IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE APPEAL DIVISION

HOLDEN AT ABUJA

APPEAL NO.: CVA/872/2021

IN SUIT NO.:KB/CV/1255/2020

BEFORE THEIR LORDSHIP

1. **HON. JUSTICE. Y. HALILU (PRESIDING JUDGE)**
2. **HON. JUSTICE. H. MU'AZU (HON. JUDGE)**

ON THE 02/02/2022

BETWEEN:

MRS.GLORIAAKUBUILO……………………………………….APPELLANT

AND

DR. J.C. OKPARA (J.U. UGONMA HOSPITAL LTD)…..RESPONDENT

(Suing through his Attorney:Mr.FuelOkere)

JUDGMENT

This is an Appeal against the decision of the Senior District Court of the federal Capital Territory, Kubwa, Abuja Coram Ahmed Yusuf Ubangari, delivered on the 20th of August, 2021.

The Respondent as Plaintiff in the Lower Court by way of plaint with Suit No KB/CV/1255/2020 against the Appellant claimed the following reliefs:

a. *Immediate vacant possession of shop 4 and appurtenance situate at Sharon Plaza 153 market road, new Maitama, Kubwa, Abuja.*

b. *Mesne profit of N33, 333 per month from the 1/06/2020 until vacant possession is delivered less the deposit made against the consent of the Plaintiff.*

c. *Immediate payment/refund of N100, 000. 00 professional fee paid to the Plaintiff Counsel to prosecute this Suit and N10, 000.00 cost of action both totaling N110,000.00.*

The Learned Magistrate on the 20th of August 2021 entered Judgment against the Appellant as the Defendant/Counter Claimant to pay the sum of N100,000.00 being the Legal fees

paid by the Plaintiff/Respondent to his Lawyer for prosecuting his instruction and N10, 000. 00 cost of the Suit.

The Appellant being dissatisfied with the decision of the Lower Court filed an Appeal to this Court vide a Notice of Appeal dated 20th August, 2021 and filed on the 23rd August, 2021 containing three (3) grounds of Appeal.

Ground 1:

The Learned District Court Judge erred in Law when he held that a party who gave evidence of an oral agreement must prove the existence of the oral agreement even when the other party did not challenge or controvert the evidence.

Ground 2:

The Learned District Court Judge erred in Law when he held that any payment made after notice cannot amount to a waiver to therefore vitiate any purported notice.

Ground 3:

The Learned District Court Judge erred in law when he held that the Counter Claim of the Defendant failed because there was no fresh issue.

The Appellant sought for order of this Court allowing the Appeal and setting aside the Judgment of the Senior District Court, Kubwa, Abuja, dated 20th August, 2021 in Suit No. KB/CV/1255/2020 delivered by His Worship Ahmed Yusuf Ubangari and enter Judgment for the Counter Claimant on his Counter Claim.

Two issues were formulated for determination by the Appellant, to wit;

1. *"whether an unchallenged and uncontroverted evidence require further proof (grounds 1 & 3)."*
2. *"whether the address of Counsel in a final Argument can amount to a defence and evidence to a Counter Claim."*

On issue one:

"whether unchallenged and uncontroverted evidence requires further proof".

Learned Appellant's Counsel contended that the Lower Court erred in law by holding that unchallenged and uncontroverted evidence require further proof.

Learned Counsel argued that the evidence adduced by the Respondent agreeing with the Appellant that the Appellant shall pay one year's rent in advance before the 30th September, 2022 as in Exhibit TT, the testimonies of DW1 and DW2 in pages 57 and 59 – 63 respectively were not challenged or controverted anywhere.

Learned Counsel referred to the decision in DEBS V. LENICO LTD (1986) 3 NWLR (PART 32) 846 &CAPPA & DALBERTO LTD V. AKINTILO TILO (2003) NWLR (PART 74) AT when it was held

> *"Evidence which is not contradicted or denied is deemed to have been admitted. Apart from the evidence led, the fact that an averment is not denied is enough to admit it in evidence".*

Counsel contends further that it was the Court Suomoto in the Judgment (page 75 of the record) that put up a defence for the Respondent. Where it stated and held:

> *"DW2 also testified that he demanded the Plaintiff to withdraw the Suit and as well sent SMS without a date, Exhibit TT for the Plaintiff to withdraw the Suit. They could not show the response of the Plaintiff".*

The learned Counsel Argued that Exhibit TT clearly bore a date of 1st November, 2020 contrary to the finding of the Court. Further, that the fresh rent the Defendant/Appellant paid on the 24th September, 2021 (Exhibit RR) which the Respondent

never rejected or refunded was further proof of the oral agreement evidenced by Exhibit TT, but the Court still ignored.

On issue two:

> *"Whether the address of Counsel in a final argument can amount to a defence and evidence to a Counter Claim"*

Learned Appellant's Counsel submitted that a Counter Claim is an action and separate suit on its own requiring the Plaintiff who becomes a defendant to the Counter Claim to enter a defence or reply on the merit.

Counsel cited the case of UDIH V. IZEDONWEN (1990) 2 NWLR (PART 132) where it was held: *"Parties may by agreement, express or implied, create a new tenancy".*

Counsel contends that the Court erred when it relied on the address of Counsel rather than evidence before the Court to arrive at its decision. Counsel cited the case of OLORUNTOBA-OJU V. ABDU RAIHEM (2009) 39 NSCQLR 105 where it was held that;*"It is also settled law that address of Counsel however*

brilliant, cannot take the place of evidence, particularly where there is no evidence"

Court was finally urged to allow the Appeal.

Upon service, the Respondent filed his brief of argument and formulated two issues for the consideration and determination of the Court, to wit:

1. *Whether considering the nature of the trial Court as a Court of Summary Jurisdiction and having regard to rules of procedure of the Court, was the Respondent obligated to file a final Reply to the statement of defence filed by the Appellant in the Suit without a Court order or directive for parties to file pleadings and whether failure by the Respondent to file a defence to the Appellant Counter Claim amounts to an admission so as to relieve the Appellant of the burden to prove the Counter Claim by evidence as*

argued by law (this issue is distilled from grounds 1 and 3 of the Grounds of Appeal)

2. *Whether the Learned Trial Judge was not right when he held that the unilateral payment made by the Appellant after service of notice to quit and intention to apply to Court to recover possession, and without consent, permission or authorization of the Respondent, cannot amount to a waiver of the notices or capable of vitiating the notices issued and served (this issue is distilled from ground 2 of the Grounds of Appeal).*

On the first issue, Learned Respondent's Counsel in response to the position of the Counsel for the Appellant,thattheir evidence at the trial Court was undefended, unchallenged and uncontroverted, submitted that the submission were misconceived both in law and in fact and flows from a wrong understanding of the principles of laws and Rules of

procedureapplicable in a District Court; a Court of Summary Jurisdiction as provided under Orders 11(I); III (I) and XXIII (1) & (2) of the District Court (Civil Procedure Rules (as applicable in the FCT – Abuja).

Learned Counsel posited that,by Order III stated above, written pleadings in a case before a District Court, is not required and necessary, unless and except where ordered by the Court.

Counsel contended that, in this regard, the Respondent had established through Evidence that the Appellant was his tenant and he issued and served on the Appellant the requisite statutory notices, i.e. notice to quit and intention to apply to Court to recover possession as mandated under sections 7 and 19 of the Recovery of Premises Act (Cap 544) LFN, 1990, exhibits ‘C’&‘D’ in the record of the trial Court, following which the burden shifts to the Appellant to establish any fact to Counter or in Cross Examination demolish the Respondent’s

case. Counsel relied on provisions of sections 131 – 134 of the Evidence Act, 2011.

Counsel further submitted that Exhibits 'C' and 'D' being documentary in nature is the evidence of the intention and conductof the Respondent regarding the tenancy relationship with the Appellant. It is further contended that Exhibits C and D cannot be varied, contradicted or altered by oral evidence of the Appellant in Court and Exhibit TT cannot amount to an agreement by the Respondent so as to supplant the effects of Exhibits'C' and 'D' or waive same.

Learned Counsel Referred to decisions in FASHANU V. ADEKOYE (1974) 6 SC 83, UDEORA V. NWAKONOBI (2003) 4 NWLR (PART 811) 643. See SECTION 128 (1) of the Evidence Act, 2011.
Learned Counsel referred the Court to the Evidence in Chief of DW1 at pages 50 – 51 of the Record as well as her testimony under Cross- Examination at pages 54 – 55 of the Record where DW1 clearly admitted that there was no agreement with the

Respondent for her to pay one year's rent. Also testimony of DW2 on pages 60 – 61 and 63 in Examination in chief and cross – examination respectively to similar effect.

Counsel argued that the Learned Trial Judge was right to demand that the response of the respondent to Exhibit TT was necessary to show that he agreed to waive Exhibits'C' and 'D' or consented to the payment or deposit of money into his account.

On the statement of defence filed by the Appellant in the suit, it was filed without an order of Court and as such the Respondent was not obligated to file any formal reply to the allegation contained in the statement of defence. By Order XXIII (1) and (2) of the Rules, the trial Judge is required to proceed to hear the Respondent's claims in a Summary manner.

Counsel contends further that with the presence of the Plaint and the Counter Claim which borders on same or similar allegations, issues are already joined between the parties without the need for a formal reply to the Counter Claim.

Counsel also argued that where the Court find the Respondent's case meritorious, as the trial Court did find, the claims in the Counter Claim must fail.

On issue 2

> *"Whether the Learned Trial Judge was not right, when he held that the unilateral payment made by the Appellant after services of Notice to quit and intention to apply to Court to recover possession and without the consent, permission or authorization of the Respondent cannot amount to a waiver of the notices or capable of vitiating the notices issued and served.*

Learned Respondent's Counsel contends that once valid notice to quit is issued and served, tenancy relationship is terminated from the moment the quit notice expires. And it remains so until a new or fresh tenancy is created between the parties. Thus, where the notice to quit expires, the tenant cannot unilaterally act to waive same without the express agreement

or consent of the Landlord. The Respondent referred to the decisions in DAVIES V. BRISTON (1920) 3 KB 428 AT 440 PILLARS (NIG) LTD V. WILLIAMS KOJO DESBORDES& ANOR (2010) SC 105.

Accordingly, Learned Counsel argued that exhibit 'TT' is not an express agreement that can waive exhibits'C' and 'D'. Neither can the payment made without consent in exhibit 'RR'.

Finally, Counsel submitted that ground 2 on the Appellant Notice of Appeal from which there was no issue formulated by Appellant for determination and for which no argument was preferred should be deemed abandoned. Counsel relied on the decision in KEHIMDE AJUMOBI V. STATE (2018) JS CNLR (VOL. 2) 391 AT 400 PARAGRAPHS A - B.

Counsel urged this Court to dismiss the Appeal with cost and affirm the decision of the trial/Lower Court.

On the part of the Court, we have considered the brief of argument of the Appellant on the one hand and the brief of argument of the Respondent on the other hand. For the due determination of this case, we hereby adopt the two issues formulated by the Respondent for determination as issues to be considered by the Court.

On issue one,

> *Whether considering the nature of the trial Court as a Court of Summary Jurisdiction and having regard to rules of procedure of the Court, was the Respondent obligated to file a final Reply to the statement of defence filed by the Appellant in the Suit without a Court order or directive for parties to file pleadings and whether failure by the Respondent to file a defence to the Appellant Counter Claim amounts to an admission so as to relieve the Appellant of the burden to prove the Counter Claim by evidence as argued by law.*

We must observe from the outset that the jurisdiction of the District court is exercised as a court of summary jurisdiction as provided under the District court law, and particularly the District court rules. For a better understanding of this position, the provisions and Order II(1), III(1) and XXIII(1) & (2) of the District court rules of 2014 (that was applicable at the time) are most instructive.

For clarity, the Order XXIII (1) & (2) provides thus:

> *"(1) if on the day of hearing both parties appear, the plaint shall be read to the defendant and the District judge shall require him to make his answer or defence thereto, and, on such defence or answer being made the District Judge shall immediately record the same and shall except where the court consider it necessary to order otherwise, proceed in summary way to hear and determine the cause without further pleadings, or formal Joinder of issues."*

> *"(2) In all suits written pleadings may be ordered by court."*

"(4) When the court for any reason decide not to order written pleadings, the court, either itself or by the Registrar shall at or before the trial, take from each party or from the barrister or solicitor or each party, and record a short statement of facts andplea upon which such party relies sufficiently definite and detailed to enable the court and the parties to know as far as possible at the outset of the trial, the issues of fact and law which fall to be decided at the trial. Such record shall be read over by the courts to the parties as soon as made and shall thereupon bind the parties to the same effect as if such record were pleadings filed under this order.

It must be said that the counterclaim of the Appellant before the lower court is a plaint in its own right and requires only a response where the plaintiff sees the need to enter a defence. In other words, filing of formal process is not necessary to respond to the case of the Defendant/ counter claimant.

At the lower court, the burden casts on the Respondent (who was Plaintiff at the lower court) was to produce evidence that the appellant was his tenants and he issued and served on the appellant, the requisite statutory notices to quit and intention to apply to court to recover possession as mandated under Sections 7 and 19 of the Recovery of Premises Act (cap 544) LFN, 1990. Where that is done, the burden would shift to the appellant to prove that she had an agreement with the Respondent where the Respondent agreed to accept rent from her after the service of Exhibits 'C' and 'D'; to produce credible evidence to the effect that despite exhibits 'C' and 'D' the respondent agreed to accept rent from her.

At this point, we must agree with the respondent's counsel that in the clear presence of Exhibits 'C' and 'D', the oral testimony of DW1 and DW2 cannot contradict, alter or vary contents of Exhibits 'C' and 'D'. Also exhibit 'TT' cannot also supplant exhibits 'C' and 'D' in the absence of clear evidence that the respondent signed or consented to the appellant paying or depositing money into his bank account after the issuance and

service of Exhibits ‘C’ and ‘D’ on the appellant.See sections 131, 132, 133 and 134 of the Evidence Act, 1990.

Accordingly, we hold that the reasoning and conclusion reached by the learned trial judge on the validity and effects of Exhibits ‘C’ and ‘D’ in relation to the oral testimony of DW1 and DW2 and exhibit ‘TT’ are appropriate.

Also, we hold the firm view that by Order XXIII (1) as reproduced in the preceding part of this judgment, the presence of the Plaint and the counterclaim which borders on the same and similar allegations; issues are already joined between the parties. And where the trial court finds, as it did, that the respondent’s case was meritorious, the Appellant's counterclaim (for money expended in defending claim in court) must fail. We so hold.

The first issue is resolved in favour of the Respondent.

On issue two;

> *“where are the learned trial Judge was rights when he held that the unilateral payment made by the appellant after service of notices to quit and intention to apply to*

court to recover possession and without the consent, permission or authorization of the respondent cannot amount to a waiver of the notices or capable of vitiating the notices issued and served."

This issue was considered by the Supreme Court in the case of PILLARS NIGERIA LIMITED AND WILLIAM KOJO, DESBORDES & ANOR (2021) 12 NWLR pt 1789 pg 122 at 144 SC per Agim (JSC) where it held:

"The fact that a landlord collected rent on a property still in the occupation or possession of the tenant after issuing a notice to quit, cannot by law or equity amount a waiver of the notice to quit even where the notice had expired, and the tenant refused to yield possession in time. The notice to quit will subsist until it is formally rescinded by the landlord and or when a fresh tenancy agreement is entered into.

We further state, with emphasis, that an act of new tenancy is specific and conscious one that must be a subject of bilateral conduct on the part of Landlord and Tenant. As a matter of law, the parties must clearly and unequivocally express their willingness to enter into a new tenancy on the termination of the old one.It cannot be a subject of guess or speculation, as same is not a game of chess. Once the Ad idem of parties is missing, court will find that a contract agreement was not duly made. See ODUTOLA V. PAPERSACK (NIG) LTD (2006) 11-12 SC 60.

Accordingly, we find that the learned judge was right to hold that unilateral payment made by appellant (as evidenced by exhibit 'RR') after service of notices to quit and intention to apply to court to recover possession cannot amount to a waiver of the notices or capable of vitiating the notices issued and served.

Accordingly, and without further ado, we also resolve the second issue in favour of the Respondent.

Having resolved both issues against the Appellant, it is the decision of the Court that this appeal is lacking in merit and is hereby dismissed and the decision of the trial court affirmed.

Signed
Hon. Justice Y. Halilu
(PRESIDING JUDGE)
02/02/2022.

Signed
Hon. Judge H. Mu'azu
(HON. JUDGE)
02/02/2022.