

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 11TH DAY MARCH, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 9
SUIT NO: CV/2359/2016

BETWEEN:

REV. BENSON ONUABUCHI ----- PLAINTIFF

AND

MR. BALA ALI SALIHI ----- DEFENDANT

JUDGMENT

This suit was initially filed under the undefended list pursuant to the provisions of Order 21 of the then rules of Court. Upon receipt of the Writ marked ‘undefended’ the defendant filed a Notice of intention to defend dated 20th of March, 2017 together with an affidavit. This Court in its ruling transferred the matter to the general cause list and directed parties to file pleadings.

The plaintiff filed his Statement of Claim on the 21/11/2017. Leave was also granted to the defendant to file his Statement of Defence and Witness Statement on

oath out of time. With issues joined, the plaintiff testified for himself as PW1. He adopted his witness statement on oath and tendered the following documents:

- Loan agreement made on the 8/7/15 marked as Exhibit A.
- Letter of demand dated 22/7/16 marked as Exhibit A1
- Acknowledgment of payment of N500,000 dated 26/7/16 marked as Exhibit A2.

PW1 was duly cross examined. Oluwapese Benson Sunday testified as PW2. He adopted his witness statement on oath and was also duly cross examined by learned counsel to the defendant.

The case was then adjourned for defence. However, though the defendant filed his Statement of Defence, no evidence was led on same. Thus upon the application of the plaintiff's counsel, the defendant was foreclosed from defence. On the 9/12/2020, **S.A. Ibrahim Esq** who has

been appearing for the defendant filed a Notice withdrawing his appearance for the defendant.

Obinna Ugwu Esq filed the plaintiff's final written address dated 10/10/2019 wherein he raised a sole issue for determination as follows:

“Whether from the totality of the evidence as adduced the plaintiff has established his case as to be entitled to the reliefs sought.”

Learned counsel submitted that the burden of proof in civil cases lies on the person who asserts, and the plaintiff must succeed on the strength of his case and not on the weakness of the defence. Reference was made to Akinbade vs. Babatunde (2018) 7 NWLR (part 1618) 366 at 367, Andrew vs. INEC (2018) NWLR (part 1625) 507 at 551 – 552. He added that the defendant did not take on the plaintiff on the contents of Exhibit A during cross examination, which presumes acceptance of the contents by the defendants. He cited Duke Orji vs. FRN (2019) LPELR – 46534 (SC), Oludamilola vs. State (2010) 8 NWLR

(part 1197) 565, Olowu vs. Building Stock Ltd (2018) 1 NWLR (part 1601) 343.

Counsel further submitted that the attempt by the defendant to discredit PW2's statement on oath during cross examination is a mere emphasis on form over substance and an attempt to employ technicality to defeat the justice in PW2's testimony. That a witness statement on oath cannot stand alone as the affidavit does, hence the need for its confirmation on oath and adoption by the deponent. He urged the Court not to allow substantial justice to be defeated by technicalities. Reference was made to Lambert vs. Okujagu (2015) All FWLR (part 808) 652, Rt. Hon. Rotimi Chibuike Amaechi vs. INEC (2008) LPELR – 446 (SC). He urged the Court to grant the reliefs of the plaintiff.

For a start, it is pertinent to refer to the testimony of PW2 when he stated under cross examination that he signed his witness statement on oath in Mr. Salihi's office. It should be noted that unlike an affidavit per se, a

witness statement on oath filed in Court is not evidence unless it has been duly adopted by the witness at the trial. The law also is that a deposition on oath must be signed in the presence of a person authorized to administer oaths. See Mohammed & ors vs. Gani (2019) LPELR – 47190 (CA).

The Supreme Court in the case of Buhari vs. INEC (2008) 12 SCNJ 1 at 91 held that:

“When a deponent swears to an oath, he signs in the presence of the Commissioner for Oaths who endorses the document authenticating the signature of the deponent. Signatures signed outside the presence of the Commissioner for Oaths fall short of the requirements of the statute and such document purported to be sworn before the Commissioner for Oaths is not legally acceptable in Court.”

See also Onyechi Erokwu vs. Jackson N. Erokwu (2016) LPELR - 41515, Chidubem vs. Ekenwa (2009) All FWLR (part 455) 1692.

PW2 Oluwapese Benson Sunday testified under cross examination thus:

“I signed the witness statement on oath in Mr. Salih office. Lawyer to the plaintiff brought it to me and I signed.”

This offends the requirement of the law as it was not signed before the authorized person. In law once inadmissible or incompetent evidence had been admitted perhaps inadvertently, it stands to be expunged by the Court in its judgment. In Brossette Manufacturing Nig. Ltd vs. M/S Ola Ilemobola Limited & ors (2007) LPELR - 809 (SC), the Supreme Court had re-echoed this salient position of the law thus:

“A trial judge has the right to expunge from the record a document which he wrongly or wrongfully admitted. He can do so suo moto at the point of

writing judgment. He needs no prompting from any of the parties...”

Having averted my mind to the evidence of PW2 during cross examination, I find that the statement on oath adopted by PW2 was grossly invalid. It is an issue of competence going to the root of the validity of the evidence of PW2. Consequently, the statement on oath adopted by PW2 being invalid is hereby struck out and the entirety of the evidence of PW2 is hereby expunged from the records of the Court. This leaves the Court with the evidence of PW1 only.

It must be stated that though the defendant filed Statement of Defence, it was not supported with evidence. In Omo - Agege v.s Oghojafor & ors (2010) LPELR - 4775 (CA), the Court held that averments in pleadings are mere paper tigers and are not evidence. A party must lead evidence oral or documentary in support of facts stated in his pleadings. Thus the law is firmly settled that a party who does not give evidence in

support of his pleadings, or in challenge of the evidence of the adverse party is deemed to have accepted the evidence of the adverse party notwithstanding the general traverse. See Akinlola vs. Balogun (2000) 1 NWLR (part 642) page 532 at 545. Also the effect of a party's failure to lead evidence in support of averment in his pleading translates into a voluntary abandonment of such averments. See WAEC vs. Oshionebo (2007) All FWLR (part 370) page 1501 at 1509. In Arabambi vs. Advance Beverages Ind. Ltd (2005) NWLR (part 959) page 1, the Supreme Court held:

“Pleading is not synonymous with evidence and so cannot be considered as such in the determination of the merit or otherwise of a case. Thus, a party who seeks judgment in his favour is required by law to produce adequate credible evidence in support of his pleadings, and where there is none, then the averments in the pleading are deemed abandoned...”

Now as rightly stated by learned counsel to the plaintiff, since the defendant did not give evidence in support of his pleadings, the averments therein are taken as having been abandoned for they stand as no more than mere averments which have not been supported. The Statement of Defence filed by the defendant is therefore deemed abandoned.

The case of the plaintiff is that between November, 2013 to October, 2014 the defendant collected various sums of money totaling N15 Million with a verbal agreement to repay same. The defendant paid back the sum of N2.5 Million leaving a balance of N12.5 Million. All effort to get the defendant to repay the outstanding proved abortive. The defendant gave the plaintiff two documents for properties in Kuje FCT and Kano State as guarantee for the loan. Parties eventually entered into an agreement for the repayment of the loan. The defendant is yet to pay back the loan despite written demand by the plaintiff's solicitor.

Under cross examination, PW1 stated that he did not operate a bank and being an African he lends money to friends, and the loan given to the defendant did not attract interest. He added that some of the money was collected cash and also through Benson Sunday, Yahaya and the defendants wife between November, 2013 – October, 2014. The witness further stated that he had no record of the money borrowed except the agreement entered into by the parties.

It is trite as rightly submitted by Mr. Ugwu that a plaintiff must succeed on the strength of his case. A plaintiff must prove his case with credible and cogent evidence, and he must succeed in his claim, on the strength of his case because he who asserts must prove. See Sunmonu vs. Sapo (2001) LPELR-9954(CA), Tallen & ors vs. Jang & ors (2011) LPELR-9231(CA). The applicable principles are that the plaintiff must succeed or fail on the strength of his case, and the evidence which he brought to court, any weakness in the defence

notwithstanding. See Alibe vs. Yaro (2001) LPELR-7022(CA), Odum vs. Ugandan (2009) 9 NWLR (part. 1146) page 281

The evidence of the plaintiff was not controverted by way of cross examination by the defendant. It is elementary law that evidence whether by affidavit or viva voce that remains uncontroverted, must be believed as being the truth and acted upon by the Court. See A.G. Lagos State vs. Purification Tech (Nig) Ltd (2003) 16 NWLR (part 845) page 1, Adeleke vs. Iyanda (2001) 13 NWLR (part 729) page 1. The law is well settled, if not elementary, that anyone who desires the Court to give judgment as to any legal right or liability must prove those facts. Evidence is the basis of justice, and the rule of evidence is that he who asserts the positive must prove. See Okafor vs. Ezenwa (2003) 47 WRN 1 at 11, Abiodun vs. Adehin (1962) 2 SCNLR 305.

In this instance, Exhibit A which is the Agreement was duly executed by the parties. The content of Exhibit A is reproduced hereunder as follows:

“NOW IT IS HEREBY agreed as follows:

- 1. That the borrower shall within a reasonable time use all the endeavour to source and secure the fund for the liquidated of the loan the subject matter of this agreement either in whole or by installments as may be deemed reasonable by the parties herein.*
- 2. In the unlikely event that the borrower was unable to secure such fund or a reasonable part thereof within such time as would in the estimation of the parties herein be deemed reasonable, the borrower shall dispose by way of sale his properties which details are contained in paragraph ii of the recital above for the said loan.*
- 3. That upon disposal of the properties by way of sale by the borrower, every fund realized from such sale*

shall be paid to the lender in liquidation of the said loan.

4. In the event that the said properties are to be disposed off by way of sale, either parties herein particularly the lender can upon satisfying himself of his genuiness of the said property look for or secure an interested purchaser of purchase either of the land.

5. If however the borrower is able to secure the fund as he promised and indeed liquidate the entire sum of Twelve Million, Five Hundred Thousand (12,500,000.00) Naira without having to dispose the properties hereinabove referred to, the borrower shall upon such payment/repayment return the documents relating to the land as was given to the lender by the borrower.”

It is clear from the above that the defendant was to dispose off his properties used to secure the loan where he is unable to source/secure funds to liquidate the loan.

The plaintiff on the other hand was at liberty to assist or source for purchasers of the plot upon being satisfied of the genuineness of the property in the event of sale. The defendant herein has not liquidated the loan and has not made any efforts to sell the properties.

A Court of law must always respect the sanctity of the agreements reached by the parties. It must not make a contract for them or re - write the one they have already made for themselves. A literate person of full age and capacity at law is presumed to understand the contents of a document to which he appends his signature, and he is therefore bound by whatever the document says. Both parties in this instance are persons of full age, and the law is that persons of full age and mind are bound by any agreement lawfully entered into by them. See Fagge vs. Tukur (2007) All FWLR (part 387) 876 at 898, Sona Brew. Plc vs. Peters (2005) 1 NWLR (part 908) page 478, S.E. Co. Ltd vs. N.B.C.I. (2006) 7 NWLR

(part 978) page 201, Omani vs. Alabi (2004) 5 NWLR (part 870) page 551.

In the light of the agreement (Exhibit A), the only function of the Court is to interpret the agreement in enforceable terms without more. See Artra Ind. Ltd vs. NBCI (1997) 1 NWLR (part 483) 593.

In reiteration, the defendant did not deny or controvert the evidence of the defendant. In Nanna vs. Nanna (2006) 3 NWLR (part 966) page 1, the Court observed that evidence which is not successfully challenged or discredited and which is relevant to the issues in controversy ought to be admitted and relied upon by the trial Court. I hold that the evidence of the plaintiff is credible and I believe same more so when there is nothing to put on the other side of the imaginary scale. I hold that the plaintiff is entitled to a refund of the money owed him by the defendant. Thus, judgment is entered for the plaintiff in the sum of N12,500,000.00

(Twelve Million, Five Hundred Thousand Naira only) being the outstanding debt owed by the defendant.

The plaintiff has also prayed for the sum of N2.5 Million being the cost of prosecuting this suit. He testified that he paid his solicitor N500,000.00 (Five Hundred Thousand Naira) leaving a balance of N2,000,000.00 (Two Million Naira) to be paid after the prosecution of the suit. He tendered Exhibit A2, having acknowledgement for payment of N500,000.

This is clearly a claim for solicitors fees for prosecuting the action. The question is whether the claimant is entitled to the award of this solicitors fees or cost of prosecuting the action? In the case of Michael vs. Access Bank (2017) LPELR - 41981 1 at 48 - 49, Ugochukwu Anthony Ogakwu, JCA stated thus:

“It seems to me that a claim for solicitors fees which does not form part of the cause of action is not one that can be granted....In Guinness Nigeria Plc vs. Nwoke (part 689) 135 at 159, this Court

held that a claim for solicitors fees is outlandish and should not be allowed as it did not arise as a result of damage suffered in course of any transaction between the parties. Similarly, in Nwanji vs. Coastal Services Ltd (2004) 36 WRN 1 at 14 – 15, it was held that it was improper, unethical and an affront to public policy to have a litigant pass the burden of costs of an action including his solicitors fees to his opponent in the suit.”

Similarly, in the case of Ihekwoaba vs. ACB Nig Ltd (1998) 10 NWLR (part 571) 590, the Court per Akpabio JCA, had on this issue succinctly pronounced inter alia thus:

“The issue of damages as an aspect of solicitors fees is not one that lends itself to support in this country.”

See also Ibe & anor vs. Bonum (Nig) Ltd (2019) LPELR – 46452 (CA), In RE: Glaxosmithkline Consumer Nig. Plc (2019) LPELR – 47498 (CA). Thus, the claim for the sum

of N2.5 Million being cost of prosecuting the suit is refused notwithstanding that the claim was uncontroverted by the defendant.

The plaintiff finally prayed for post judgment interest of 20% per annum until the judgment sum is liquidated. This amount of interest is not substantiated by the plaintiff in any way, how it is arrived at has not been explained. However, the Rules of Court, Order 39 Rule 4 therein provides thus:

“The Court at the time of making any judgment or order or at any time afterwards, may direct the time within which the payment is to be made or other act is to be done, reckoned from the date of the judgment or order, or from some other point of time, as the Court may deem fit and may order interest at a rate not less than 10% per annum to be paid upon any judgment.”

Thus 10% interest instead will be awarded.

On the whole, judgment is entered for the plaintiff in the following terms:

- The defendant shall pay the sum of N12,500,000.00 (Twelve Million, Five Hundred Thousand Naira) to the plaintiff being the total debt owed to the plaintiff.
- 10% interest is awarded on the judgment sum from today until the judgment sum is fully liquidated.

Hon. Justice M.A. Nasir

Appearances:

Obinna Ugwu Esq – for the plaintiff

Defendant absent and not represented