

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT GUDU - ABUJA

ON THURSDAY THE 25TH DAY OF JANUARY, 2022.

BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO -ADEBIYI

SUIT NO. CV/1035/2020

PIETRO UZOCHUKWU MACELO -----CLAIMANT

AND

1. R/ADMIRAL AYODELE ODEJIMI (RTD)

2. OLANIYI OYINLOYE Esq.----- DEFENDANTS

RULING

The Claimant while testifying in this case sought to tender in evidence, videos, voice audio, a certificate of compliance and a letter dated 22/5/2019, wherefore, the Defendants counsel objected on the grounds that:-

- i. The videos were not duly pleaded.

He argued that he simply stated in paragraph 28 of his statement of claim “videos” that he did not say video of what hence pleading is insufficient to enable him tender the video evidence. Also, that there is a lack of pleading to support the voice messages as from the submission of the Plaintiff counsel what is contained in the voice message is beyond what they pleaded in paragraph 16 of their statement of claim. He urged the court to reject the two (2) pieces of document because by virtue of Section 83 (3) of the Evidence Act such documents are prohibited from admission as exhibits as the Claimant kept saying in the video “we will meet in court” hence the Plaintiff was clearly anticipating this suit.

Claimant's counsel in response to the audio referred the court to paragraphs 14 and 17 of the statement of claim. likewise, paragraphs 13, 16 and 28 which talked about different audios and that paragraph 28 of the statement of claim well captured the video. Also, that the said video was frontloaded therefore they were not taken by surprise. He urged the court to discountenance the objection as the Claimant averred in his statement of claim of the incident being recorded in pictures, audios and voice message more so they have a certificate of compliance.

- ii. That by law of evidence document can be proved either by primary or secondary evidence.

Defence counsel argued that the letter dated 22/5/2019 is not the original but a photocopy of an acknowledgement hence it is not properly before the court. That Claimant pleaded that he will tender an acknowledgment copy of the letter but rather he brought a photocopy. That there is no police report of the lost document and also that the document is not in its complete version as the document spoke of receipts which receipts were not attached hence shows that the document was never made. That the signature was super imposed.

In response Claimant counsel submitted that Sections 87, 89 and 90 of the Evidence Act 2011 states that when the original is lost, destroyed or cannot be found any secondary evidence is admissible and there is no provision that says that a report must be made to the police. That the document is well pleaded and that Section 101 of the Evidence Act 2011 empowers this court to compare signatory when same is in dispute. On the fact of not attaching the copies of the receipts attached he submits that the letter as a forwarding letter is sufficient.

I have carefully examined the document sought to be tendered in evidence vis-à-vis the pleadings filed before the Court. I have equally attentively listened to submissions of Counsel for both parties for and against the admissibility of the document sought to be tendered in evidence and

appreciated same. It is trite that the conditions precedent for admissibility of documentary evidence under **Section 83 of the Evidence Act 2011** are as catalogued below:

- The document sought to be tendered in evidence shall be the original, **Section 83 (1)** of the Act;
- It shall be tendered by the maker or a person having personal knowledge thereto, **Section 83 (1) (a) and (b)** of the Act;
- A copy of the original may be tendered in evidence if it is impracticable to access the original; **Section 83 (2) (b)** of the Act; and
- Any other person may if and only if, proper foundation is laid before tendering same, **Section 83 (1) (b) and; (2) (b)** of the Act.

Apart from these conditions, it is settled law that the issue of admissibility of any documentary evidence is governed by the principle as to whether or not the document is pleaded by the party or parties to the proceedings; whether it is relevant to the subject matter of inquiry by the court and whether it is admissible in law and the judicial authority in **Orji v. Ugochukwu [2009] 14 NWLR (Part 1161) 207 CA, [308, paras, B-F]**, stated that the recorder is the most appropriate person to tender audio-visual image in evidence. If impracticable by the recorder any other person can, provided proper foundation is laid to the satisfaction of the court. It is crystal clear that the law has laid down a procedure that should be followed in tendering video message.

In the instant case the Claimant in laying foundation for the admissibility of the video and voice audio stated that he is the maker, that the video and voice audio were pleaded in Paragraphs 13, 14, 16, 17 and 28 of the statement of claim. And that both are relevant. I have considered the said document and I find that the video and voice audio are indeed pleaded and relevant to the case, as it touches on the basis for which the parties are before this court. The Defendants cannot be heard to object on the grounds that he simply said in paragraph 28 of his statement of claim “videos” that he did not say video of what or that what is contained in the voice message

is beyond what they pleaded in paragraph 16 of their statement of claim as it is trite law that only facts are to be pleaded not evidence. In other words Defendant counsel objection that the video evidence was not pleaded goes contrary to the dictates of the law relating to pleadings. The video sought to be tendered as evidence is in support of the fact contained in the pleadings that workers whom the caretaker and landlord sent to remove the roof had allegedly done some damage to the property which claimant pleaded in his statement of claim of being recorded. Having pleaded this fact, the law does not put a responsibility on the claimant to plead the evidence. This is supported by Rhodes-vivor JCA in OGHONYONE V. OGHONYONE (2010) 3 NWLR (Pt. 1182) 564 @ 587 paras B-C when his Lordship held that facts are pleaded and documents are tendered in support of facts pleaded hence facts are pleaded and not documents.

On the objection raised by the Counsel for the Defendants in respect of **Section 83(3) of the Evidence Act 2011** which provides as follows: -

“Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish”.

The evidence (video and voice audio) was gathered during the alleged act that gave rise to the cause of action. It is clear it was not made in the pendency of a suit but it should not also be argued that it was made in anticipation of this suit because this is evidence that gave rise to this cause of action. Without prejudice to the content of the video and voice audio we must bear in mind that what drives admissibility is relevance. It is within his right to express the legal options available to him other than resort to self-help. The statement “we will meet in court” is not anticipatory in my view, it is a statement establishing the legal options available to the Plaintiff “if” the need arises. It would be foolhardy for this court to hold that every statement that “we will meet in court” will definitely end in legal proceedings and hence anticipatory of an intending

suit. From statement of claim plaintiff had alleged been frustrated and bitter as stated in paragraph 10 “he had to bitterly complain to defendants when in addition to the leakages, the soakaway collapsed around October, 2019 and thus even threatened legal action if nothing is done”.

On the whole, within the purview of **Section 83 of the Evidence Act**, and most importantly the context of the facts of this case to wit: that the video was made during the alleged act that gave rise to the cause of action; In determining whether (video) a document was prepared in anticipation of litigation the court must take into cognizance the purpose of which the video was made, when the video was made and the possibility of litigation occurring as a result of the video. Claimant in this case has pleaded on the alleged damage done to his apartment by workers of the defendant. For the court to hold that the video was made in anticipation of litigation, the maker of the video must have intentionally established the alleged wrong complained of and recorded the video mala fide. This is not the position in this suit as Plaintiff has stated in his pleadings that workers at the behest of the Defendant had come to his house under the guise of renovation and had damaged parts of the structure of his rented apartment. By recording the video no malafide has been established against the Claimant. I hold that the video and voice audio was not made in anticipation of this suit to the mind of the court. It is a statement as to the legal consequence of an alleged act to which redress must be sought. The objection is accordingly discountenanced and the video and voice audio are admitted in evidence. However, the Claimant counsel is ordered to make arrangement for both to be played in the open court to ascertain the uniformity of the content with the frontloaded copies.

On the letter dated 22/5/2019, the document sought to be tendered is not an original copy, but a photocopy. The Claimant in laying foundation to the whereabouts of the original of the said document while in the witness box restated Paragraph 29 of his reply to statement of defence to the effect that the original is with the 2nd Defendant and that the acknowledgment

copy was destroyed by flood hence the photocopy and in the same vein put the defendants on notice to produce the said original.

As stated above question of admissibility of documents in evidence is guided by 3 main criteria's namely: Is the document pleaded; Is it relevant to the enquiry being tried by the court and is it admissible in Law? The defendants are not contesting that the document is not pleaded and/or is not relevant to the case. From their objection they conceded two but rather that the document sought to be tendered is inadmissible in law as same is a photocopy of an acknowledgment, that the document was never made and that the signature was super imposed. It is the law that he who asserts must prove. The defendants have not in any way proved this assertion, a mere denial of the existence of the said letter will not avail the defendants.

The Court of Appeal in **SPDC & ANOR V. PESSU (2014) LPELR-23325 (CA)** held thus;

"The law is that where a party given notice to produce a document fails to produce the same, then the other party is at liberty to tender admissible secondary evidence, that is, a copy of that document or proceed with committal proceedings..."

In the light of the foregoing, since the Defendant has been put on notice to produce and they neglected to do so then the secondary document becomes admissible in law.

On the whole, the documents sought to be tendered are pleaded, relevant and admissible in law and is hereby admitted and marked as follows;

- i. Video in disk as Exhibit L
- ii. Voice Audio in disk as Exhibit M
- iii. Certificate of compliance dated 12/11/2020 as
- iv. Letter dated 22/5/2019 as Exhibit

One final point. The question of admissibility is a distinct matter from the weight to be attached to the document. That will solely depend on the totality of the evidence whether real, documentary or oral that will be placed before the court at the end of hearing.

Parties:

Appearances:

HON. JUSTICE M. OSHO-ADEBIYI

JUDGE

25THJANUARY, 2022

