IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT JABI ABUJA

DATE: 16TH DAY OF SEPTEMBER, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 9
SUIT NO: CV/1495/2007

BETWEEN:

ALHAJI UMAR KARETO LAWAN ---- PLAINTIFF

AND

1. CHIEF DANIEL KANU
2. HONOURABLE AMINU MOHAMMED DAN MALIKI } DEFENDANTS
3. D.M.T. WEBS COMMUNICATIONS LTD
4. AZUBUIKE EKWEREKWU

JUDGMENT

This suit was commenced under the undefended list procedure pursuant to Order 21 of the then Rules of Court. Upon service of the writ marked 'Undefended', the 1st, 2nd and 3rd defendants filed a notice of intention to defend. After hearing parties, this Court in a considered ruling on the 27/5/2008 transferred the matter to the general cause list for parties to file and exchange pleadings.

It is the case of the plaintiff that the 1st and 2nd defendants approached him and orally asked him for a friendly loan of N50,000,000.00 (Fifty Million Naira only) to execute a contract awarded to D.M.T Webs Communications Ltd (3rd defendant) for the procurement and installation of electronic equipment for viewing centers in Local Government Areas in all the States of the Federation, including FCT. The plaintiff agreed to grant the friendly loan which the 1st and 2nd defendants agreed to repay within 6 months. The plaintiff subsequently at the request of the 1st and 2nd defendants purchased a bank draft from Diamond Bank for the sum of N26 Million only in favour of the 4th defendant. The plaintiff further issued two Equitorial Trust Bank cheques for N20 Million and N4 Million respectively in favour of the 2nd defendant. The cheques and Bank draft are admitted as Exhibit A1 and A2 respectively. It is the case of the plaintiff that the defendants have refunded the sum of N10 Million only, but defaulted in settling the outstanding debt of N40 Million.

PW1 testified on the 26/5/2009 and was duly cross examined by counsel to the 1st and 3rd defendants on the 17th of June, 2009 and Exhibit A tendered therein. And further cross examined by 2nd defendant on 24/6/2009. Parties sought to settle the matter out of Court between 14/10/2009 and 25/2/2010 but settlement failed. An attempt was made by the 1st defendant to strike out his name from this suit vide a motion which was heard on the 20/5/2010. The application was refused vide a ruling delivered on the 14/6/2010. After several adjournments and a failed interlocutory appeal by the 1st defendant, the case was adjourned to the 9/6/2011 for defence. On that date the 1st and 3rd defendants were foreclosed from defence. On the 7/7/2011, the 2nd defendant was also foreclosed while the 4th defendant was foreclosed on the 15/11/2011 after failed appearances. The case was then adjourned for adoption of written addresses. On the 26/4/2012 the plaintiff reopened his case vide a motion on notice and the subpoenaed bank officers who produced

some documents in form of cheques from Equitorial Trust Bank and Diamond Bank Plc. The cheques were tendered as Exhibits A1 and A2 respectively. The case was again adjourned for adoption of written addresses.

On the 16/6/2012, the 1st and 3rd defendants filed a motion seeking to discharge the order foreclosing them from defence. The application was moved on the 3/7/2012 and granted on the 13/7/2012, on terms. The case came up twice and the defendants were absent and not represented. On the 28/11/2012, the 1st and 3rd defendants were again foreclosed from defence. On the 29/11/2012 the 1st and 3rd defendants filed another motion to reopen their case. It was moved on the 30/1/2013 and ruling delivered on the 7/2/2013. This Court having discovered the ploy of the defendants to forestall the proceedings and buy time for their own personal interest, refused the application and adjourned the case for adoption of written addresses.

The 1st and 3rd defendants did not give up on their antics and filed another motion on the 4/3/2013 seeking to stay the proceedings pursuant to an appeal filed against the ruling of this Court refusing the application to reopen the case. The application was heard on the 21/3/2013 and ruling delivered on the 14/5/2013 refusing same. On the 24/6/2013 when the case came up for adoption of written addresses, the 1st and 3rd defendants again filed a motion for extension of time to file their final written address. The application was granted and the defendants were directed to file within 7 days. On the 10/7/2013 the plaintiff adopted his final written address and the case was adjourned for judgment, as the defendants were absent and not represented.

On the 6/12/2013 when the case came up for judgment, the Court came across several motions filed by the defendants and therefore gave the defendants the opportunity to move the motions. After two adjournments,

on the 30/6/2014 the Court was served with a motion for stay of proceedings filed at the Court of Appeal. This necessitated the Court to stay further proceedings and the matter was thus adjourned sine die. After 4 years at the Court of Appeal, the appeal was dismissed with cost of N100,000. At the resumed hearing before this Court, Obinna Onya Esq announced appearance only for the 1st defendant and filed a motion to put in his written address. This necessitated the plaintiff to now serve the 3rd defendant separately. The 3rd defendant however was not represented in Court and did not file any written address.

Parties adopted their written addresses on the 2/7/2020. Learned counsel to the plaintiff **S.A. Mustapha Esq** filed the written address dated 21/5/2011 and duly adopted same before this Court. A sole issue was formulated therein for determination. The issue is:

"Whether the plaintiff proved his case to enable the Court to grant the reliefs sought in the Writ of

Summons dated 25/9/2007 and Statement of Claim dated 18/7/2008."

The submission of counsel is simple and straight, that where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, it is always open to the Court seized of the proceedings to act on the unchallenged evidence before it. That the defendants who were represented by counsel and served with all the processes and hearing notices, refrained from calling evidence, thus the evidence of the plaintiff remains unchallenged. Counsel urged the Court to enter judgment for the plaintiff. He cited **Isaac Omoregbe vs. Daniel Pendor Lawani (1981) 3 – 4 SC 108 at 117.**

Obinna Onya Esq filed the 1st defendants final written address on the 5/2/2018 and formulated three issues for determination as follows:

"1. Whether the evidence of PW1 contradicts Exhibit A and the effect of such manifest contradiction.

2. Whether the 1st defendant can be sued in his personal capacity having regards to Exhibit A being an agent of a disclosed principal.

3. Whether the plaintiff has locus to institute this suit."

Learned counsel submitted that documentary evidence is the best evidence, and where there is conflict between the documentary evidence and oral evidence the Court is bound to bend towards the documentary evidence. That where a trial Court is faced with substantial and/or fundamental contradictions between the evidence of a witness at the trial and material documents made by him, the evidence of such witness should be regarded as unreliable and it is unsafe for the Court to act on such unreliable evidence. Counsel urged the Court to reject Exhibit A and the evidence of the plaintiff.

Counsel further submitted that by Exhibit A, the transaction was between the plaintiff or Lead Engineering Ltd and the 3rd defendant. That the 1st defendant cannot be sued in his personal capacity especially when no money was advanced to him personally since he acted as an agent for a disclosed principal. Counsel argued that 1st defendant should be exonerated from personal liability. Counsel added that by virtue of Exhibit A, the parties to the contract are not before the Court and therefore the Court lacks jurisdiction to entertain the suit. He urged the Court to dismiss the suit. Reference was made to the following cases A.G. Bendel State vs. UBA Ltd (1986) 4 NWLR (part 337) 547 at 563, Gbileve vs. Addingi (2014) 16 NWLR (part 1433) 394, Igbi vs. The State (1998) 11 NWLR (part 574) 429 at 431, Onubogu vs. The State (1974) 9 SC 1, Samuel Osigwe vs. Privatization Share Purchase Loan Scheme Management Consortium Ltd & ors (2009) 3 NWLR (part 1128) 378.

Replying on points of law, learned counsel to the plaintiff submitted that it is a misconception of the law and facts for the 1st defendants counsel to suggest that the money subject matter of this suit belongs to Lead Engineering and not the plaintiff. Counsel urged this Court to expunge Exhibit A (solicitor's letter) on the ground that it was not pleaded by any of the parties. Reference was made to the case of Kubor & anor vs. Dickson & ors (2012) LPELR. Reference was also made to the trite position of the law that none of the parties to a suit will be allowed to spring surprise midway into the hearing of a case by bringing document not pleaded by any of the parties. He cited Odiba vs. Azege (1998) LPELR – 2215 (SC), Dasuki vs. FRN & Ors (2018) LPELR – 43897 (SC), Reptico S.A. Geneva vs. Afribank (Nig) Plc (2013) LPELR – 20662 (SC), BUA vs. Dauda (2003) LPELR – 810 (SC).

After a careful perusal of the evidence adduced and the written submissions on behalf of the parties, it is my

view that the single issue which should determine this case is;

> *"Whether from the pleadings filed and the evidence led by the claimant, he has discharged the onus of proof laid on him to entitle him to the reliefs sought."*

However, it is imperative for this Court to address some preliminary issues raised by the counsel to the 1st defendant before dealing with the substantive issue. I have considered the submissions of both learned counsel on the issues. Learned counsel challenged the capacity of the plaintiff to institute the action. Locus standi denotes legal capacity to institute proceedings in a Court of law. It is used interchangeably with terms like 'standing' or 'title to sue'. Locus standi affects the jurisdiction of the Court and on no account should the merits of the case be considered before locus standi is decided. Consequently, if the plaintiff does not have locus standi to institute the suit, the Court

would have no jurisdiction to entertain the suit. See Daniel vs. INEC & ors (2015) LPELR – 24566 (SC), Thomas vs. Olufosoye (1986) 1 NWLR (part 18) 669, Odeneye vs. Ofunuga (1990) LPELR – 2208 (SC).

Now the question is whether the claimant in this case has a legal or special interest in the subject matter. In determining this question, the Court has to look/scrutinize the Statement of Claim. This is judicially reasonable because it is the Statement of Claim that discloses the cause of action and the nexus between the claimant and the cause of action. See Registered Trustees of The Christ Apostolic Church vs. Dada (2015) LPELR – 40737 (CA), INEC vs. Ogbadibo Local Government & ors (2018) LPELR – 24839 (SC).

From the Statement of Claim, the plaintiff gave a friendly loan of N50 Million to the defendants and was refunded only the sum of N10 Million. He now claims the balance of N40 Million before the Court. The plaintiff has

sufficient personal interest in the subject matter of the suit and will certainly be affected by the action of the defendants for failure to repay the friendly loan. In **Pacers Multi – Dynamics Ltd vs. M.V. Dancing Sister & anor (2012) LPELR – 7848 (SC),** the Court held:

"A person has locus standi to sue in an action if he is able to show to the satisfaction of the Court that his civil rights and obligations have been or are in danger of being infringed. There are two tests for determining if a person has locus standi. They are:

1. *The action must be justiciable; and*

2. *There must be a dispute between the parties…"*

The claimant in this case in my view has satisfied the above tests. He has the right to be heard and therefore has the locus standi to institute the action. This translates to the fact that the Court has jurisdiction to entertain the suit.

On whether the 1st defendant being an agent of disclosed principal can be sued. This Court has noted that the 1st defendant is the Managing Director of the 3rd defendant DMT Webs Communications Ltd. It was the 1st defendant together with the 2nd defendant who approached the plaintiff for a friendly loan. It was the 1st defendant who asked the plaintiff to release the loan and at his behest, the plaintiff purchased bank draft in favour of the 4th defendant for the sum of N26 Million. Even the refund of N10 Million was done through the 1st defendant.

The 1st defendant also in his Statement of Defence at paragraph 2 stated;

"The 1st and 3rd defendants admit paragraph 2 of the Statement of Claim."

Paragraph 2 of the Statement of Claim reads thus:

"The 1st defendant is the Managing Director of the D.M.T. Webs Communications Ltd, the 3rd defendant herein."

The 2nd defendant in the Statement of Defence, apart from admitting paragraph 2 of the Statement of Claim stated in paragraph 4 as follows:

"In specific answer to the paragraph 11 of the Statement of Claim, the cheque of N26 Million made in favour of the 4th defendant, who was contractor to the 3rd defendant was applied to the execution of the project of 3rd defendant, which the 1st defendant superintended as the Managing Director of the 3rd defendant."

In MMA INC & anor vs. NMA (2012) LPELR – 20618 (SC), the Court held:

"A company is only a juristic person, it can act through an alter ego, either its agents or servants…"

Furthermore in the case of **Osigwe vs. PSPLS (2009) 1 SCNJ at 28, Aderemi, JSC** opined inter alia:

> *"The general law is that a contract made by an agent acting within the scope of his authority for a disclosed principal is in law the contract of the principal and the principal and not the agent is the proper person to sue and be sued upon such a contract."*

However, like most rules, there is an exception to the above stated general principle of law with respect to agency. This is where the proviso to Section 65 of the Companies and Allied Matters Act, (CAMA) 1990 comes into play.

In the case of **Asaba Foods Factory Ltd vs. Alraine Nig. Ltd (2002) NWLR (part 781) 235 at 380, Uwaifo, JSC** succinctly restated the law on agency thus:

> *"The position of the law is clear that a person may decide to act by another as his agent and get the benefit or bear the liability of that arrangement,*

one who authorize is the principal while the other authorized is the agent. The agent acts as if it is the principal who does the act. In case of default, the agent normally becomes directly liable while the principal may as well be liable. It has been held that the fact that a person is an agent and is known to be does not therefore of itself necessarily prevent him incurring personal liability. Whether he does so is to be determined by the nature of terms of the contract and the surrounding circumstances."

The 1st defendant being the Managing Director and alter ego of the 3rd defendant and having benefited from the loan cannot now hide behind the company to escape liability. Having highlighted the role played by the 1st defendant in bringing about the present state of affairs, I hold that the plaintiff has every right to sue the 1st defendant in his personal capacity.

Learned counsel to the plaintiff has urged the Court to expunge Exhibit A from the records for being wrongly admitted. The Supreme Court in Nwabuoku vs. Onwordi (2006) LPELR – 2082 (SC) stated that a trial judge has the competence to either completely reject admitted evidence or disregard such evidence admitted at the stage of writing judgment if he comes to the conclusion that the evidence, documentary or oral, was wrongly admitted. This is because at the stage of writing judgment the trial judge is fully exposed to the totality of the evidence before him and therefore in the best position to determine the probative strength of the evidence. Accordingly, where a document earlier admitted does not carry any probative value by virtue of the Evidence Act, the judge can expunge the document or disregard it in the course of evaluating the totality of the evidence to enable him arrive at a proper decision. See also Obi vs. Nwagwu (2017) LPELR – 43281 (CA).

It is also trite law that parties are bound by their pleadings and any evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the Court. A Court is enjoined to concern itself only with evidence of those matters that were duly pleaded. See Onyia vs. Onyia (2011) LPELR – 4375 (CA), SPDC (Nig) Ltd vs. Ifeta (2001) 11 NWLR (part 724) 473.

I have dispassionately looked at the pleadings before the Court, and I am of the humble view that without evidence placed before the Court, by way of pleadings, the Court cannot examine a document in vacuum. See Salahudeen & ors vs. Ajibola & ors (2019) LPELR – 47412 (CA).

Exhibit A which is the plaintiff's solicitors letter was not pleaded by any of the parties and cannot take the place of evidence legally tendered by the plaintiff. This Court is in total agreement with Mr. Mustapha to the effect that Exhibit A goes to no issue and inadmissible against the plaintiff. The address of counsel should be based on

pleaded facts canvassed by both parties before the Court. It is never a substitute for compelling evidence. See Orere vs. Orere (2017) LPELR – 42160 (CA), CCB vs. Onyekwelu (1999) LPELR – 12630 (CA), Ogunsanya vs. State (2011) LPELR – 2349 (SC).

Therefore, the address of Mr. Obinna for the 1st defendant urging the Court to reject both Exhibit A and the evidence of the plaintiff is of no moment and accordingly hereby discountenanced. No matter how brilliant or eloquent it would appear to be, the address of counsel must not take the place of evidence in any matter. See Kwande & anor vs. Mohammed & ors (2014) LPELR – 22575 (CA). It is therefore my considered view that Exhibit A has not probative value and cannot be used against the plaintiff. It is hereby disregarded.

Now to the substantive issue for determination. It is pertinent to state that the defendants were served with the processes and consistently served with hearing notices

throughout the proceedings. Only the 1st, 2nd and 3rd defendants filed Statement of Defence. No evidence however was led in support of the pleadings. The law is trite that pleadings are only averments of the facts and do not constitute evidence. See **Abue vs. Egbelo & ors (2017) LPELR – 43483 (CA), Alalade & ors vs. Ododo & ors (2019) LPELR – 46888 (CA).** Averments in pleadings are mere paper tigers and are not evidence. See **Omo – Agege vs. Oghojafor & ors (2010) LPELR – 4775 (CA).** Therefore pleadings without evidence to support it are worthless. See **Cameroon Airlines Mike E. vs. Otutuizu (2011) LPELR – 827 (SC) Ambassador Yahaya Kwande & anor vs. Air Marshal Kouktar Mohammed (Rtd) & ors (2014) LPELR – 22575**. In **Help (Nig) Ltd vs. Silver Anchor (Nig) Ltd (2006) LPELR – 1361 (SC),** the Court held **Per Katsina – Alu J.S.C**;

> *"It must be said that pleadings in themselves cannot constitute evidence. Mere averments without evidence in proof of the facts pleaded is no*

proof of the facts averred therein…if a party to an action fails to or does not lead evidence in support of the averments in his pleadings, the averments would be taken as having been abandoned."

Therefore this Court has no difficulty in deeming the joint Statement of Defence filed by the 1st and 3rd defendants as having been abandoned. Same fate befalls the Statement of Defence filed by the 2nd defendant dated 28/11/2008. Learned counsel representing the 2nd defendant also informed this Court that he was not addressing the Court. I restate also that 3rd defendant did not address the Court. For the 4th defendant Azubuike Ekwerekwu, he never appeared before this Court and was not represented by any counsel eventhough he was consistently served with hearing notice by substituted means vide an order of this Court.

As it stands, the evidence before the Court is unchallenged and uncontroverted and the Court must

accept it and act on it. See **IBWA Ltd vs. Imano (Nig) Ltd (2001) 6 SCNJ page 470, MTN vs. Aquaculture Cooperative Farmers Society Ltd (2014) LPELR – 24194 (CA).** The exception to this principle of law which do not apply to this care are:

1. Where the unchallenged or uncontroverted evidence is in itself unreliable and not capable of being believed;

2. Where the uncontroverted and unchallenged evidence relates to unpleaded facts. See **Omoregbe vs. Lawani (1980) 3 – 4 SC 108, Erigo vs. Obi (1993) 9 NWLR (part 315) 60, Deputy Sheriff Kaduna State High Court vs. Keystone Bank Ltd & anor (2015) LPELR – 25876 (CA).**

As stated, these exceptions do not apply to this case. The claimant was able to prove the fact of the friendly loan given to the defendants. Exhibits A1 and A2 showed the amounts released being the sum of N50 Million. It is an undisputed fact that only the sum of N10 Million was refunded to the plaintiff through the 1st defendant.

The Court has a duty to consider the totality of the evidence to determine which has weight and which does not have weight by putting the evidence on an imaginary scale. See Magaji vs. Odofin (1978) 4 S.C. 91 at 93. However, where there is no evidence to be put on the other side, minimum evidence which can discharge the burden of proof is enough. In this case, it is reasonable to conclude that the evidence led by the claimant on the facts pleaded is admissible, relevant and uncontradicted and also not discredited by cross examination. This Court can legally rely and act on it.

On the whole, the legal consequence of the choice not to call evidence by the defendants is that though success in a civil case depends upon the balance of probabilities or preponderance of evidence, the Court has little or no choice in accepting the evidence adduced by the plaintiff which has not been discredited under cross examination. Minimal proof is required in this situation. See Ajero vs.

Ugorji (1997) 7 SC (1) 58 at 76, Egbunike vs. ACB (1995) 2 SCNJ 58 at 78.

In this present case, the evidence placed before this Court which was one sided, was placed on the imaginary scale of justice and as there is no evidence at all to be placed on the other side, the evidence tilted the scale on the side and in favour of the plaintiff. The Supreme Court in the case of Adewoyi vs. Odukwe (2005) 7 SC (11) 1 at 13 restated the position of the law when it held that:

> *"It is now settled law that where there is no evidence to put on one side of the imaginary scale in civil case, minimal evidence on the other side satisfied the requirement of proof."*

The evidence adduced by the plaintiff in proof of his claims against the defendants has met the required standard and burden of proof by preponderance of minimal evidence. In the result, he is entitled to succeed on the

claims. Judgment is entered against all the defendants jointly and severally in these terms:

1. **The defendants shall refund to the plaintiff the sum of N40,000,000.00 (Forty Million Naira) being the outstanding balance out of the sum of N50,000,000.00 (Fifty Million Naira) only friendly loan granted by him through bank cheques issued in favour of the 2nd and 4th defendants.**

2. **Eventhough this Court has the discretion to grant 10% interest on any judgment sum as stipulated in Order 39 Rule 4 of the Rules of Court, the plaintiff herein only claimed interest of 4% on the judgment sum.**

   Thus the said 4% interest per annum shall be paid on the judgment sum of N40,000,000.00 (Forty Million Naira) from the date of judgment which is today, until the sum is fully liquidated.

3. Cost of N200,000.00 (Two Hundred Thousand Naira) awarded in favour of the plaintiff.

Hon. Justice M.A. Nasir

Appearances:

S.A. Mustapha Esq with A.A. Orire Esq – for the plaintiff

Obinna Onya Esq – for the 1st defendant

C.P.S. Maduka Esq – for the 2nd defendant

3rd defendant absent and not represented

4th defendant absent and not represented