IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA – ABUJA

BEFORE HIS LORDSHIP: **JUSTICE SALISU GARBA**
COURT CLERKS: **FIDELIS T. AAYONGO & OTHERS**
COURT NUMBER: **HIGH COURT TWO (2)**
CASE NUMBER: **FCT/HC/CV/1456/2019**
DATE: **10TH MARCH, 2020**

BETWEEN:

SYL-ORGIE NIGERIA LIMITED - **CLAIMANT**

AND

NIGERIA COMMUNICATION COMMISSION) **DEFENDANT**

Defendant represented by Nazir Lukman and the Claimant by John A. Egweni and Lawrence. Machie for the Claimant.
Ogechi Ogbonna for the Defendant.
Claimant's Counsel – The matter is for judgment and we are ready to take same.

J U D G M E N T

This suit was commenced via the Undefended List Procedure and was subsequently transferred to the General Cause List. By the writ of summons and statement of claim dated 12/9/2019, the Claimant claim against the Defendant as follows:

1. A Declaration that there was a subsisting contract between the Claimant and the Defendant until the Defendant served its letter, not to continue with the project on the Claimant.

2. A Declaration that the Defendant unilaterally determined the contract when the letter conveying its decision not to continue with the project and consider the contract as closed out was served on the Claimant.
3. An Order directing the Defendant to pay to the Claimant the sum of N21,986,046.51 (Twenty One Million, Nine Hundred and Eighty Six Thousand, Forty Six Naira, Fifty One Kobo) only being 35% of the outstanding amount the contract sum of N75,436,233.50 after deducting N12,618,957.75 paid before the letter of discontinuance was served on the Claimant.
4. 15% post judgment interest on the aforesaid sums pursuant to the rules of this court from the date of judgment until the entire judgment sum is fully liquidated.
5. N2,000,000.00 (Two Million Naira) only being the cost of this suit.

In prove of this claim, the Claimant filed 15-paragraph statement of claim dated 12/9/2019 and 13-paragraph reply dated 23/9/2019 and called two witnesses John Abanum Egweni testified as the PW1. In his evidence-in-chief, he adopted a 16-paragraph witness statement on oath dated 12/9/2019 as his evidence; the said PW1's statement on oath is accordingly adopted as forming part of this judgment.

The gist of the PW1's evidence is that the Defendant awarded a contract for civil works at the Emergency Communication Centre, Lagos State for the sum of N75,436,233.50 only to the Claimant. That the defendant did not have any site to hand over to the

Claimant until after 12/4/2012. That the Defendant's consultant, in its report of 20/4/2012 stated that there was need to determine the extent of adjustment to redesign site plan in line with the existing site soil condition which necessitated the review of foundation.

The witness stated further that the Defendant requested the Claimant to price the Completion Bills of Quantities which was submitted on 25/7/2017.

That the Quantity Surveyor to the Claimant usually uses a profit margin factor of 1.53 in preparing the bill rates for tender due to the competitiveness of public bidding.

That the Defendant wrote a letter dated 17/10/2016 which was delivered on 12/11/2018 informing the Claimant not to continue with the project and consider the contract as closed out. There was no unresolved issue between the parties before the Defendant issued the said letter of discontinuance on the Claimant. Thereafter the solicitor to the Claimant wrote two letters to the Defendant requesting for damages. That the Defendant has failed, neglected and refused to pay the damages arising from the discontinuance of the contract despite repeated demands.

In the cause of Pw1's evidence, the following documents were admitted in evidence as exhibits:

1. Letter of Award of Contract dated 3/12/09 – Exhibit A.
2. Letter dated 3/6/2011 – Exhibit B.

3. Letter dated 13/4/12 – Exhibit C.
4. Report dated 20/4/2012 – Exhibit D.
5. Letter dated 15/4/15 – Exhibit E.
6. Letter dated 15/6/17 – Exhibit F.
7. Letter dated 15/7/2017 – Exhibit G.
8. Letter dated 17/10/2018 – Exhibit H.
9. Letter dated 10/12/2018 – Exhibit I.
10. Letter dated 14/1/19 – Exhibit J.

Under cross-examination of PW1 by the Defendant's counsel, the PW1 stated that the contract was to be completed within 16 weeks of the award of the contract.

The PW1 further stated they were paid 15% mobilization fees. That the land for the project only became available in 2012 at Ibejl Lekki, Lagos.

Valuation of work done by the Claimant was made and communicated by a letter dated 13/3/14 from the Defendant; the said letter was admitted in evidence as Exhibit K.

The PW1 went further to state that upon receipt of Exhibit K, they wrote to the defendant confirming acceptance of the said Exhibit K. The Claimant's letter dated 17/3/14 was also admitted in evidence as Exhibit L.

No re-examination, PW1 was discharged.

Olukayode Michael Ojo, a Quantity Surveyor testified as PW2. In his evidence-in-chief, he adopted an 8-paragraph witness statement on oath dated 12/9/19 as his evidence.

The gist of PW2's evidence is that sometimes in 2009, the Managing Director of the Claimant invited him to price the Bills of Quantities issued by the defendant as part of the documents issued to those bidding for the contract for civil works at the Emergency Communication Centre - Lagos State. That he initially used a profit margin factor of 1.65 in preparing the bill rates for tender but had to reduce the profit margin factor of 1.53 due to competitiveness of public bidding as at that time. That the contract was later awarded to the Claimant by the defendant in December, 2009. That sometime in November, 2018 the Managing Director of the Claimant informed him of the decision of the Defendant not to continue with the project and consider the contract as closed out.

In the cause of PW2's evidence-in-chief, two certificates bearing the name of the PW2 dated 3/11/2000 and 27/3/12 were admitted in evidence and marked Exhibit M1 and M2 respectively.

Under cross-examination of PW2 by the Defence Counsel, the PW2 stated that he is not a shareholder or Director of the Claimant's company. That he was paid by the Claimant to do work for them. He was not paid to come to court to testify.

No re-examination, PW2 was discharged and that is the case for the Claimant.

In defence of this case, the Defendant filed a 24-paragraph statement of defence dated 19/9/2019 and called a sole witness.

Bassey Uket an Engineer in the employment of the Defendant testified as the sole witness DW1. In his evidence-in-chief, the DW1 adopted a 24-paragraph statement on oath dated 20/9/2019 as his evidence; the said DW1's statement on oath is accordingly adopted as forming part of this judgment.

The gist of the DW1's evidence is that the Claimant was awarded a contract for the construction of the Emergency Call Centre in Lagos for the contract sum of N75,436,233.50k subject to a formal agreement to be signed between the Claimant and the Defendant.

That Lagos State Government did not allocate land for the execution of the project and the Defendant did not hand over any land to the Claimant.

That the Claimant on its own violation obtained land for the project at Ibeju Lekki; the said land was water-logged and was unfit for the project use desired by the defendant and on its violation commenced the construction of the Emergency Call Centre for Lagos State.

The DW1 went further to sate that the foundation and allied work done on the site and for which the Claimant had been paid were sub-standard and had cracks and was unsatisfactory to the Defendant.

It is the evidence of Dw1 that after the termination of the appointment of the consultant in 2012, the project was relocated to Oshodi to a building belonging to the Defendant and the

project was to continue subject to the appointment of a new consultant.

The witness further stated that the management of the Defendant met with the Claimant and took the decision to terminate the project and duly communicated same to the Claimant vide a letter dated 17/10/2018.

That the Defendant did valued the work carried out by the Claimant which work valuation valued the work done by the Claimant as N12,618,957.75k same was duly communicated to the Claimant vide a letter dated 13/3/2014 and the Defendant did paid the said sum to the Claimant.

The DW1 stated that the Defendant is not indebted to the Claimant in the sum of N21,986,046.51 or any other sum of money alluded to by the Claimant. Court is urged to dismiss the case.

Under cross-examination by the Claimant's counsel, the DW1 *stated that he was not visiting the project site. The project was* not moved from Ibeju – Lekki to Oshodi. That he is not a member of the Defendant's Project Evaluation Committee.

No re-examination, DW1 was discharged and that is the case for the Defendant.

The Defendant's Counsel filed a 19-page final written address dated 19/11/2019 wherein counsel distilled an issue for determination, thus:

"Whether the Claimant has led any evidence or sufficient evidence to prove its allegation of breach of contract/negligence against the Defendant"

On this sole issue, it is the submission of counsel that the Claimant did not discharge the legal and evidential burden of proof of its claims and allegation against the Defendant and therefore not entitled to the reliefs sought against the Defendant. Court is referred to Sections 131, 132, 133 and 134 of the Evidence Act 2011 and the case of UKAEGBU v NWOLOLO (2009) 3 NWLR (Pt 1127) 194 at 230 Para A.

It is submitted that in prove of the Claimant's claim, the Claimant tendered a photocopy of the Letter of Award Exhibit A and also a photocopy of letter dated 3/6/2011 emanating from the Defendant (Exhibit B). That the Defendant being a public institution any document emanating from them for it to be admitted in evidence it must be the Certified True Copy. Court is referred to Sections 89(e), 90(1) (c), 102 and 104 Evidence Act. That Exhibit A, B and C which are neither original copies nor CTC are inadmissible evidence in law. Court is urged to expunge them. See UNION BANK LTD v SAX (1994) 8 NWLR Part 361 Pg 150 at 171.

It is further submitted that oral evidence led upon the facts which the Claimant sought to establish by Exhibit A, B, C are also inadmissible. See NIGERIAN PORTS PLC v BECHAM PHARMACEUTICAL PTE & ANOR (2012) 18 NWLR Pt 1333 Pg 454 at 490 Para B.

It is the submission that assuming but without conceding that Exhibit A is admissible, it is submitted that there is no evidence of a valid contract between the parties before this Honourable Court. The contention is supported by paragraphs 8 of Exhibit A which expressly stated that Exhibit A shall be subject to a formal agreement between the Claimant and the Defendant.

It is further submitted that in the absence of a consultant after the first one was fired in 2012 attests to the fact that no work was done by the Claimant since 2012 for which it could be paid since the terms of the award relied upon by the Claimant expressly stated that the Claimant shall be supervised by a consultant.

It is submitted that the Defendant led evidence that termination of the appointment of a consultant in 2012 and the failure of the Claimant to prove the appointment of a new consultant by giving the names and details of the appointment of this new consultant to supervise the Claimant in line with the terms of the contract is fatal. Court cannot therefore pick and choose which testimony to believe and which one to disbelieve. See AZUBUIKE v DIAMOND BANK (2004) 3 NWLR Part 1393 Pg 116 at 127 Para H.

It is the submission that the contract and the terms between the parties have been varied by the actions of the Claimant and the Defendant, and the stated variation led to a new legal contractual regime governing their relationship and that the terms of these new legal contractual regime has also been satisfied. Therefore, the Defendant does not owe the Claimant any obligation. Court is referred to Exhibits K and L and the case of

SHELL PETROLEUM DEV. CO OF NIG. v FED BOARD OF INTERNAL REVENUE (1990) 8 NWLR Pt 466 Pg 256 at 285 Para F.

It is the contention that the failure of the Claimant to tender in evidence proof of the alleged 35% of the outstanding amount from the stated contract sum of N75,436,233.50 unequivocally rebuts his claims. See ALUMINUM MANUFACTURING CO. NIG LTD v VOLKSWAGEN OF NIG. LTD (2010) 7 NWLR (Pt 1192) Pg 97 at 118 Paras D – E and at 124 Para D.

It is further submitted that the claim of N2 Million as cost of this suit is speculative as the details of the cost were not stated nor particulars such as alleged cost of action given and accordingly cannot stand. See AGIP NIG. LTD v AGIP PETROLEUM INTERNATIONAL & ORS (2010) 5 NWLR Pt 1187 Pg 348 at 413 Paras B – C.

It is also submitted that the cost of this suit as claimed by the Claimant is contrary to public policy. See GUINESS NIG. PLC v NWOKE (2000) 15 NWLR Pt 689 Pg 135 at 150 Paras C, A – E.

It is submitted that the Claimant has failed to prove its entitlement to the declaratory reliefs and as such all its claims must fail and should be dismissed.

The Claimant's counsel filed a 12-page final written address dated 11/12/2019 wherein counsel formulated the following issues for determination:

1. ***"Whether there was a valid contract between the Defendant and the Claimant for the construction of Emergency***

Communication Centre in Lagos State until the Defendant's letter conveying its decision "not to continue with the project and consider the contract as closed out" was served on the Claimant.

2. ***Whether the defendant wrongfully terminated the said contract when it took the decision to terminate the project and duly communicated same to the Claimant vide a letter dated 17/10/2018 duly delivered to the Claimant.***
3. ***Whether the Claimant is entitled to damages (Anticipated Project) of N21,986,046.51 being 35% of the outstanding work to be done".***

On Issue 1, it is the submission that the existence of a statutorily valid contract between the parties that necessitated the issue of exhibit A by the Defendant was never denied by the defendant and was even corroborated by the defendant in paragraphs 2, 3 and 4 of its witness statement on oath.

It is trite law that facts admitted need no further proof. See case of ALAHSSSAN & ANOR v ISHAKU & ORS (2016) LPELR – 40083 (SC) and the case of EDOSOMWAN v OGBEYFUN (1996) LPELR – 1019 (SC). Court is urged to hold that there was a valid contract between the parties.

On Issue 2, it is the submission that the Defendant incapacitated itself when it failed to provide land for the said contract before awarding same, which is contrary with the provision of Financial Regulations No. FR 2925(1) (a) and also failed, neglected and/or refused to engage the services of a

consultant for a long time when it knew fully well that the claimant had to work under the supervision of a consultant.

It is submitted that the provision of land and engagement of a consultant to supervise the project are internal proceedings of the Defendant which the Claimant has no say and cannot inquire into the regularity of the internal proceedings of the Defendant. See the case of J.A. OBANOR & CO. LTD v COOPERATIVE BANK LTD (1995) LPELR – 24846 (SC).

It is the submission that the Defendant admitted that it terminated the contract in question. Court is referred to paragraph 15 of the DW1's statement on oath.

Despite the fact that the Defendant has incapacitated itself from performing by its failure to provide land for many years and by not engaging a consultant, the claimant continue to wait for the Defendant to put its house in order since December 2009 only for the Defendant to turn around to terminate the project in October 2018 without any excuse or offer of compensation to the Claimant. Court is urged to resolve this issue in favour of the Claimant.

On Issue 3, it is the submission that the amount of damages to be paid to a person for breach of contract is the amount it will entail to put the person in the position he would have been if there had not been any breach of contract. See the case of CHITEX INDUSTRIES LTD v OCEANIC BANK INTERNATIONAL (NIG) LTD (2005) LPELR – 1293 (SC).

It is submitted that an aggrieved contractor is entitled to balance of payment for work done and to recover damages for loss of profit. See ACME BUILDERS LTD v KADUNA STATE WATER BOARD & ANOR (1999) LPELR – 65 (SC).

It is the contention that in other to prove its claim for anticipated profits, the Claimant called PW2 an expert witness whose evidence was not challenged in any material way. PW2 in paragraph 5 of his statement on oath stated that he initially used a profit margin factor of 1.65 in preparing the bill rate for tender but had to reduce the profit margin factor to 1.53 due to the competitiveness of public bidding as at that time.

It is submitted that the damages arising from the value of work left to be done is 35% of N62,817,275.75 will give us N21,986,046.51k. Court is urged to hold that the Claimant is entitled to anticipated profit and resolve this issue in favour of the Claimant.

It is the submission that there was nowhere in the pleadings where the Defendant claimed to have paid the Claimant the total sum of N23,934,411.00 and it was never an issue during the hearing of this case. Court is urged not to rely on that piece of evidence. See FAGGE v AMADU (2015) LPELR – 25920 (CA).

On award of cost, it is submitted that it is solely at the direction of the court. See case of NNPC v CLIFCO NIG LTD (2011) LPELR – 2022 (SC). Court is urged to enter judgment for the Claimant.

I have carefully considered the processes filed, evidence of PW1, PW2 and DW1, exhibits tendered and the submission of learned counsel on both sides, I do adopt the sole issue formulated by the learned counsel to the Defendant as the sole issue for determination to wit:

> ***"Whether the Claimant has led any evidence or sufficient evidence to prove its allegations of breach of contract/negligence against the Defendant"***

It is trite law that he who assert must prove as statutorily provided for in Section 132 and 133 Evidence Act. See case of UKAEGBU v NWOLOLO (Supra).

It is the contention of learned Defence Counsel that the Claimant tendered photocopies of Exhibits A, B and C in prove of its case. That since the documents are public documents it is only the CTC of such document that are admissible in evidence. As such the court wrongly admitted them. Court is urged to expunge them based on the case of UNION BANK LTD v SAX (Supra) where the Court of Appeal held as follows:

> ***"Where inadmissible evidence has been improperly received by the lower court even no objection was raised, it is the duty of the Court of Appeal to reject it and decide the case on legal evidence"***

It is pertinent to note that this court is not sitting on appeal over this matter. However, assuming that the said documents were wrongly admitted and is expunged what difference will it make.

It is not in doubt that there was a valid contract between the parties before the court. The Defendant sole witness DW1 admitted that there was a binding contract between parties in his paragraphs 2, 3 and 4 of witness statement of claim. In the case of ALAHASSAN & ANOR v ISHAKU & ORS (Supra) the Supreme Court held inter alia:

> ***"It is trite and well settled law, that where a party admits a fact in issue such fact in issue does not require any proof of (any) again. The courts do not need proof of fact already admitted and further dispute of such facts should not be entertained since admission is the strength and highest of the fact in issue"***

In the light of the above, I hold the view that there was a valid contract between the parties. Accordingly the Defendant counsel's submission at paragraph 27 to 36 of his final written address is of no moment, I so hold.

It is also the contention of the Defendant's counsel that the Clamant neither pleaded nor tendered any formal agreement which it entered with the Defendant as stipulated by paragraph 8 of Exhibit A.

Again by the admission of the Defendant's witness DW1 in paragraph 3 and 4 of his witness statement on oath to the effect that the said agreement was duly entered between the parties, it requires no further prove.

In the light of the above, the submission of learned counsel to the defendant in paragraph 37 to 39 of his final written address is of no moment.

It is also not in doubt that the Defendant terminated the contract and duly communicated same to the Claimant vide a letter dated 17/10/2018. This fact was admitted by the DW1 in paragraph 15 of his witness statement on oath. Again the facts of termination of the contract need not be proved.

It is also not in doubt that the Claimant was paid 15% of the stated contract sum at the time of the award. This fact was admitted by the PW1 under cross-examination where he stated as follows:

"We were paid 15% mobilization fees"

The PW1 further stated that valuation of work done by the Claimant was made and communicated by a letter dated 13/3/14 – Exhibit K and Exhibit L dated 17/3/2014 wherein the Claimant admitted that the value of work done by its was the sum of N12,618,957.75k (Twelve Million, Six Hundred and Eighteen Thousand, Nine Hundred and Fifty Seven Naira, Seventy Five Kobo) was paid to the Claimant by the Defendant. See also paragraph 15© of the Claimant's statement of claim.

It is instructive to note that the afore-mentioned sum of money is the valuation of work done by the Claimant as stated in Exhibit K dated 13/3/2014 which sum of N12,618,075.75k is also an additional payment to the 15% of the contract sum whose receipt the Claimant also admitted.

I am of the considered view that Exhibit K dated 13/3/2014 and Exhibit L dated 17/3/2014 is an accord between the Claimant and the Defendant; whilst the payment of the agreed sum of N12,618,975.75k whose receipt the Claimant also admitted is the satisfaction of that accord in line with the agreement of both Claimant and the Defendant, which varied or set-aside any legal order binding upon both parties sequel to the letter of award of contract vide Exhibit A and B. See the case of SHELL PETROLEUM DEV. CO OF NIG. v FED. BOARD OF INLAND REVENUE (Supra).

In the light of the above, I hold the considered view that the payment made by the Defendant, sequel to the accord by the Claimant and the Defendant vide Exhibit K and L extinguished any claims which the Claimant may have against the Defendant, I so hold.

As stated earlier, the Claimant admitted that the Defendant paid it the sum of N12,618,975.75k. See paragraph 15© of the statement of claim being the valuation of the work done by the Claimant. Also 15% of the contract sum of N75,436,233.50k which is N11,315,435.025k was also paid to the Claimant. From simple calculation, the Claimant was paid a total sum of N23,934,411.00 pursuant to the contract in issue.

Now as rightly submitted by both counsel in their written addresses that anticipated profit may or may not be earned in future; hence the law requires that such claim must be pleaded with particulars and strictly proved. See ACME BUILDERS LTD v KADUNA STATE WATER BOARD & 2 ORS (Supra) cited by counsel on both sides.

From the record of this court no evidence was adduced by the Claimant about how he would have earned this sum of N21,986,046.51k.

Accordingly I hold that this claim falls in the realm of speculation, which is not allowed in law. See AIR LIQUID NIG PLC v NNAM (2011) 9 NWLR Pt 1251 Pg 61 at 81 Paras C – D.

It is also instructive to note that the expert witness PW2 never tendered the Bill of Quantities he prepared for the court to be well informed on how he arrived at the profit margin factor of 1.53.

In the light of the above, I hold the considered view that the Claimant have failed to proffer credible evidence to be entitled to Relief a, b and c of paragraph 15 of his statement of claim.

It is also not in doubt that Relief d and e has its foundation on the principal relief. The Claimant having failed to prove the principal relief, these reliefs must also fail.

Accordingly, I hold the firm view that there is no credible or sufficient evidence adduced before the court to entitle the Claimant to the judgment of this court in its favour. This case is hereby dismissed.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
10/03/2020