a commissioner for oaths as required by law. This is not defect in form as envisage by Section 113 Evidence Act 2011. It is a fundamental and statutory error that

cannot be waived. Therefore the witness statement on oath of the respondent dated 9th October, 2008, is incompetent and inadmissible, it is hereby expunged having failed the statutory test of authenticity and admissibility."

The above two cases are on all fours with the instant case whereby the Claimant said the witness statement on oath was brought to him in Port Harcourt and he signed it, definitely it was not signed before the commissioner for oath, in High Court, FCT Abuja.The commissioner for oath merely attested to the document. I consider the defect in signing outside the presence of thecommissioner for oaths to be in substance and not a mere defectin form which Section 113 Evidence Act may cure. The issue of determining this case on technicality does not arise because the procedural error is of great substance. The defect affects the statutory provision which says the oath SHALL be signed before the commissioner for oaths. It must be emphasised that the failure to comply with Section 117 Evidence Act is very material to the provisions of the law.

I firmly believe and understand that the Evidence Act and the Oath Act deal with substantive law above mere mattersof procedure. The provisions of Evidence Actbeing substantive law, the rules of substantive law must be complied with it.The argument of the learned SAN that substantive justice must apply in avoidance of technical errors is inapplicable in the present case. The substantive justice which is actual and concrete justice in this case is personified in the application of Section 117 Evidence Act, that the statement on oath must be signed before the commissioner for oaths. Therefore, noncompliance with this provision is as a matter of law and have effect of rendering the evidence of the Claimant invalid. The provision of Section 117 Evidence Act cannot be

waived,this is the position of the law. I therefore, hold that the affidavit of the Claimant is discountenanced and expunged.

The resultant effect, amounts to failure of calling evidence in support of pleadings. It is trite law that where pleadings are not supported by evidence as in the instant case, such pleadings are deemed abandoned since pleadings do not constitute evidence on oath. Therefore, in the absence of the witness statement on oath in support of the pleadings, I consider the Claimant's pleadings as abandoned notwithstanding theadmission by the defence.The Claimant does not thrive on the weakness of the defence case.

In this regard, the Claimant has failed to prove his case beyond the preponderance of evidence and by virtue of Order 38 Rule(1) of the FCT, High Court Rules of Procedure, the Claimant is hereby non-suited.

HON. JUSTICE A. O. OTALUKA
20/11/2019.