

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
BEFORE HIS LORDSHIP: HON JUSTICE ASMAU AKANBI – YUSUF
DELIVERED THE 30TH DAY OF MARCH, 2021
SUIT NO. CT/HC/CV/1082/19**

BETWEEN

MRS. JULIANA EGOPIJA PLAINTIFF

AND

SEVEN-UP BOTTLING COMPANY NIG LTD DEFENDANT

JUDGMENT

By a writ of summons dated and filed the 13th February, 2019, plaintiff herein claims against the defendant as follows:

1. AN ORDER of this Honourable court directing the defendant to pay Special damages of the sum of One Hundred Million Naira (N100,000,000) only as compensation to the plaintiff for loss being suffered in her business resulting from the negligence of the defendant.
2. AN ORDER of this court directing the defendants to pay general damages of the sum of Fifty Million Naira (50,000,000) only to the plaintiff.

3. A PERPETUAL INJUNCTION restricting the defendant either by themselves, their agents, servants, privies or however called from further producing, selling and distributing unwholesome products to the Nigeria populace.

Upon the service of the writ on the defendant, the defendant filed a statement of defence and counterclaim dated and filed on the 28/3/2019. The claim of the defendant against the plaintiff is as follows:

1. Whereof, the defendant counterclaims against the plaintiff the sum of #5, 000, 0000.00 (Five Million Naira) only as general damages to its imputation.

The plaintiff in response filed on the 17/4/2019 a reply to the defendant's statement of defence and counterclaim.

The plaintiff testified for herself and also called two witnesses in prove of her case, whilst the defendant called a sole witness to also prove its case.

It is the evidence of the Pw1 and Pw2 that the defendant is the producer, seller and distributor of seven up, pepsi mountain dew drinks; that the defendant is situate at plot 302/304, Idu Industries Airport Road ,Abuja; that sometimes in 2007 after purchasing some crates of seven up drinks from the defendant and in the course of the Pw1's usual business transaction with her customers, one of the customers drew her attention to a bent cork

found inside an unopened seven up bottle drink; that some days after the incidence, she went to the defendant's office located along the airport road to report the matter, that she was given a crate of seven up drinks and sent away. The plaintiff's witnesses continued further that sometimes in 2012, the plaintiff again was embarrassed when one of her customers confronted her in anger with a well corked bottle of mountain dew drink wherein a dead fly was found right inside the content of the drink. It is their evidence that the matter was again reported to the defendant. The pw2 stated further that he wrote a letter of complaint to the defendant; that one of the representatives of the defendant by name Mr Nurudeen contacted him and they met at Lugbe Total Filling Station; that the said person informed him that they couldn't build a case against the defendant as nobody was above mistake. The witnesses testified further that the defendant offered and gave the plaintiff a pack of plastic pepsi drink and an iron stand of the company. It is further stated by the pw1 and pw2 that sometimes in 2018, the pw1 bought some drinks sold by the defendant and the course of doing her business, a customer returned back to her in annoyance a bottle of mountain dew; that upon her enquiries from the customer what the problem was, he showed her the particles contained in the content of the mountain dew drink. The pw2 stated that he used his phone to take the pictures of the

bottle. It is the evidence of the witnesses that these incidences have affected the business of the plaintiff as majority of her customers have concluded that her business will put their health at risk; that Pw1 has lost a lot of customers as a result of the defendant's act of negligence. It is further in evidence that the pw1 instructed her lawyer to write to the defendant and demand for compensation from them; that the defendant has failed to compensate her for her loss.

The evidence of pw3 is that he is a customer of the plaintiff; that sometimes in December 2018 he found some particles in the mountain dew drink he bought from the plaintiff; that he immediately returned the bottle with the content intact to the plaintiff; that the plaintiff apologized to him and also refunded back his money. That he later complained to the plaintiff's son, who also confirmed that, the plaintiff informed him; that the plaintiff's son also apologized to him. The pw3 testified further that after some months he was informed by the pw2 that the defendant refused to listen to their complaint; that one Mr Nurudeen said they couldn't make a case against the defendant. He stated that since the incident happened, he is scared of buying soft drinks from the plaintiff; that he knows some of his friends who were aware of the incidence have also stopped buying drinks

from the plaintiff. That he is aware the plaintiff's shop is not as busy as before.

The following exhibits were admitted in evidence:

1. Exhibit A1 is the picture of the mountain dew bottle and the certificate of compliance filed the 20/11/2019;
2. Exhibit A2 is the mountain dew bottle together with the content;
3. Exhibit B is the letter of complaint of negligence and demand for the immediate compensation of 4th December, 2018, addressed to the manager seven up bottling company.

Above is the case of the claimant. All the witnesses were cross examined by the defence.

Ibrahim Oguntade the Dw1 is the quality control manager of the defendant. It is his evidence that all the products of the defendant are manufactured under high internationally accepted and hygienic condition; that the regulatory authorities, that is the National Agency for Food and Drug Administration and Control [hereinafter referred to as Nafdac] and Standard Organization of Nigeria [hereinafter referred to as SON] inspected and certified the products of the defendant; that before Nafdac and Son certifies a product for public consumption, the product must have met the uncompromising standard, hygienic and scientific approved method of production and that all these standards were

met and same has become the tradition of the defendant. He continued further that the defendant having met the requirements of the regulatory authorities was issued with certificates to that effect; that the defendant being a company of international repute has its products marketed beyond the shores of Nigeria; that the products are manufactured under internationally accepted hygienic procedure. The defendant in evidence gave a detailed explanation on how the productions of their products are carried out. {These are stated in Paragraphs 7a to z of the defendant's witness statement on oath}

The following documents were admitted in evidence;

1. Exhibit A1 is the Nafdac certificate of registration with Reg No: 01-7741 granted in respect of mountain dew carbonated soft drink
2. Exhibit A2 is the Son certificate with No: 000195 issued to seven up bottling company Nigeria plc.

The Dw1 was cross examined. An attempt by the defendant's counsel to re examine the witness was objected to and same was sustained by the court.

At the close of the defendant's case, and pursuant to the rules of this court, parties filed and exchanged their final written addresses.

The defendant's final written address was filed on the 8/10/2020 and settled by Amos A. Ademola Esq. wherein he formulated a sole issue for determination, to wit:

Whether or not from the totality of the evidence before the court the plaintiff had discharged the onus of proof placed upon him by law on the preponderance of the evidence led on record to warrant a grant of the reliefs sought in this suit

Pius Achimi Andrew Esq. settled the final written address of the claimant and same was filed on the 11/1/2021. Learned counsel for the claimant raised two issues for determination, that is:

- i) Whether in the circumstances of this case and having regards to the available evidence, if the defendant has a duty of care to the claimant and has breached that duty to the claimant.
- ii) Whether with regards to the evidence before this Honourable court the claimant has suffered any loss or damage emanating from the defendant's negligence that should entitle her to all the reliefs sought.

The defence counsel argued that for a claimant to succeed in an action of negligence against a defendant he must satisfy three conditions and these conditions must be met conjunctively. The conditions are; that the defendant owed him a duty of care, that there was a breach which caused him injury or damage must be

met conjunctively for a claimant to succeed in an action for negligence. He referred the Court to **UNILORIN TEACHING HOSPITAL V ABEGUNDE (2013) LPELR 21375 (CA) P. 30 paras B-E, KABO AIR LTD V MOHAMMED (2014) LPELR 23614 (CA) ABIRU JCA**

He argued that the claimant has failed to prove the ingredients of negligence before the court, thus not entitled to the reliefs sought.

It is the argument of the defendant's counsel that negligence is only actionable upon proof of actual damage; that the claimant in this case has failed to either prove negligence or establish damages suffered against the defendant. Counsel referred the court to **MAKWE V NWUKOR (2001) FWLR PT 63, PG 1 AT PG 16 PARAS C-D** and some other authorities.

Learned Counsel to the Defendant further argued that there are vital discrepancies in the claimant's evidence; he urged the court not to place reliance on the pw1 and pw2 as the evidence are contradictory. Counsel relied on **KWARRA V INNOCENT (2009) ALL FWLR (PT460) PG 719 at 757, paras A-D.**

It is further submitted by the defendant's counsel that the water tight procedure for the manufacture of products was not challenged by the claimant. He stated that all the products of the defendant including the ones given directly to the claimant directly does not contain any foreign particle; that the purported product with particles were never subjected to any laboratory test; that the

claimant didn't state the name of the retailer or agent of the defendant from which the product were purchased. He argued that the claimant did not proof any failure on the part of the defendant to meet the standard of care prescribed by law.

On the issue of damages, the defendant's counsel stated that the claimant did not in any way link the Defendant's product to any damage suffered and as such, the claim cannot stand; that nothing is placed before the court to show that the claimant has a booming business. He argued further that the special damages claimed are speculative and anticipatory; that the burden is on the claimant. He relied on **B.B ADUGO & SONS LTD V OHMD (2016)LPELR-405 98 (SC) PG 60-61, PARAS D – A; UNION BANK V NWAKWO & ANOR (2019) LPELR – 46418 (SC)**

It is the argument of the defendant's counsel that the order of perpetual injunction against the defendant ought not to be granted as the claimant failed to establish a legal right which the court can protect. Counsel relied on **ALADE V SOFOLARIN & ORS (2015) LPELR-25008 (CA)** and urged the court to dismiss the claimant's claim with cost.

Learned counsel to the claimant argued that the defendant owes the claimant a duty of care due to the fact that the claimant buys products from the defendant [mountain dew and 7up]; that there is no doubt that there is a relationship between the claimant and the

defendant. He is of the view that the claimant like every other customer deserves a proper and adequate care from the defendant; that it is the duty of the defendant to ensure that their products meets the standard required for consumption. He argued further that the claimant cannot exonerate itself from liability on the basis that;

(a) The claimant is not known to be a registered consumer.

(b) That the product in question is fake and not their product.

Counsel referred the court to 7UP BOTTLING COMPANY V EMMANUEL (2013) LPELR 21104 (CA)

Counsel further submits that the list of all registered customers of the defendant is not before the court; that it is wrong for the defendant to conclude that the claimant is not registered with them. He states that the Dw1 vividly pointed the distinctive features of their product especially the mountain dew. He argued that the features outlined by the Dw1 are evident on exhibit A2; that the Dw1 failed to tell the court the features that distinguishes its own product from the fake ones. He is of the opinion that no laboratory test is needed to know that the content is not fit for human consumption; that exhibit A2 is real evidence which speaks for itself.

Learned counsel further stated that from the evidence before the court, it is clear that the Defendant is in gross negligence of its

duties with respect to the production and distribution of mountain dew drink. He argued that the defendant by Exhibit DWA2 which is the standard organization of Nigeria MANCAP certificate the defendant does not have the minimum requirement to display the MANCAP logo on mountain dew drinks. He relied on the authority of **ISIENYI V CHUKWU (2019) LPELR 48187 (CA)** to buttress his point. On the second issue, Counsel submitted that the business of the claimant has suffered a major setback due to the fact that her customers deserted her for lack of trust and confidence in her products. He stated that the claimant pleaded the particulars of her loss but that the method and manner of pleading such particulars cannot be the same in all cases; that in the instant case the claimant's scale of business and her educational level should be put into consideration; that the claimant does not maintain a separate account for her business or keep details of her daily transactions; that the way to determine the loss in business of the claimant is by considering the drastic reduction in the number of customers that patronize her and what she realizes at the end of the day. Counsel relied on the cases of **UBA PLC V UZOUCHUKWU (2017) LPELR 42787(CA); REGISTERED TRUSTEE OF MASTER'S VESSEL MINISTRIES (NIG) INCORPORATED V EMENIKE & ORS**

He urged the court to grant the plaintiff's claim in the interest of justice.

I have considered the submissions of counsel for and against as well as the evidence before the court and I find it appropriate to adopt the sole issue formulated by the defendant as same will determine the issues before the court, that is;

Whether or not from the totality of the evidence before the court the plaintiff had discharged the onus of proof placed upon him by law on the preponderance of the evidence led on record to warrant a grant of the reliefs sought in this suit

As rightly stated by learned counsel for the defendant, the claims of the claimant are for tort of negligence. What then is the meaning of negligence? I refer to the case of DIAMOND BANK LIMITED v. PARTNERSHIP INVESTMENT COMPANY LIMITED & ANOR (2009) LPELR-939(SC) Per IKECHI FRANCIS OGBUAGU, JSC [RTD] (P. 18, paras. C-E) where he stated thus:

In Black's Law Dictionary, 8th Edition at pages 1062 to 1063, twenty eight (28) types or categories of negligence, are stated therein. At page 1061 thereof, negligence is generally defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect

others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights."

Therefore in order for the claimant to succeed in her claim, she must establish the following:-

- (a) the existence of a duty of care owed to her by the defendant;
- (b) that the defendant failed to attain the standard of care prescribed by law; and
- (c) that as a result of the claimant's breach she suffered damages.

The duty of care is said to exist where there is sufficient relationship of proximity as between the defendant and the plaintiff who suffered the damage such that a reasonable man can conclude that carelessness on the part of the defendant likely caused the damage. See *BOUYGUES NIGERIA LIMITED v. O. MARINE SERVICES LIMITED* (2012) LPELR-9295(CA)

It is not in doubt that the defendant in this case owes not only the claimant a duty of care, but also the society at large. The Court of Appeal in *SEVEN UP BOTTLING COMPANY PLC v. MR. ALUKO OLUSOLA EMMANUEL* (supra) relying *on the case of Donoghue vs. Stevenson (2002) 12 WRN 101 at 106* Lord Atkin stated thus; *it is not enough to prove the respondent to be careless in his process of manufacture. The question is does he owe a duty to take care*

and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles for food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty in my opinion he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption. He intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desire for his own ends imposes upon him a duty to take care to avoid injuring them."

The burden of proving this lies squarely on the claimant, even where no evidence is called by the defendant, not until same is proven before it can shift on the other side. **See Sections 131 – 133 of the Evidence** states that;

131. (1) whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person who would fail if no evidence at all were given on either side.

132(1) In Civil cases, the burden of first proving the existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleading.

In an action for negligence, such as in this case, the claimant must plead all the particulars in sufficient detail of the negligence alleged and the duty of care owed by the defendant and all these must be supported by credible evidence at the trial. See UNIVERSAL TRUST BANK OF NIGERIA v. FIDELIA OZOEMENA (2007) LPELR-3414(SC)

The claimant herein testified that she buys and sells the products manufactured by the defendant; that she on two occasions had cause to lodge complaints at the defendant's branch located within the Abuja. That on those two occasions she was compensated. She further stated that sometimes in 2018, the pw3 in annoyance returned exhibit A2 to her that the content contains some particles considered to be dangerous to health. The defendant however denied the fact that exhibit A2 was produced by their company. It is also the evidence of pw2 that in 2012 he took the picture of the bottle of mountain drink which contained a dead fly and in addition to that, he wrote a letter of complaint to the defendant.

Upon being cross examined by the defence counsel, the pw 1 stated

Ques: in the year 2007, in your para 2 who were you with, when one of your customers drew your attention to that issue

Ans: I can't remember the person. It's been long, how many years now

Ques : and you can't remember the name of the customer

Ans: I don't know the person

Ques: in 2012, see para 12 who was with you when your customer drew your attention to the bottle

Ans: my brother I can't remember the person, but I know they bring the thing with fly inside

Ques: you claimed that you are a retailer of the defendant. Is there any documents given by the defendant showing that you are an accredited dealer of the defendant

Ans: I didn't register with the company; I only buy from their motor way pass.

Also under the cross examination of the pw2, he stated

Ques: in your para 7 is there anything to show any acknowledgment

Ans: yes, I wrote but I didn't keep the letter because it is been long since 2012

Ques: see para 12 did you subject it to any laboratory test before you concluded

Ans: no

The dw1 upon being cross examined stated that

Ques: having stated earlier before the court, that you don't know the claimant to be your customer, can you now tell the court the number of customers that you have

Ans: like I said earlier our distributors and sales agent are those whose record we have and that can be obtained from the marketing manager

Ques: that list that the marketing manager has, did you bring it before this court.

Ans: No

From the above, it appears that the claimant has failed to support her evidence with credible evidence; her evidence that sometimes in 2018, she purchased the product of the defendant. i.e. mountain dew drink without any other credible evidence to buttress such fact is not sufficient enough. There is also no evidence to show where or whom she bought the product from. Also the plaintiff here failed to place any document before the court to show that there exist a relationship between the defendant and herself. The incidences alleged to have happened by the plaintiff's witnesses in 2007 and 2012 were also not

buttressed with cogent evidence. It is true that exhibit A2 is before the court, however there is no nexus that links the exhibit A2 to the defendant. The evidence adduced by the plaintiff witnesses did not link the Exhibit A2 to the defendant. The Dw1 in his evidence in chief vividly stated the procedure adopted by the defendant in manufacturing the mountain dew drink and other products (7UP, Pepsi, Miranda, Mountain Dew, Team tonic, Soda water etc) and same was not controverted by the claimant. It is not enough to allege facts in pleadings, without establishing them with credible and reliable evidence at the trial. It is the law that he who asserts must prove. Thus where a party alleges the existence of a fact the onus is on such party to prove the existence of such fact conclusively. The onus rests on the plaintiff to prove that the content of exhibit A2 is that of the defendant.

In civil suits, cases are won upon the preponderance of evidence and balance of probabilities. It follows therefore that a plaintiff in such a case has the burden of establishing his claim upon relevant and credible evidence. As stated earlier, the defendant did not admit Exhibit A2 as its product. The defendant tendered exhibits DA1 and DA2, particularly Exhibit DA2 which is the certificate of registration granted to the defendant to produce mountain dew carbonated soft drink. There was uncontradicted evidence that the defendant failed to meet the required standard

expected of them and also while being cross examined the Dw1 stated that Nafdac and Son are of same status. I therefore cannot locate the contention of the claimant that the defendant willingly or deliberately failed to fulfill its duty of care towards her as there is no basis for such whatsoever. She not only failed to establish her link with the defendant; she also failed to buttress her earlier claims i.e. 2007 and 2012 as it is her evidence that she was compensated, she however failed to present the pack of plastic pepsi drink and the iron stand given to her by the defendant's company in 2012. **Also the pw 2 stated that in 2012 when he wrote to the defendant, one Mr Nurudeen asked him to meet him at Lugbe Total Filling Station. The question I ask here, is Lugbe Filling Station the office address of the defendant? Certainly not! The Plaintiff witnesses stated in evidence that the office of the defendant is situate at Idu Industries Airport Road, Abuja.**

Furthermore, it is the evidence of pw3 that sometimes in December 2018 he bought mountain dew soft drink from the plaintiff; however upon being cross examined he stated thus;

Ques: you said you bought the mountain dew in December, which date

Ans: it is October

The crux of this suit is the mountain dew drink said to have been sold to the pw3 by the pw1 sometimes in 2018. However the pw3

in his evidence in chief stated that he bought the said drink sometimes in December, 2018 but under cross examination, he said it was in October. Which of the evidence of the pw3 am I to believe? The essence of cross examination is to test the veracity of the evidence of a witness. The plaintiff witnesses 1 & 2 did not state the specific month the said drink was sold to the pw3. They also failed to state where the drink was purchased from; the Plaintiff in paragraph 2 of her Further Statement on oath stated that she buys drinks from the accredited dealers of the defendants. This piece of evidence was denied by the defendant. He who asserts must prove and the onus rest squarely on the plaintiff. Section 132 Evidence Act

From the available evidence before the court, I find that the burden placed on the plaintiff has not been discharged as she failed to establish the existence of the duty of care owed to her by the defendant and I so hold. The claimant's claim is based on speculations and assumptions without credible evidence and in so doing she failed to prove the particulars of the negligence and I so hold. Courts are not expected to decide cases on speculation. A court is not entitled to assume or speculate anything. It is dangerous and unfair to do so. **UNIVERSAL TRUST BANK OF NIGERIA v. FIDELIA OZOEMENA (2007) LPELR-3414(SC)**

On the issue of damages, the essence of the award of damages is to compensate the claimant for the harm done to her. The plaintiff's counsel has asked the court to consider the loss in business of the plaintiff by considering the drastic reduction in the number of customers that patronize her and what she realizes at the end of the day; that also the level of education and scale of business of the plaintiff should be put into consideration. All these are facts known to the plaintiff and her counsel. The plaintiff failed to support these facts with credible and cogent evidence. How is the court supposed to know the number of customers that patronizes the plaintiff's shop on or before the alleged incidence? What was/is the profit margin of the plaintiff before and after the alleged incidence? No evidence whatsoever was led to state the daily income of the plaintiff. The plaintiff who wants to be compensated with the sum of One Hundred Million Naira (N100,000.00) only as special damages for the loss she suffered in her business as a result of the negligence of the defendant as well as Fifty Million Naira (#50,000,000.00) for general damages must be able to support her fact with the record of her business, her daily income from the said business and more. There is no single document or record of her business/income before the court. She has left the court with no choice but to help her do the arithmetic, which translates to speculations and conjecturing of facts. The

law does not permit me to do so! See UNIVERSAL TRUST BANK OF NIGERIA v. FIDELIA OZOEMENA [Supra] In any event the claimant having failed to establish the act of negligence against the defendant, I further hold that she is not entitled to any of the damages claimed by her; be it special or general damages.

The relief of perpetual injunction also fails. As rightly argued by the defendant's counsel, can only be granted where the plaintiff has proved her legal right in an action. A perpetual injunction is based on final determination of the rights of parties, and it is intended to prevent permanent infringement of those rights and obviate the necessity of bringing an action after action in respect of every such infringement.

I agree with learned counsel to the claimant, that the claimant like every other customer deserves proper and adequate care from the defendant and that also the defendant has a bounden duty to ensure that their products meets the standard required for consumption. In the present case, the plaintiff failed to prove that the defendant falls short of the standard required of them. The defendant credibly gave detailed explanations of the procedure adopted in producing their products; these facts supported by exhibits DA1 & DA2 were uncontradicted. Thus there is no justification to grant an order of perpetual injunction against the defendant.

On the whole, I hold that the plaintiff woefully failed to prove her case on the balance of probabilities and therefore not entitled to Judgment in her favour. The claims of the plaintiff are hereby refused and the suit is dismissed accordingly.

There is no order as to cost.

The Defendant/Counterclaimant failed to lead evidence to his counterclaim, therefore same is dismissed.

Asmau Akanbi – Yusuf

[Hon Judge]

APPEARANCES:

Elaigwu Justin Esq. for the Claimant.

Ademola Adewoye Esq. for the Defendant