



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/1573/2013

VESTER CASTRO LIMITEDPLAINTIFF

AND

1. NATIONAL COMMISSION FOR MUSEUMS)
AND MONUMENTS) DEFENDANTS)
2. ROYAL STONE GLOBAL LTD).....DEFENDANTS

JUDGMENT

The facts of this case as may be garnered from the averments in the amended statement of claim is that sometime in 2012 the 1st defendant by a newspaper publication invited interested companies to bid for three categories of contracts. The Plaintiff allegedly bided for the three slots by paying the specified fees for each slot. At the end of the exercise the Plaintiff claimed that he lost on the first and second slots but successful in the third slot. It also alleged that rather than issue the necessary award letter in its favour the letter was issued in the name of the second defendant who was not the successful bidder during the exercise. Letters of complaint were forwarded by the Plaintiff to the Bureau of Public Procurement for

redress without any positive result. The Plaintiff who is aggrieved has approached this Court vide an amended writ of summon filed on 3rd June, 2014. The reliefs sought as per paragraph 13 of the statement of claim are as set down below:

- 1. A declaration that the contract awarded to the 2nd defendant for the construction of Adamawa Heritage Centre/Museum Shelleng is illegal and against the Procurement Act and thereof null and void.**
- 2. An Order directing the 1st defendant to award the contract for the construction of Adamawa Heritage Centre/Museum Shelleng to the Plaintiff since he (sic) won the bid for same.**
- 3. A claim of Ten Million Naira (N10,000,000.00) Only against the defendants for manipulation of the due process in the award of contracts for construction of Adamawa Heritage Centre/Museum Shelleng.**

Originally the Bureau of Public Procurement was sued as the 2nd defendant while the instant 2nd defendant was the 3rd defendant. However, the Bureau of Public Procurement entered a conditional appearance and thereafter challenged the competence of the Plaintiff's action against the Bureau on the ground that mandatory condition precedent for the presentation of the action was not

satisfied before the action was filed. The Court acceded to the prayer of the Bureau vide a ruling delivered on 21st May, 2014 and struck out the name of the Bureau thereby leaving the original 3rd defendant as the 2nd defendant at the end of that exercise.

Upon the receipt of the Originating process the 1st defendant engaged one Babs Akinwumi Esq of Licit Fort Solicitors who on 16th April, 2014 filed a motion for leave to file Memorandum of Appearance and other processes out of time. However, the 1st defendant merely challenged the jurisdiction of the Court on the ground that the 1st defendant is an agency of the Federal Government which may only be sue before the Federal High Court. The Court overruled the 1st Defendant on the ground that this action is founded on contract. Surprisingly the 1st defendant did not bother to file any statement of defence let alone defend the claim against it.

In a related development the 2nd defendant (who was formerly the 3rd defendant) filed a similar process to that of the 1st Defendant but did not defend this action. The record of the Court revealed that one J. U. Otaru, Esq appeared on its behalf on 13/06/2013. What played out in that proceeding is as captured below:

13/06/2013

Ijeoma Madu, Esq for the Plaintiff.

I. Julius Esq for the 1st defendant.

J.U. Otaru Esq for the 3rd defendant (now 2nd defendant).

Otaru Esq – We have a motion for extension of time to file our memorandum and statement of defence out of time.”

Court – The motion sought to be moved has not been filed. It is therefore not competent. It is struck out.”

The 2nd defendant (as former 3rd defendant) did not take any further step to defend this action. In other words none of the two defendants listed on record filed processes in defence of this action.

At plenary the Plaintiff called one witness and tendered documents marked as exhibits VC 1 to VC 4 series. The matter was then adjourned for cross examination but the defendants failed to turn up for that exercise leading to a foreclosure order upon the application of the learned Counsel for the Plaintiff.

The Court thereafter adjourned for defence but the defendants were again absent in Court. On this note E.I Essene Esq who appeared for the Plaintiff made the following application:

“E.I Essene, Esq - Case is for defence. The defendants has been served with hearing notice of today’s proceedings. Defendants are absent. No reason has

been advanced. They did not file any statement of defence. We ask that they be foreclosed.”

It is on the above premise that the Court foreclosed the defendants and ordered the filing of final written addresses. Thus, Mr. Emmanuel Esene Esq of counsel for the Plaintiff filed his final written address with leave of Court which was adopted in the open Court. Learned counsel identified four issues as arising for determination. They are:

1. Whether the contract for the construction of Adamawa Heritage Centre/Museum Shelleng was properly awarded to the 2nd defendant by the 1st defendant, the plaintiff having been pronounced to have won the bid and fulfilled the requirement under the law to be awarded the contract?
2. Whether it can be said to be a breach of the processes or procedure of awarding Federal Government contract under the relevant law when the 2nd defendant who was neither the lowest nor the second lowest bidder was awarded the contract?
3. Whether the plaintiff is not entitled to claim damages from the defendant's conduct in manipulating the due process leading to the award of contract for the

construction of Adamawa Heritage Centre/Museum
Shelleng?

4. Whether the defendants' failure to call evidence to defend the case made against them does not amount to admission of plaintiff's case?

However, after a painstaking appraisal of the state of pleadings and the evidence led in support by the plaintiff I think the four issues raised by the learned counsel for the Plaintiff can be effectively rolled into one, to wit:

“Whether the plaintiff has discharged the burden of proof placed on it by law to warrant the grant of the reliefs sought.”

DETERMINATION OF ISSUE

The law is clear that the plaintiff has the burden to lead credible evidence to determine its entitlement to the reliefs sought in this case especially as the first relief sought is declaratory in nature.

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.

In this case the plaintiff who has presented one principal declaratory relief must either succeed or fail on the strength of its own evidence. It cannot capitalize on the failure of the Defendants to defend as a ground to warrant the grant of its claims. The plaintiff must therefore lead credible evidence and satisfy the Court by that evidence of its entitlement to the declaration sought. Thus in **ADDAH VS UBANDAWAKI (2015) 7 NWLR (PT. 1458) 325 AT 344** it was held by the Supreme Court that:

“It should be stated clearly that the weakness of the defendant’s case does not assist the plaintiff’s case. He swims or sinks with his own case. See Animashaun vs Olojo 1991 10 SCNJ 143; Dantata vs Muhammed 2000 7 NWLR (PT. 664) 176; Ekundayo vs Baruwa 1995 2 NLR 211; Nwokidu vs Okanu 2010 3 NWLR (PT. 1181) 362 and Dumez Nig Ltd vs Nwakhoba 2008 18 NWLR (PT. 1119) 361 at 373-374 wherein it was graphically captured that the burden of proof on the plaintiff in establishing declaratory relief to the satisfaction of the Court is

quite heavy in the sense that such declaratory reliefs are not granted even on the admission by the defendant where the plaintiff fails to establish his entitlement to the declaration by his own evidence.”

In its bid to discharge this burden the Plaintiff called its Managing Director, Mr. Ehis Aigbedion who testified as PW1. The totality of his testimony is encapsulated in a 13-paragraph witness statement on oath attached to the amended statement of claim filed on 3rd June, 2014. In view of the relative brevity of his testimony I shall reproduce same to facilitate ease of understanding of the plaintiff's case, to wit:

1. The plaintiff is a Limited Liability Company with Office at Wuse Zone 6, Abuja and I am the Managing Director of the plaintiff.
2. The 1st defendant is the National Commission for Museums and Monuments with its office at the Federal Secretariat Abuja.
3. The 2nd defendant is a company that the 1st defendant wrongfully and illegally awarded a contract to and same is based in Abuja.
4. That the 1st defendant required as per the attached exhibit A for the invitation of tender in August 19, 2012 for the

Renovation of Aba Museum, the upgrading of facilities in Lokoja Museum and the construction of Adamawa Heritage Centre/Museum Shelleng.

5. The plaintiff bided for the said three jobs on payment of Twenty Thousand Naira (N20,000.00) each. The drafts are hereby attached. That the plaintiff was invited for the bid having qualified in the pre qualification process that prompted the invitation.
6. That the plaintiff lost his bid for the renovation of Aba Museum and the upgrading of facilities at Lokoja Museum and he (sic) won the construction of Adamawa Heritage Centre/Museum Shelleng.
7. That the plaintiff bided the sum of N74,199,413.50 for the construction of Adamawa Heritage Centre/Museum Shelleng while the 2nd defendant bided the sum of N82,948,283.25 for the same project. That the 1st defendant and Bureau of Public Procurement in the presence of the plaintiff's representative and other observers declared the plaintiff as the winner of the bid for the construction of Adamawa Heritage Centre/Museum Shelleng as the lowest evaluated responsive bidder.
8. That the plaintiff annexed his company's profile hereby attached as exhibit B in his (sic) bid. That the plaintiff met all

the necessary pre-qualification as contained in the advert of the 1st defendant.

9. That after the plaintiff won the bid for the construction of Adamawa Heritage Centre/Museum Shelleng, the 1st defendant later manipulated the process and award the contract to the 2nd defendant, when the plaintiff refused to give a bribe of Five Million Naira only to them to award the contract to him (sic) on their demand.
10. That the plaintiff legally won the bid for the construction of Adamawa Heritage Centre/Museum Shelleng and awarding same to the 2nd defendant or any other person is illegal, wrongful and contrary to the Procurement Act.
11. That the plaintiff complained to the 1st defendant Bureau of Public Procurement as per the attached exhibit D1, D2 and D3. That despite the complaint of the plaintiff, the contract was not awarded to him (sic).
12. That the 2nd defendant did not win the bid for the construction of Adamawa Heritage Centre/Museum Shelleng at anytime and the award of the said contract to the 2nd defendant was unfair and untransparent, that the 2nd defendant was not qualified before the contract was awarded to him (sic) by the agents of the 1st defendant.”

The plaintiff also tender in support of its case documents marked as exhibits CV1 – CV4 series as earlier pointed out. The particulars of the exhibits are:

- 1. Certified True Copy of Federal Government Tender with Revenue collection receipt as as exhibit CV 1.**
- 2. Copy of plaintiff's company profile is exhibit CV2.**
- 3. Photocopy of Access Bank Manager's cheque issued to the 1st defendant on 8/11/2012 is exhibit CV3.**
- 4. Plaintiff's letters to the Director of Bureau for Public Procurement are exhibits 4, 4(A) and 4(B).**

Before I proceed with the evaluation of the evidence led by the plaintiff I have observed that paragraph 10 of the witness statement on Oath is in contravention of Section 115(2) of the Evidence Act, 2011 which provides as follows:

“An affidavit shall not contain extraneous matter, by way of objection, prayer of legal argument or conclusion.”

Having stated the Law on this point it is apposite here to set out the offending paragraph 10 in the statement of the PW1, to wit:

“That the plaintiff legally won the bid for the construction of Adamawa Heritage Centre/Museum Shelleng and awarding same to the 2nd defendant or any

other person is illegal, wrongful and contrary to the Procurement Act.”

The PW1 obviously concluded that the conduct of the 2nd defendant is illegal, wrongful and contrary to the Procurement Act. This is a clear contravention of the express provision of the Evidence Act. On this point I refer to the case of **PROCTER & GAMBLE NIGERIA LIMITED V. NWANNA TRADING STORES LTD (2011) LPELR-4880-(CA)** where the Court of Appeal reviewed the provision of the Law and held as follows:

“Clearly an averment in an affidavit which does not contain deposition of facts or which contains opinions or conclusions would run foul of the above provisions and therefore invalid.”

Arising from the forgoing position of the Law I have no choice other than to strike out the offending paragraph in the PW1’s statement on Oath. It is accordingly expunged from the record. This now lead me to the final written address of the plaintiff’s counsel.

I read the final written address filed on behalf of the plaintiff and I agree with the plaintiff’s counsel that by the express provision of Section 16(17) of the Public Procurement Act the plaintiff who emerged as the lowest responsive bidder ought to be awarded the

disputed contract. From the documents tendered by the plaintiff the 2nd defendant who was awarded the contract came a distant third in term of lowest responsive bidder while the plaintiff came first. The plaintiff has alleged that the failure to pay a bribe of N5Million demanded by the 1st defendant led to the manipulation of the award process in favour of the 2nd defendant. This is no doubt a grave allegation which ought to be properly laid before the Court. Bribery is undoubtedly a criminal act. If that be the case, it's now trite law that allegation of crime must be proved beyond reasonable doubt.

See the case of **KWALI & ANOR V. DOBI & ORS (2008) LPELR-4413 CA** where the Law was aptly re-echoed in unmistakable terms to the effect that:

“... an allegation of the commission of a crime both in criminal and civil cases must be proved beyond reasonable doubt. Consequently, the allegation of manipulation of election materials, results and all illegal acts during elections must be proved beyond reasonable doubt.”

The Court went further:

“It is therefore inappropriate for a court or tribunal to infer that a particular candidate at an election was

responsible for the illegal acts committed during the election in the absence of evidence which shows beyond reasonable doubt that himself was responsible for the alleged acts.”

In this case the plaintiff merely made a bare assertion without any tangible particular or scintilla of evidence to support the sweeping allegation. It is not enough to allege that the 1st defendant demanded for bribe. In any case, the said 1st defendant is an artificial entity which carries on its respective activities through human agents. Thus, the plaintiff has a mandatory duty to mention the name of the officer or agents of the 1st defendant who demanded the bribe in issue. The plaintiff both in its pleadings and evidence led in support failed to identify any personnel of the 1st defendant who requested for bribe. This omission has effectively reduced the allegation to a mere speculation which cannot attract the sympathy of the Court for obvious reason.

The law is well settled that Courts of Law cannot speculate on issues not properly laid before the Court. In **EJEZIE V. ANUWU (2008) 4 S.C 167** the Supreme Court per Tobi, JSC (of blessed memory) aptly captured the Law thus:

“A court of law has no jurisdiction to speculate or conjecture. A court of law must confine itself to the

evidence before it and give judgment on the evidence alone.”

Now the case of the Plaintiff as may be garnered from the evidence before the Court is that the Plaintiff Company was successful in the public bid for the award of the disputed contract being the lowest responsive bidder. To support this point the Plaintiff tendered exhibits VC4, VC4(A) and VC4(B) which are complaint letters. On the face of exhibit VC4 which is undated but addressed to the Hon. Minister of Culture and Tourism the Plaintiff claimed that the outcome of the bid on Lot 3 which is the subject matter of this suit is as follows:

(i)	Vester Castrol Ltd	N74,199,413.50
(ii)	Royal Stone Global	N82,948,283.25
(iii)	Famas Homes	N86,478,777.00
(iv)	Falwas Nig. Ltd	N79,963,954.00

Exhibit VC4A dated 14th November, 2012 and forwarded by the Plaintiff to the Director-General of the Bureau of Public Procurement also contained similar breakdown with respect to the outcome of the bid which formed the foundation of the Plaintiff's case. After a careful scrutiny of the exhibits and the totality of the evidence put forward by the Plaintiff I discovered that the Plaintiff did not support its claim with any valid document. If indeed the

Plaintiff emerged victorious in the bid preceding the award of the contract in dispute the Plaintiff ought to furnish the Court with relevant documents from appropriate government department to support such assertion. Unfortunately I have nothing before me to suggest that the Plaintiff emerged victorious in the bid.

Furthermore, the point must be made that the disputed bid is documentary in nature. Accordingly it is the relevant documents from either the 1st Defendant or the Bureau of Public Procurement showing the record of the transaction would amount to an admissible evidence of the transaction. To me exhibits VC4 and VC4A which purports to show the result of the bid is hearsay in nature and not admissible as it does not emanates from the appropriate authority. It is settled Law that documents speak for itself. In this case the relevant documents which ought to assist the Plaintiff are not tendered in this matter. This is fatal to the case of the Plaintiff.

The point must be made that the failure of the Defendants in this case to defend the action does not absolve the Plaintiff of the onus to proof its case. The absentee Defendants cannot in law be said to have admitted the case of the Plaintiff hook, line and sinker by their absence. The Plaintiff must of necessity discharge the legal burden

identified herein before the burden will shift to the Defendants to proffer a defence.

See **AJIDE VS. KELANI (1985) 11 SC 124** where Anigolu, JSC stated the law as follows:

“In civil cases the onus of proof shifts from plaintiff to defendant and vice versa, from time to time, as the case progresses. Called the onus probandi, it rests on the party who would fail if no evidence at all, or no more evidence as the case may be, were given on either side. It may shift constantly accordingly, as one scale of evidence or the other preponderates.”

What then is the legal effect where the Plaintiff as in this case failed to discharge the legal burden of proof? The law is that in such cases the Defendant cannot be called upon to defend the action. This is so because there is nothing to defend in the first place.

The position of the law was well laid out in the case of **OKEDION & 2 ORS V. FEDERAL AIRPORT AUTHORITY OF NIGERIA & ANOR (2007) LPELR-8678 (CA)** as follows:

“It is only when the plaintiff discharges his burden of proof that the said burden will shift to the defendant as the party who would fail if no evidence is adduced-

onus probandi - See AJIDE Vs. KELANI (1985) 11 SC 124; AND YUSUF Vs. ADEGOKE (2007) 7 ALL FWLR (Pt.385) 384 AT 405. Where a plaintiff fails to discharge his burden by calling credible and cogent evidence as in the present case his case has collapsed and should be dismissed by the trial Court.”

What has played out in this case is simply that the Plaintiff's case is not founded on any credible and admissible evidence to sustain its claim. Having held that the Plaintiff has not proved its case the Court is left with no other option but to refuse its claim. Accordingly the claims of the Plaintiff are hereby refused and dismissed in its entirety.

**SIGNED.
HON. JUSTICE H. B. YUSUF
(PRESIDING JUDGE)
16/10/2019**