

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 10

SUIT NO: FCT/HC/CV/189/2018

BETWEEN:

MESSRS XCESS STRENGTH NIG. LTD.....CLAIMANT

VS

1. THE HON MINISTER OF POWER, WORKS AND HOUSING

2. FEDERAL MINISTRY OF LANDS, HOUSING & URBAN

DEVELOPMENT..... DEFENDANTS

RULING/JUDGMENT

By a Writ of Summons dated 12/11/2018 and filed same day, under the Undefended List Procedure, the Claimant claims against the Defendant as follows:-

- (1) AN ORDER OF THE HON. COURT DIRECTING** the Defendants to pay the Claimant the sum of **₦16,075,576.95 (Sixteen Million, Seventy Five Thousand, Five Hundred and Seventy Six Naira, Ninety Five Kobo)** only being the balance of the contract sum for the construction of ICT Centre at Akobo , Ikeduru Local Government Area of Imo State duly executed by our Clients as awarded by the **Ministry.**

- (2) **AN ORDER OF THE HON. COURT DIRECTING** the Defendants to pay the Claimant 1% of the contract price of **₦19,500,000.00 (Nineteen Million, Five Hundred Thousand Naira)** only per day starting from **3rd April, 2014** when the balance was due and payable as confirmed by the Defendants themselves in their final "**Certificate of Practical Completion**" till the judgment sum is liquidated, being the damages for delay in payment of the balance as agreed by parties under Article 7 of the Agreement
- (3) **An Order of the Honourable Court directing** the Defendant to pay the Claimants the sum of **₦3,500,000.00 (Three Million Five Hundred Thousand Naira)** only being the legal fee paid to the Claimant's counsel to institute and prosecute this matter for recovery of the debt herein from the Defendant.
- (4) Post-Judgment interest of 21% on the Judgment sum until judgment is liquidated by the Defendant.

Accompanying the Writ of Summons is a 22 Paragraph affidavit with 9 (Nine) annexures attached and marked as Exhibits 1 – 9. The affidavit was sworn to by Alex Agulefo, the Managing Director of the Claimant. The originating processes was served on the Defendant on 24/11/2019, yet failed to react to the processes by filing the requisite Notice of Intention to Defend as required by Order 35 Rule 3 (1) of the FCT High Court (Civil Procedure) Rules 2018 (hereinafter called the Rules).

The case was called up for hearing on 12/2/2020, after several adjournments and despite Hearing Notice, the Defendant still failed to react.

The case of the Claimant is that pursuant to an award letter dated 5/10/2012, the Claimant was contracted to build an ICT Centre at Akabo, Ikeduru Local Government Area of Imo State for the sum of ₦19,500,000.00 (Nineteen Million, Five Hundred Thousand Naira) only and same accepted by the Claimant, both letters is Exhibit "1A" and "1B" respectively. That by Exhibit 2, the parties entered into an Agreement which stated by the Terms and Condition of the contract. Further pursuant to the Terms the Claimant commenced and completed the job within the stipulated time as per the terms on 14th March, 2013. The job was duly certified by the Representatives of the Defendants in line with the Terms and covered by Exhibits "3" and "4A" – "4C" respectively. That shortly after the Defendant paid the sum of ₦3,424,423.05 (Three Million, Four Hundred and Twenty-Four Thousand, Four Hundred and Twenty Three Naira, Five Kobo) only on 2/1/2013, leaving a balance of ₦16,075,576.95 (Sixteen Million, Seventy-Five Thousand, Five Hundred and Seventy Six Naira, Ninety Five Kobo) only evidenced by Exhibit 5. That despite the submission of certificate of practical completion" Exhibit "6A" and "6C, in line with the Terms of their Agreement, the Defendants failed to pay the outstanding balance. Rather than pay the balance, the Defendants vide a letter of 17/3/2016, Exhibit 7 acknowledge the debt, but claimed that the amount owed is ₦14,640,111.37 (Fourteen Million, Six Hundred and Forty Thousand, One Hundred and Eleven Naira, Thirty Seven Kobo) only and

promised to pay. That despite demands from their Solicitor vide Exhibit 8, for full payment of the outstanding debt owed, the Defendants failed to pay up and consequent upon that failure took out an action through their Solicitor upon payment of legal fees, covered by Exhibit 9. The Claimant contend that the Defendants have no defence to this action, therefore urge the court to enter judgment in their favour.

The Defendant vide two (2) Motions, M/7615/2020 dated 15/6/2020, praying for an order stay proceedings and refer the parties to Arbitration and the second M/7614/2020, dated 15/6/2020, prayed for extension of time to file Notice to Defend in this Suit. The court in a well-considered Ruling dismissed the first Motion M/7615/2020 and allowed the second Motion M/7614/2020, thus allowing the Defendants to defend the Suit. Consequent upon this leave granted to the Defendant to defend, the Defendant filed an 8 paragraph affidavit in support of Notice to Defend, and by paragraphs 4 (a –m), the Defendants indeed admitted wholly the terms of the contract, save the alleged claim of the Claimant that it was agreed that the Defendant pay 10% per day of the contract price as delay payment damages, contending that it was never provided in the contract Agreement.

After a careful consideration of the case of the Claimant as contained in the affidavit in support of the Writ of Summons, the issue that can be distilled for determination is;

“Whether the Claimant has made out a case to be entitled to Judgment under the “Undefended List”.

By Order 35 Rules 3 (1) of the Rules of Court, where a Defendant is served with a Writ under the Undefended List and marked as such, the Defendant has five (5) clear days to file his Notice of Intention to Defend along with an affidavit disclosing a defence. Further by Order 35 Rule 4 of the Rules, where a Defendant neglects to deliver the Notice of Intention to Defend and an affidavit prescribed by Order 35 Rule 3 (1) of the Rules, or is not given leave to defend by the court, the Suit shall be heard as an undefended Suit and Judgment given accordingly.

In the instant case, the Defendant filed a Notice to Defend with an affidavit disclosing a defence.

It is trite law that where a Defendant files a Notice of Intention to Defend along with an affidavit disclosing a Defence in consonance with Order 35 Rule 3 (1) of the Rules, the duty of the court at that stage is to look at the affidavit to find if there are triable issues from the facts contained in the affidavit. It is not the duty of the court at that stage to determine whether the defence being put up will ultimately succeed or whether the defence has been proved or comprehensive. See Trade Bank Plc Vs Spring Finance Ltd (2009) 12 NWLR (PT. 1155) Pg. 360 @ 373.

To succeed the Defendant must show that there are triable issues as revealed in the affidavit accompanying the Notice to Defend. On what may amount to triable issues, the Court of Appeal in the case of Patigi Local Government Vs I.K. Eleshin-Nla (2008) ALL FWLR (PT.421) Pg. 854 @ 875 Para E – G, stated thus;

“That the following situation may give rise to the discharge of the burden placed on the Defendant;

- (a) A difficult point of law has been raised on the Defendant’s affidavit.
- (b) Dispute as to fact raised by the Defendant
- (c) Dispute as to the correct amount owed.
- (d) Where there is probability of a bonifide defence e.g counter-claim”

See also case of Ataguba & Co Vs Gura Nig Ltd (2005) All FWLR (PT.256) Pg. 1219 @ 1233 Ratio 7.

I have earlier stated the case of the Claimant in course of this Ruling/Judgment. The Defendant on the other hand by Paragraphs 4 (a) (b) (c) (d) (f) (g))h) is in Agreement with the Claimant claim, but contend by Para 4 (e) that the payment of 10% per day of the contract price as delay payment damages was not provided for in the contract Agreement, rather by Para 7 (1) of the contract Agreement, the Claimant is entitled to a one-off payment of 1% default payment damage of on the unpaid balance.

I have critically perused the said contract Agreement and note that by Article 7.1, clearly provide for payment of 1% of the contract price to the contractor by the employer as delay payment in respect of any sum of money or contract sum due to the contractor. In this instant the contract sum due to the contractor as agreed by both parties to the Agreement and vide their respective affidavits, Para 11 of the Claimant’s supporting

affidavit and by Paragraph 4 (c) of the Defendants affidavit in support of the Notice to Defend is the sum of ₦16,075,576.95 (Sixteen Million, Seventy-Five Thousand, Five Hundred and Seventy-Six Naira, Ninety Five Kobo) only. Also find that the parties are at ad idem as to other terms of the contract Agreement. The court having considered the evidence as gleaned from the facts as stated by both parties, what is left for the court is to determine is whether the Defendant has disclosed triable issues in his affidavit evidence in support of the Notice of Intention to Defend to warrant the transfer of the matter to the General Cause List. My Answer to this is No. The Defendant by their affidavit evidence, in particular Paragraphs 4 (a) (b) (c) (d) (f) (g) (h) is in Agreement with the Claimant on the contract Agreement, thus conceding to that part of the claim of the Claimant before the court, that is for the sum of ₦16,075,576.95 (Sixteen Million, Seventy-Five Thousand, Five Hundred and Seventy-Six Naira, Ninety Five Kobo) only, but contend the 2nd claim of the Claimant for 1% of the contract price of ₦19,500,000.00 (Nineteen Million, Five Hundred Thousand Naira) only per day from 3rd April, 2014.

This court have resolved that this position of the Claimant on the claim cannot stated based on the Article 7.1 of the contract Agreement, cannot be entitled to this claim.

The "Undefended List Procedure" is a procedure meant to shorten the hearing of a Suit where a Defendant has no defence, hence the Defendant should not merely file his Notice to Defend for the purpose of delaying the hearing as proposed by the Defendant, having positively admitted the main claim save the only disputed claim, what this court has resolved in their

favour. To that extent the Defendant Notice of Intention to Defend, fails. See Patigi Local Government Area Vs I.K. Eleshin-Nla (Supra).

From all of these and having carefully considered the affidavit evidence of the parties, and the Exhibit, the court finds that the evidence is satisfactory, and credible and accordingly enter Judgment in favour of the Claimant as follows:-

- (1) It is hereby ordered that the Defendants jointly and severally pay to the Claimant the total sum of ₦16,075,576.95 (Sixteen Million, Seventy-Five Thousand, Five Hundred and Seventy-Six Naira, Ninety Five Kobo) only being the balance of the contract sum for the construction of ICT Centre at Akabo, Ikeduru Local Govt. Area of Imo State.
- (2) It is also ordered that the Defendants jointly and severally pay 1% default charge to be calculated on the remaining balance of the contract sum, being ₦19,500,000.00 (Nineteen Million, Five Hundred Thousand Naira) only, pursuant to Article 7.1 of the Contract Agreement.
- (3) On the Relief 3 of payment of Legal Fee by the Claimant to his counsel, suggested by Exhibit 9. It is settled law in the case of Guinness (Nig) Plc Vs Nwude (2000) 15 NWLR (PT.689) Pg 150, that;

"It is unethical and affront to public policy for the litigant to pass on the burden of his Solicitors fees to his opponent in a case"

Accordingly, this relief lack merit and is hereby refused.

On Relief 4, Post-Judgment Interest of 21% of the Judgment sum until the judgment sum is liquidated by the Defendants. In line with the Provisions of Order 39 Rule 4 of the Rules of Court, the court is empowered to grant this Relief. Accordingly, the Claimant shall be entitled to 10% interest of the Judgment sum until the total sum is liquidated by the Defendants.

This is the Judgment of the court.

HON. JUSTICE O.C. AGBAZA

Judge

27/1/2021

Appearance

I. A. NWALA FOR THE CLAIMANT

C.F. ADENIYI FOR THE DEFENDANTS