IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT APO

CLERK: CHARITY

COURT NO. 16

SUIT NO: FCT/HC/CV/3520/12

DATE: 08/05/2020

BETWEEN

STANLEY ORAKPO ESQ …….. PLAINTIFF

AND

ABUJA ENVIRONMENTAL PROTECTION BOARD …. DEFENDANT

JUDGMENT

(DELIVERED BY HON. JUSTICE S. B. BELGORE)

For a start, I must of necessity and deep regret go historical about this case. It was bedevilled from the beginning manifesting series of adjournment for which no one can hardly be blamed.

It is a case we started in 2012, precisely on 26th July ,2012. I intend to be sequential and graphic in my narratives.

DAY1 :- The parties were not in court that was on 26/7/12.

DAY2:- Only the plaintiff was in court. Being a lawyer, he appeared for himself and asked for an adjournment toenable him proceed. The Defendant were absent. This was on 16/1/13.

DAY3:- This was on 11/2/13.The Defendant were absent in court. The Plaintiff by this time had engaged the services of a counsel by name Paul Audu. He

informed the court, that the Defendant had been served with all court processes.

DAY4:- Both parties had legal representation in court . That was on the 6/3/13. On that day, theDefendant's counsel,A.H. Falaki moved a motion on notice for leave to enter appearance, file statement of defence and also statement of witness out of time. There was no objection from the Plaintiff's counsel and it was granted.

DAY 5:- 30/4/13. On this day, the Defendant 's counsel was absent in court but the plaintiff's counsel was in court. Since there was no communication to the court, we proceeded to hearing. PW1 was taken. That was the plaintiff himself. Exhibit 'A' a notice of intention to commence civil action addressed to the Defendant's Director and Exhibit 'B' – a purchase receipt was admitted in evidence. PW1 finished his examination- in- chief on that day. We adjourned for cross examination and fixed 18/6/13 since the Defendant were not in court.

DAY 6:- 18/6/13; Both parties were not in court .

DAY 7:- 25/11/13; the Defendant's counsel A.H.Falaki was present in court but the plaintiff (PW1) was absent. So, no one or witness to be cross examined. We adjourned to 17/3/14.

DAY 8 :- 17/3/14; Both parties were in court and PW1 was cross-examined. we adjourned to 6/5/14 for defence.

DAY 9 :- 6/5/14; the plaintiff was absent in court. The Defendant's counsel who was present in court asked for adjournment because his witness was absent. We adjourned to 30/6/14.

DAY 10:- 30/6/14; Both parties were in court. We took the testimony of DW1- Ismaila Haruna Dankogi under affirmation. He simply adopted his witness statement on Oath and was cross-examined. No Re-examination was conducted. we adjourned to 27/10/14 for address.

DAY 11:- 27/10/14; By this day, the Defendant's counsel who had earlier filed a motion for extension of time within which to file his final address was not in court to move same. We adjourned to 11/12/14 for that purpose.

DAY 12 :- The Defendant's counsel was in court but the plaintiff was absent. The Defendant's counsel moved his application –M/6969/14/ and we adjourned to 26/2/15 to enable the plaintiff's counsel file his own final address as well.

DAY 13:- 26/2/15; Defendant's counsel A.H.Falaki was in court but the plaintiff and his counsel were absent. And by that date, they had not filed their final address. We adjourned to 11/5/15 to enable them do so.

By that 11/5/15, we had general election in this country. Election Petition Tribunal were constituted and I was posted in quick

succession to Kebbi and Anambra and Bayelsa Sates. I resumed back for work in late October,2015. Or April 2016?

We fixed 14/12/16 to enable us proceed with this case.

DAY 14:- 14/12/16; on this date only the plaintiff was in court. TheDefendant was absent. We adjourned to 2/3/17.

Then, another Tribunal assignment. This time Chairman Gubernatorial

Election Petition Tribunal for Ekiti State. We finished the assignment on February 2018?

DAY 15:- 22/2/18; parties were not in court

DAY 16 :- 5/7/18; parties were absent in court.

In 2019, there was another general election in this country. Election Petition Tribunals were again constituted and I was posted to Delta State as Chairman Gubernatorial Election Petition Tribunal! I resumed work in October 2019.

DAY 17- 13/2/20; All the parties were in court and counsel adopted their final written addresses. We adjourned to 31/3/20 for Judgment.

Then came COVID-19 palaver with the forced holiday by the middle of March, 2020. The rest, as some people would say, is now history.

Be all the above as it may, we now move to the substance of this Judgment. The plaintiff claims against the Defendant as follows:

(1)A declaration that the seizure of the plaintiff's Original Sumac. Fireman SPE 800ER generator by the Defendant's agents or worker is wrongful, illegal and unconstitutional.

(2)A declaration that the Defendant has no Authority to seize the plaintiff's generator without first serving a notice on him to abate

whatever nuisance he is accused of causing before the seizure of his generator.

(3)A declaration that theplaintiff's generator not being in use as at the time it was seized at the 3rd floor of the Plaza or any time before then cannot make noise or produce smoke or constitute nuisance that required abatement.

(4)A declaration that in view of the extensive damage done to the plaintiff's generator by the Defendant's agent, the plaintiff is entitled to the cost of the generator as at the current price.

(5)An order on the Defendant to pay the plaintiff the sum of **₦ 200,000**= **being the current cost of the original Sumac** fireman Model SPE 800ER generator seized from him.

(6)The sum of **₦10,000,000=** as general damages for the deprivation of the use of the generator and for the humiliation of the plaintiff.

(7)Cost of the action.

Upon service of the writ of summons on the Defendant, they filed a statement of defence.

The plaintiff testified for himself as PW1 while the Defendant called one witness –Haruna Dan kogi –as DW1.

The evidence of PW1 is to the effect that he was in his chambers on 2/3/12 when two men from the Defendant's office walked in and told him they had a complaint that generators by the tenants in the premises are very noisy, smokyand constitute health hazard. He saidhe told them he does not operate his generator upstairs but downstairs. They (the two men) went away but came back few minutes late and forcefully removed his generator and took it to their office.

On 8/3/2012, he wrote a demand /pre-action notice to the Defendant.

On 28/3/2012,the Defendant returned his generator to him but it was in bad shape, as, according to him, the generator was badly damaged.

Exhibit A and B were tendered in evidence in support of his case.

Exhibit A is the Notice of intention to commence a civil action against the Defendant while Exhibit 'B' is the purchase receipt of the generator.

On their part, the Defendant did not dispute the facts substantially or in material particulars. They agreed they seized the plaintiff's generator upon some complaints referred to them but said they returned same to him after some days.They pleaded that their action was covered by the Act setting up the Board. In effect, they stated orbelieved they did no wrong in the matter.

The Defendant's counsel filed a written address wherein he submitted a sole issue for determination i.e. whether the plaintiff is entitled to the relief sought.

The core of the Defendant's counsel argument is that they are justified to remove the plaintiff's generator in the circumstances of this case. And that the plaintiff has not shown how he arrived at the sum **₦ 200,000** = as the cost of the generator in question.

Relying on **S.6 (1)(c), 12(1)(d) and S.36(1)(a)** of the **Abuja Environmental Protection Board Act, No. 10 of 1997**, the defendant urged the court to refuse the Plaintiff's claim.

No case law authority was cited.

On his part, the plaintiff also submitted one issue for determination, to wit: whether given the state of pleadings and evidence of the parties, the plaintiff is not entitled to judgment as per the reliefs claimed by him.

The written submission is to the effect that condition precedent to enable the Defendant exercised the power of seizure of his generator was not fulfilled. That condition, according to the plaintiff, is the issue of Notice of abatement to him to abate the nuisance. He cited **S.36(1) of AEPB Act** for his argument.

The plaintiff qua counsel also argued that, although, the Defendant claimed they issued him an abatement Notice, the same was not produced in court and there was no evidence of it at all. Failure to produce it raises the presumption in **S.167(d)** of the **Evidence Act**. He wrote at paragraph **4.10 and 4.11 of his address as** follows:

> *"We submit that the duty to produce the abatement Noticewhich the Defendant pleaded that it served on the plaintiff lieswith the Defendant and failure*

*to produce it therefore raises the presumption under **section167(d)** of the Evidence Act.*

In **TSOKWA MOTORS NIG LTD VS AWONIYI (1999) 1 NWLR (PT. 586)199, PER MUHAMMED JCA, it was held"**

*" **T**helaw is that where a party relying on a document in an action fails to produce the document and there is no proper explanation as to his inability to produce the said document, the court may, upon his failure to produce it, presume that the document if produced , would have been unfavourable to that party by invoking Section 149(d) of the Evidence Act now S.167(d) of Evidence Act as amended"*

Paragraph 4.11 reads:

" _ _ _ the Defendant at paragraph 10 of its statement of defence said that it served the required Notice on the plaintiff/all the occupants of Danyadado House and pleaded the said Notice. At paragraph 14 of the Defendants' DW1 witness statement on Oath, he testified also that the abatement notice was duly

served on the plaintiff. This so called abatement Notice was never tendered in evidence by the DW1who is the sole witness to the Defendant and the implication of this failure in line with S.167(d) of the Act and the above cited authorities is that there was no such abatement Notice."

In conclusion, he urged me to grant all the plaintiff's claim by entering judgment in his favour.

For all his arguments, the plaintiff cited the cases of **TSOKWA MOTORS NIG LTD NS AWONIYI(SUPRA); N.A.S. LTD VS U.B.A PLC(2005) ALL FWLR(PT. 284) 275, UGOCHUKWU VS UNIPETROL (NIG.) PLC(2002) FWLR(PT. 108)1433; BUA VS DAUDA(2003) FWLR (PT.172)1892 AND BFI GROUP CORPORATION VS BUREAU OF PUBLIC ENTERPRISES(2013)ALL FWLR(PT. 676) 444.**

Without much ado, it is clear to all of us that there is only one issue for determination in this case.It is"whether the plaintiff is entitled to all the reliefs he is claiming in this court?"

However,before proceeding further, let me quickly set –out the basic facts of this case. They are;

(1)The plaintiff is a legal practitioner who has his office in one of the Plaza in this city of Abuja. His office is situated on the 3rd floor.

(2)The plaintiff has a generator in his office which he uses when the need for it demands.

(3)The DW1 led a team from the Defendant's office on official assignment on the 21st March,2012 to the plaintiff's plaza.

(4)On that 21st March,2012, the DW1 and his team entered the Plaintiff's office on the 3nd Floor and informed him(plaintiff) of a complaint they got that some occupants of the Plaza were using generators that causes nuisance by noise and smoke.

(5)The Plaintiff informed them that he does not use the generators upstairs but down stairs whenever the occasion demands.

(6)The Defendants agent including DW1 left and returned few minutes later to seize the generator.

(7)The Plaintiff was not served any abatement Notice (none was put in evidence) as required by the Abuja Environmental Protection Board Act before the seizure of his generator.

(8) The Plaintiff served a pre action Notice on the Defendant as a result of which his generator was returned to him.

(9)No generator, whether damagedor not was put in evidence.

The 7th fact listed above was hotly disputed. The Defendant claimed they served abatement notice on the Plaintiff. But this claim was not proved. It is my view that the Defendant in order to prove that an Abatement Notice was served mustProducea copy of that Notice in court. This they failed to do. And this is the CRUX OF THIS CASE.

It must be emphasised that once an Environmental Authority such so the Defendant is satisfied that a statutory nuisance exists, it is under a duty to serve an abatement Notice which must require any or all of the following:

(a)The abatement of the nuisance or the prohibition or restriction of its occurrence or re-occurrence.

(b) The execution of works or other necessary steps to comply with the Notice.

A statutory nuisance *interalia*includes smokes emitted from premises, fumes or gases emitted from premises, any dust,steam,smell or other effluvia arising from industrial or business premises etc.

See **S.79(1) of the Environmental Protection Agency Act of 1988**.

Once an abatement Notice is issued, it remains in force indefinitely unless otherwise stated. However, the notice would specify the time within which compliance is required.

Where an individual has been served with an abatement notice, contravention of that notice without reasonable excuse makes that person guilty of a criminal offence. The converse is equally the position in law. Meaning where no Notice is served for abatement, no offence is cognisable and no action is thereby maintainable in court.

See.BOTROSS VS LONDON BOROUGH OF HEMMERSMITH AND FULHAM(1999) EWLR 217.

To give the required notice is a sine qua non to any enforcement step to be taken by health officers. By notice we mean, to bring the offending conduct nor nuisance to a person's knowledge or attention. See **ONONYE VS CHUKWUMA (2005)17 NWLR (PT. 953) 90.**

Flogging this issue further, the condition precedent to the exercise of power seizure is the issuance and service of abatement Notice to a perceived offender. It isonly and only when such a person fails to head the content of the Notice that the power to seize can be invoked.

A condition precedent is that thing that must be done or which must happen in particular case before a person is entitled to act even despite having a *prima facie*right of action. See **IAL316 INC. VS MOBIL OIL(NIG.) PLC(1999)9 NWLR(PT.601).**

In this case the requisite Notice for abatement as required or referred to under Sections 36(1) and 37(1) of Abuja EnvironmentalProtection Board Act were not complied with.

With all the above in mind, it is glaring that with the exception of one or two of the plaintiff's claim, the rest has considerable merit and are therefore grantable.

Let me break them down.

Claim I:- Declaration that the seizure of the plaintiff's original**Sumac Fireman Model SPQ 800 ER generator**is wrongful, illegal and unconditional.

Yes. It is trite and this claim is hereby granted.

Claim II :- **A** declaration that the defendant has no authority to seize the plaintiff's generator without first serving a notice on him to abate whatever nuisance he is accused of causing before the seizure of his generator.

Yes. I agree. This claim is hereby granted.

Claim III :- **A** declaration that the plaintiff's generator not being in use as gat the time it was seized at the 3rd Floor of the plaza or any time before then cannot make noise or produce smoke or constitute nuisance that required abatement.

Yes, this claim is true and therefore granted.

Claim IV :- A declaration that in view of the extensive damage done to the plaintiff's generator by the Defendant's agent, the plaintiff is entitled to the cost of the generator as at the current price**.**

No. This claim is not proved.

No damaged generator was put in evidence. So, this claim is not made out and it is therefore refused.

Claim V:- **An** order on the Defendant to pay to the plaintiff the sum of **₦200,000=** being the current cost of the original **Sumac Fireman Model SPQ 800 ER generator seized** from him. This claim flows from the claim IV. My finding is the same.

This claim is refused.

Claim VI :- The sum of **₦10,000,000=** as general damages for the deprivation of the use of the generator and for the humiliation of the plaintiff.

I agree the plaintiff has suffered sum deprivation or pain for the inability to use his generator as a result of the seizure but the Defendant which I had found to be unlawful. So, this claim for general damages falls due. General damages are damages which the law would assume to have occurred as a result of the injury or loss or harm occasioned to the plaintiff as a result of the unlawful act or conduct of the Defendant. They are the sort of damages that are not open to precise calculation. The law usually presume them to have occurred. **See NIGERIA EXPORT COUNCIL VS BAMBA COMM.LTD(2008) 24 WRN142.**

The question now is what is quantum of damages I should award having regard to circumstances of this case?

The plaintiff's claim is₦10 million. But my own assessment is less. The deprivation only related to the lack of use of the generator. Not that the plaintiff's office was sealed. He was not molested by the agent of the Defendant. I put my assessment at ₦ 1,000,000.

I consequently award a sum of ₦1 million in favour of the plaintiff as general damages against the Defendant.

Claim VII:- Cost of action. This head of claim is not part of our jurisprudence. Apart from that, it is not even proved by evidence. How much was expended in the prosecution of this case was not stated and therefore remained in the realm of conjecture.

I agree, that the courts do give cost at the end of trial in favour of a successful party at the end of trial. Such cost at to defray expenses of filing,transportation e.t.c. But is usually after judgmenthas been delivered. But to make it a separate head of claim as done in this case, is not the allowed practice.

In short, this claim is refused. This case succeeds in part.

……

Suleiman Belgore

(Judge) 8-5-2020.