**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT APO ABUJA**

**ON 31ST DAY OF JANUARY, 2020**

**BEFORE HIS LORDSHIP HON. JUSTICE CHIZOBA N. OJI**

**PRESIDING JUDGE**

**SUIT NO: FCT/HC/CV/1532/16**

**BETWEEN:**

**EXTREME ENGINEERING NIG. LTD ……. PLAINTIFF**

**AND**

**ENERGY COMMISSION OF NIGERIA …….. DEFENDANT**

**PARTIES ABSENT**
**CHRIS OHENE ESQ. FOR THE PLAINTIFF**
**CHARLES JONAH ESQ. FOR THE DEFENDANT**

# JUDGMENT

The Plaintiff commenced this suit under the undefended list by a writ of summons filed on 20thApril 2016. Upon the filing of the Defendant's notice of intention to defend and affidavit, the court entered judgment in part for the Plaintiff and transferred the remainder of the claim to the general cause list and parties were ordered to file their pleadings.

By paragraphs 10 (i) to (iv) of its statement of claim filed on 18th January, 2017, deemed duly filed and served on 25th May 2017, the Plaintiff claims against the Defendant as follows:

"(i) AN ORDER directing the Defendant to pay the Plaintiff the sum of N4,960,000, (Four Million, Nine Hundred and Sixty Thousand Naira) only being contract sum for the establishment of solar powered borehole at NTAN Cross River State.

(ii) AN ORDER directing the Defendant to pay the Plaintiff interest at the rate of 10% from date of judgment till the judgment sum is liquidated.

(iii) Cost of this suit in the sum of Five Hundred Thousand Naira only

(iv) And such further or other orders as the Honourable Court may deem fit to make in the circumstance of this suit".

On 14th June 2017, the Defendant filed her statement of defence and witness statement on oath.

Parties attempted out of court settlement which failed, after several adjournments. Consequently the Plaintiff opened her case on 25th June 2018 with her sole witness, PW1 Dr Ekpe Phillips Uche, the manager of the Plaintiff. He adopted his witness statement on oath sworn on 18th January, 2017 and tendered the following documents in evidence.

- Original letter of award of contract dated 5th November 2012 – Exhibit P1
- Acknowledged photocopy of acceptance of Contract award dated November, 9th 2012 – Exhibit P2
- Acknowledged original copy of letter of notification of completion of contract award dated December 3rd 2012 – Exhibit P3.
- Acknowledged photocopy of request for certificate of completion dated February, 19th 2013, - Exhibit P4

According to PW1, the Plaintiff was awarded a contract by the Defendant for the establishment of solar powered borehole at NTAN, Cross River State at the contract sum of N4,960,000 (Four Million, Nine Hundred and Sixty Thousand Naira) on 5th November 2012 vide – Exhibit P1.

The Plaintiff accepted the contract vide Exhibit P2 dated 9th November 2012.

The Plaintiff executed the contract according to specification and wrote a letter of completion to the Defendant vide Exhibit P3 dated 3rd December 2012; and the Plaintiff requested for a certificate of completion vide Exhibit P4 dated 19th February 2013.

The said certificate of completion was not given to the Plaintiff despite repeated demands by the Plaintiff, neither was the contract sum of N4,960,000 paid to the Plaintiff, hence the Plaintiff's claims against the Defendant.

In cross examination, the contract agreement between the parties was tendered by Mr Eniwaye for the defence through PW1 and admitted in evidence as Exhibit D1.

The Defendant elected to rest her case on that of the Plaintiff, therefore she did not call any witness in her defence.

Mr Chris Ohene learned counsel for the Plaintiff filed his final written address on 10th November 2019.

Therein he raised two issues for the court's determination thus;

"1. Whether the Plaintiff is entitled to the relief or judgment in his favour

2. Whether in the circumstances of this case, it can be inferred that there is any dispute between the parties which ought to be referred to arbitration".

The Defendant adopted the same issues in her final written address of 23rd January, 2019, argued by Mr Charles Jonah.

On issue No. 1, Mr Chris Ohene for the Plaintiff submitted that the Plaintiff is entitled to the reliefs sought, the Plaintiff having tendered Exhibit P1, the letter of award of contract and Exhibit P2 the acceptance of same, and having avowed that he executed and completed the contract and communicated the completion to the Defendant, but the Defendant despite repeated demands, refused to pay him.

Learned counsel submitted that the Defendant made a general traverse in paragraph 2 of their statement of defence and in paragraph 3 thereof, they admitted they awarded the said contract to the Plaintiff.

That the Defendant also admitted that the parties entered into an agreement and that a mobilisation fee of N744,000 being 15% of the contract sum was paid to the Plaintiff.

And in paragraph 6 of the statement of defence the Defendant averred that the Defendant is entitled to deduct certain stated percentages of the contract sums, therefore the Plaintiff is not entitled to the total contract sum of N4,960,000.

Learned counsel argued that the Defendant has failed to adduce any material evidence to prove its assertion or to disprove the Plaintiff's claim, hence the evidential burden on the Defendant has not been discharged.

Learned counsel urged that the Defendant led no evidence to prove that the Plaintiff was paid the 15% mobilisation fee agreed by parties, therefore the court should find that none was paid to the Plaintiff.

He urged the court to hold that the Defendant is only entitled to the statutory tax deduction of 5% value added tax and 5% withholding tax from the contract sum.

The court was further urged to find that the Defendant's averment that the Plaintiff was not issued a certificate of completion because the contract was never completed to be an afterthought as the Defendant never brought any notice of breach/complaint to the Plaintiff since 2012 when the contract was executed and duly completed. Parties he urged, are bound by their agreement, and the court cannot legally read into the agreement terms which parties have not agreed upon. In the absence of fraud or mistake he urged the court to uphold the parties' agreement.

Finally, learned counsel submitted that what is admitted, needs no proof. He urged the court to find that the defence by paragraph 9 of their statement of defence admitted their indebtedness to the Plaintiff, therefore that issue one be resolved in Plaintiff's favour. Reliance was placed on the following cases:
**JABRE V JABRE (1999) 3 NWLR PART 596 6060 AT 621; ABDULLAHI BABA V NIGERIA CIVIL AVIATION, ZARIA AND ANOTHER (1991) 5 NWLR (PART 192) 388; M.V CAROLINE MAERSIL V NOKOY INVEST LTD (2007) 7 NWLR (PART 666) 581 AT 605; AGBANELO (TRADING UNDER THE NAME AND STYLE OF EPACO NIGERIA CO) V U.B.N (2000) 7 NWLR (PART 666) 534 AT 556 – 557.**

On issue No 1, Mr Charles Jonah, for the Defendant, conceded that parties are bound by their agreement Exhibit P1 & D1, which the Plaintiff admitted vide Exhibit P2.

Learned counsel however contended that the Plaintiff failed to lead evidence as to the exact amount it was being owed after all the deductions agreed to in Exhibits P1 & D1 have been made. He maintained that it is not the duty of the court to speculate on the amount due to the Plaintiff, or to calculate the amount due to the Plaintiff. Therefore the court was urged to hold that the Plaintiff has failed to prove its case and to dismiss same.

It was further submitted that there was no evidence led to support the Plaintiff's claims of N500,000 as costs of the suit. The claim therefore, should be dismissed. See **OMOREGBE V LAWANI (1980) 3-4 SC 708, TERAB V LAWAN (1992) 3 NWLR (PART 231) 569 AT 590 OKWEJIMINOR V GBAKEJI (2008) ALL FWLR (PART 409) 405 AT 534** Per Tabai JSC**,** amongst others**.**

On Issue No 2, Mr Chris Ohene for the Plaintiff submitted that there is no dispute between the Plaintiff and the Defendant within the contemplation of Exhibit D1 that calls for arbitration.

That in the instant case, the Defendant has never disputed that the said contract contained in Exhibit D1 was executed in line with the terms of the offer or award letter, that the Plaintiff made series of demands on the Defendant to issue him a certificate of completion and pay him the contract sum having executed and completed same, which demand the Defendant neglected and refused to pay.

Learned counsel submitted that non-payment of the contract sum alone which has been agreed and predetermined in Exhibits B1 & D 1 cannot constitute or be construed as a dispute within the contemplation of the agreement.

The court also will not rewrite an agreement duly entered into between the parties.

Learned counsel further argued that arbitration is not a blanket or shield that will deny a Plaintiff from seeking other legal remedies where obvious injustice has be occasioned on him, and where parties to the suit have taken steps in the proceedings commenced by the Plaintiff, the parties will be deemed to have waived their right to arbitration. See **M.V LUPEX V NOC & S LTD (2013) 15 NWLR PART 844;** S.5 Arbitration and Conciliation Act.

Learned counsel urged that it is incumbent on the Defendant to initiate arbitration if he desired it, and the Defendant having taken procedural steps in this matter is deemed to have waived his right to arbitration. Thus he urged that judgment be entered in the Plaintiff's favour.

For the Defendant it was argued that the dispute arising between the parties is the payment of the alleged contract sum after taking into account deductions agreed upon in paragraphs 2-7 of Exhibit D1. That the Plaintiff having failed to first explore arbitration as agreed in Exhibit D1, the suit is premature as the condition precedent has not been fulfilled and same should be struck out. Counsel placed reliance on **ONWARD ENTERPRISES LIMITED V M.V " MATRIX" & 2 ORS (2010) ALL FWLR (PART 543) RATIO 6**, per Mshelia JCA. Thus he urged the court to find in favour of the Defendant.

I have considered the evidence before me and submissions of learned counsel on both sides.

I shall begin with issue No 2, as the Defendant seeks to challenge the competence of this suit by his submissions thereon.

"Whether in the circumstances of this case, it can be inferred that there is a dispute between the parties which ought to be referred to arbitration"

Whereas the learned counsel to the Plaintiff has argued that non-payment of the contract sum alone which has been agreed and predetermined cannot constitute or be construed as a dispute between the parties within the contemplation of the agreement that calls for arbitration, on the other hand, the Defendant has argued that the payment of the alleged contract sum is a dispute between the parties and which must first be determined by arbitration in according with the agreement of the parties.

The Plaintiff's case before this court as pleaded in his statement of claim is that it was awarded a contract by the Defendant for the establishment of solar powered borehole at NTAN, Cross River State for N4,960,000. The award letter is Exhibit P1.That the Plaintiff accepted the award vide Exhibit P2.

That it executed the contract in accordance with specifications and informed the Defendant in writing. That upon its demand for certificate of completion, the Defendant refused to issue same. That despite repeated demands, the Defendant has refused and neglected to pay him the contract sum of N4,960,000.

Let me state that I agree with the Defendant that from the facts and circumstances of this case, that there is a dispute between the parties or at least, a claim i.e. the sum claimed by the Plaintiff for work satisfactorily done for which the Defendant has refused/failed to pay. Exhibit D1, which is the agreement of the parties provides in paragraph 21, that "All disputes, differences or claims arising from the interpretation or implementation of the provisions of this agreement which cannot be settled amicably shall be resolved in accordance with the provisions of the Arbitration and Conciliation Act, Cap A18, Laws of the Federal of Nigeria 2004" (Emphasis mine).

In **BCC TROPICAL (NIGERIA) LIMITED V THE GOVERNMENT OF YOBE STATE & ANOR (2011) LPELR – 9230 (CA) AT PAGE 14-15 PARAGRAPH F-D** the Court of Appeal per Uzo Ifeyinwa Ndukwe- Anyanwu JCA stated that;

"A dispute would arise if a claim is made-

(b) Comprising in that claim is an allegation that the other party is liable for some or all that claim.

(c) There is a denial by that other party that it is so liable or a refusal or failure to answer the allegation made.

Accordingly there is a dispute once more unless and until the Defendants admit that the sum is due and payable **HALKI SHIPPING CORPORATION V SCOPE AND OILS LTD (1998) 1 WLR PAGE 726.**

It is not every dispute or difference that can be referred to arbitration. Dispute that can be referred must be justifiable issues which can be tried as a civil matter.

These should include all matters in dispute about real or personal property, disputes as to whether a contract has been breached by either party thereto, or whether one or both parties have been discharged from performance thereof" (Emphasis mine).

In this case the Defendant refused/failed to even answer the Plaintiff's demand for the contract sum.

The question then is, whether the said dispute/claim for payment for a contract well executed ought to be referred first to arbitration, before resorting to this court.

It has been argued for the Plaintiff that reference to arbitration is optional; conversely, the Defendant has argued that it is mandatory as Exhibit D1 employs the word "shall" in its arbitration clause.

Upon a calm reading of the Arbitration clause in Exhibit D1, I am of the view that it is not a mandatory provision. Notwithstanding that "shall" was employed. It is optional and does not oust the jurisdiction of the court.

The arbitration clause in Exhibit D1 is not of the **"Scott V Avery"** kind which is mandatory and which parties must resort to before approaching the court.

In **CITY ENGINEERING NIG LTD V FEDERAL HOUSING AUTHORITY (1997) LPELR – 868 (SC) PAGE 23 PARAGRAPHS B-F** Ogundare JSC had this to say on arbitration clauses.

"As the learned counsel to the Plaintiff/Appellant has rightly pointed out, arbitration clauses, speaking generally, fall into two classes. One class is where the provision for arbitration is a mere matter of procedure for ascertaining the rights of the parties with nothing in it to exclude a right of action on the contract itself, but leaving it to the party against whom an action maybe brought to apply to the discretionary power of the court to stay proceedings in the action in order that the parties may resort to that procedure which they have agreed. The other class is where arbitration followed by an award is a condition precedent to any other proceedings being taken, any further proceeding, then being, strictly speaking, not upon the original contract but upon the award made under the arbitration clause. Such provisions in an agreement are sometimes termed 'SCOTT V AVERY clauses, so named after the decision in 'SCOTT V AVERY (1856) 5.H.L AS. 81".

In **CITY ENGINEERING**'s case, the Supreme Court considered the following arbitration clause which also employed the word "shall".

" Any dispute or difference arising out of this agreement shall be referred to the arbitration of a person to be mutually agreed upon, or failing agreement, of some person appointed by the President for the time being of the Institution of Consulting Engineers".

The Supreme Court found that it was clearly different from the SCOTT V AVERY clause. In fact, the court found that it belonged to the first class of arbitration clauses.

In such a scenario the parties have an option whether or not to resort to arbitration. S. 4 (1) & (2) & 5 (1) & (2) of the Arbitration and Conciliation Act Cap 19 LFN 1990 provide;

(4) (1) A court before which an action, which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.

(2)Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court

(5) (1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(2) A court to which ain application in made under subsection (1) of his section may, if it is satisfied-

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

(b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings"

In the instant case, the Defendant who seeks to enforce the arbitration clause has not complied with the provisions of the Arbitration and Conciliation Act. He made no application to the court to stay proceedings pending arbitration

nor did he show willingness to proceed to arbitration. Having taken steps in the proceedings he is deemed to have waived his right to arbitration and I so hold.

In conclusion therefore, notwithstanding that I find there is a dispute between the parties, there is nothing to be referred to arbitration as the Defendant has waived his right to arbitration. The Defendant's objection to this suit is therefore dismissed. I hold that the Plaintiff's case is competent before this court.

On issue 1.
Whether Plaintiff is entitled to the relief or judgment in his favour.

As righty submitted by learned counsel on both sides, in the absence of fraud or mistake parties are bound by their agreement.
Exhibit D1 is the contract agreement.

It is the unchallenged evidence of the Plaintiff via PW1, that it duly executed and completed the contract for the establishment of one Solar Powered Borehole at NTAN, Cross River State at the sum of N4, 960, 000 as agreed with the Defendant.

But the Defendant upon completion of same refused to issue the Plaintiff a job completion certificate on demand and refused to pay the contract sum as agreed. He tendered Exhibits P1-P4 in support of his case.

The Defendant in his statement of defence averred in paragraph 8 thereof that:

"The Defendant avers further that the contract awarded to the Plaintiff in paragraph 3 supra was never completed and this was why the Defendant refused to issue the Plaintiff with the certificate of completion".

The Defendant at the close of the Plaintiff's case, called no witnesses, but chose to rest their case on that of the Plaintiff.

Therefore the averment in their statement of defence that the job was never completed is deemed abandoned.

There was equally nothing in their cross examination of PW1 to challenge the Plaintiff's evidence that the contract was executed and completed according to specification. There was no termination of the contract or query of any kind.

The onus on the Plaintiff is therefore discharged on minimal proof. In **FAIRLINE PHARMACEUTICAL INDUSTRY LIMITED & ANOR V TRUST ADJUSTERS NIGERIA LIMITED (2012) LPELR – 20860 (CA) AT PAGE 63 – 64 PARAGRAPHS B-C** per Haruna Simon Tsamani JCA, on the legal implication of a Defendant resting his case on that of the Plaintiff, the learned jurist stated thus:.

"It is the law that where a Defendant does not adduce evidence, as in the instant case, the evidence before the court goes one way leaving the court with no other evidence or set of facts with which to do the measuring of the scale. This is because in a situation where a Defendant leads no evidence in proof of the facts pleaded by him, such pleading is deemed abandoned and the Defendant would be left with nothing with which to present against the Plaintiff. Thus, in a situation where a Defendant abandons his pleading and rests his case on the Plaintiff's evidence, he is deemed in law to have

completely accepted both the pleadings and evidence or the case presented by the Plaintiff.

In such a situation, it may mean that (a) the Defendant is stating that the Plaintiff has not made out any case for the Defendant to controvert or respond to; or (b) He admits the facts of the case as presented by the Plaintiff, or (c) He has a complete legal defence in law in answer to the Plaintiff's case, it seems therefore that a Defendant may adopt the option of resting his case on that of the Plaintiff as a legal strategy. If that strategy succeeds, then his case is enhanced, and he may therefore succeed on that ground, but if he fails, that strategy would have been decimated. See **KOTUN V OLA SEWERE (Supra) at page 430; ADMIN./EXEC; ESTATE OF ABACH V EKE SPIFF (SUPRA) AT page 421 paragraph(as H-E. OSADIM V TAWO (2010) 6 NWLR (Pt 1189) page 155 and ODUWOLE V WEST (2010) 10 NWLR (Part 1203) page 598 at 621**. The standard of proof expected of the Plaintiff in such a situation is a minimal one, as in such a situation there is nothing to put on the other side of the imaginary scale against the evidence proferred by the Plaintiff".
See also **NEWBREED ORGANISATION LTD V ERHOMOSELE (2006) LPELR – 1984 (SC) PAGE 26 PARAGRAPH B-C.**

In FCDA V NAIBI (1990) LPELR 1262-(SC) AT PAGE 18 PARAGRAPH B-C per Nnamani JSC (of blessed memory), the learned jurist stated:
"Pleadings cannot constitute evidence and a Defendant who does not give evidence in support of his pleadings or in challenge of evidence of the Plaintiff is deemed to have accepted the facts adduced by the Plaintiff notwithstanding his general traverse. See **HUTCHFUL V BINEY (1971), 1 ALL NLR 268; UDC V LADIPO (1971) 1 ALL NLR 102; 1.0.0. IMANA V ROBINSON (1979) 3 – 4 SC 1 AT 9 – 10**..."

Having considered the unchallenged, oral and documentary evidence of the Plaintiff, which I find credible, I hold that the Plaintiff has proved its claim that it duly executed and completed the contract in accordance with specification in Exhibit D1 & P1 and is entailed to payment for the contract.
There comes the matter of how much the Plaintiff is entitled to be paid on the said contract.

As I earlier stated, in the absence of fraud or mistake parties are bound by their contract. Exhibit D1 is the contract agreement. It has the same terms as Exhibit P1.

The contract sum is N4, 960, 000 (Four Million, Nine Hundred and Sixty Thousand Naira only. Exhibit D1 provides that the contractor (Plaintiff) shall be paid 15% of the contract sum which is N744, 000 mobilisation fee. The Plaintiff claims include this um. There is no evidence that the said N744, 000 was paid to the Plaintiff by the Defendant.

The Defendant who claimed they paid same abandoned their statement of defence.

I therefore find that the mobilisation fee of N744, 000 was not paid to the Plaintiff by the Defendant, to which the Plaintiff is entitled.

In paragraphs 6 & 7 of Exhibit D1, it provides:
"6. 5% of the total contract sum shall be deducted by the Commission and be paid to the Federal Government as withholding tax, while another 5% shall be deducted and be paid as value Added Tax.

"7. 5% of the total contract sum shall be deducted by the Commission and be utilised for maintenance and evaluation of the contracts at their various locations".

As parties are bound by their contract, the Plaintiff is entitled to the contract sum less 5% Value Added Tax and 5% for maintenance and evaluation.

In paragraph 6 of the statement of defence it is pleaded:
"The Defendant further states that apart from the 15% mobilization fee paid to the Plaintiff the Defendant is also entitled to deduct from the contract sum as follows;

- 5% of the contract sum as retention fee which is N248,000.00
- 5% of the contract sum as commission to be paid to the Federal Government which is N248,000.00
- 5% of the contract sum to be deducted as value Added Tax which is N248,000.00
- 5% of the contract sum of N248, 000. 00 to be deducted and utilised for maintenance and evaluation of the contract at the location".

The learned defence counsel has argued in paragraphs 7.0 to 7.2 of his written address that as the Plaintiff did not lead evidence as to how much exactly it is entitled to, when all these deductions agreed to in Exhibit P1 & D1 are removed, that the court will not speculate or work out the arithmetic for the Plaintiff, therefore the court was urged to hold that the Plaintiff failed to prove its case.

With due respect to learned defence counsel, his argument holds no water, he is relying on technicality and the era of technicality has long gone.

Where a Defendant has by himself admitted by his pleadings that 5% of the contract sum is N248, 000, what more does the Plaintiff need to prove regarding the amount? A fact admitted in pleadings needs no proof. There is no speculation here. See **SABRU MOTORS LTD V RAJAB ENT (NIG LTD) 2002 LPELR 2971 (SC) PAGE 20 PARAGRAPH B. PER OGWUGBU JSC; EKPO V TOYO & ORS 2011 LPELR 4518 CA PER TUR JCA PAGE 13. Paragraph F.**

I therefore hold that the Plaintiff is entitled to judgment in the sum of N4, 960, 000 les 5% withholding tax (N248,000, less 5% value Added Tax (N248,000) less 5% for maintenance and evaluation (N248,000) = N4,960,00 – N744,000 = N4,216,000.

The Defendant is not entitled to withhold 5% as retention for 6 months the contract having been duly executed and completed in accordance with specification since December 2012, more than 6 months now.

I order Defendant to pay the Plaintiff interest at the rate 10% per annum on the judgment sum from today being the date of judgment till the judgment sum is fully liquidated.

I find nothing to justify the Plaintiff's claim of Five Hundred Thousand Naira as costs. The Plaintiff is entitled to normal costs of action. This is a 2016 matter, parties took several adjournments to explore settlement out of court which unfortunately yielded no result. I award cost of N50, 000 in favour of the Plaintiff against the Defendant.

**Hon. Judge**