

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT MAITAMA – ABUJA**

BEFORE: HIS LORDSHIP HON. JUSTICE SAMIRAH UMAR BATURE

COURT CLERKS:	JAMILA OMEKE & ORS
COURT NUMBER:	HIGH COURT NO. 32
CASE NUMBER:	SUIT NO. FCT/HC/CV/2298/17
DATE:	15TH MARCH, 2021

BETWEEN:

(1). ULTIMATE GAS LIMITED }
2. GAS PROJECT LIMITED }CLAIMANTS

AND

MEDALIST OIL & GAS LIMITED.....DEFENDANT

APPEARANCES:

Adebayo Ologe Esq for the Claimants.

B. G. Haruna Esq for the Defendant

RULING

During the course of these proceedings objection was raised by the learned Counsel to the Claimant Adebayo Ologe Esq, to the admissibility of a document sought to be tendered in evidence by the Defendant's Counsel during cross-examination of Pw1.

In his evidence during cross-examination, Pw1 identified the document on a Board Resolution of his company made on the 14th September 2015.

The objection of Mr. Ologe Esq is on the grounds that the document has not passed the criteria for admissibility which is that it is must be

pleaded, it must be relevant and also admissible. Learned Counsel submitted that a document that is inadmissible cannot be admitted even by consent of the parties. It is submitted further that the fact that the witness has expressed familiarity with the document cannot make it admissible in any way. Counsel urged the Court to reject the document and mark it as same.

In his response to the said objection, M. G. Duku Esq, learned Counsel to the Defendant submitted that in bringing the said document before the attention of the Court, the witness has admitted that it was made by the company Ultimate Gas Ltd and that the said document is the very foundation of the transaction that gave rise to this action of the Claimant in this suit. That without the said document, the transaction would not have proceeded.

Learned Counsel submitted however, that in the circumstances, the Defendant will be requesting for a notice to produce the original of the document which is in custody of the Claimant. Learned counsel then applied to withdraw the document and stated that the Defendant shall issue a written notice for the Claimant to produce the said document.

However, at this point, Ologe Esq argued that it is too late in the day for Defendant's Counsel to withdraw the document when issues have been joined. And secondly, that notice to produce is given in pleadings and in the instant case, there's no such notice in the pleadings. Learned Counsel submitted that the application is strange and urged the Court to reject the document and mark it as same.

Now, I have carefully considered the objection raised by Claimant's Counsel as well as submissions of Counsel on both sides on the issue.

First of all it is instructive to note that admissibility of a document under cross-examination is completely permissible and unimpeachable. If the purpose is to tender a previous statement made in writing by a party to the proceeding in order to contradict or discredit his evidence on oath before the Court. On this please see Section 232 of the Evidence Act and the case of ***IPINLAIYE V OLUKOFUN (1996) 6 SCNJ, 74.***

The learned Claimant's Counsel has also argued in his submission that the said document is admissible as it has not passed the criteria in relation to it being pleaded. Well let me state here that the witness Pw1, has clearly indentified the document as a Board Resolution of Ultimate Gas Ltd made on 14th September 2015.

Therefore, there's no doubt that the document exists but is clearly under the control or in possession of the Claimant herein.

Now, although, the said document was not pleaded, the law is trite that documentary evidence need not be specifically pleaded to be admissible in evidence. On this premise, I refer to the case of **IPINLAIYE OLUKOFUN (supra)** per Igu, J.S.C, P.16, para B – D, where the Court held as follows: -

“Documentary evidence, however needs not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded...”

In any event, learned Defendant's Counsel applied to withdraw the said document and also applied with the leave of Court to issue the proper notice in line with the provision of the Evidence Act 2011.

Section 89 of the Evidence Act deals with admissibility of secondary documentary evidence. In particular Section 89(1)(a)(i) of the act provides: -

“Secondary evidence may be given of the existence, condition or contents of a document when –

- (a). The original is shown or appears to be in the possession or power***
- (i). of the person against whom the document is sought to be proved; or***
- (ii). Of any person legally bound to produce it, and when, after the notice mentioned in Section 91 such person does not produce it”***

However, the question to ask here is whether learned Counsel's withdrawal is proper in the instant case.

From the record, the withdrawal of the document was made at the point learned Defendant's Counsel was responding to his learned friend's objection and apparently realised that the document is inadmissible without the proper notice being given in line with the provisions of Section 89 and 91 of the Evidence Act.

Now, on this issue, I've carefully considered Claimant's Counsel's submission that the withdrawal was made late in the day. However, in my humble view, I've considered the fact that issues were not completely or finally joined when Counsel applied to withdraw the document. Counsel's withdrawal was made timeously as well as his application for leave of Court to issue the said notice, Counsel's reply was on relevancy of the document and not admissibility.

On this premise I refer to the case of ***OYETUNJI V AKANNI (1986) 5 NWLR (Pt. 42) 461 at 467 (CA)*** where the Court held that where a party seeking to tender a document realises that the document has some features that make it inadmissible and applies to withdraw it before replying to argument opposing its admissibility, the Court cannot at this stage mark it rejected.

I have noted that the said document according to learned Defendant's Counsel is relevant and forms the very foundation that has founded the action of the Claimant. In the circumstances therefore, the application for withdrawal is considered and granted as prayed. In the interest of justice leave is hereby given to the Defendant to issue notice to produce to the Claimant in accordance with Section 91 of the Evidence Act 2011.

Signed:

***Hon. Justice Samirah Umar Bature
15/3/2021***