

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

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 6

SUIT NO: FCT/HC/CV/118/2018

BETWEEN:

GIT ENGINEERING LTD.....CLAIMANT

VS

TRANSMISSION COMPANY OF NIGERIA PLC.....DEFENDANT

JUDGMENT

By a Writ of Summons dated 6/11/2018 and filed same day, the Claimant commenced this Suit against the Defendant. In Para 19 of the Statement of Claim, the Claimant claim against the Defendant as follows:-

- i. A Declaration that the failure of the Defendant to honour its obligations in the Agreement between the Claimant and the Defendant pertaining to the contract for Rehabilitation and Reinforcement of 330/132 and 132/33KV Transmission Substation Bid No: NGP-TI Lot 1 (Onshore and Offshore) embodied in the Terms of Settlement dated 09/06/2017 but filed on 15/6/2017 in Suit No. **FCT/HC/CV/485/2016: GITENGINEERING LTD VS TRANSMISSION COMPANY OF NIGERIA PLC & 1 OR**, which was entered as Consent Judgment of the Honourable Court on 24th July, 2017 as well as

the Claimant's letter of 23rd November, 2017 amounts to breach of contract.

- ii. The sum of USD 867,932.89 (Eight Hundred and Sixty-Seven Thousand, Nine Hundred and Thirty-Two US Dollars, Eighty Nine Pence) being loss of profit on the contract for Rehabilitation and Reinforcement of 330/132 and 132/33KV Transmission Substation Bid No: NGP-TI Lot 1 (**Offshore Contract**)

PARTICULARS

- | | | | |
|------|---|---|-------------------|
| i. | Offshore Contract Price | - | USD7,785,548.00 |
| ii. | Value of Outstanding work | - | 4,339,664.46 |
| iii. | Loss of Profit (20% of outstanding Work) | - | 867,932.89 |
- iii. The sum of ₦128,925,423.34 (One Hundred and Twenty-Eight Million, Nine Hundred and Twenty-Five Thousand Four Hundred and Twenty-Three Naira Thirty-Four Kobo) being loss of profit on the contract for Rehabilitation and Reinforcement of 330/132 and 132/33KV Transmission Substation Bid No: NGP-TI Lot 1 (**Offshore Contract**)

PARTICULARS

- | | | | |
|------|---|---|------------------------|
| i. | Onshore Contract Price | - | ₦607,923.722.00 |
| ii. | Value of Outstanding work | - | 515,701,693.37 |
| iii. | Loss of Profit (25% of outstanding Work) | - | ₦128,925,423.34 |
- iv. The sum of ₦5,000,000.00 (Five Million Naira) as cost of this action

- v. Statutory interest of 10% per annum on the Judgment sum from date of Judgment until Judgment debt is fully liquidated.

Upon being served the originating processes on 17/12/2018, the Defendant filed its Statement of Defence on 7/5/2019 with Leave of Court. And in the said Statement of Defence, the Defendant Counter-Claim against the Claimant as follows:-

- a. A Declaration that the instant suit is Res Judicata.
- b. An Order directing the parties to maintain the status quo.

Pleadings having been settled and exchanged by the parties, trial in the suit commenced on 3/7/2020 with Engr. FredOgwazu, the General Manager of the Claimant, who testified on behalf of the Claimant as PW1. He adopted his Witness Statement on Oath sworn to on 6/11/2018 as his evidence in this case. He testified that by Writ of Summons and accompanying Statement of Claim filed on 15/12/2016, the Claimant initiated suit No. FCT/HC/CV/485/2016: GIT Engineering Ltd VsTransmission Company of Nigeria Plc& 1Or against Defendant. That the said Suit related to a simple contract contained in a contract instrument dated 22/6/2012 between Defendant's predecessor-in-title, Power Holding Company of Nigeria Plc, as the employer and the Claimant, and the Claimant's Technical Partner, Xian Electric Engineering Company Ltd and the contract was for Rehabilitation and Reinforcement of 330/132 KV and 132/33KV Transmission Substations Bid NGP-TI Lot 1 dated 22/6/2012. Stated that by a letter dated 29/11/2016, the Defendant purported to terminate the Claimant's contract and in consequence, Claimant

initiated the Suit No: FCT/HC/CV/485/2016 served on Defendant on 15/12/2016. That sometime later, after dismissal of Defendant's Preliminary Objection challenging the court's jurisdiction to entertain the Suit, the Defendant reached out to Claimant and indicated its intention to settle the Suit out of court and Claimant, being amenable to amicable settlement agreed with Defendant to settle the matter out of court. After series of discussions between parties, the Suit was eventually settled and Terms of Settlement drafted, executed and adopted as Consent Judgment of court. That by the Terms of Settlement filed on 15/6/2017 and voluntarily adopted by the parties as Consent Judgment of court on 24/7/2017, Claimant fulfilled all its obligations in accordance with the Terms of Settlement and Consent Judgment and after Claimant fulfilled its obligation as embodied in the Terms of Settlement, Defendant failed to honour its obligation in line with Clause 9 of Terms of Settlement/Consent Judgment. That from inception, the trick of Defendant was to lure out Claimant and reward the unexecuted part of the contract to cronies of its management and was therefore taken aback that Claimant meticulously fulfilled its obligation under the Terms of Settlement/Consent Judgment.

Further stated that the authority for the Claimant to proceed to complete the contract was the parties signing fresh contract pursuant to Clause 9 of the Terms of Settlement which Defendant failed to do. That Defendant mischievously wrote Claimant a letter dated 23/11/2017 wherein it stated that it would not reengage the Claimant and all the reasons stated in the Defendant's letter were concocted by Defendant and consequently by letter dated 14/12/2017 and delivered to Defendant on 15/12/2017, Claimant

through its counsel repudiated the contents of Defendant's letter and laid bare to Defendant its treachery while making claims for sums of US\$867,932.89 and ₦128,925,423.34 for loss of profit and unfinished aspect of the contract. That Defendant did not in any way deny the contents of Claimant's letter. That usually, the expected profit in the engineering industry of the type Claimant was engaged is between 20% to 30% of work to be done and in this case, Claimant's work on the offshore segment of the contract, that is USD4,339,664.46 equalling USD 867,932.89 as loss of profit and 25% of the value of outstanding work on the onshore segment of the contract, that is ₦515,701,693.37 equalling ₦128,925,423.34 also as loss of profit. The marginal 5% estimated profit on the onshore segment of the contract flows from technical rigours of that aspect of the work. That following receipt of Claimant's letter of 14/12/2017, Defendant engaged Claimant in series of meetings wherein it appealed to Claimant to exercise patience. That in the meeting with Claimant's Chairman on 15/2/2018, the Defendant requested Claimant to provide it with its Procurement schedule for the offshore materials of the contract, evidence of approval of NR Electric Co Ltd as manufacturers of Control Panels for the work and assured Claimant that it would sign the new contract on Claimant meeting the new request. That all Defendant's request, though outside the Terms of Settlement and Consent Judgment between parties were met by Claimant's vide Claimant's letter of 16/2/2018. That having met its request, Defendant in its usual manner went back to slumber.

In the course of the testimony of the PW1, the following documents were tendered and admitted in evidence collectively as Exhibit 1 – 9.

1. Terms of Settlement - Exhibit 1
2. Consent Judgment in Suit No.
FCT/HC/CV/485/2017 - Exhibit 2
3. Copies of letters dated 16/6/2017, 19/6/2017
12/9/2017, 12/10/2017, 16/2/2018 - Exhibit 3,4,
5,6,7 respectively.
4. Copy of Defendant's letter dated 23/11/2017 - Exhibit 8
5. Copy of letter dated 14/12/2017 but delivered to
Defendant on 15/12/2017 - Exhibit 9

Cross-examine by Defendant and when shown Exhibit 1 and asked to read Clause 8, he stated that the work plan is Exhibit 3 and that Exhibit 3 with its attachment were frontloaded in the documents filed along with its processes. When shown Exhibit 1 and asked to read Clause 9, he stated that he cannot remember that he was notified in writing the Defendant's compliance to Clause 9. When shown Exhibit 8 and asked to read the 1st Para; stated that the 1st Para, of Exhibit 8 is not a confirmation of the Defendant's compliance. He also stated that the Exhibit 3 has no attachment.

On 20/1/2021 the Claimant close its case. The Defendant, on 7/7/2021 open its defence with Engr. AdamuAbubakar, a Civil Servant and project Engineer with the Defendant who testified for the Defendant as DW1. He

adopted his witness deposition on Oath sworn to on 2/5/2019 as his testimony in this suit. He testified that the contract between the parties was revoked because of Claimant's inability to comply with Terms and conditions of the contract as stipulated in the contractual agreement. That the Suit FCT/HC/CV/485/2016 which was initiated was, however, settled out of court and same reduced into writing and adopted as Consent Judgment. That the matter between the parties bordering on reliefs of Claimant has been amicably settled out of court, Terms of Settlement drafted and endorsed by parties and same adopted as Consent Judgment of court of competent jurisdiction, therefore same cannot be brought via fresh suit. He stated that the Claimant failed to perform its obligation under the Terms of Settlement that was adopted as Consent Judgment and upon failure to meet its obligation in accordance with the Terms of Settlement and Consent Judgment, particularly Clause 7 and 8; Defendant could not perform its obligation under Clause 9. Further stated that the contract was terminated due to non-performance on the part of Claimant after series of meetings with him where he kept giving assurance of intentions to complete the contract but failed to do so having observed for 4 years his inability to move the contract to acceptable performance level and that the contract was terminated in line with Clause 42:2.2 of the general condition of contract for non-performance.

He also stated that they only come in contact to the so called curriculum vitae of technical key personnel that will perform the contract as in Clause 7 of Terms of Settlement and work plan on how the JV of XIAN/GIT intends to complete and commission all outstanding works as in Clause 8

when they were served with Claimant's Statement of Claim. That no work plan on how the JV of XIAN/GIT intend to complete all outstanding works from June 31st December was submitted to Defendant 2nd week of June or anytime. Further stated that failure of Claimant to fulfill the stated conditions precedent to Clause 9 as stated clearly in Clause 7 and 8 resulted into disengaging Claimant as contained in Defendant's letter dated 23/11/2017.

In the course of the evidence of the DW1, the contract document titled "Rehabilitation and Rein of 330/132 KV And 132/33 KV Transmission Substations Between PHCN And XIAN Electric Engineering Company Limited/GIT Engineering Limited was tendered and admitted in evidence as Exhibit 10.

Under Cross-examination by Claimant, he stated he does not know if the Defendant gave Claimant reasons in writing for not reinstating Claimant as per the Terms of Settlement pursuant to Terms of Contract. When shown Exhibit 8 and asked to read the content, he confirmed the explanation of Defendant why Claimant was not re-engaged. He however, stated he was aware that before Claimant went to court which produced the Exhibit 1 and 2, the Defendant had terminated the contract. He admitted that having terminated the contract, the only legal basis to go back is for defendant to reinstate Claimant. He also admitted that from Exhibit 8, the primary reason given by Defendant not keeping to the Terms in the letter is incorrect. He stated that he does not have anything to show that request made by Defendant to World Bank alluded to in Exhibit 8 for Claimant's reinstatement and also nothing to show the World Bank's refusal to

reinstate Claimant alluded to in Exhibit 8. He confirmed that Exhibit 8 was later in time before Exhibit 1 and 2. He admitted that it was nowhere mentioned that Claimant did not comply with the Terms mentioned in Exhibit 1. He also admitted his witness deposition on Oath which he adopted as his evidence in this suit was signed in the legal department in his office but says he cannot remember who witnessed his signing it. When shown Exhibit 10, he confirmed that it is the original contract which was terminated by the Defendant.

At the close of trial, the matter was adjourned for Filing and Adoption of Final Written Addresses. On 20/1/2022 the parties adopted their respective Written Addresses.

In the Final Written Address of the Defendant dated 17/1/2022 and filed with the leave of court, I.H. Nalaraba of Counsel formulated two (2) issues for determination namely:

- (1) Whether the Plaintiff has proved his case on balance of probability as required by law which would have made it entitled to grant of the reliefs sought.
- (2) Whether the Defendant's Witness Statement on Oath of Engr. Adamu Abubakar is worthy of being accorded probative value by the court.

In the Written Address of Claimant dated 14/12/2021, J.C. Njikonye, SAN Counsel for Claimant, formulated two (2) issues for determination which are:-

- (1) Whether the Witness Statement on oath of the Defendant's only witness Engr. AdamuAbubakarSanni lacks probative value and liable to be discountenanced in view of his admission that the Witness Statement on Oath was not signed before a Commission for Oath or a person authorized to take or administer Oath.
- (2) Whether considering the state of the pleadings, lack of admissible or probative evidence in chief bythe Defendant, Exhibits 1 – 9 tendered bythe Claimant and the Defendant's pregnant and direct admissions the Claimant has proved its case entitling it to the grant of the reliefs claimed.

I have given an insightful consideration to the pleadings, the testimonial and documentary evidence, the submission of both learned counsel and the judicial authorities cited and find that two (2) issues calls for determination.

- (1) Whether or not the Claimant has made out a case against the Defendant and entitled to the grant of the reliefs sought.
- (2) Whether or not the Defendant has established a case entitling it to the reliefs sought in the counter-claim.

However, before proceeding to determine the above issues distilled for determination bythe Court, it would be appropriate to deal with the issue raised bythe Claimant to the effect that the Witness Statement on Oath of the only witness of Defendant, that is the DW1, contravenes Section 6

of the Oath Act because it was not sworn to or signed before the Commissioner for Oath or Notary Public and having admitted not to have sworn his Statement on Oath before a Commission for Oath or a Notary Public, his Witness Statement on Oath is invalid, inadmissible and should be discountenanced. Indeed the Defendant's sole witness, the DW1 under Cross-examination admitted that his Witness Statement on Oath which he adopted as his evidence in this case was signed not before a Commission for Oath or a Notary public as the case may be, but in the legal department of his office. Quere: Does the signing of his Witness Statement on Oath in his office and not before a Commissioner for Oath or a Notary Public invalidates or renders inadmissible the Witness Statement on Oath of the DW1? In the view of court, the fact that the Defendant's witness, the DW1 did not signed his Witness Statement on Oath before a Commissioner for Oaths or a Notary Public does not invalidates or render the Witness Statement on Oath of the DW1 inadmissible. A Witness Statement on Oath and all that is therein contained upon adoption becomes the witness evidence before the court. See *Onyenuwe & Anos Vs Anaejionu* (2014) LPELR -22495 (CA). In any event it may be treated as an irregularity. See Order 5 of the Rules of this Court.

Now to the issues for determination by the court. On issue 1, it is the settled position of the law in our adversarial legal jurisprudence that the burden of proof lies first on a party who asserts a state of affairs and seek the court favourable finding or declaration in that regard to lead credible evidence in proof of it lest he fails. The burden of proof however, is not

static as it shifts from party to party until the issue in contention is resolved. See Sections 131 – 134 of the Evidence Act, 2011.

In this instant case, it is the case of Claimant, in brief, that it entered into contract with Defendant's pre-decessor in title PHCN, the Exhibit 10, for rehabilitation and reinforcement Substations which Defendant purported to terminate the contract and in consequence initiated the Suit No: FCT/485/2016 against Defendant filed on 15/12/2016. That the Defendant desirous of settling the matter out of court reached out to Claimant and Claimant being amenable to amicable settlement agreed and consequently filed Terms of Settlement which was adopted as Consent Judgment. That Claimant fulfilled all its obligation as embodied in the Terms of Settlement but the Defendant failed to honour its obligation in line with Clause 9 of Terms of Settlement and Judgment of court.

On the other hand, it is the claim of the Defendant that the Claimant failed to meet its obligation under the Terms of Settlement that was adopted as consent Judgment, in particular Clause 7 and 8 of the Terms of Settlement and as a result the Defendant could not perform its obligation under Clause 9 of the Terms of Settlement and Consent Judgment.

The law is firmly settled that parties are bound by the Terms of their Agreement voluntarily entered into and none of the parties would be allowed to resile from it except at the pain of damages for breach of Agreement. See African Songs Ltd Vs King Sunny Ade (2008) LPELR – 46184 (CA). I have read the Clause 7 and 8 of the terms of Settlement/Judgment of court, that is the Exhibit 1 and 2 which are the

principal reasons stated by the Defendant why they failed to fulfilled their obligation under Clause 9 of the Terms of Settlement and Consent Judgment, the Exhibit 1 and 2. I have also read the Clause 9 and the question is; whether or not the Claimant complied with its obligation under the Clause 7 and 8 of the Exhibit 1. My answer is in the affirmative. I say so because from the Exhibit 3 and 4 the Claimant clearly complied with the Clause 7 and 8 of the Exhibit 1 and it did so via a cover up letters dated 16/6/2017 and 19/6/2017 respectively and were duly received by the Defendant on 20/6/2017. And having complied with the Terms under Clause 7 and 8 of the Exhibit 1, the Defendant was expected to fulfill its own part of the Agreement, that is the Exhibit 1, but failed to do so. The Defendant, therefore is in breach of its Agreement with the Claimant. What's more, from the evidence, there are several contradictions in the testimony of the Defendant's sole witness, the DW1, suggestive of the fact that aside from the Defendants failure to fulfill its own part of the Agreement in the Exhibit "1" never intended to fulfill its own part of the Agreement in the Exhibit "1". For instance, under Cross-examination of the Defendant's witness, the DW1, he stated that before the Claimant went to court which produced the Exhibit "1" and "2" the Claimant had terminated the contract. He also stated that the primary reason advanced by the Defendant for not keeping to the Terms is not correct and also that he has no evidence of the request made by Defendant to World Bank as alluded to in Exhibit 8 and also the World Bank refusal to reinstate Claimant also alluded to in Exhibit 8. He also stated it was nowhere mentioned that Claimant did not comply with the Terms mentioned in Exhibit 1.

From all of these, I have no difficulty from holding that the Defendant indeed breached its contract with the Claimant. I, therefore, resolved the issue I distilled for determination in favour of the Claimant.

On the issue 2, whether or not the Defendant has established a case entitling it to the reliefs sought in the counter-claim. It is cardinal principle of law that a counter-claim is entirely a different and independent action from the main claim. See the case of AtibaIyalamu Savings & Loans Ltd Vs. Suberu (2019) All FWLR (PT. 1008) 494 (SC). And to succeed in the counter-claim, the onus is on the Counter-Claim to discharge the burden of proof in his Counter-Claim. In other words, he must prove his case.

In this instant it is the evidence of the Defendant through the DW1 that the matter between the parties bordering on the reliefs of Claimant has been amicably settled out of court and Terms of Settlements written and adopted by the parties as Consent Judgment in suit FCT/HC/CV/485/2016, therefore, same issue could not be brought via fresh suit. He also stated that the Claimant failed to perform its obligation under the Terms of Settlement, in particularly the Clause 7 and 8 of Terms of Settlement resulting in the Defendant not to perform its obligation under Clause 9. He stated that they only came to contact with the Exhibit 3 and 4 when they were served with the Claimant's Statement of Claim. He also stated that no work plan on how the JV of XIAN/GIT intend to complete and commission all outstanding works from June to 31st December was submitted to Defendant in the second week of June or any time.

From the evidence before the court, it could be seen clearly that case of the Defendant/Counter-Claimant is without credible and satisfactory evidence to justify its claims. For instance, on its claims that the issues in suit FCT/HC/CV/485/2016 are same issues in this instant suit which have been amicably settled out of court, and Terms of Settlement drafted and adopted as Consent Judgment, that is the Exhibit 1. I am not in agreement. I say so because the suit FCT/HC/CV/485/2016 bothers on breach of contract while this instant suit by Claimant is to enforce its right under the Agreement entered into with the Defendant. On his evidence that the Claimant failed to perform its obligation under the Terms of Settlement/Consent Judgment. I have in the course of this Judgment stated that the court from the evidence finds that the Claimant complied and indeed performed its obligation under the Terms of Settlement as revealed in the Exhibit 3 and 4 of Claimant. On the evidence of the Defendant/Counter-Claimant that they only came in contract with the Exhibit 3 and 4 of Claimant when they were served with the Statement of Claim of the Claimant. This is also not correct. A critical perusal of the said Exhibit 3 and 4 will revealed that the Exhibit 3 and 4 of the Claimant was served on the Defendant on 20/6/2017 whereas the Statement of Claim of the Claimant was duly served on the Defendant on 17/12/2018. Yet again, his evidence that no work plan on how the JV of XIAN/GIT intend to complete and commission all outstanding work from June to December 31st was submitted to Defendant in the 2nd week of June or anytime, is also not correct from the evidence before the court. A look at the Exhibit 3 clearly reveals that this was complied with by the Claimant. Consequently, it is the

firm view of court that the Defendant/Counter-Claimant has not established a case to warrant the grant of the reliefs in its Counter-Claim. The issue two (2) distilled for determination by the court is, therefore, answered in the negative and in favour of the Claimant.

Now to the reliefs sought.

On the relief 1 of Claimant, it is trite that a party seeking a declaratory relief must rely on the strength of his case and not the weakness of the case of the Defendant. See *Orlu Vs Gogo-Abite* (2010) All FWLR (PT. 524) (Pg. 1) (SC). The court having found that the Defendant is in breach of the Agreement from the evidence before the court, the Claimant is entitled to this relief.

On the relief ii, the Defendant did not deny or controvert the Claimant's Claim as particularized. He is therefore entitled to this claim.

On the relief iii, the Defendant did not also controvert or deny the claim of Claimant as particularized. The Claimant therefore is also entitled to the claim.

On relief iv, cost follows events and it is at the discretion of court to exercise. I shall, therefore, exercise my discretion in this regard.

On relief v, interest on Judgment Sum is provided for by the Rules of court, Order 39 Rule 4. The Rules of Court gives the court the discretion to grant interest on Judgment Sum at the rate not less than 10% per annum. The power of court to so grant was affirmed in the case of *UBA Vs Lawal* (2018) All FWLR (PT. 434) 1548 @ 1564 Para E – F.

In conclusion, the reliefs i, ii, iii, of the Claimant are hereby granted.

On relief iv, the Defendant is hereby ordered to pay the Claimant sum of ₦500,000.00 (Five Hundred Thousand Naira Only) as cost of this suit.

On relief v, 10% interest per annum on the Judgment sum from the date of Judgment until same is fully liquidated.

All the reliefs sought by the Defendant in its counter-claim fails and are hereby dismissed.

This is the Judgment of the Court.

HON. JUSTICE O.C. AGBAZA

(Presiding Judge)

5/4/2022

APPEARANCE

J. C. NJIKONYE, (SAN) WITH BLESSING TIMOTHY, SMITH IMOWO – FOR THE CLAIMANT.

I. H. NALARABA – FOR THE DEFENDANT.