

**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/0894/2018  
DATE: 20<sup>TH</sup> MAY, 2020**

**BETWEEN:**

**ALHAJI KABIRU BELLO - CLAIMANT**

**AND**

**1, MURTALA MOHAMMED ABUBAKAR  
2. HORTIGRAPH NIGERIA LIMITED - DEFENDANTS**

Parties absent.

Chide Ebere Nwachukwu for the Claimant.

Nnamdi Nwaiwu for the Defendants.

Claimant's Counsel – The matter is for judgment and we are ready to take same.

## **J U D G M E N T**

By a writ of summons and statement of claim dated 9/2/2018, the Claimant claim against the Defendants as follows:

1. The sum of N32,000,000.00 (Thirty Two Million Naira) only being the outstanding sum due from the Defendants to the Claimant in securing the award of the contract for the sum of N277,165,380.45 in Rural Electrification Agency.
2. The sum of N50,000,000.00 being exemplary and punitive damages for willful breach of contract.

3. The sum of N1,000,000.00 being solicitor's fee in prosecuting this case.
4. 10% interest on the judgment sum until the judgment sum is liquidated.

In prove of this claim, the Claimant filed a 17-paragraph statement of claim dated 9/2/2018 and 9-paragraph claimant's reply to the statement of defence. The said reply is dated 9/11/18. The Claimant himself testified as sole witness PW1.

In his evidence-in-chief, he adopted a 20-paragraph witness statement on oath dated 9/2/18 and also a 10-paragraph additional statement on oath dated 9/11/18 as his evidence; the said PW1's statements on oath is accordingly adopted as forming part of this judgment.

The gist of the PW1's evidence is that sometimes in October, 2016, the 1<sup>st</sup> Defendant approached him and sought his assistance in a bidding process for which the 2<sup>nd</sup> Defendant had been disqualified by Rural Electrification Agency (REA) for the rehabilitation and completion of Rural Electrification Scheme in 13 (thirteen) communities in Borno State.

That he and the Defendants mutually agreed on the terms and conditions for which the PW1 will deploy his skill, expertise and experience in convincing the Bureau of Public Procurement (B.P.E.) to reverse its earlier decision disqualifying the 2<sup>nd</sup> Defendant and to ensure that the contract is awarded to the 2<sup>nd</sup> Defendant. That the PW1 wrote letters of complaint and petition on behalf of the 2<sup>nd</sup> Defendant to R.E.A. and B.P.E. respectively

protesting the disqualification of the 2<sup>nd</sup> Defendant from the financial bidding.

It is the evidence of PW1 that the Defendants agreed to pay 15% of the contract sum of N277,165,380.45 to him on the receipt of the letter of award of the contract.

That based on the Claimant's efforts and endeavours, the contract was awarded to the 2<sup>nd</sup> Defendant by R.E.A. for the sum of N277,165,380.45. That what is due to him under the agreement being 15% of the contract sum is N37,000,000.00 of which the Defendants have only paid N5 Million leaving a balance of N32 Million.

That when the Defendants failed and refused to pay the balance of N32 Million, the Claimant retained the services of Musah Kabiru & Co for which the Claimant was charged a fee of N1 Million to take appropriate measures to recover same.

It is the evidence of PW1 that after repeated demands from the Defendants and rather than paying the outstanding sum, the Defendant wrote to the Plaintiff suggesting payment in installments without dates for the payment.

In the cause of PW1's evidence, the following documents were admitted in evidence as exhibits:

1. Letter dated 2/11/16 – Exhibit A.
2. Letter dated 25/11/16 – Exhibit B.
3. Notification of Contract Award dated 27/1/17 – Exhibit C.
4. Memorandum of Understanding dated 7/1/17 – Exhibit D.
5. Letter of Demand dated 25/4/17 and Cash Receipt No. 076 – Exhibits E1 and E2.

6. Letter dated 16/3/2017 – Exhibit F.
7. Letters dated 3/1/2017 and 26/1/2017 – Exhibits G1 and G2 respectively.
8. Zenith Bank Plc Statement of Account and CTC of CAC Form CO2 – Exhibits H and I respectively.
9. Letter dated 10/11/2016 – Exhibit J.

Under cross-examination of PW1 by the Defence Counsel, the PW1 stated that he is not a staff of the 2<sup>nd</sup> Defendant but a business partner. That he has a MOU to show that he was appointed by the Defendants as facilitator. PW1 further stated that he made the letter head in Exhibit B. The defendants did not give him Exhibit B but they gave him the mandate. That he had not being to Borno, the site of the contract because it was not part of his mandate.

The Claimant has stated that he wrote to B.P.E. and they replied him and based on his letter, the contract was awarded to the 2<sup>nd</sup> Defendant.

In Exhibit D (MOU) it is clearly stated that the Claimant will be paid for his work.

No re-examination, PW1 was discharged and that is the case for the Claimant.

In defence of this case, the Defendants filed a 17-paragraph statement of defence dated 25/9/2018. However, in their wisdom the Defendants decided or elected to rest their case on that of the Claimant. The court thereafter ordered parties to file their respective final written address.

The Claimant's Counsel filed a final written address dated 15/1/2020 where counsel distilled a lone issue for determination to wit:

***“Whether the Claimant herein ahs made out his case upon the balance of probabilities and is entitled to the reliefs sought”***

On this singular issue, it is the submission of claimant counsel that a court of law in reaching a decision in a suit before it, is enjoined to take cognizance of all the documents in its file. See AGBO v THE STE (2007) 10 WRN 95 AT 107.

It is submitted that a close look at the evidence before the court particularly Exhibits A – J will move the court to agree that there was a contract between the Claimant and the Defendants on the one hand and a breach in the terms of payment by the Defendants on the other hand.

From the cross-examination of PW1, there is no contradiction in the evidence of the Claimant that there is an agreement between the parties, for employing the skills and competence of the Claimant to secure the award of contract in favour of the Defendants.

It is the contention that the Defendants had the ample opportunity to open their case and/or call their witness(es) so as to produce documents in rebuttal of the Claimant's claim and assertion, but they failed to do so. It is settled law that an unchallenged, uncontroverted and uncontradicted averment stand admitted and will be taken as the true state of affairs. See

GOV. ZAMFARA STATE v GYALANGE (2013) 8 NWLR (Pt 1357) SC 462 at 469 ratio 13.

It is the submission that the Defendant haven failed to call witness has abandoned their pleadings. See case of SALZGITTER STAHL (GmbH) v TUNJI DOSUNMU INDUSTRIAL LTD (2010) 42 (Pt 2) NSCQR 1085 at 1109.

It is submitted that the Claimant has disclosed the wrongful act of the Defendants which in effect gives the Claimant a cause of complaint and the resultant damage from the Defendant's wrongful act. See UWAZURUONYE v GOV. IMO STATE (2013) NWLR Pt 1355 Pg 28 at 56 – 57.

It is further submitted that the evidence of PW1 was never challenged in any material way. Court is urged to adopt and act on it. See ALAGBE v IAM & BAKER (NIG) LTD (2000) 7 NWLR (Pt 663) Pg 33; ARTRA IND. NIG. LTD v THE NIG. BANK FOR COMMERCE & IND. (1988) 2 SCNJ 97 Pg 203. Court is urged to enter judgment for the Claimants.

The Defendants filed a final written address dated 31/1/2020 wherein counsel submitted an issue for determination, to wit:

***“Whether from the pleadings and evidence led at the trial, the Claimant is entitled to the reliefs claimed”***

On this sole issue, it is the submission of counsel, that the reliefs being declaratory in nature, the Claimant must succeed on the strength of his case and not on the weakness of the defence or admission of the Defendants. See Section 131 to 133 of the Evidence Act and the case of UNION BANK OF NIGERIA v PROF. A.O. OZIGI (1994) 3 NWLR (Pt 333) P. 385.

It is the contention that the Claimant's claims were predicated solely on the allegation that he wrote Exhibits A and B. However, under cross-examination, the PW1 admitted he was not the one that signed Exhibit A and B which means he did not write the documents.

It is the contention of the Defendants that the PW1 is not a witness of truth because he stated that he personally wrote Exhibits A & B in paragraph 8 of his witness statement on oath but during cross-examination he made a turnaround to claim otherwise that the 2<sup>nd</sup> Defendant wrote Exhibit A. Court is urged to hold that PW1 is not a witness of truth.

On the issue of the Claimant receiving N5 Million payment from the Defendants, it is submitted that the purported payment of N5 Million was never paid to the Claimant but to Kaybel Investment Limited which is distinct from the Claimant.

On the issue of Exhibits A & B, it is the submission that from the evidence elicited from the PW1 under cross-examination, the Claimant is not the maker of Exhibits A & B respectively. Court is urged to hold that the PW1's evidence are contradictory and there should not be believed. See *MUSA v AHMAD* (2018) LPELR – 44247 (CA).

On the issue of the Memorandum of Understanding (Exhibit D), it is submitted that a Memorandum of Understanding in its nature and usage is non-binding and unenforceable because it only contains details of the preliminary understanding of parties and not the actual contract itself. See the case of *STAR FINANCE & PEROPETY*

LTD & ANOR v NDIC (20) LPELR – 8394 (CA). Court is urged to dismiss this suit.

The Claimant's Counsel filed a Reply on Points of Law dated 11/2/2020 wherein counsel submitted that the PW1 under cross-examination stated that Exhibit A was made by the Defendants but at his (PW1) instance which is furtherance of the MOU Exhibit D. Court is urged to hold that there is no contradiction in the PW1's evidence.

On the issue of the Memorandum of Understanding, it is submitted that the law has always been that the heading of a document as in the instant case, is of no significance or importance. What matters is the content of such document. See OGBONNA v A.G. IMO STATE (1992) 2 SCNJ 26 AT 45.

It is submitted that in the instant case the title memorandum of understanding is immaterial and of no moment in the consideration.

It is further submitted that assuming without conceding that there are contradiction in the evidence of PW1, the contradiction are not material contradiction that would affect the case of the Claimant. See EGESIMB v ONUZURIKE (2002) 9 SCNJ 46; OFFONRY v EMEZI & ORS (2012) LPELR 15356 (CA). Court is urged to grant the reliefs of the Claimant.

I have carefully considered the processes filed, oral and documentary evidence of PW1 and the submission of learned counsel on both sides, I must say that this case poses no complexity.



It is a cardinal principle of law that civil actions are determined on balance of probabilities and preponderance of evidence. See the case of OSUJI v EKEOCHA (2009) 16 NWLR 9Pt 7166) 8.

The Claimant himself testified as PW1 and tendered Exhibits A to J. From Exhibit D (i.e. The Memorandum of Understanding, it is crystal clear that there existed a contractual relationship between the Claimant and the Defendants as the said Exhibit D was duly executed by the parties.

It is the uncontroverted and unchallenged evidence of the PW1 that the Claimant was approached to deploy his skills and knowledge to secure a contract for and on behalf of the 2<sup>nd</sup> Defendant in a Scheme wherein the 2<sup>nd</sup> Defendant had been disqualified. Agreement to this effect was entered and executed by the Claimant and the Defendants via Exhibit D (The Memorandum of Understanding). The Claimant went into action and the 2<sup>nd</sup> Defendant was awarded the contract in which it had been rejected before the Claimant's services was employed. Upon securing the job and in accordance with the agreement, the 2<sup>nd</sup> Defendant paid to the Claimant through the Claimant's company the sum of N5 Million part of the money agreed. However, refused to complete the payment hence this action.

The law is trite: Facts not disputed are taken as admitted and/or established. They accordingly required no further proof. Admitted facts are usually regarded as the best evidence. See the Supreme Court case of FUT, MINNA, NIGER STATE & ORS v OLUTAYO (2017) LPELR – 43827 (SC).

It is also the law that documents when tendered and admitted in court are like words uttered and do speak for themselves. They are more reliable and authentic than words from the vocal cord of man as they are neither transient nor subject to distortion and misinterpretation but remain permanent and indelible through the ages. See AIKI v IDOWU (2006) 9 NWLR (Pt 984) 50.

Thus, documentary evidence, being permanent in form, is more reliable than oral evidence, and it is used as a hanger to test the credibility of oral evidence. See C.D.C. (NIG) LTD v SCOA (NIG) LTD (2007) 6 NWLR (Pt 1030) 300.

In the instant case by the content of Exhibit F a letter that emanated from the Defendants to the Claimants is to my mind an admission to the claim of the Claimant. For want of doubt the said letter Exhibit F is hereunder reproduced:

"The Managing Director,  
Kaybel Investment Limited,  
Kaduna

16<sup>th</sup> March, 2017

Sir,

**PAYMENT SCHEDULE FOR THE FACILITATION OF CONTRACT AWARD FROM RURAL ELECTRIFICATION AGENCY TO HORTIGRAPH NIGERIA LIMITED**

Above refers.

We write to acknowledge your effort in the process that lead to the award of Contract to our company from Rural Electrification Agency.

In view of the award, and as earlier agreed with your company/person, we write to solicit for your understanding towards our inability to pay off at a go the agreed facilitation fees in the sum of **N37,000,000.00 (Thirty Seven Million Naira) only.**

We therefore proposed the following payment schedule:

- |            |                                        |
|------------|----------------------------------------|
| 1. Stage 1 | N5.0 Million on Advance Payment (Paid) |
| 2. Stage 2 | First Valuation Payment N10.0 Million  |
| 3. Stage 3 | Second Valuation payment N10.0 Million |
| 4. Stage 4 | Third Valuation payment N5.0 Million   |
| 5. Stage 5 | Final Payment N7.0 Million             |

**TOTAL**

**37.0 Million**

Thank you once more for your doggedness and hardwork that got us thus far.

Yours faithfully,  
HORTIGRAPH NIGERIA LIMITED  
(Sgd)

**Murtala Mohammed Abubakar”**  
**Managing Director/CEO**

In the light of the above, it is clear that the Claimant did facilitate the process of the award of contract to the Defendant. And that the said Exhibit F is clear admission by the defendants that the Claimant did carried out his own obligation in line with the Memorandum of Understanding Exhibit D.

By the provision of Section 123 of the Evidence Act 2011 fact admitted need no further prove.

In the light of the admission by the Defendants in Exhibit F, I hold the firm view that the submission of learned counsel to the Defendant is of no moment, same being pedestral.

In the words of NIKI TOBE (JSC) of blessed memory in the case of EGESIMBA v ONUGURUIKE (2002) VOL. II NSQLR Pg 588 at 625 stated:

***“Litigation is not a game of smartness but one in which the parties must not cunningly but decently and overtly place their cards on the table of justice. For purpose of measuring where the pendulum really tilts. Justice in its practical content is truth in action. And the court has a duty to search for the truth and find it. Justice is not built on technicalities or caricature”***

In conclusion, I hold the considered view that he Claimant Alhaji Kabiru Bello carrying on business under the name Kaybel Investment Limited as in the introductory paragraph of the

Memorandum of Understanding (Exhibit D) has adduced credible and compelling evidence to warrant the court enter judgment in his favour.

However, the claim for solicitor's fees must fall like a pack of card on the authority of GUINNESS NIG. PLC v NWOKE (2000) 15 NWLR (Pt 689) 135, 150 Paras C – D which is to the effect that it is unethical and an affront to public policy to pass on the burden of solicitor's fee to the other party.

Accordingly, judgment is entered in favour of the Claimant against the Defendants as follows:

1. The Defendants are directed to pay to the Claimant the sum of N32,000,000.00 (Thirty Two Million Naira) only being the outstanding sum due from the Defendants to the Claimant in securing the award of the contract for the sum of N277,165,380.45 in Rural Electrification Agency.
2. The sum of N500,000.00 (Five Hundred Thousand Naira) only is awarded as damages for breach of contract.
3. 10% Interest per annum on the judgment sum from the judgment date until same is finally liquidated is hereby awarded.

**JUSTICE SALISU GARBA  
(PRESIDING JUDGE)  
20/05/2020**

Claimant's Counsel – We are very grateful for the well-considered judgment.

Defendant's Counsel – We thank the court for the judgment.

**JUSTICE SALISU GARBA  
(PRESIDING JUDGE)  
20/05/2020**