

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS TUESDAY, THE 1ST DAY OF JUNE, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/941/19

BETWEEN:

FOCAL POINT CONSTRUCTION LIMITED.....PLAINTIFF

AND

VINMARK ALUMINIUM PRODUCTS LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff's Claims as endorsed on the Writ of Summons and Statement of Claim dated 29th January, 2019 are as follows:

- 1. A Declaration that the Defendant is in breach of the terms of contract of supply and installation of 624 High Quality Aluminum Sliding Windows Glazed with Tinted Glass and USA Sliding Mosquito Net.**
- 2. An order directing the Defendant to refund the sum of N8,494,000(Eight Million, Four Hundred and Ninety Four Thousand Naira) being the total contract sum paid by the Plaintiff to the Defendant.**
- 3. General damages against the Defendant to the tune of N5,000,000.00(Five Million Naira).**
- 4. Exemplary damages against the Defendant to the tune of N5,000,000.00(Five Million Naira).**
- 5. Interest on the Judgment sum at the conservative rate of 28% per annum from the date of Judgment until final liquidation of the Judgment.**

6. Such further reliefs as this Honourable Court may deem fit to make in the circumstance of this case.

The Defendant in response filed a Statement of Defence dated 19th March, 2019. The matter then proceeded to trial. In proof of its case, the Plaintiff called only one witness, Hassan Rilwan, the Group Managing Director (GMD) who testified as PW1. He deposed to a witness statement of oath dated 30th January, 2019 which he adopted at the Hearing. He tendered in evidence the following documents to wit:

1. Letter of Defendant dated 21st August, 2017 to Plaintiff submitting a quotation for Aluminum Sliding Windows glazed with tinted glass and USA Sliding Mosquito Net was admitted as **Exhibit P1**.
2. Letter of award to Defendant for the supply and installation of 624 High Quality Sliding Windows glazed with tinted glass and USA Sliding Mosquito Net by Plaintiff dated 24th August, 2017 was admitted as **Exhibit P2**
3. Acceptance letter by Defendant dated 24th August, 2017 was admitted as **Exhibit P3**
4. Statement of Account of Plaintiff with United Bank of Nigeria (UBA) from 23rd August, 2017 to 28th February, 2018 together with the certificate of compliance was admitted as **Exhibit P4**.
5. Statement of Account of Plaintiff with Fidelity Bank from 10th October, 2017 to 27th February, 2018 together with the certificate of compliance was admitted as **Exhibit P5**.
6. Notice of Plaintiff of intention to terminate contract with Defendant dated 6th April, 2018 and the letter of termination of contract dated 2nd May, 2018 were admitted as **Exhibits P6a and b**.
7. Letter by Defendant dated 4th May, 2018 was admitted as **Exhibit P7**.
8. Letter by the Law Firm of Y.K Abdul to the Defendant dated 8th May, 2018 was admitted as **Exhibit P8**.

PW1 was then cross-examined by Counsel to the Defendant and in the process a copy of letter by Defendant to Plaintiff dated 4th May, 2018 (and earlier admitted as **Exhibit P7**) was again tendered and admitted as **Exhibit P9**.

With the evidence of PW1, the Plaintiff closed its case.

On the part of the Defendant, one witness also testified on its behalf. Vincent Ngene, its Managing Director (M.D) testified as DW1. He adopted his witness deposition dated 19th March, 2019. He did not tender any documentary evidence. He was then cross-examined by counsel to the Plaintiff and with his evidence, the Defendant closed its case.

At the conclusion of trial, parties filed and exchanged final written addresses. The Defendant's final written address is dated 18th December, 2020 and filed same date at the Court's Registry. In it, one issue was raised as arising for determination:

“Whether the Plaintiff is entitled to any Relief(s) it seeks in view of the evidence before the Honourable Court.”

On the part of Plaintiff, the final address is dated 11th January, 2021 and filed on 10th February, 2021 and in it, one issue was equally raised as arising for determination:

“Whether based on the facts and materials before the court, the Plaintiff has proved his case on a preponderance of evidence entitling him to the reliefs sought in his Writ of Summons and Statement of Claim.

The Defendant then filed a Reply on points of law dated 5th March, 2021.

I have set out above the issues as distilled by parties. In substance, the issues are the same even if framed differently. In the circumstances, the issues raised can conveniently be harmonized and accommodated under the single issue formulated by court as follows:

Whether on a preponderance of evidence, the Plaintiff has proved its case to entitle it to all or any of the Reliefs sought against Defendant.

The above issue has thus brought out with sufficient clarity, the pith of the contest which remains to be resolved by court shortly. It is therefore on the basis of this lone issue that I would now proceed to consider the evidence and submissions of

counsel. In furtherance of the foregoing, I have carefully read the final written addresses filed by parties. I will in the course of this judgment and where necessary make references to submissions made by counsel and resolving whatever issue(s) that may have arisen by the submissions(s).

ISSUE 1

Whether on a preponderance of evidence, the Plaintiff has proved its case to entitle it to all or any of the Reliefs sought against Defendant.

I had at the beginning of this Judgment stated the claims of Plaintiff. The cause of action is predicated on contract. From the pleadings and evidence of Plaintiff, the case made out is that the Defendant was awarded a contract for the supply and installation of 624 High Quality Aluminum Sliding Window glazed with Tinted Glass and USA Sliding Mosquito Nets which was to be executed within a specific time frame. That payments were duly made for the contract but the Defendant failed to deliver or meet up with its contractual obligations and was in breach which then entitles the Plaintiff to all the Reliefs sought.

On the other side of the aisle, the case of the Defendant is that it was not in breach of the agreement but that it was Plaintiff who could not meet up with its financial obligations under the contract which then impacted on its ability to execute the contract within time as agreed and that it has substantially executed the contract.

An important point in resolving this dispute clearly lies in situating the ambit and or remit of the agreement of parties and adherence to its terms by the parties. It is therefore to the pleadings which has streamlined the issues in dispute and the evidence that we must now beam a critical judicial search light in resolving these contested assertions.

In this case, the plaintiff filed a (22)twenty two paragraphs statement of claim which forms part of the Record of Court. I shall refer to specific paragraphs where necessary to underscore any relevant point. The evidence of plaintiff and sole witness is largely within the structure of the pleadings.

The defendant on its part filed a (13) thirteen paragraphs statement of defence joining issues with the plaintiff. I shall equally refer to relevant paragraphs where necessary. The evidence of the sole witness for the defendant was equally largely within the structure of the defence.

I shall in this judgment deliberately and *in extenso* refer to the above pleadings of parties as it has clearly streamlined or delineated the issues subject of the extant

inquiry. The importance of parties' pleadings need not be over-emphasised because the attention of court as well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings and ultimately the quality and probative value of the evidence led in support.

In doing so, it may be convenient to start by defining what a contract is, its essential elements and to restate some settled principles that will guide our evaluation of the evidence.

Now, generally in law, a contract is an agreement between two or more parties which creates reciprocal legal obligations to do or not to do a particular thing. To bring a contract to fruition where parties to the contract confer rights and liabilities on themselves, there must be mutual consent and usually this finds expression in the twin principles of offer and acceptance. The offer is the expression of readiness to contract on terms as expressed by the offeror and which if accepted by offeree gives rise to a binding contract.

It should be pointed out clearly that the offer itself is not the contract in law but the taking of preliminary steps that may or may not ultimately crystallize into a contract where the parties eventually become *ad-idem* and where the offeree signifies a clear and unequivocal intention to accept the offer. See **Okubule Vs Oyegbola (1990)4 N.W.L.R (pt. 147) 723.**

Putting it more succinctly, the basic elements in the formation of a contract are:

1. The parties must have reached agreement (offer and acceptance)
2. They must intend to be legally bound, that is an intention to create legal relation.
3. The parties must have provided valuable consideration.
4. The parties must have legal capacity to contract.

See Alfotrim Ltd Vs A.G Fed (1996)9 NWLR (pt.475) 634 SC; Royal Petroleum Co. Ltd.Vs FBN Ltd (1997)6 NWLR (pt.570) 584; UBA Vs. Ozigi (1991)2 NWLR (pt.570)677.

Let me equally situate the import of a **declaratory Relief** which forms the fulcrum of **Relief 1** of the Plaintiff's claims and on which other reliefs sought have significant bearing. Understanding what a declaratory Relief entails is critical in view of the submissions made by Counsel to the Plaintiff in his address on the

failure of the Defendant to produce certain evidence as constituting admission which impacts favourably on the claims made by Plaintiff.

Now declarations in law are in the nature of special claims or reliefs to which the ordinary rules of pleadings particularly on admissions have no application. It is therefore incumbent on the party claiming the declaration to satisfy the court by credible evidence that he is entitled to the declaration. See **Vincent Bello V. Magnus Eweka (1981) 1 SC 101 at 182; Sorungbe V. Omotunwase (1988) 3 N.S.C.C (vol.10)252 at 262.**

The point is that it would be futile when a declaratory relief is sought to seek refuge on the stance or position of parties in their pleadings. The court must be put in a commanding position by credible and convincing evidence at the hearing of the claimants' entitlement to the declaratory relief(s).

Having above streamlined what a contract and a declaratory Relief entails in law, it is equally relevant to state certain principles that are now fairly constant and universal which guides the court in the process of evaluation of evidence. It is now settled principle of general application that 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. See **Section 131(1) Evidence Act.** By the provision of **Section 132 Evidence Act**, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations.

1. The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;
2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act**. It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

Now a convenient starting point is to understand the precise situational basis of the agreement of parties.

As stated earlier, the pleadings of parties presents a fair take off point. Indeed the pivotal role of pleadings cannot be over-emphasised, because anything outside its purview cannot be relevant or have any significance. On the pleadings, and evidence, there clearly is no dispute that the Plaintiff awarded Defendant a contract for the supply and installation of 624 High Quality Aluminum Sliding Window glazed with Tinted Glass and USA Sliding Mosquito Net vide **Exhibit P2** dated 24th August, 2017.

By **Exhibit P3**, the Defendant duly accepted the letter of offer. Indeed by **Exhibit P1** and prior to the offer, the Defendant had made an offer or quotation for the job or contract in the sum of **₦8,678,000.00**

In the light of this evidence that was not in any way challenged or impugned, the pleading of Defendant in paragraph 1 that it is not in any position to “**admit or**

deny” paragraph 3 of the statement of claim with respect to the contract awarded to it and **“and puts the Plaintiff to the strictest proof”** is in law bad pleading and amounts to an admission. A denial of a material allegation of fact must not be general or evasive, but specific. Every allegation of fact, if not denied specifically or by necessary implication shall be taken as established. So that, if a Defendant refuses to admit a particular allegation in a statement of claim, he must state so specifically, and he does not do this satisfactorily by pleading thus: **“Defendant is not in a position to admit or deny...and will at the trial put the Plaintiff to proof”**. Both set of pleas amount to in law an insufficient denial of the particular allegation in the Statement of Claim. See **Oshodi V. Eyifunmi (2000)13 N.W.L.R (pt.684)298 at 337B; Ekwealor V.Obasi (1990)2 N.W.L.R (pt.131)231 at 251 B; C-D.**

The bottom line is that parties entered into a clear contract or agreement vide **Exhibit P2** which as stated earlier, the Defendant accepted vide **Exhibit P3**. Indeed if there was no such contract, the Defendant cannot at the same time be vigorously contending in its pleadings vide **paragraphs 4, 5, 6 and 11** that it was because Plaintiff failed to meet its own financial commitments that delayed the project or contract and that the project is even at completion stage. The Defendant cannot blow hot and cold on the same issue or put up diametrically opposed and inconsistent positions on the issue of existence of a contract between parties. **Exhibit P2** undoubtedly defined the contractual relationship of parties. Parties must be held bound by this agreement and by all its terms and conditions and there should be no room for departure from what is stated therein. See **Jeric (Nig)Ltd V. Union Bank Nig Plc (2000)15 N.W.L.R (pt.691)447 at 462-463; 466.**

Indeed, the principle is settled that where there is any disagreement on any particular point, the authoritative and legal source of information for the purpose of resolving that disagreement or dispute is the written contract executed by parties. This is to ensure that a party to a contract in writing does not change his position midstream in his underserved advantage and to the detriment of the unsuspecting adverse party. See **Larmie V. D.P.M & Services Ltd (2005)18 N.W.L.R (pt.958)88 at 496 A-B**

Now what are the key terms of this contract offer. Let me allow **Exhibit P2** speak for itself as follows:

**“The Managing Director
Vinmark Aluminum Products Limited**

Block A Sabondale Shopping Complex, Abuja

Dear Sir,

**LETTER OF AWARDS FOR THE SUPPLY AND INSTALLATION 624
HIGH QUALITY ALUMINUM SLIDING WINDOWS GLAZED WITH
TINTED GLASS AND USA SLIDING MOSQUITO NET.**

Kindly find our offer of contract award for the supply and installation of the following items:

1. 1200 x 1200	288pcs	N16500 each
2. 1200 x 1600	24 pcs (Window and Fixed Light)	N22000 each
3. 900 x 1300	10 pcs	N15000 each
4. 900 x 900	120 pcs	N14000 each
5. 600 x 600	182 pcs	N7000 each

Transportation of the entire material	N110000
TOTAL	N8,494,000

COMPLETION PERIOD: 3 WEEKS from first payment

PAYMENT TERMS

40% First payment; 40% after 8 houses are completed; Balance payment 3 weeks after completion of the contract and handover.

Thanks

**Yours faithfully,
Signed
Hassan Rilwan”**

The above provides clear terms governing the relationship and we must now evaluate the pleadings and evidence to situate compliance and breach and by whom. That really is the crux of this dispute.

I prefer here to situate the case made with respect to compliance with the terms of **Exhibit P2** from the pleadings. In the following paragraphs 7-10 of the claim, the Plaintiff pleaded as follows:

- 7 The Plaintiff avers that the Defendant was thereafter mobilized with the requested sums in several tranches. The Plaintiff pleads and shall rely on payment receipts and bank statement to that effect.**
- 8 By the payments made, the Plaintiff paid the sum of N7,492,200.00 and in another transaction with the Defendant for which the Plaintiff was supposed to pay the sum of N1,985,000, the Plaintiff overpaid the Defendant to the tune of N2,181,947.45 providing an excess of N196,947.45 bringing the total paid to the Defendant to ₦7,689,147.45.**
- 9 Consequently, the Plaintiff in all reasonableness expected the Defendant to fulfill his obligation under the contract to wit supply and installation of 624 High Quality Aluminum Sliding Windows glazed with Tinted Glass and USA Sliding Mosquito nets within the three weeks stated in the award letter.**
- 10 That after five months and no word from the Defendant as to the state of the contract, the Plaintiff wrote a letter to the Defendant indicating intention to terminate the contract for non-performance. The Plaintiff pleads and shall rely on the said letter dated 6th April, 2018 at the trial of this action and the Defendant is hereby put on notice to produce the original thereof.**

In response, the Defendant in its defence vide paragraphs 5 and 6 averred as follows:

- 5 The Defendant specifically denies paragraphs 7, 8 and 9 of the statement of claim and in reaction states that the Plaintiff failed to pay the said agreed sum for the project in line with the spirit and letters of the said agreement between it and the Plaintiff, even when the officers of the Defendants orally reminded the officers of the Plaintiff severally to make the payment in line with the said agreement.**

6 In further reaction, the inability of the Plaintiff to make payment in line with the said agreement, made it practically impossible for the Defendant to carry out his own obligation fully. However, the Defendant did its best within the circumstance in line with the said agreement as the job is almost completed. The Defendant is awaiting the Plaintiff to pay the final trench of the agreed sum to enable it fully complete the said project. The Defendant pleads pictorial evidence of the job already done by him at the said project site and shall rely on same at the hearing of this suit.

The Defendant has clearly here joined issues with respect to compliance with the terms of the agreement particularly with respect to financial commitment by Plaintiff which it claimed impacted on its capacity to deliver on time and the issue therefore became a matter of proof with credible evidence.

Now by **Exhibit P2** above, the total contract sum is clearly indicated to be **₦8,494,000** and the completion period was stated to be 3 weeks from first payment. The payment terms are indicated as follows:

“40% first payment; 40% after 8 houses completed; balance payment 3 weeks after completion of the contract and handover.”

Now the burden was on Plaintiff to creditably show when and how these payments were made in line with the terms of the agreement.

In evidence, PW1 merely repeated the contents or averments highlighted in the pleadings above in paragraphs 7, 8 and 9 in his deposition vide paragraphs 8 to 11. PW1 stated in paragraphs 8 that the Defendant was mobilized with the **“requested”** sums in **“several tranches.”** Now from the agreement, **Exhibit P2**, there is no where or room to situate that the payment for the contract was to be made in **“several tranches.”** By **Exhibit P2**, the payments for the contract sum are to be made in 3 tranches to Defendant; no more and this was clearly streamlined with clear time lines in the offer letter. It is too late in the day to alter or make any interpolations to the terms of **Exhibits P2**. See **Section 128 of the Evidence Act**.

Even if the court chooses not to make much of the issue of the payments in “several tranches”, the critical question is when was the Defendant mobilized and was it in compliance with **Exhibit P2**?

The fundamental point is that there is no where in the pleadings or evidence streamlining where and when this “tranches” were paid to Defendant. By **Exhibit P2**, the offer letter containing payment terms, the first payment to be made by Plaintiff is 40% of the contract sum of ₦8,494,000. Under cross-examination PW1 stated that by **Exhibit P4**, the Plaintiff’s Statement of Account, the sum of **₦3,397,600** representing 40% initial payment was made to Defendant on 24th August, 2017.

The second 40% payment was to be made after 8 houses are completed and the balance payment was to be made 3 weeks after completion of the contract and handover.

Now on the pleadings and evidence of PW1 for the Plaintiff, there is absolutely no clarity with respect to whether this second tranche of payment was made and indeed if any further payments were made by them to Defendant and in accordance with the agreement. By **Exhibit P2**, the next payment due to Defendant was another 40% after completion of 8 houses. The Defendant contends that further payments made by Plaintiff was not in accordance with the offer letter. I had earlier referred to paragraph 8 of the claim which I must repeat even at the risk of prolixity thus:

“By the payments made, the Plaintiff paid the sum of N7,492,200.00 and in another transaction with the Defendant for which the Plaintiff was supposed to pay the sum of N1,985,000, the Plaintiff overpaid the Defendant to the tune of N2,181,947.45 providing an excess of N196,947.45 bringing the total paid to the Defendant to ₦7,689,147.45”.

PW1 wholly repeated the above in paragraph 9 of his witness deposition. By this paragraph, the Plaintiff is saying that they paid the total sum of N7,492.200.00 to Defendant. I pause here. There is nothing in the pleading or evidence of PW1 showing when payment for the next 40% due payment was made and specifically how much was paid representing 40%. Was it made after the 8 houses were completed in line with **Exhibit P2**? Both the pleadings and evidence of Plaintiff was silent on this critical point. If payments were made to the value of

N7,492,200, when were they paid? Does this then not show as contended by Defendant that the payments were haphazardly made in violation of the contract terms and most importantly that the Defendant was executing the contract? It is logical to hold that if the contract was not been executed, then the Plaintiff clearly would have not made the payments alluded to by them.

To further muddy the waters and to make an already fluid situation more unclear, in the same paragraph 9, the Plaintiff alluded to having over paid the Defendant in another transaction different from the extant one to the tune of N196,947.45 and that this excess should represent additional payment for the extant transaction. It is really difficult to situate the factual or legal basis for this contention.

First, this other contract; the parties involved and its terms are not subject of the extant proceedings. No scintilla of evidence of the said contract and its nexus with the extant proceeding was supplied by Plaintiff. How then is the court to determine the basis for any “**over payment**” as alleged in a different contract and then apply it to the transaction subject of this case. The allusion to another contract and any over payment must necessarily be discountenanced as the court cannot engage in an idle exercise of speculation.

The bottom line here is if there was a total contract payment of **₦7,492,200** to Defendant, the questions remain: where is the evidence of such payments? When were the payments made and where they in line with the provisions of **Exhibit P2**? Unfortunately here, the receipt payments pleaded by Plaintiff were not tendered to precisely show how the payments to Defendant was made to situate if they were made within the purview of the offer letter. Apart from the initial payment of 40% alluded to by PW1 and this was even during cross-examination, when he referred to **Exhibit P4**, the Plaintiff’s UBA statement of account, not much was made of the accounts tendered in evidence.

Yes it is true that the Statements of Account of plaintiff with **UBA** and **Fidelity Banks** were tendered vide **Exhibits P4 and P5** but there is absolutely nothing either in the pleadings or evidence streamlining or showing when the second 40% payment and other payments in the structure as stated in **Exhibit P2** were made to the Defendant through the conduit of the Statements of Account tendered. There necessarily ought to have been a demonstration in open court when these further payments were made from the contents of the statements of account.

In law, there is a clear dichotomy between admissibility of a document and placing probative value on it. While admissibility is based on relevance, probative value depends not only on relevance but also on proof. An evidence has probative value if it tends to prove an issue. See **Buhari V. INEC (2008) 19 NWLR (pt.1120) 246 at 414 G-H.**

It is perhaps necessary to state in view of the rather flawed position of plaintiff tendering documents without evidence in support that Documentary evidence, no matter its relevance, cannot on its own speak for itself without the aid of an explanation relating to its existence to prop it up. This is not a matter for final address however well written or articulated. The validity and relevance of documents to admitted facts or evidence is when it is done in the open court. It is also not the duty of a court to speculate or work out a method of arriving at an answer on an issue which could only be elicited by credible and tested evidence at trial. Where a party, as it were, simply dumps documents on the court without showing how the documents affects his case, it is not the duty of the court to embark on an independent inquiry to fix the documents on the evidence, more so when it is outside the hearing in court. See **Nwole V Iwuagwu (2000) 16 NWLR (pt.952) 543; A.C.N V Lamido (2012) 8 NWLR (pt.1303) 560 Sa'eed V Yakowa (2013) 7 NWLR (pt.1352) 2.** I note that the Plaintiff's counsel in its final address in paragraphs 2.6 has sought to supply evidence of how these further payments were as follows:

“That further payments were made to the Defendant and captured in the Plaintiff's Fidelity Bank statement of account admitted in evidence as Exhibit PW5 viz:

- | | |
|----------------------|------------------------|
| a) 17/10/2017 | - N1,290,302.50 |
| b) 26/1/2018 | - N 800,000.00 |
| c) 29/1/2018 | - N2,597,600.00 |
| d) 19/1/2018 | - N 500,000.00 |
| e) 5/2/2018 | - N 700,000.00 |
| f) 27/2/2018 | - N 391,697.45” |

The point here is that counsel has through the conduit of his address sought to create a case not made on the pleadings or evidence. And cases are decided on the pleadings and evidence led in support and not by address of counsel. An address properly understood is no more than a handmaid in adjudication and cannot take

the place of the hard facts required to constitute credible evidence. No amount of brilliance in a final address can make up for the lack of evidence to prove and establish or disprove and demolish points in issue. See **Iroegbu . M.V. Calabar Carrier (2008)5 N.W.L.R (pt.1079)147 at 167; Michika Local Govt. V. N.P.C (1998)11 N.W.L.R (pt.573)201.**

What is strange here is that the evidence of PW1 under cross examination, does not support the adventurous voyage by learned counsel and even completely undermines the case of Plaintiff that any further payments were made after the initial 40% payment to Defendant. Under cross-examination, this is what PW1 said:

“...Yes after the (first) payment of 24/8/17, I made further payments on 17/10/17 but this payment was for the second or other contract and nothing to do with the contract subject of this case. From the contract document, Exhibit P2 there are modalities for payment. The second 40% payment was to be made after 8 houses have been completed. This has not been done by Defendant till date. So there was no basis for any further payment”.

The above evidence contradicts in fundamental respects the pleadings of Plaintiff that after the first 40% initial payment of N3,397,600 on 24th August, 2017, the Plaintiff has made further payments to the tune of N7,492,200.00 as pleaded in paragraph 8 of the claim and the evidence of PW1 in paragraph 9. PW1 is here categorically asserting that after the initial 40% payment, he refused to make any further payments to Defendant. The law is settled that oral or documentary evidence must be accurate in the sense that it brings out the facts as averred in the statement of claim. In other words the evidence led must dance to the same music as in the statement of claim. Where the evidence led does not bring out the facts in the statement of claim, or where there is material contradiction, the court is entitled to hold and will hold that the claimant did not prove his case. Here the court uses the statement of claim as a reference point because that is where the facts of the case originally germinate. See **Boniface V Anyika & Co. Lagos (Nig) Ltd V. Uzor (2006) 15 NWLR (pt.1003) 560 at 572 B-C.**

The Plaintiff's case unfortunately as demonstrated above is not consistent and clear and this absence of consistency and clarity has served to detract from the credibility of the positions advanced and to undermine the very basis of the case.

There clearly in this case was a contract but there is no clear evidence donating or situating that the Plaintiff has itself complied with the terms of the agreement, **Exhibit P2** on payments for the contract for them to now seek enforcement of same. The law is settled that a person seeking the enforcement of a contract must show that all conditions precedent thereto have been fulfilled and that he has either performed his part or is ready and willing to perform all the terms which ought to have been performed by him. See **F.G.N. V. Zebra Energy Ltd (2002)3 N.W.L.R (pt.754)471 at 491-492 F-F**

The case presented by Plaintiff suffers from complex evidentiary difficulties as I have demonstrated. The point to perhaps underscore at the risk of again sounding prolix is that pleadings, however strong and convincing the averments may be, without clear evidence in proof thereof, go to no issue. Through pleadings, people know exactly the points which are in dispute with the other. Evidence must then be led to prove the facts relied on by the party to sustain the allegations raised in the pleadings. See **Union Bank Plc V Astra Builders (W/A) Ltd (2010) 5 NWLR (pt.1186) 1 at 27 F-G**. Averments in pleadings are therefore not evidence. Where evidence is led that conflicts or is inconsistent with the pleadings, the pleadings will lack value and will be discountenanced.

It is therefore difficult by a confluence of facts to situate the breach of the terms of contract, **Exhibit P2** by Defendant particularly in such very fluid and unclear circumstances. If the Plaintiff did not or refused to make available the contract sums to Defendant as agreed in the offer letter, **Exhibit P2**, then it is difficult to situate the basis of the complaint that the execution of the contract was contrary to or breached the time lines as provided in the agreement. The Plaintiff has not furnished clear and sufficiently credible evidence denoting that the Defendant has by words or conduct evinced an intention not to perform or expressly declared that it is unable to perform its obligations under **Exhibit P2** in some essential respect.

There was nothing before court to show a refusal by defendant to perform its side of any contract in any material respect and the court cannot speculate or engage in any futile exercise of speculation or conjecture. Furthermore there was nothing before me to allow for the conclusion that the defendant do not intend to be bound by the terms, or that they are determined to do so in a manner inconsistent with their obligations under **Exhibit P2**.

The point to underscore as I round up is that the whole trial process, whatever its imperfections is completely evidence driven. Not just any kind of evidence but admissible evidence with probative value, qualitative and with credibility. Where evidence lacks these key values and is improbable, inherently contradictory, feeble and or tenuous, that would amount to a failure of proof. See **A.G. Anambra State V A.G Fed. (2005) All F.W.L.R (pt.268) 1557 at 1611; 1607 G-H**. The guiding principle or rule has always been that a court must not grant a party what it has not asked for in clear terms and sufficiently proved. See **Joe Golday Co. Ltd. V. Cooperative Development Bank Ltd. (2003) 35 SCM 39 at 105**.

In the circumstances, **Relief 1** seeking a declaration that the Defendant is in breach of the terms of the contract of supply, **Exhibit P2** must fail. The point to again repeat is that Relief (1) is a declaratory relief which is not granted on admissions, neither is it operational or availing within the unwieldy realms of speculations or conjectures. With the failure of **Relief (1)**, all the other reliefs (2-6) sought by Plaintiff predicated on the success of Relief (1) stand compromised or undermined. They are all not availing.

On the whole, the single issue raised for determination is answered in the negative. As a consequence of this holding, all the reliefs sought by plaintiff are not availing. For the avoidance of doubt, the plaintiff's case therefore fails completely and it is accordingly dismissed.

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Hon. Justice A.I. Kutigi

Appearances:

- 1. Y.K. Abdul, Esq., for the Plaintiff**

- 2. A.G. Ugwueke, Esq., for the Defendant**