IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 29TH DAY OF JUNE, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 6
SUIT NO: CV/3053/2017

BETWEEN:

BENJAMIN ALIGHYE ADICK ------ PLAINTIFF

AND

ENSURE INSURANCE PLC. ------ DEFENDANT

JUDGMENT

The Plaintiff commenced this suit vide a Writ of Summons dated and filed on the 5th October, 2017. The Plaintiff claimed against the defendant as follows:

"a. A declaration that the refusal and continued refusal of the Defendant to honour lawful calls of the Plaintiff to liquidate the Plaintiff's investment with the Defendant under the Education Endowment Fund Policy No: UACL/301/9854, of the Defendant in the sum of N364,910.00 (Three Hundred and Sixty Four

Thousand, Nine Hundred and Ten Naira) since March 2013 is illegal, unlawful, fraudulent and a breach of the contract the Plaintiff had with the Defendant.

b. *An order of this Honourable Court directing the Defendant to liquidate and pay to the Plaintiff the sum of N364,910.00 (Three Hundred and Sixty Four Thousand, Nine Hundred and Ten Naira) contributed by the Plaintiff and illegally held over by the Defendant after valid calls by the Plaintiff for same to be liquidated and paid to the Plaintiff by the Defendant.*

c. *An order directing the Defendant to pay to the Plaintiff ten percent (10%) of the Judgment sum per annum until the Judgment sum is liquidated from March, 2013 when the Plaintiff made the call for the liquidation of his investment with the Defendant.*

d. *An order directing the Defendant to pay to the Plaintiff the sum of N50,000,000.00 (Fifty Million Naira) only as punitive damages for breach of contract, illegal and*

fraudulent attempt to deny the Plaintiff his hard earned money.

e. *An order that the sum of N5,000,000.00 (Five Million Naira), be paid to the Plaintiff as cost for litigation by the Defendant."*

The facts that gave rise to the present suit is that, sometime in 2011, the Plaintiff undertook an Educational Endowment Policy with the Defendant. The Plaintiff was presented with terms of the Policy by the Defendant which he accepted. Plaintiff commenced payment of premium by taking up a savings plan of five (5) years paying the sum of N30,389.00 (Thirty Thousand, Three Hundred and Eighty Nine Naira) monthly premium. The Plaintiff further contended that he continued to meet his obligations until he had paid the sum of N364,910.00 (Three Hundred and Sixty Four Thousand Naira, Nine Hundred and Ten Naira only. He then requested for determination of the policy in

March, 2013 due to the fact that he could not continue to bear the burden of the monthly obligation.

The Plaintiff thereafter demanded for a refund of the amount paid to the Defendant under the Policy. The Plaintiff maintained that the Defendant refused and neglected to refund the said amount despite repeated demands.

In proof of his case, the Plaintiff testified as sole witness and adopted his Witness Statement on oath of 5th October, 2017. Through PW1, a total number of seven (7) documents were tendered and admitted in evidence as follows:

1. Receipts of monthly Premium issued by the Defendant to the Plaintiff collectively marked as exhibit A.
2. Education Endowment Assurance Plan of the Defendant marked as exhibit A1.
3. E-mail correspondences between the Plaintiff and the Defendant marked as exhibit A2.

4. Statement of the Premium account dated 10/12/2015 marked as exhibit A3.
5. Letter of demand issued to the Defendant by the Plaintiff dated 24/01/2017 marked as exhibit A4.
6. Reply by the Defendant dated 10/02/2017 and 13/2/17 marked as Exhibits A5 and A6.

Upon completion of his testimony, PW1 was duly cross-examined and later discharged by the Court.

In their defence, the Defendant equally called a sole witness one Adeniran Adeyemi who testified as DW1, DW1 adopted his Witness Statement on Oath of 19/02/2018. DW1 was also cross-examined and subsequently discharged.

The Defendant through DW1 testified that the Plaintiff paid the monthly Premium only for a period of Twelve (12) months totaling the sum of N364,910.00 (Three Hundred and Sixty Four Thousand, Nine Hundred and Ten Naira). The Plaintiff thereafter failed, refused and neglected to

continue the payment of the Premium on his Insurance Policy and demanded for refund of the amount already paid to the Defendant.

That the plaintiff was informed on his eligibility for cash surrender value vide Clause 8 of the Educational Endowment Policy document, if he paid the Premium continuously for two years. That the Plaintiff having failed to meet this condition is not entitled to any cash surrender under the policy.

At the close of evidence, parties were directed to file their final Written Addresses. Agba Eimunjeze Esq. filed the Defendant's final Written Address on the 10/03/2020 wherein learned counsel raised a sole issue for determination as follows:

> *"Whether the Plaintiff is entitled to the reliefs sought in this suit having regard to the facts, the relevant laws and evidence led"*

Learned counsel submitted that an insurance policy is the written instrument in which the terms of the contract of insurance are set forth and same is binding on both the insurer and the insured. Counsel submitted that unlike other contracts which are signed by both parties, an insurance policy is signed only by the insurer and the content of same is binding on the insured upon payment of Premium with respect to the said insurance. Counsel cited and referred this Court to the following authorities:

a. Baalo vs. FRN (2016) LPELR – 40500 (SC)
b. Agu vs. CBN (2016) LPELR – 41091 (CA).
c. Niger Classic Investment Ltd. vs. UACN Property Development Coy. Plc. & Anor. (2016) LPELR (41426) (CA).
d. Prof. Olusegun Yenkun, Insurance Law in Nigeria, First Edition (2013), page 112.
e. J.O. Irukwu, Fundamental of Insurance Law, First Edition (2007) page 41.

Learned counsel submitted to the effect that the parties in this suit are bound by the terms of the Educational Endowment Policy No: UACL/301/9854 dated 1st October, 2011 (Exhibit A1) which was duly delivered to the Plaintiff. After payment of several premiums under the policy, counsel submitted that the Plaintiff cannot turn back to say he is not bound by the insurance policy, but by what the Defendant's agent told him.

Counsel finally submitted that parties to a contract, which in this context includes insurance contract, are bound by the terms of the contract/insurance policy. That the Plaintiff cannot opt out from the insurance contract merely because he later found out that the contract/insurance policy is not favourable to him. Counsel then urged this Court to dismiss the Plaintiff's claim against the Defendant in its entirety with substantial cost. He referred this Court to the following cases:

1. Yadis Nigeria Limited vs. Great Nigeria Insurance Company Limited (2007) LPELR – 3507 (SC)
2. Enemchukwu vs. Okoye (2016) LPELR – 40027 (CA)
3. Addison United Nigeria Ltd vs. Lion of Africa Insurance Ltd. (2010) LPELR – 3596 (CA).
4. Presidential Implementation Committee on Federal Govt. Landed Properties vs. Aywila & Anor (2017) LPELR – 43204 (CA).

On his part, Ocholi O. Okutepa Esq. filed the Plaintiff's final written address on the 21st May, 2020. Learned Counsel also formulated a sole issue for determination as follows:

> *"Whether from the totality of evidence before this Court, the Plaintiff is entitled to the reliefs sought in the claim."*

Learned counsel submitted that it is the contention of the Plaintiff that the sole issue before this Court ought to

be answered in the affirmative having regard to the claim and the totality of evidence before this Court.

Counsel submitted that the Defendant breached its duty of trust and/or contract between it and the Plaintiff when it refused to honour lawful calls of the Plaintiff to liquidate his investment in the sum of N364,910.00 (Three Hundred and Sixty Four Thousand, Nine Hundred and Ten Naira) only in his Premium Account, but rather sent to him a policy document which the defendant unilaterally made and claimed to be binding on him.

Counsel went on to submit that exhibit A1, the Educational Endowment Assurance Plan was unilaterally made by the Defendant after the Plaintiff had commenced payment of premium on such terms as was made known to him by the agent of the Defendant (Ofonime Frank) in Eket, Akwa Ibom State in September, 2011.

Counsel further submitted that assuming but not conceding that this Court can even look at exhibit A1 in the

context of this contract, the evidence of the Plaintiff is that the said exhibit does not reflect the agreement entered into between the Plaintiff and the agent of the Defendant before the Plaintiff began the payment of his Premiums. Counsel submitted that the law is trite that to constitute a valid contract, there must be an agreement between the parties regarding the essential terms and conditions thereof. That parties must be ad idem to create a binding legal agreement.

Counsel finally submitted that the Plaintiff is not bound by the said Educational Endowment Policy (exhibit A1) as there was no consensus *ad idem* between the parties as it relates to the contents of the policy document. That the Plaintiff only entered into a valid oral contract with the Defendant through the representation of it's agent, Mr. Ofonime Frank. Counsel finally urged this Court to find in favour of the Plaintiff. Counsel referred this Court to the following cases:

1. C.B.N vs. Okojie (2015)14 NWLR (Part 1479) 231 at 258, paragraphs C – E.
2. Dr. Christian Ejike Imoke & Anor vs. United Bank for Africa Plc. (2014) All FWLR (Part 717) page 747 at 764.
3. Metibaiye vs. Narelli International Ltd. (2009) 16 NWLR (Part 1167) 326 at 350.
4. Bala James Ngillari vs. National Insurance Corporation of Nig. (1998) LPELR – 1989 (SC).
5. Osigwe vs. PSPLS Management Consortium Ltd. & Ors. (2009) LPELR (SC).

The Defendant filed a Reply on points of law on the 15th July, 2020 the contents of same was further adopted by learned counsel for the defendant.

Now, it is clear that the two issues separately formulated by learned counsel across the divide are similar, I will however proceed to determine this suit based on the issue submitted by counsel for the plaintiff. The issue is:

"Whether from the totality of evidence before this Court the plaintiff is entitled to the reliefs sought in the claim."

Generally, the legal burden of proof in a civil case is on a claimant to prove to the satisfaction of the Court the assertions made in the pleadings, and he has the onus of proving his case by preponderance of evidence. Failure by the Defendant to prove or his refusal to testify cannot alleviate the primary burden on the claimant. See Sections 131 – 134 of the Evidence Act, 2011. In **Akinbade & Anor. vs. Babatunde & Ors. (2017) LPELR – 43463 (SC),** the Supreme Court held as follows:

"It is settled principle of law that in civil cases, the burden of proof lies on the person who desire the Court to give judgment as to any legal right or liability which depends on facts which he assert to prove that those facts exist. It is also settled that the burden of proof in a particular proceeding lies

on the person who would fail if no further evidence is given on either side."

Now, the law is that a contract of insurance should be one of utmost good faith, *Uberrima Fidei*. To constitute a contract of insurance, therefore, there must be an unqualified acceptance by the other party. A prima facie contract of insurance only comes into existence the moment an insurance proposal in the normal form is accepted unequivocally without qualification by the insurers. See: Yadis (Nig.) Ltd. vs. (Great Nigeria Insurance Coy. Ltd. (2007) LPELR – 3507 (SC).

In other words, a contract of insurance is created where there has been an unqualified acceptance by one party of an offer made by the other party. Consequently, if the parties are still negotiating, there can be no contract. The contract of insurance contains the terms and conditions of the contract including the rights and liabilities of the parties thereto. For a Plaintiff to succeed in an action

under such a contract he must bring himself within the terms and conditions of the policy or contract. See: Addison United (Nig) Ltd. vs. Lion of Africa Insurance Ltd. (2010) LPELR – 3596 (CA), Leadway Ass. Co. Ltd. vs. J.U.C. Ltd. (2005)5 NWLR (Part 919) 539 CA.

It is pertinent to state at this juncture that the law has imposed payment of premium to be condition precedent to the existence of a valid insurance contract. Section 50 (1) of the Insurance Act provides as follows:

> *"The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect to an insurance risk, unless the premium is paid in advance."*

The Supreme Court in the case of Jombo Utd. Co. Ltd. vs. Leadway Assurance Co. Ltd. (2016) LPELR – 4083 (SC) held as follows:

"…. The fundamental purpose of an insurance contract is to give cover for an insurance risk. In other words, where a law states that there is no insurance cover unless premium is pre-paid, then in effect it means that the contract is void if no premium is actually pre-paid. Thus, from the contents of the provisions of Section 50(1) of the Insurance Act No. 29,1997 set out above, the premium is a condition precedent to a valid contract of insurance and there cannot be cover in respect to insurance risk unless or except the premium therefor is paid in advance."

Also, see: Charles Chime vs. United Nigeria Co. Ltd. (1972)2 ECSLR 808, Irukwu vs. Trinity Mills Insurance Brokers (1997)12 NWLR (Part 531)11 at 134 – 135.

In this instance, as stated earlier, the Plaintiff's contention is that he had concluded and entered into a parole/oral contract with the Defendant's agent prior to the

issuance of the insurance policy, exhibit A1 by the Defendant. Therefore, according to the Plaintiff exhibit A1 is not binding on him, because he has already commenced payment of his premium before he was served with exhibit A1.

The plaintiff further contended that the terms of the oral contract entered into with the Defendant was encapsulated in a leaflet issued to him by the defendants agent Ofonime Frank. It is noted however that the said leaflet was never tendered by the Plaintiff before this Court.

The law is settled that 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. See: Union Bank Plc. vs. Ravih Abdul & Co. Ltd. (2018) LPELR – 46333 (SC). Furthermore, it is settled law that parties are bound by the contract they voluntarily enter into and cannot act outside the terms and conditions in the said contract. See A.G. Ferrero & Co. Ltd vs. Henkel Chemicals (Nig) Ltd (2011)

LPELR – 12 (SC). The plaintiff herein was fully aware when he received Exhibit A1 of all the terms stipulated therein. He was not under any legal disability and should have been the best judge of his legal interest. However, he continued to make payments of premiums under the same contract, he cannot now be heard to complain about what he has accepted. The plaintiff herein has acquiesced on whatever irregularity was in the contract. See Oriloye vs. Lagos State Government & ors (2014) LPELR – 22248 (CA).

Thus, the Plaintiff had the onerous duty proving with cogent and credible evidence the existence of another policy prior to the issuance of exhibit A1. Sadly, the Plaintiff has done little to discharge this duty. This is more so, when the Plaintiff admitted under cross-examination that exhibit A1, the insurance policy was delivered to him four(4) months after he commenced payment of the premium and he continued to pay premium for Eight (8) more months after receipt of the policy document.

In the case of Ngillari vs. NICON (1998) LPELR – 1989 (SC), **Belgore, JSC** (as he then was) stated thus:

> *"Once the rate of premium is fixed and the insured has paid the sum after the advice of the insurer's agent, a valid contract of insurance has been completed. The agent is presumed to have not only the express authority bestowed upon him by his principal but also impliedly the further authority to do all things necessary in the ordinary course of selling insurance policy by making sure that he presented correctly the terms and conditions of the insurance before accepting payment of premium from the insured."*

The trite position of the law is that he who asserts must prove. See Sunmonu vs. Sapo (2001) LPELR-9954(CA), Tallen & ors vs. Jang & ors (2011) LPELR-9231(CA). The plaintiff herein failed to prove the existence of any other policy apart from Exhibit A1. No wonder the plaintiff seeks

a declaration of this Court under the same Education Endowment Fund Policy No. UACL/301/0854. Even the payments made on the official receipts (Exhibit A) issued to the plaintiff were payments made with respect to the same Education Endowment Policy (Exhibit A1). The plaintiff cannot turn around to say that he is not bound by the policy. In the circumstance, I hold that the plaintiff is bound by the Education Endowment Fund Policy , Exhibit A1.

Learned counsel for the plaintiff had submitted that it was the duty of the defendant to call Ofonime Frank to tender the leaflet he gave to the plaintiff and failure to do so amounted to withholding of evidence under Section 167(d) of the Evidence Act, 2011.

The plank of Section 149(d) of the Evidence Act is to the effect that a Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to

the facts of the particular case, and in particular the Court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. See **Oloyede & anor vs. Olaleye & anor (2012) LPELR – 9845 (CA).**

It is pertinent to state that the plaintiff pleaded the detailed leaflet of the defendant given to him by Ofonime Frank and that he accepted the terms of the plan on the leaflet before he commenced payment. And under cross examination the plaintiff said:

> *"In paragraph 1, I referred to a leaflet. It is the contract between me and the defendant."*

It is my view that the plaintiff ought to have tendered the detailed leaflet with the terms he subscribed to in the contract he alleged to have entered with the defendant. In **The People of Lagos State vs. Mohammed Umaru (2014) SC.455/2012,** the Supreme Court **per Mohammed JSC** (as he then was) stated thus:

"Where a party claims to have evidence that goes to show the existence of a document in proof of his case, the document should be tendered. Where such evidence could be produced, it is presumed to be against the interest of the party withholding it."

Similarly in Yusuf vs. State (2018) LPELR – 46718 (CA) the Court held:

"The purport of the Rule in Section 167(d) of the Evidence Act is to permit the Court to presume that a party who withholds evidence which could be but was not produced, would if produced, be unfavourable to or against him. Such a party withholds the evidence at his peril… Failure to adduce vital evidence at a party's disposal which he is supposed to adduce amounts to withholding evidence and would raise a presumption that if produced, the evidence would be unfavourable to him.

See also Emeka vs. Chuba Ikpeazu & ors (2017) LPELR – 41920 (SC), Shurumo vs. The State (2010) 12 SCNJ 47, Musa vs. Yerima (1997) 7 NWLR (part 511) 38.

In this instance, the plaintiff did not tender the detailed leaflet allegedly given to him by the defendant's agent. The presumption of withholding evidence under Section 167(d) of the Evidence Act, 2011 would apply in this instance against the plaintiff and not against the defendant.

Furthermore, the plaintiff averred that the defendant acted fraudulently and with intent to defraud by sending him Exhibit A1 alleging the document does not bind him.

The defendant on the other hand averred that it acted in line with standard Insurance practice with no intention to defraud and the plaintiff was put to the strictest proof.

The position of the law on allegation of fraud in civil proceedings is that the particulars must be pleaded and proved strictly. See Agbasi vs. UBA Plc (2019) LPELR –

47193 (CA), Fabunmi vs. Agbe (1985) 1 NWLR (part 2) 299, Ojibah vs. Ojibah (1991) 6 SCNJ 156 at 164, Egbase vs. Oriareghen (1985) 10 SC 80

Where the commission of a crime by a party to any proceeding is directly in issue, in any cause or matter civil or criminal, it must be proved beyond reasonable doubt. See State vs. Njoku (2010) All FWLR (part 523) page 1924 at 1945. Fraud, in most cases, involves dishonesty. Actual fraud takes the form of statement which is false or a suppression of what is true. See Umanah vs. Attah & ors (2006) LPELR-SC 255/2005.

Learned counsel to the plaintiff submitted that Exhibit A1 is an illegal afterthought designed to defraud. He added that the Court should construe the surrounding circumstances including written or oral statements made in the course of the transactions leading up to this case to discover the intention of the parties. That the fraud in the premium account position and Exhibit A1 is apparent from

the totality of the evidence before the Court. In response, learned counsel to the defendant submitted that the allegation of fraud made by the plaintiff was not specifically pleaded with particulars neither was it proved by the plaintiff during trial.

Reading through the pleadings filed by the plaintiff, I have not come across where the allegation of fraud was specifically pleaded. This issue was only brought to fore in the plaintiff's written address. The law is explicit as regards counsel making out a case in the written address. It is trite that addresses by counsel are designed to assist the Court, and the address of counsel no matter how brilliant cannot make up for the lack of evidence to prove and establish, or else disprove and demolish any point in issue. See **Ibikunle v. Lawani (2008) All FWLR (Pt. 398) 359 at 374.** The allegation of fraud in my view has not been substantiated by the plaintiffs having not particularized and proved strictly. It is hereby accordingly discountenanced.

As there is nothing to show that the agreement between the parties was obtained by fraud or any misrepresentation of the term of the contract, the plaintiff cannot resile just because he later found out that he could not continue with the payment of the premium. This is the whole essence of the doctrine of sanctity of contracts. See Agrovet Sincho Pham Ltd vs. Dawaki & ors (2013) LPELR – 20364 (CA).

What then is the effect of what I have been saying on the claims of the plaintiff? The plaintiff has prayed the Court as per Relief (a) for a declaration that the refusal and continued refusal of the defendant to honour lawful calls to liquidate his investment under the Education Endowment Fund Policy since March, 2013 is illegal, unlawful, fraudulent and a breach of the contract the plaintiff had with the defendant.

It is trite and indeed an elementary principle of law that when a litigant claims declaratory reliefs, he does no more

than to invite the Court to declare what the law is on the issue. Such declaration is granted at the discretion of the Court and such discretion must be exercised judicially. This implies that all relevant facts that could affect the withholding of the discretion of the Court to make the declaration, are properly canvassed and placed before the Court for consideration. The discretion cannot rightly be based on facts or circumstances which have not been submitted by the parties to the Court, but which the Court on its own, has restlessly fathomed out outside the issues, raised by the pleadings. See Uwandu vs. Chinagorom & ors (2019) LPELR – 46909 (CA), Barclays Bank of Nigeria Ltd vs. Ashiru (1978) 6 – 7 SC 99, Ukwu vs. Offorah (1992) 6 NWLR (part 246) 236.

A declaratory reliefs is a discretionary remedy which would be refused where the plaintiff fails to establish his alleged entitlements to the satisfaction of the Court. See Ogolo & ors vs. Ogoo & ors (2003) LPELR 2309.

The plaintiff in this instance has alleged that the defendants are in breach of the terms of the contract. He relied on the terms contained on a leaflet as the terms of the contract which was not presented before to the Court. However, this Court has earlier held that the plaintiff is bound by the terms of the Education Endowment Policy (Exhibit A1). The defendant has stated that by Clause 8 of Exhibit A1, the plaintiff is not entitled to cash surrender until the premium is paid up for up to two years. Clause 8 provides:

> *"CASH SURRENDER VALUE:- at the request of the person or persons entitled to this policy and upon delivery and surrender of this police, the company will pay a Cash Surrender Value to be determined by the company on Whole Life, Endowment, and Children Assurances after payment of two years premiums where the term on which premiums are*

payable is not more than twenty years; otherwise after payment of three years premiums."

The payment of premium was based on the Education Endowment Policy Exhibit A1. In this regard this Court is at one with the submission of learned counsel for the defendant that where the Insurance Policy had been delivered to the insured, he cannot come back to state that he was not aware of the existence of the various terms in the said policy and/or he is not bound by the terms therein.

From the totality of the evidence adduced, the plaintiff has failed to lead any credible evidence to show the existence of another policy different from Exhibit A1. The defendant in this instance was not bound to honour any call by the plaintiff seeking to liquidate his investment under Exhibit A, or pay to the plaintiff the amount already advanced as premium under the Education Endowment Fund Policy. In effect Reliefs (a) and (b) as claimed are refused.

Following the refusal of the main reliefs above, the claim in Reliefs (c) which is predicated on Reliefs (a) and (b) equally fails. In any event, the claim appears to be for 10% interest pre-judgment. This is not provided or envisaged by the parties. It is also not provided by any statute. It is therefore refused.

The same fate befalls Reliefs (d) and (e). The plaintiff certainly is not entitled to either punitive damages of N50 Million and costs of N5 Million for litigating the suit.

On the whole, I hold that the plaintiff is not entitled to any of the Reliefs and this suit is accordingly dismissed.

Hon. Justice M.A. Nasir

Appearances:

Ocholi O. Okutepa Esq – with him Victory N. Amadi Esq, Susan Anejodoh Esq and Elijah David Esq for the claimant

Agba Eimunjeze Esq – for the defendant