

**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/16/2010

BETWEEN:

- 1. USMAN ADAMU**
- 2. MOHAMMED ADAMU.....CLAIMANTS**

VS

- 1. MBANEFO & BROTHERS NIGERIA LTD**
- 2. MR. JOHN CHIBUZOR.....DEFENDANTS**

JUDGMENT

By a Writ of Summons and Statement of Claim dated 28/6/2010, the Claimant seeks the following reliefs:-

- (1) The sum of One Million, Three Hundred and Fifty Thousand Naira (₦1.35m) being the cost of materials/repairs of the Petroleum Tanker Truck with Registration Number (Lagos XN 833 LND).
- (2) The sum of Two Million, Two Hundred Thousand Naira (₦2.2m) being the cost of spilled LPFO (Black oil) of Twenty-Two Thousand liters at ₦100.00 per liter, from the Plaintiff truck.

- (3) The sum of Three Hundred Thousand Naira (₦300,000.00) per week for the loss of use of the vehicle from the 4th November, 2009 to the 20th day of January, 2010.
- (4) The sum of Two Million Naira as general damages for the trauma, nervous shock and discomfort suffered by the Plaintiff on account of the Defendants negligence.
- (5) Cost of the action.

The processes were served on the Defendants on 28/6/2010, and with leave of court, the Defendants filed their Statement of Defence and Counter-Claim.

The Defendants Counter Claimed against the Claimants as follows:-

- (1) The sum of ₦2,110,000.00 (Two Million, One Hundred and Ten Thousand Naira) being the cost of materials/repairs and workmanship of luxury bus with Registration No. XC 768 NNE belonging to the 1st Defendant.
- (2) The sum of Twenty-Six Million, Four Hundred Thousand Naira, (₦26,400,000.00) being the total revenue loss for the period of 1st Defendant's luxury bus was detained by the Police from November 4th, 2019 to the 30th day of June, 2010 at average daily income of ₦110,000.00 (One Hundred and Ten Thousand Naira) accruable to the

1st Defendant which the 1st Defendant lost as a result of the reckless and negligent act of the 2nd Plaintiff.

- (3) The sum of ₦500,000.00 (Five Hundred Thousand Naira) being the burial expenses and settlement of the family of Izuchukwu Ezumou, one of the 1st Defendant conductor, who died as a result of the reckless and negligent act of the 2nd Plaintiff.
- (4) General Damages of ₦900,000.00 (Nine Hundred Thousand Naira) for the wrongful act of the Plaintiffs and for all materials and direct consequences of the wrongful act of the Plaintiffs.
- (5) Total sum of Counter Claimed by the Defendants against the Plaintiff's jointly and severally is ₦30,000,000.00 (Thirty Million Naira) being special and general damages for the negligent act of the Plaintiffs.

With pleadings settled and exchanged, by the parties, the suit went into full trial.

The Plaintiff's on proof of their case called three (3) witnesses, whilst the Defendants in proof of their defence and Counter-Claim called two (2) witnesses.

The Plaintiff evidence through PW1 & PW2 and PW3, who adopted their respective Witness Statement on Oath of 13 Paragraph sworn to 28/6/2010, 16 Paragraphs sworn to on 28/6/2010 and 21/5/2013 of 8

Paragraphs. ThePW1, the owner of the Truck, testified that he was informed by the 2ndPlaintiff ofthe road accident and when he got to the scene and saw that the truck was badly damaged and the contents spilled out, causing loss of 22,000 liters of black oil. He testified that the case was investigated and the 2nd Plaintiff is facing trial before the Chief Magistrate Court, Abaji. Consequent upon the damaged, asking for recovery of items losses.

The PW2, testified that he is an employee of the 1st Plaintiff that on 4/11/2009 at about 4.30am – 5.00am, had an accident close to Abaji, on his way from Port-Harcourt, where he alleged that it was the reckless and negligent driving of the 2nd Defendant that caused the said accident, causing the death of one person in the Defendants bus and also hit another vehicle. Also caused the loss of 22, litres black oil contained in their trucks. That the accident caused the Plaintiff's loss of earning, payment for the spilled 22,000 litres of black to the owners.

The PW3, testified that he is the conductor.He testified and restated the events of 4/11/2009, leading to the accident causing loss and death of one person in the Defendants bus. He testified that as a result of these accident, the Plaintiff suffered severe loss. In course of PW3, evidence, four (4) documents were tendered.

- (1) NNPC Bridging Note dated 20/10/2009 as Exhibit "B 1".
- (2) NUPENG loading point receipt dated 30/10/2009 as Exhibit "B2".

- (3) Okson General Services Way Bill dated 30/10/2009 as Exhibit "B3".
- (4) Sales Invoice from Johnceno Triumph Metal Construction as Exhibit "C".

Under Cross-examination, all three witnesses, confirmed not knowing the name of the alleged owner of the Black Oil, and also not have any knowledge of the market price of the Black Oil. Also, could not confirm the type of product loaded, nor the quantity so loaded. PW1 and PW2, confirm the knowledge and expenses of PW2 as a Truck Driver, though not trained before the driving, and not having knowledge to the Traffic Codes.

The Defendants witness, through DW1, DW2 adopted the witness deposition and testified on the earning of the Bus and the loss resulting thereof from alleged Plaintiff's negligent and careless driving.

In course of Evidence-Chief, the following documents were tendered and marked as Exhibits "D", "E1", "E3", "E4", "E6" and "E7".

Under Cross-examination, the witness confirmed that he did not witness the incident, but was informed on 5/11/2009. He confirmed that 40 passengers were in the bus travelling from Onitsha to Kano. He confirmed travelling to the scene of the accident on the instruction of his Chairman. He confirmed that information about the accident was given to the company by 1st Defendant. He said he cannot confirm who was at fault. He confirms that the 2nd Defendant has been driving with the 1st Defendant since 1975 and never recorded any accident before this case. He said he is

not aware that the 2nd Defendant is facing trial at the Chief Magistrate Court Gwagwalada.

Under cross-examination, DW2, confirmed that he got drivers, licence in 1975 and driving since then. He said that there was no warning signs from the 2nd Plaintiff's vehicle when the truck stopped suddenly and that he did not hit the truck deliberately. He confirmed that the accident occurred on 4/11/2009 along Abaji Junction at about 4.00am. He admitted running into the truck to save the lives of the passengers and on-coming vehicles behind him. He confirmed that he was arrested and charge to Court, along with the 2nd Plaintiff. He maintained that the truck was in Motion when the accident happened and not parked. He stated that he cannot state the quantity of the spilled Black Oil.

At the close of trial, Learned Counsel for the Defendant, S.N.S. Eze Esq, filed the Defendant's Final Address and formulated two (2) issues for determination;

- (1) Whether from the oral and documentary evidence lead in this case, the Claimant has proved by a preponderance of evidence that they are entitled for the reliefs sought by them in the substantive case.
- (2) Whether in the circumstances, the Respondents have proved their uncontroverted Counter-Claim on a preponderance of evidence.

The learned Counsel for the Plaintiff Okoroafor James, Esq, filed the Plaintiff's Final Address and formulated two(2) issues for determination;

- (a) Whether the Claimants have proved their case in the regularized Statement of Claim against the Defendants to entitle them to the reliefs sought.
- (b) Whether the Defendant's Counter-Claim is sustainable in law and has been proved by credible evidence to entitle them to the reliefs sought.

Having carefully considered both the documentary and evidence of the parties, the submission of both parties, including the judicial authorities cited, the court finds that only two (2) issues calls for determination;

- (1) Whether the Claimant has proved their case against the Defendants to entitle them to the reliefs sought.
- (2) Whether the Defendants has proved by credible evidence if they are entitled to the reliefs sought in their Counter-Claim.

These two issues encapsulates all the issues formulated by the both counsel in their respective Final Addresses.

In line with the evidence of the Defence witness, S.M.S Eze Esq, contend that this case is predicated on the alleged negligence of the 2nd Defendant, the driver of the 1st Defendant luxury Bus, that the Claimant failed to establish the ingredients of the negligent act of the 2nd Defendant firstly, that the 2nd Plaintiff failed to show due diligence in his driving ability,

confirmed by his evidence that he hardly known the traffic and/or codes, therefore operates by what his mind tells him to do. Further in this instant case, it is the practice in proof to tender a sketch of the accident scene, but the Claimant failed to tender the said sketch. Also, that the Claimant failed to shoe evidence or particulars of the negligence alleged.

Also, contend that there are material contradiction in the evidence of the Claimant witness as to the quantity of the Black oil, the names of the owner, date of loading vis-vis the date of the accident, and the authenticity of the documents – product owners and way bill as stated in Exhibits “B2” and “B3”. On this issue¹, submits that the Claimant has failed to prove his case against the Defendant and urge the court to resolve in favour of the Defendants. Counselreferred the court to several judicial authority, Framo Nig Ltd Vs Daodu (1993) 3 NWLR (P. 281) 372 Ratio 4;Z.B Koya Vs United Bank for Africa Ltd (1997) 1 NWLR (PT. 481) 251 Ratio; Umudje Vs Shell B.P. Petroleum Development Coy Ltd (1975) 9 – 11 SC 155.

On issue II, submitsthat the Counter-Claim of the Defendant was never challenged on controverted by the Claimant, and that it is trite law that facts not controverted are deemed admitted. That the evidence of the Defendant through DW1 and DW2 were never challenged and therefore, urgedthe court to resolved the issue in favour of the Defendant.

In line with the evidence of the Claimant witness, Claimant Counsel, Okoroafor James Esq, contends that the Claimant has by credible evidence established their case to entitle them to the reliefs sought. That in doing so,the Claimant placed reliance on the Exhibit “B1”, “B2”, “B3” and “B4”.

Further that the evidence and Exhibits tendered through the PW3 are proper and in line with the Provision of Section 39 (d) and 41 of the Evidence Act and that there is no contradiction with the evidence of PW2 as alleged by the Defendant. On the issue of damages, submit that the Claimant from the evidence before the court have proved that they are entitled to damages, which was specially proved in line with order 23 Rule 4 (1) of the Rules of Court. Counsel referred the court to several judicial authorities and relevant laws in urging this court to resolve relief 1 in favour of the Claimant.

On issue ii, submits firstly that there is no Counter-Claim before the court, the Defendant having failed to take steps to bring before court a proper Counter-Claim to enable the court to adjudge on it. Refer the court to the Defendant Motion on Notice dated 2/8/2010, wherein they sought leave to file their Statement of Defence and no mention of Counter-Claim nor any fees paid in line with the Rules. Urged the court to note, that Counter-Claim being an Independence claim ought to be filed and fees duly paid for. That in this instance the Defendant did not pay any fees for the Counter-Claim and is fatal to the Defendants. The implication being that there is no Counter-Claim before the court and cannot be cured by payment now of filing fees. Referred the court to several judicial authorities on the position of the law. *Wema Bank Vs Osilaru* (2005) 10 NWLR (PT. 1094) Pg. 161 – 162. *Ukpabio Vs NFVCB* (2008) 9 NWLR (PT. 1092) Pg. 225-227; *O.O.M.F Vs N.A.C.B Ltd* (2008) 12 NWLR (PT. 1098) Pg. 417 *Abbas Vs Tera* (2013) 2 NWLR (PT. 1338) Pg. 286; *Ugwaniyi Vs Nikon Insurance* (2004) 15 NWLR (PT. 897) Pg. 618 – 619.

Submits further that if the court is minded to consider the Counter-Claim, that the Defendants has failed to establish any case that would sway this court to grant in their favour. In all urged the court to dismiss the Defendants Counter-Claim.

Now to determine the issues formulated by court.

“Whether the Claimant has proved their case against the Defendant to entitle them to the relief sought”

This case borders on an action in the Test of negligence, “Negligence properly defined is the failure to take reasonable care, where there is a duty and it is attributed to the person whose failure to take reasonable care, has resulted to damage to another”. See the case of U.T.B (Nig) Ltd Vs Ozoemena (2007) 3 NWLR (PT. 1022) 448 @ 453; Owigs and Obigs Nig Ltd Vs Zenith Bank (2020) LPELR-50702 (CA).

It is settled law that, a Plaintiff to succeed in an action for negligence must plead and prove sufficient particulars of negligence act alleged. The Plaintiff must prove by credible evidence the following:-

- (1) The existence of a duty of care owed to the Plaintiff by the Defendant.
- (2) Breach of that duty of care by the Defendant.
- (3) Damages suffered by the Plaintiff as a result of the breach by the Defendant of that duty of care. See Abubakar Vs Joseph (2008) 13 NWLR (PT. 1104) Pg. 307 @ 317; Zenith Bank Plc Vs Areo (2021) LPELR 53309 (CA).

In proving the alleged acts of negligence by the Defendant, the burden of proof is on the Plaintiff, who alleged and failure to prove particulars of the acts of negligence pleaded will be fatal to the case of the Plaintiff.

In this instant case, the Plaintiff pleaded the facts of the events leading to the accident; merely alluded to the fact that it was the 2nd Defendant who caused the accident by his negligence conduct. This is a case of motor accident where evidence was led to the effect that the Police was called in, it is expected that in aid of proof of acts of negligence, a sketch report should have be taken by the Police of the scene of the accident given a fair view of what transpired at the scene of the accident. There is evidence from this Plaintiff's Witness, PW2, that there was a sketch report was obtained but was not tendered in evidence. This in the court view, is not in favour of the Plaintiff, this is an occasion where the Provision of Section 169 (d) of the Evidence Act, 2011 would be invoke against the Plaintiff's failure to tender the said sketch report which if tendered will assist the court to determine if the Defendant was indeed negligent.

Further, in proof of negligence, the Plaintiff has the burden duty to establish the duty of care owed to them by the Defendant. This is the bedrock in the claim of Tort of Negligence; see *Koya Vs UBA Ltd (1997) LPELR 1711; 64 – 65*.

Also, it is the duty of the Plaintiff to state on their claim, particulars of negligence alleged. See also case of *Koya Vs UBA Ltd (Supra)*.

A careful perusal of the Statement of Claim of the Plaintiff upon which this case is anchored, the Plaintiff did not in line with the law, establish any link as to the duty of care owed to it, but merely asserted to the facts leading to the accident without more. And further did not in line with the law, state the particulars of the alleged negligence on their pleadings. It is the court firm view that failure to do all of these is fatal to their case which borders of Tort of Negligence.

This court has carefully perused the Statement of Claim evidence of the Plaintiff witnesses, Exhibits and find that the Plaintiff has not either directly or by circumstantial evidence, established any of these requirements in proof of their case. The evidence before the court merely shows that there was indeed an accident but the evidence lead failed to show how the Defendant was negligent.

In all, the court finds that the Plaintiff has failed to prove the case of negligence against the Defendant, accordingly his claims fails in its entirety and is dismissed.

On the Counter-Claim of the Defendant, the Defendant is seeking the reliefs set out in their Counter-Claim against the Plaintiff.

“It is settled law that a Counter-Claim is a claim for reliefs asserted against an opposing party after an original claim has been made, that is, a Defendant’s Claim in opposition to or as a set off against the Plaintiff’s Claim. It is only a claim by the Defendant against the Plaintiff in the same proceedings but it is regarded as an independent and separate action in which the Defendant/Counter-Claimant is in

opposition to the Plaintiff and therefore has the burden of proving the Counter-Claim to be entitled to Judgment thereon” See the case Jeje Vs Enterprise Bank Ltd & Or (2015) LPELR-24829 (CA) Pg. 96 – 108; also Section 131-134 of Evidence Act, 2011.

In this instant, the Plaintiff raised a substantial issue on the competence of the Counter-Claim filed along with the Statement of Claim by the Defendant and noted that though the Defendant sort leave of court to enter appearance and filed Statement of Defence being out of time and filing fees paid, but there was no filing fees paid in respect of the Counter-Claim, neither any further application to have it regularize. That this failure, in line with Rules of Court and Judicial authorities relied on, the said Counter-Claim is incompetent and the court cannot act on it for lack of jurisdiction.

In all of these, the Defendant/Counter-Claimant did react to this.

In this instant case, this court has perused the processes filed by the Defendant, in particular the Motion on Notice No. M/120/2010, wherein the Defendant/Applicant therein sought leave to file process being out of time. Granted that the Relief 2, as contained is seeking leave for filing their Statement of Defence, did not specially include the Counter-Claim, assuming without conceding that it is the practice that Counter-Claim can and has always being filed along with the Statement of Defence. In this instance, from the records, the Defendant/Applicant did not pay any filing fees for the said Counter-Claim as required by the law. A careful perusal reveals that it was not paid for and this is against the Provision of the Rules

of court and the law. See case of Wema Bank Plc Vs Osilaru (Supra); Ukpabio Vs NFVCB (2008) 9 NWLR (PT.1092 Pg 225. 227; and O.O.M.F. Vs N.A.C.B Ltd (2008) 12 NWLR (PT.1098) Pg 417.

Having found that the Defendant failed to comply with the condition precedent to enable the court to exercise its jurisdiction in respect of their Counter-Claim, this failure has the effect rob this court of the jurisdiction to determine this Counter-Claim of the Defendant. Consequently, in line with the law, See Ugwanyi Vs NICON Insurance (2004) 15 NWLR (PT.897) PP. 618 – 619, decline jurisdiction to determine the Counter-Claim against the Plaintiff. In consequence therefore, the Counter-Claim of the Defendant is hereby dismissed.

From all of these, the Plaintiff's claim is hereby dismissed on the grounds stated in this Judgment.

This is the Judgment of the Court.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

10/5/2022

APPEARANCE:

OKOROAFOR JAMES ESQ – FOR THE CLAIMANTS

S.M.S. EZE ESQ FOR THE DEFENDANTS

