IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT MAITAM ABUJA

DATE: 4TH DAY NOVEMBER, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 5
SUIT NO: CV/043/2018

BETWEEN:

JALIMA NIGERIA LIMITED ------ CLAIMANT

AND

ASCELLON NIGERIA LIMITED ------ DEFENDANT

JUDGMENT

By Writ of Summons dated 31/10/2018 the claimant Jalima Nigeria Ltd is seeking for the following reliefs against the defendant:

"a. Vacant possession of the four (4) bedroom duplex and one room boys quarters.

b. The sum of N10,000,000.00 (Ten Million Naira) only being Twenty (20) months arrears of rent from 1/12/2016 to 31/7/2018 owed to the claimant by the defendant.

c. *The sum of N758,333.00 (Seven Hundred and Fifty Eight Thousand, Three Hundred and Thirty Three Naira) only being fourteen (14) months service charge from 1/6/2017 to 31/7/2018 which the defendant has refused to pay to the claimant.*

d. *The sum of N18,500.00 (Eighteen Thousand Five Hundred Naira) only per day as mesne profit from 1/8/2018 till judgment.*

e. *The sum of N800,000.00 (Eight Hundred Thousand Naira) as the cost of this suit."*

In proof of the case, the plaintiffs called one witness, Nuhu Tanko Dogara who testified as PW1 and caretaker of the plaintiffs property known as 4 bedroom terrace duplex together with the one room boys quarters situate at plot 3680 Erie Crescent, Maitama. The witness adopted his witness statement on oath at the hearing. The substance of the evidence is that the defendant as tenant rented the four (4) bedroom terrace duplex together with

the one room boys quarters at the rate of N6,000,000.00 (Six Million Naira) yearly with service charge of N650,000.00 (Six Hundred and Fifty Thousand Naira) only per annum, commencing from 1/6/2014 to expire 31/5/2016. At the expiration of the term granted, the defendant promised to renew the rent for another one year but instead paid the sum of N3,650,000.00 (Three Million, Six Hundred and Fifty Thousand Naira) being 6 months rent for 1/6/2016 to November, 2016 and 1 year service charge. The defendant has refused to pay the outstanding balance and subsequent rent on the property. The claimant avers that the defendant is in 20 months arrears of rent and 14 months arrears of service charge amounting to N10,758,333.00 (Ten Million, Seven Hundred and Fifty Eight Thousand, Three Hundred and Thirty Three Naira).

Due to the defendant's refusal to pay the outstanding rent and deliver up possession, the claimant instructed its solicitor to write a demand letter dated

17/4/2018. The defendant was also served with all due statutory quit notices, but he refused to vacate the premises. The defendant was served with the Writ of Summons on the 7/3/2019. Despite service of hearing notices, the defendant did not appear throughout the course of this proceedings and did not file any defence. PW1 tendered in evidence the following documents, to wit:

- Notice of appointment as property manager dated 6/9/2018 marked as Exhibit A.
- Tenancy Agreement dated 8/4/2014 marked as Exhibit A1.
- Demand for payment by the plaintiff's solicitor dated 17/4/2018 marked as Exhibit A2.
- Notice to quit dated 2/8/2017 marked as Exhibit A3.
- Notice to tenant of owners intention to apply to recover possession marked as Exhibit A4.

The defendant has been given every opportunity to respond to the allegations made against him but he has

exercised his right not to do so. That clearly is his prerogative as he is under no obligation to respond or indeed take any steps if he so chooses. In the final written address of plaintiff, **Omeh Mercy Esq** of counsel formulated one issue for determination:

> *"Whether the claimant have proved its case to be entitled to the reliefs claimed against the defendant."*

Counsel submitted that the defendant has no defense to the case of the claimant and the law is that evidence that is relevant to the matter in issue and which was neither discredited nor demolished remains credible evidence that ought to be relied upon by a trial Judge. Counsel cited **Eghareuba vs. Osagie (2007) 12 SCNJ 166 at 183, Consolidated Res. Ltd vs. Abofar Ven (Nig) Ltd (2007) 6 NWLR (part 1030) 221 at 225.** Counsel added that the case of the plaintiff is unchallenged or uncontroverted and therefore credible and should be

acted upon by the Court. Learned counsel urged the Court to enter judgment for the claimant.

It is the law and it has been reiterated almost to irritation that recovery of premises must be done by due process of the law. Any other form of recovery is unlawful. It cannot be over-emphasized that recovery of possession of premises from a tenant by a landlord can only be by an order of Court obtained after hearing the parties pursuant to the relevant Recovery of Premises Law. See Ndieli & anor vs. Eze (2019) LPELR – 42122 (CA), Ihenacho v. Uzochukwu (1997) 2 NWLR Pt. 487 257.

The plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure or default to call or produce evidence. The mere fact that a case is not defended does not entitle the trial Court to overlook the need to ascertain whether the facts adduced before it establish or prove the claim or not. In this vein, a trial Court is at no time relieved of the burden of ensuring that the evidence

adduced in support of a case sustains it irrespective of the position of the defendant. See Nnamdi Azikiwe University vs. Nwafor (1999) 1 NWLR (part 585) 116 at 140 – 141.

A logical corollary that follows the above instructive dictum is the attitude of Court to the issue of burden of proof where it is not satisfactorily discharged by the party upon which the burden lies. See Duru vs. Nwosu (1989) 4 NWLR (part 113) page 24 where the Supreme Court stated thus:

> *"….a trial Judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory, then he had not made out what is usually referred to as a prima – facie case, in which case the trial judge does not have to consider the case of the defendant at all."*

From the above, the point appears sufficiently made that the burden of proof lies on the plaintiff to establish his case on a balance of probability by providing credible evidence to sustain his claim whether in the presence and/or absence of the defendant. See **Agu vs. Nnadi (1999) 2 NWLR (part 589) at 142.**

In this instance, there is no dispute that the defendant's initial tenancy began on the 1/6/2014 and ran for two years certain, expiring on the 31/5/2016. The defendant for the new term only paid rent for six (6) months.

The position of the law is that in order for a landlord to successfully evict a tenant from the premises he occupies lawfully, he must first be served with the prescribed statutory notice to determine the tenancy. This is what is known as "Notice to Quit". The period stated in the notice depend on the nature of the tenancy, whether, yearly, quarterly or monthly. It may also depend on the period otherwise agreed by the parties

themselves. If the tenant remains on the premises and fails to deliver possession after the expiration of the Notice to quit, the law requires the landlord to issue a further notice termed "Notice to Tenant of owner's intention to apply to recover possession". It is commonly referred to as the "7 days notice". It is only after the expiration of the second notice that is the 7 days notice, that the landlord can institute an action against the erring tenant for refusing to deliver up possession. See Iheanacho vs. Uzochukwu (supra).

In other words, the absence of service of a valid notice to quit or notice of owner's intention to apply to recover possession, (i.e. statutory notices), the plaintiffs claim for recovery of possession will be deemed not properly constituted and thus incompetent and such claim will be struck out in which case he is afforded the opportunity to bring a new action after due compliance with the strict requirements of a valid quit notice. See Ndubuisi vs. Shobande (2013) LPELR – 22770 (CA), Eleja

vs. Bagudu (1994) 3 NWLR (part 334) 534 and Sule vs. Nigeria Cotton Board (1985) 2 NWLR (part 5) 17.

In this instance, the tenancy of the defendant was initially for a term certain renewable in the subsequent years. It is established that the pattern of the tenancy relationship of the parties was between 1st June to expire 31st May of every year, with a new term automatically beginning. A new term would automatically begin at the expiration of the preceding.

The question now is whether the notice to quit dated 2/8/2017 has competently determined the tenancy.

In order to be effective a notice to quit should determine a tenancy at the end of the term of the tenancy. For instance a notice of six months is necessary to determine a yearly tenancy as in the instant case and such notice must terminate the tenancy at the end of the current term of the tenancy. Thus any notice given and due to end at the middle of the term of the tenancy will

be invalid. See Akpokiniovo vs. Air Liquid Nig. Plc (2012) LPELR – 9582 (CA), Omotosho vs. Olorode (1988) 4 NWLR (part 37) 225; African Petroleum Ltd. vs. Owodunni (1991) 8 NWLR (part 210) 391 SC; Paper Sack Nig. Ltd vs. Odutola (2004) 13 NWLR (part. 891) 509.

In this instance, the question whether or not the tenancy of the defendant had expired by effluxion of time deserves to be examined closely. Though, the tenancy was initially for a fixed term of two years, the evidence of PW1 showed that the landlord continued to accept rents from the tenant yearly. By implication therefore parties have agreed to convert their tenancy into a yearly one determinable by the length of notice as prescribed by law. At the time the notice to quit was issued, the defendant's tenancy had been converted from one for a fixed tenancy to a tenancy from year to year, and thus the defendant was entitled to half a year's notice to determine the tenancy.

In the case of **Ayinke Stores Ltd vs. Adebogun, (2008) LPELR – 3831 (CA)** the Court held:

> *"In absence of such service of valid quit notice under the law, the claim of the respondent was not properly instituted therefore the respondent's claim should have been struck out."*

See **also Ekpere v. Aforiji (1972) 3 SC 113.** A notice to quit in order to be effective ought to determine the tenancy at the end of the current term of the tenancy and any notice given and due to end at the middle of the term will be invalid. See **African Petroleum Ltd vs. Owodunni (supra).**

In this instance, the notice to quit (Exhibit A3) dated 2/8/2017 which sought to determine the tenancy which commenced 1/6/2017 and was due to expire 31/5/2018 was invalid. I say this because an existing tenancy had commenced on the 1/6/2017 while the notice to quit (Exhibit A3) was served barely 2 months into the tenancy.

Exhibit A2 the demand for the payment of the outstanding balance of rent and service charge was written on the 17/4/2018 while tenancy of the defendant was still pending. This is 8 months after service of Exhibit A3 (quit notice) and Exhibit A4 (notice of owners intention to recover possession). Infact, in paragraph 4 of Exhibit A2 plaintiff's solicitor stated thus:

> *"You may wish to note that our clients records shows you are now owing sixteen (16) months arrears of rent and Ten months arears of service charge in the sum of N8,000,000.00 (Eight Million Naira) and N541,670.00 (Five Hundred and Forty One Thousand, Six Hundred and Seventy Naira) respectively from 1st December 2016 to 31st March, 2018."*

Above goes further to show that the claimant acknowledged the fact that the tenancy of the defendant was still subsisting as at the time Exhibit A2 was written.

"It is in the law and it has been reiterated almost to irritation that recovery of premises must be done by due process of the law. Any other form of recovery is unlawful."

Per Ogunwunmiju, JCA (as he then was) in **Ndiehi & anor vs. Eze (2016) LPELR – 42122 (CA).** Since the defendant's tenancy was still subsisting, the appropriate notice to quit would have been six (6) months notice to terminate at the expiration of the term.

In **Amah vs. Ozouli (2010) LPELR – 3762** **Per Sanusi JCA** (as he then was) stated thus:

"an order of possession is not granted as matter of course…A landlord seeking an order of recovery of possession of premises must therefore strictly comply with the procedure laid down therefore, and failure to so comply there with will justify the Court's refusal to grant such order of recovery."

In the circumstance, I hold that the claim for possession is premature, it is unmeritorious and it is hereby refused.

The claimant by Relief (b) seek for N10,000,000.00 (Ten Million Naira) being twenty (20) months arrears of rent and (c) the sum of N758,333.00 (Seven Hundred and Fifty Eight Thousand, Three Hundred and Thirty Three Naira) being fourteen (14) months arrears of service charge. The law is that the Court may make an order in respect of arrears of rent; severable from a claim for possession and mesne profits. See **Dominic Nnadozie vs. Anthony Oluoma (1963) ENLR page 77.** In **Akpiri vs. Oluwa (1972) 9 CCHCJ page 90** the Court held that:

> *"There are authorities for the proposition that despite the fact that the notices served on the tenant are bad, nevertheless this is no bar to the recovery by the landlord in the action of his claim for arrears of rent."*

In a claim for arrears of rent, the landlord is not challenging the validity of the continued occupation of the premises by the tenant; indeed, he concedes that the tenant is validly and legally in possession. See Felix O. Osawaru vs. Simeon O. Ezeiruka (1978) LPELR – 2791 (SC). Arrears of rent is also liquidated damages. See Bolori vs. Offorke (2010) LPELR – 3886 (CA).

Now the onus is on the plaintiff to prove that the rent lawfully due is in arrears, and that the amount has not been paid at the date the proceedings commenced. The onus however is not static. Once the plaintiff gives evidence that the defendant is in arrears with his rent for a stated period, the onus shifts to the defendant to show that he paid his rent within that period by leading evidence in rebuttal. See Osawaru vs. Ezeiruka (supra).

It is established from the evidence that the defendant is in arrears of rent for a cumulative period of 20 months totalling the sum of N10,000,000.00 (Ten Million Naira) only, and 14 months arrears of service charge amounting

to N758,333.00 (Seven Hundred and Fifty Eight Thousand, Three Hundred and Thirty Three Naira). This is for the period of 1/12/2016 – 31/7/2018 for arrears of rent, and for arrears of service charge from 1/6/2017 to 31/7/2018. The rent claimed herein is liquidated as parties agreed to the payment of N6 Million per annum. This is endorsed by the tenancy agreement Exhibit A. Thus, the defendant shall pay the above sum to the claimant for the stated period. Relief's (b) and (c) are accordingly granted.

The claimant has prayed for the *sum of* N18,500.00 (Eighteen Thousand Five Hundred Naira) only per day as mesne profit from 1/8/2018 till judgment. The law is that, while rent is liquidated and operative during the subsistence of a tenancy, mesne profits are unliquidated and only start to run when the tenancy expires and the tenant holds over. See Osarawu vs. Ezeiruka (supra), Ahmed Debs & ors vs. Cenico Nig. Ltd (1986) 3 NWLR (part 32) page 846 at 852, Marine and General Assurance

Co. Ltd vs. Rossek & or (1986) 2 NWLR (part 25) page 750 at 763.

Simply put, mesne profits means intermediate profits, that is, profits accruing between two points of time, that is between the date when the defendant ceased to hold the premises as a tenant and the date he gives up possession. As a result the action for mesne profits, accordingly does not lie unless either the landlord has recovered possession or the tenant's interest in the land has come to an end. See Abeke vs. Odunsi & anor (2013) LPELR – 2064 (SC)

In this instance, having held that the tenancy is still subsisting and has not been duly determined by the appropriate notice to quit, the claim for mesne profits cannot be maintained. It is also hereby refused.

The claimant seeks for N800,000.00 (Eight Hundred Thousand Naira) as the cost of this suit. This appears to be a claim for solicitors fees for prosecuting the action.

The question is whether the claimant is entitled to the award of his 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 **Ihekwoba 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 solicitor's 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).**

However the general position of the law is that a successful party in an action is entitled to costs. It is a matter within the discretion of the Court and such discretion must be seen to have been exercised judiciously and judicially. By the provisions of Order 56 of the Rules of Court, the principle to be observed in fixing the amount as cost, is that the party who is in the right is to be indemnified for the expenses to which he has been

necessarily put in the proceedings, as well as compensated for his time and effort in coming to Court. Thus costs of this suit shall be granted accordingly.

On the whole, judgment is entered in part for the plaintiff as follows:

- The claim for possession is accordingly refused.
- The claim for arrears of rent and arrears of service charge succeeds. In effect the defendant shall pay the sum of for N10,000,000.00 (Ten Million Naira) being twenty (20) months arrears of rent (for the period 1/12/2016 to 31/7/2018) and the sum of N758,333.00 (Seven Hundred and Fifty Eight Thousand, Three Hundred and Thirty Three Naira) being fourteen (14) months arrears of service charge (for the period 1/6/2017 to 31/7/2018) owed to the plaintiff.
- Cost of N100,000.00 (One Hundred Thousand Naira) awarded in favour of the claimant against the defendant.

Hon. Justice M.A. Nasir

Appearances:

Mercy Omeh Esq – for the plaintiff

Defendant absent and not represented.