IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS MONDAY, THE 8TH DAY OF JUNE, 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CV/0987/2018

BETWEEN:

MRS. IFEANYI OMOFUMA ……..CLAIMANT

AND

NIGERIAN POSTAL SERVICE ……DEFENDANT

JUDGMENT

The Plaintiffs' claims against the defendant as endorsed on the writ of summons and statement of claim dated 20th February, 2018 are as follows:

i. **A Declaration that there was a contractual agreement between the Plaintiff and the Defendant when the Plaintiff paid the sum of N118, 573.00 (One Hundred and Eighteen Thousand, Five Hundred and Seventy Three Naira) to Expedited Mail Services (EMS Nigeria), the business arm of the Defendant, for the shipment of the Plaintiff's parcel of clothes to Canada within 5 days.**

ii. **A Declaration that the Defendant breached the contractual agreement between it and the Plaintiff when it delivered the parcel of clothes on 30th November, 2017, instead of 30th October, 2017, without any reasonable excuse whatsoever for the breach.**

iii. **An Order directing the Defendant to pay the sum of N802, 000.00 (Eight Hundred and Two Thousand Naira), being the balance, which was**

forfeited by the Plaintiff to her client, Queen Rita Oransanye, due to the late delivery of the parcel of clothes to her, which delay was caused by the Defendant.

iv. **An Order directing the Defendant to pay the sum of N23, 000, 000.00 (Twenty Three Million Naira) as general damages for the Plaintiff's loss of business, goodwill and patronage.**

v. **An Order directing the Defendant to pay the sum of N4, 000, 000.00 (Four Million Naira) for the psychological distress, trauma and embarrassment that was caused to the Plaintiff as a result of the acts of the Defendant.**

vi. **An Order to pay the cost of this suit.**

vii. **An Order to pay 10% (Ten Percent) interest per annum until the judgment sum is liquidated.**

The defendant filed its defence dated 11th June, 2018 which was regularized by order of court on 28th February, 2019.

At the hearing, plaintiff testified in person and the only witness. She adopted her witness deposition dated 20th February, 2018 and tendered in evidence the following documents. to wit:

1. Receipt of payment issued by EMS Nigeria (Expedited mail service) was admitted as **Exhibit P1.**

2. Guaranty Trust Bank (G.T.B) statement of account of claimant was admitted as **Exhibit P2.**

3. Document titled "EMS Tracking" was admitted as **Exhibit P3.**

4. Document titled "Track DHL Express Shipment" was admitted as **Exhibit P4.**

5. Copy of letter by the law firm of Jude Dimgba & Co. dated 21st November, 2017 was admitted as **Exhibit P5.**

PW1 was then cross-examined by counsel to the defendant and with her evidence, the plaintiff closed her case.

On the part of the defendant, they also called one witness, one Otamere Sunday who testified as DW1. He deposed to a witness statement on oath dated 12th June, 2018 which he adopted at the hearing. A document titled "Delivery Progress with tracking No. EE329204357NG" was admitted as **Exhibit D1**. He was duly cross-examined and with his evidence, the defendant close its case.

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

The Defendants final address is dated 23rd December, 2019. In the address two (2) issues were raised as arising for determination as follows:

1. **Whether the acceptance, postage and delivery of an item constitute a valid contract or creates a legal relationship between the claimant and the defendant in the circumstance of this case.**

2. **Whether the claimant is entitled to any claim where the defendant has discharged its statutory duty by delivering the parcel to the addressee intact and in good condition without any comment/complain at the office of destination.**

On the part of the plaintiff, her final address is dated 13th January, 2020 and five (5) issues were raised as arising for determination as follows:

i. **Whether the witness statement on oath of Oke Otamere Sunday for the Defendant is valid and competent, having not been sworn before a Commissioner for Oath.**

ii. **Whether the Defendant filed any competent pleading to the claimant's statement of claim.**

iii. **Whether in the light of the evidence before this Honourable Court there was a contract between the claimant and the Defendant.**

iv. **Whether the Defendant breached the contract between it and the claimant.**

v. **Whether in the light of the evidence before this Honourable Court, the claimant is entitled to the reliefs claimed.**

The defendant filed a reply on points of law dated 7th February, 2020 in response to the claimants final address.

I have set out above the issues as distilled by parties as arising for determination. On a careful consideration of the issues precisely streamlined on the pleadings and the evidence led at trial, the fundamental question raised by the extant dispute is situated on alleged breach of contract and the crux of the dispute appear to me to be whether the plaintiff has on a balance of probability established her case to entitle to her to the reliefs sought? All the other questions on the competence of the pleadings of defendant and the witness statement on oath can be accommodated within the broad question as formulated by court.

I must quickly make the point clear that it is now settled principle of general application that whatever course the pleadings take, an examination of them at the close of pleadings and trial should show precisely what are the issues between parties upon which they must prepare and present their cases and which remain to be resolved by court. Anything or issue outside the template of the pleadings will have only peripheral significance, if any at all. In **Overseas Construction Ltd V. Creek Enterprises Ltd & Anor (1985)3 N.W.L.R (pt13)407 at 418,** the Supreme Court instructively stated as follows:

"By and Large, every disputed question of fact is an issue. But in every case there is always the crucial and central issue which if decided in favour of the plaintiff will itself give him the right to the relief he claims subject of course to some other considerations arising from other subsidiary issues. If however the main issue is decided in favour of the defendant, then the plaintiff's case collapses and the defendant wins."

The issue thus raised by court is not raised in the alternative but cumulatively with the issues raised by parties. See **Sanusi V Amoyegun (1992) 4 NWLR (pt.237) 527**. The issue raised by court as earlier stated conveniently accommodates all the issues raised by parties and it is on the basis of the said issue that I will now proceed to consider the evidence led and resolve the matter. In furtherance of the foregoing, I have carefully read the final written address on both sides of the aisle

and in the course of this Judgment and where necessary, I would be making reference to specific submissions.

ISSUE 1

Whether the plaintiff has established her case on a balance of probability to entitle her to the reliefs sought.

I had at the beginning of this Judgment stated the claims of plaintiff. The cause of action seems to be predicated in contract and the key to the determination of this action lies in determining the nature and parameters of the agreement; the parties involved and whether there has been a breach of the agreement and depending on the answers, what consequences or remedy, if any should follow in the circumstances.

The case of the plaintiff on the pleadings is that she had a contractual agreement with the business arm of the defendant to deliver clothing materials in Canada within a certain time frame but that the said arm of the defendant did not meet up with the terms and thus in breach which accordingly entitled her to the reliefs she is seeking from court.

On the part of the defendant, there case is that the relationship of defendant with plaintiff is statutory and not contractual and that it fulfilled its obligations by delivering the material at the destination in Canada. It is therefore to the pleadings which has streamlined the issues in dispute and the evidence that we must now beam a critical search light in resolving these contested assertions. Before doing so, let us address the preliminary points relating to the competence of the statement of defence and the witness deposition of defendant.

I start with the statement of defence. The case of plaintiff here is that the statement of defence filed in this case along with a motion on notice to regularize the process does not show that it was assessed and fees paid and further that it was not dated and signed.

On the other side of the aisle, the case of defendant is that the defence was properly filed in that that they filed a motion on notice to regularize the defence which the court granted. It was further submitted that even if at all there was any defect with the defence, it is a mere irregularity within the purview of **Order 5 Rule 1 (1) of**

the Rules of Court and that any challenge ought to have been filed within a reasonable time and before the party applying has taken any fresh step after becoming aware of the defect as provided for under **Order 5 Rule 2 (1) of the Rules.**

That in this case the defence was regularize in 2018 and it was on the basis of this pleading that the case was contested; that it is too late in the day to challenge the competence of the statement of defence.

Now in this case, it is not in dispute that the defendant did not file there statement of defence within time as provided for by the Rules of Court. An application was thus filed seeking among others an extension of time to file a conditional appearance and the statement of defence and to deem the processes as properly filed and served.

From the face of the application, it was processed at the High Court Registry, a motion number given and the affidavit in support shows that it was deposed before the commissioner for oaths, FCT Judiciary who signed and affixed his official seal. In addition, the stamp of the High Court can be conspicuously seen on the address in support of the application.

I am therefore in no doubt that this application was processed at the **High Court Registry**. There is no counter evidence from any quarters suggesting otherwise. If the Registry elects or chooses not to prescribe fees as required by the Rules of Court and labels the process as "official" whatever this means, it is difficult to situate or lay the blame on the defendant. It is at best a purely administrative lapse for which the Registry staff should be held wholly responsible.

Now I have again perused the defence in the record and it was dated 11th June, 2018 and signed by Ruth Zikachet Kaburuk-Badung (Mrs.) of counsel. The contention that the defence was not signed or dated clearly has no basis. With respect to failure to file a fresh clean copy, it is to be noted that as part of the reliefs sought, there was a deeming prayer and when the application was moved, counsel to the plaintiff clearly informed court that he was not opposing the application and it was duly granted. It therefore appears to me a little belated to now raise this challenge particularly when the case was fought or contested fully by parties on the basis of the said pleadings.

Indeed if there was even any fault with the pleadings, and this as demonstrated has not been precisely established, it is at best an irregularity relating to form within the purview of **Order 5 Rule 1 (2) of the Rules of Court**. Where a party feels compelled to challenge the irregularity, the application by **Order 5 Rule 2 (1)** will only allowed if brought within a reasonable time and before the party applying has taken any fresh steps after becoming aware.

As stated earlier, this application to regularize was granted unopposed as far back as 28th February, 2019. The case was fully contested on the basis of the pleadings; evidence was led on it and witnesses were cross-examined on both sides. It is therefore too late to now raise the extant objection. It is accordingly discountenanced.

Now with respect to the witness deposition of the defendant, the complaint is that it was not signed and sworn before the commission for oaths and thus incompetent and should be struck out. The case of **Erokwu & Anor V Erokwu (2016) LPELR – 41515 CA** was cited.

On the other side, the defendant contends that the witness deposition is valid and competent. That the error in not having the depositions signed and sealed by the commissioner for oaths is simply an error or mistake on the part of the Registry staff and that the consequence of such error should not be visited on the innocent litigant.

Furthermore, it was submitted that this error and the fact that the witness said he deposed to the deposition at the Federal High Court are mere irregularities within the purview of **Order 5 Rule 1 (1) and 2 (2) of the Rules of Court** which is not fatal and which the court can make an order as appropriate to remedy the situation.

Now under the new regime of civil trials, parties in filing their pleadings are expected to accompany the pleadings with certain documents. One of such documents which is relevant here is the witness statement on oath.

In this case, there is clearly a signed and dated witness deposition in the processes filed by the defendant but perusing it shows clearly that the column for the commissioner for oaths to sign and append his seal is conspicuously missing. Indeed it is blank. What then is the legal implication of this apparent failure to

have the deposition signed before the commission of oaths? Indeed what does oath taking entail. In **Erokwu & Anor V. Erokwu (supra)**, the Court of Appeal stated instructively what is involved in the process of oath taking and I will quote them in extenso as follows:

"The concept of oath taking involves:

i. **The deponent making a statement in writing,**
ii. **The document is taken to a Commissioner for oaths or any person duly authorised to take the oath,**
iii. **The Commissioner for Oaths requires the deponent to swear on a holy book particular to the deponent's faith or a mere declaration for a deponent whose faith forbids him to swear.**
iv. **The Commissioner for Oaths then asks the deponent to verify what has been stated,**
v. **The deponent afterwards signs in the presence of the Commissioner for Oaths, who witnesses that the affidavit was sworn in his presence.**

This explains the phrase "Before me" usually signed by the Commissioner for Oaths. Any agreement other than the above amounts to nullity.

The learned trial judge in his wisdom held at page 348 of the Record that the provisions of Section 112 and 113 of the Evidence Act 2011, make the written deposition valid in law because it was sworn before an authorised person. The learned trial judge failed to avail himself of Section 117 (4) of the Evidence Act, 2011. Section 117 (4) of the Evidence Act is clear on this,

It provides as follows:

"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"

When a deponent swears on oath, he signs in the presence of the Commissioner for Oaths, who endorses the document authenticating the signature of the deponent. Signature signed outside the presence of the Commissioner for Oaths falls short of the requirement of the statute and such

document purported to be sworn before the Commissioner for Oaths is not legally acceptable in Court."

In real terms, when a deponent swears to an oath, he or she signs in the presence of the commissioner for oaths, who endorses the document authenticating the signature of the deponent. I am in no doubt that if the deponent in this case was present, the signing of the deposition and the swearing of the oath would have been carried or done in the presence of the commissioner for oaths who would automatically then endorse the signature and fulfill all necessary formalities. It is where the deponent is not available, that the possibility of lack of endorsement may arise because the presence of the deponent is critical for purposes of authentication by the commissioner for oaths.

The argument that the failure to endorse is that of the Registry is one that certainly does not fly in the circumstances. The provision of **Order 5 Rules 1 (1) and 2 (1)** will not be helpful here. If the deponent was present, there will be no reason for the authentication not to be carried out because the deponent will be "Before" the Commissioner for Oaths. A deposition signed outside the presence of the commissioner for oaths as in this case clearly falls short of the requirement of the statute and such document purported to be sworn before the commissioner for oaths would lack legal validity and will be discountenanced. See **Erokwu & Anor V Erokwu (2016) LPELR – 41515 CA; Chibubem V Ekenna & 12 ors (2008) LPELR – 3913; All FWLR (pt.455) 1692.**

The court therefore considers it imperative to sound a note of warning to counsel who indulge litigants by not impressing on them on the need to be available to go through the streamlined process of oath taking before the Commissioner for Oaths before signing their deposition(s). As shown above, signing a deposition outside the presence of the Commissioner for Oaths undermines or compromises the deposition and is fatal. I say no more.

The witness statement of DW1 shall accordingly be discountenanced in the circumstances. The implication here is that the statement of defence in this case is bereft of any evidence to support the averments contained therein. In **N.I.M.V Ltd V F.B.N Plc (2009)16 N.W.L.R (pt.1167)411at 437 D.E**. the Court of Appeal stated thus:

"Pleaded facts on which no evidence was adduced in support are deemed abandoned. Pleadings are the body and soul of any case in a skeleton form and are built and solidified by the evidence in support thereof. They are never regarded as evidence themselves and if not supported by evidence are deemed abandoned."

Having determined these preliminary points, let us now go to the substance and or merits of the case. It is however imperative to state that notwithstanding the fact that the witness deposition of defendant would not be available for consideration in this case, it is critical to underscore the point that the core **Reliefs (1) and (2)** on which the other reliefs of plaintiff are predicated are **Declaratory Reliefs** which must be established by cogent and credible evidence presented by the plaintiff without relying, as it were, on the case or position made out by the defendant. On the authorities, declarations are in the nature of special claims or reliefs to which the ordinary rules of pleadings particularly on admissions have no application. Indeed it would be futile when Declaratory reliefs are sought to seek refuge on the proposition that there were admissions by the adversary on the pleadings. The authorities on this principle are legion. I will refer to a few.

In **Vincent Bello V. Magnus Eweka (1981)1 SC 101 at 182,** the Supreme Court stated aptly thus:

"It is true as was contended before us by the appellants counsel that the rules of court and evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence not by admission in the pleading of the defendant that he is entitled to the declaration."

The law is thus established that to obtain a declaratory relief as to a right, there has to be credible evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon the state of the pleadings or by admissions therein.

In **Helzgar V. Department of Health and Social Welfare (1977)3 AII ER 444 at 451; Megarry V.C** eloquently stated as follows:

"The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what, it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument. That is quite plain."

I may also refer to the observations of Nnamani J.S.C of blessed memory in **Sorungbe V. Omotunwase (1988)3 N.S.C.C (vol.10)252 at 262 (1988)5 N.W.L.R (pt.92)90** as follows:

"The court of Appeal relied on the decision of this court in Lewis & Peat (N.R.I.) Ltd V. Akhimien (1976)7 SC 157 to the effect that an averment which is not expressly traversed is deemed to be admitted. Admittedly, one does not need to prove that which is admitted by the other side, but in a case such as one for declaration of title where the onus is clearly on the plaintiff to lead such strong and positive evidence to establish his case for such a declaration, an evasive averment...does not remove the burden on Plaintiff. See also Eke V. Okwaranyia (2001)12 N.W.L.R (pt.726)181; Akaniwo V. Nsirim (2008)9 N.W.L.R (pt.1093)439; Maja V. Samouris (2002)7 N.W.L.R (pt.765)78 at 100-101."

The point from the above authorities is simply that declarations are not made because of the stance or position of parties in their pleadings but on proof by credible and convincing evidence at the hearing.

Now as stated earlier, this case of plaintiff is rooted in contract. It may be convenient to start by defining what a contract is. Now generally in law, a contract is an agreement between two or more parties which creates reciprocal legal obligations to do or not to do a particular thing. To bring a contract to fruition where parties to the contract confer rights and liabilities on themselves, there must be mutual consent and usually this finds expression in the twin principles of offer and acceptance. The offer is the expression of readiness to contract on terms as expressed by the offeror and which if accepted by offeree gives rise to a binding contract.

It should be pointed out clearly that the offer itself is not the contract in law but the taking of preliminary steps that may or may not ultimately crystallize into a

contract where the parties eventually become ad-idem and where the offeree signifies a clear and unequivocal intention to accept the offer. See **Okubule Vs Oyegbola (1990)4 N.W.L.R (pt. 147) 723.**

Putting it more succinctly, the basic elements in the formation of a contract are:

1. The parties must have reached agreement (offer and acceptance)
2. They must intend to be legally bound, that is an intention to create legal relation.
3. The parties must have provided valuable consideration.
4. The parties must have legal capacity to contract.

See Alfotrim Ltd Vs A.G Fed (1996)9 NWLR (pt.475) 634 SC; Royal Petroleum Co. Ltd. Vs FBN Ltd (1997)6 NWLR (pt.570) 584: UBA Vs. Ozigi (1991)2 NWLR (pt.570)677.

Having stated briefly what a contract entails in law, let me equally restate some settled principles that guides a court in the process of evaluation of evidence. It is now settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. **Section 131(1) Evidence Act.** By the provision of **Section 132 Evidence Act**, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations.

1. The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;

2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act.** It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

Now for me, a key starting point as stated earlier is to situate precisely who the parties are to the contract before situating the terms and the alleged breach.

In this case, the pleadings of parties provides a pivotal basis to situate the parties subject of this contract. In the following paragraphs, the plaintiff averred thus:

1. **The Plaintiff is a business woman and Managing Director of Apparel Craft Limited, whose address is Flat 6, Block 10, Nigerian Customs Quarter, Utako, Abuja, within the jurisdiction of the Honourable Court.**

2. **The Defendant is the national carrier of all classes of mail items, parcels and aerogramme for delivery both within and outside Nigeria, and Expedited Mail Services (EMF Nigeria is the business) is the business arm of the Defendant with the responsibility for effective and efficient**

collection, conveyance and delivery of time sensitive correspondence, documents or merchandise both locally and internationally. Expedited Mail Services is also known as EMS Nigeria.

3. **The Plaintiff avers that on 23rd on October, 2017, she processed the delivery of a parcel of clothes at the Garki, Abuja office of Expedited Mail Service (EMS Nigeria), an arm of the Defendant, to Canada.**

4. **The Plaintiff avers that she was informed by Expedited Mail Services (EMS Nigeria), an arm of the Defendant, that the cost for regular delivery of her parcel of clothes to Canada was N68, 000.00 (Sixty-Eight Thousand Naira).**

The above paragraphs clearly and unambiguously projects the foundation of the case of plaintiff and who she entered into the contract or relationship for delivery of a parcel of cloths in Canada.

By **paragraph 2** above and indeed the evidence of PW1, vide paragraph 2, the defendant sued in this case is described as **"the national carrier of all classes of mail items, parcels and aerogramme for delivery within and outside Nigeria"** and that **"Expedited Mail Services (EMS Nigeria)" is the business arm of defendant** with the responsibility for effective and efficient collection, conveyance and delivery of time sensitive correspondence, documents or merchandise both locally and internationally. Expedited Mail Service is also known as EMS Nigeria.

The above pleadings and evidence unequivocally recognises the defendant and its "Business Arm", which is known as **EMS Nigeria**.

There is nothing in the pleadings or evidence denoting the precise relationship between the defendant and EMS Nigeria beyond the above assertion that it is its business arm. There is no doubt **EMS Nigeria** was established to carry out certain responsibilities but is **EMS Nigeria a registered Limited Liability Company** or a **business name**? What is its legal status? Who are the members and or directors and what is the share holding structure? Who owns EMS Nigeria? There is nothing on the pleadings or evidence on these points and the court cannot speculate.

Indeed there is nothing on the evidence showing how EMS Nigeria is a business arm of Defendant and the court cannot again speculate or begin a futile exercise of guesswork in determining its relationship with defendant. If it is a business arm, there should be something in evidence showing or denoting this relationship. It is settled law that facts deposed to in pleadings must be substantiated and proved by evidence, in the absence of which the averments are deemed abandoned. See **Aregbesola V Oyinlola (2011) 9 NWLR (pt.1253) 458 at 594 A-B.**

The point perhaps to underscore is that pleadings, however strong and convincing the averments may be, without evidence in proof thereof, go to no issue. Through pleadings, people know exactly the points which are in dispute with the other. Evidence must then be led to prove the facts relied on by the party or to sustain the allegations raised in pleadings. See **Union Bank Plc V Astra Builders (W/A) Ltd (2010) 5 NWLR (pt.1186) 1 at 27 F-G.** Averments in pleadings are therefore not evidence. There should be no confusion or doubt about this position. The legal position is very well settled that even if the averments were duly pleaded, it would have been deemed to be abandoned, there being no evidence led to prove such averment(s).

The point to reiterate is that the **Declaratory Reliefs** sought by plaintiff cannot simply be granted as a matter of course. It is not a matter of guess work or conjecture. it is not granted on admission by the defendant or failure of defendant to defend the action. It has to be proved or established by cogent evidence.

Now from the evidence, the relationship plaintiff or PW1 had for the processing of the delivery of a parcel of clothes was with **EMS Nigeria**; the copy of the receipt of payment vide Exhibit P1 was issued by **EMS Nigeria**. I have carefully gone through this receipt Exhibit P1 and there is nothing to indicate that EMS Nigeria is a business arm of the defendant as described. This document discloses no link or relationship with defendant. There is no mention of defendant on this receipt or even on the EMS Nigeria tracking document tendered as **Exhibit P3**. Indeed even when counsel to the plaintiff wrote the letter of demand vide **Exhibit P5**, dated 23rd November, 2017, it was addressed to the **"The General Manager EMS Nigeria…"** suggesting that EMS Nigeria has its own management body incharge of its operations as distinct from the defendant on record. The letter or Exhibit P5 then explains clearly the relationship plaintiff had with EMS Nigeria (not

defendant) and how it did not live up to its commitments under the agreement and then certain demands were made from EMS Nigeria as contained in the said Exhibit P5. This letter of counsel did not make mention of defendant and did not make any allusion to it in the trajectory of the narrative of the complaint encapsulated in Exhibit P5.

Now if on the pleadings and evidence **EMS Nigeria** is the **"business arm"** of defendant with responsibility **"for effective and efficient conveyance and delivery of time sensitive correspondence, documents or merchandise both locally and internationally"** then it would appear to me that such a body which carries out such extensive courier services both in Nigeria and Internationally and which in the context of this case had a precisely defined relationship with plaintiff is party or person whose presence before the court as a defendant will be necessary in order to enable the court to effectively and completely adjudicate or settle all the questions involved in this case. Put in another way, EMS Nigeria appears to me in the context of the ascertained facts relating to a contractual relationship allegedly breached to be a party whose presence is critical to allow for the questions raised by this proceedings to be fairly and properly settled. See **Anyanwoko V. Okoye (2010) 5 NWLR (pt.1188) 497 at 519-520 H-B; O.K. Contact Point V. Progress Bank (1999) 5 NWLR (pt.604) 631 at 634 A-B.**

Now let me make the point clearer. **EMS Nigeria** as stated earlier may have been described as defendants business arm but this does not mean that in law, they are one and the same thing. There is absolutely nothing in the entire **NIPOST Act 2014** allowing for such a proposition or conclusion. The point to underscore is that Government or its parastatal or agencies may be shareholders in a company, even if majority shareholders, but such company is in law a distinct entity from such government parastatal or agency and its operations are subject to and guided by the Companies and Allied Matters Act.

Section 43 (1) of NIPOST Act reinforces this position and provides as follows:

1. **Subject to subsection (2) of this section, no person shall operate a courier service in Nigeria unless the person:**
   a. **is registered as a company under Companies and Allied Matters Act; and**

b. is licenced as a courier service operator under the provisions of this part of the Act.

EMS Nigeria clearly engages or offers courier service to customers and that largely appears to be its forte. For EMS Nigeria to operate as a courier service within the confines of the law or NIPOST Act, it must be registered as a company pursuant to the **provisions of CAMA**. In this case, as stated severally the status of EMS Nigeria was not precisely defined but there is no dispute that on the materials, the contractual/relationship to deliver clothing materials in Canada was with **EMS Nigeria** and not defendant. In the circumstances, it is difficult to situate legally how, defendant can be liable for the actions of commission on omission of its business arm EMS Nigeria.

It is therefore difficult by the confluence of the facts highlighted in this case to situate a legally binding contract in the present situation. The question of whether or not parties have agreed to confer rights and impose liabilities on themselves cannot be a matter for speculation or guess work or even the address of counsel no matter how beautifully written and articulated. That question is one of whether the mutual assent between them which must be outwardly manifested can be situated within the evidence. Indeed the test of existence of mutuality is objective and where there is such mutuality, the parties are then said to be *adidem.* In the absence of mutuality, then there is no consensus *adidem* and therefore any claim or pretention to the existence of a contract in such circumstances is compromised. See **Bilante Int Ltd. V NDIC (2011) 15 NWLR (pt.1270)407 at 423 C-F.**

Flowing from the above and as a logical corollary, the point must be underscored that on the evidence of PW1 herself and on the basis of **Exhibits P1 to P5,** there is no template to situate an enforceable contract entered into between Plaintiff and defendant on record.

In **AG Rivers State V. Akwa Ibom State (2011)8 N.W.L.R (pt.1248)3 at 49, Katsina Alu C.J.N (of blessed memory)** stated as follows:

"It is the duty of the trial Court to determine whether there is a binding contract between parties and this is done by considering the evidence led, the documentary evidence tendered and accepted by the court and the oral

testimony in line with pleaded facts. The terms of a written contract on the other hand are easily ascertained from the written agreement. The traditional view is to look for offer, acceptance and consideration. In the absence of any of them, there is no valid contract. Although that is not always the case. Valid contracts can exist in the absence of offer, acceptance and consideration such as in settlement contracts. The overriding consideration in determining if there is a binding contract between the parties is to see whether there was a meeting of the minds between the parties, that is, consensus *ad-idem*. In all cases of contracts, there must be consensus *ad-idem*.

The point flowing from the above decision is the critical role of evidence as a fundamental basis for any decision relating to the existence and the precise parameters and application of any relationship. The evidence on record unequivocally show no contractual relationship between plaintiff and defendant and this is fatal, unfortunately for plaintiff.

Even if breach of contract was established here, it is well settled principle that the court cannot give a Judgment against a person who will be affected by its decision if such person is not made a party or has no opportunity of defending the suit. The court has no jurisdiction to decide the fate of a party on a matter concerning him, when such party or person is not made a party to the action. See **Babatola V. Aladejana (2001) 12 NWLR (pt.728) 597 at 615 C-D.**

The argument may be made that **EMS Nigeria** is an agent of the defendant but this was not denoted on the pleadings. There is no power in court to expand the remit of the grievance at this point. In **Adeniran V. Alao (2001)118 N.W.L.R (pt.745)361 at 381 to 382;** the Supreme Court stated thus:

"Parties and the court are bound by the parties' pleadings. Therefore, while parties must keep within them, in the same way but put in other words, the court must not stray away from them to commit itself upon issues not properly before it. In other words, the court itself is as much bound by the pleadings of the parties as they themselves. It is not part of duty or function of the court to enter upon any inquiry into the case before it other than or adjudicate upon specific matters in dispute which the parties themselves have raised by their pleadings. In the instant case, the question of due execution of

Exhibit 1, the deed of conveyance relied on by the appellant, was never an issue on the pleadings of the parties. The trial court and the Court of Appeal were therefore wrong in treating same as an issue in the case. The Court of Appeal lacked the jurisdiction to determine the point of due execution which was not before it."

Let me however still add that the question of Agency, even if it had been availing, cannot be determined in a vacuum. The question of Agency is a function of facts and or evidence elicited and demonstrated at trial. The streamlined forensic evidence properly identified and proved provides the fundamental foundational premise to construe whether Agency was made out.

Perhaps let me just add that a relation of Agency is generally said to exist whenever one person called the **"agent"** has authority to act on behalf of another called **"the principal"** and consents to act. Whether that relationship exists in any situation depends not on the precise terminology employed by parties to describe their relationship but on the true nature of the agreement, or the exact circumstances of the relationship between the alleged principal and agent. See **Niger Progress Ltd V. North East Line Corp (1989) N.W.L.R (pt.107)68; Okwejiminor V. Gbakeji (2008)5 N.W.L.R (pt.1079)172 at 223-224 G-A.**

In this case, no such Agency relationship was creditably established beyond at best speculative posturing and the courts do not engage in the exercise of speculating. The case of plaintiff is unfortunately unclear and fluid with respect to the party she had a precise contractual relationship with.

On the whole, the plaintiff unfortunately has on the evidence failed in establishing that she had any kind of legally enforceable contractual relationship with the Defendant on record. In the circumstances, the case of Plaintiff appears fatally compromised. It is impossible to situate a breach of contract when no contract exist or has been positively identified to exist. In **AG Rivers State V. AG Akwa-Ibom State (supra),** the Apex Court stated further as follows:

"There can be no breach of a non-existent contract. Once it has been determined that no enforceable contract exists between the parties or that what took place between the parties did not translate to a contract between them, the foundation of the relief claimed collapse with the absence of a cause

of action, that is, breach of contract. There can be no consequence of a breach of contract when no contract exists. In the instant case, the appellant did not prove any enforceable contract which was binding on the respondent. Therefore, there was no plausible reason for an award of general damages for breach of contract in the circumstance. (Best Nig. Ltd V. Blackwood Hodge (Nig) Ltd. (2011)5 N.W.L.R (pt.1239)95 Referred to) (pp.427, para F-H; 429, para E-G).

The above illuminating pronouncement has sounded the final death kneel of this case. The single issue raised for determination is thus answered in the negative. As a consequence of this holding, all the reliefs sought by Plaintiff are not availing. You cannot put something on nothing and expect it to stand is a well known legal axiom.

The Plaintiffs' case therefore completely fails and it is accordingly dismissed.

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Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. ***C.J. Dimgba, Esq., for the Plaintiff***

2. ***Ruth Zikachat Kaburk-Badung (Mrs.) for the Defendant.***