

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

ON TUESDAY, 13th DAY OF SEPTEMBER, 2022

BEFORE HON. JUSTICE NJIDEKA K. NWOSU-IHEME

SUIT NO. FCT/HC/CV/1484/2022

BETWEEN:

1. PHILKRUZ WEST AFRICAN LTD
2. CHIEF PHILIP C. UZOUKWU] **CLAIMANTS**

AND

MR. ABDULAZEEZ Y. M. AGABI **DEFENDANT**

JUDGMENT

The claimant filed this suit on the 09/05/2022 under the undefended list claiming the following reliefs against the Defendant;

1. AN ORDER of this Honourable Court mandating the Defendant to pay the Claimants the sum of N9,200,000:00 (Nine Million, Two Hundred Thousand Naira) being the sum of the Defendant's outstanding indebtedness to the Claimants in respect of the loan the Defendant made the Claimants to take on his behalf since December, 2021.
2. Interest on the above sum calculated at the rate of 20% from 1st April, 2022 until judgment is delivered.

3. Interest on the above sum calculated at the rate of 10% from the date of judgment until the final liquidation of the judgment sum.
4. And the cost of bringing this action.

The claimant filed a 24-paragraph affidavit via Chief Philip C. Uzoukwu, the Chief Executive Officer of the 1st claimant and the 2nd claimant in this suit Exhibits A-G attached therewith. The Defendants despite being served with the processes in this suit did not appear in court neither were they represented.

In the Claimants 24 paragraph affidavit in support of the originating summons, the 2nd Claimant deposed as follows;

1. That the Defendant was introduced to him by a mutual friend one Eche Agunlobi and sometime in December 2021, the said Eche Agunlobi came with the Defendant, seeking urgent financial need and asking the 2nd claimant to issue him a Local Purchase Order (LPO) to enable him access the money he was processing with Norrenberger Eurobond Note, MicroFinance Bank, with office at No. 11 Volta Street, Off Thames Street, Ministers Hill, Maitama, Abuja.
2. That the 2nd claimant issued the said LPO and they went further to ask that he lend the Defendant some money. 2nd Claimant informed the Defendant of a local /private lender who could help out considering their urgent financial need as only a private lender would act fast.

3. That the 2nd claimant agreed to assist Defendant in getting the facility from Wealth Partners Co-operative Society, as they only lend money to their members and the 2nd claimant being a member of the said Cooperative Society, could easily access the facility.
4. That based on the understanding they had, he applied for the credit facility with Wealth Partners Cooperative Society for the sum of N6,000,000.00 (Six Million Naira) only but only N5,000,000.00 (Five Million) was approved for him.
5. That upon the grant of the loan in the sum of N5,000,000.00 to him by the Co-operative Society, he immediately remitted same to the Defendant who was to use same as equity contribution for another loan he was processing with Norrenberger Eurobond Note, Micro Finance Bank. The Memorandum of Understanding dated 6th December, 2021 between the Claimants and the Defendant and the letter of Loan Offer by Wealth Partners Cooperative Society dated 10th December, 2021 were attached as Exhibits "A" and "B".
6. That a condition precedent for the grant of the loan was that the 2nd claimant deposit his five (5) bedroom duplex within the 1st Claimants Estate at Dakibiyu with the lender as collateral and also issue a post-dated cheque in the sum of N6,150,000.00 being the sum for the loan and one (1) month interest on the loan.
7. That the Defendant issued a post-dated cheque in that sum, using his company cheque in the name of Hikima Minning Ltd, same was issued in the 2nd defendant's name and dated 9-1-2022. The Union Bank cheque in the sum of N6,150,000.00 (Six Million, One Hundred and Fifty Thousand) dated 9-1-2022 was attached as Exhibit "C".

8. That the tenor for the loan was (1) month, but immediately the Defendant received the money on 10th December, 2021 he became evasive and unreachable.
9. That when it was time for the 2nd defendant to repay the loan as agreed with the lender, he could not reach the Defendant, and when he presented the cheque he was issued, it was returned for lack of sufficient funds, and he quickly wrote to the lender of the money for extension of time and grace. The letter to WealthPartners Cooperative Society dated 3rd January, 2022 was attached as Exhibit "D".
10. That he had to make frantic effort before he could get the Defendant, who came begging and asked for time to enable him return the loan with the interest, for this he wrote another undertaking pleading for time and promised to pay the loan with the interest on or before 31st March, 2022 and even went further to issue another cheque covering the sum of the loan with interest in the sum of N9,150,000.00 (Nine Million, One Hundred and Fifty Thousand Naira), an Access Bank cheque dated 24/03/2022. The letter of undertaking by the Defendant dated 8th March, 2022 and the Access Bank cheque in the sum of N9,150,000.00 (Nine Million, One Hundred and Fifty Thousand Naira) dated 24/03/2022 were attached as Exhibits "E" and "F".
11. The Defendant has since refused, failed and or neglected to make the payment as promised even as the second cheque he issued was also returned unpaid for lack of funds.

12. The Claimants have through their agent Messrs. B. F. Adesina & Co. written letter of demand to the Defendant requesting for the payment of the Defendant's outstanding indebtedness to the claimants, a copy of said letter dated 28th March, 2022 and received by the Defendant's wife on the 8/4/2022 was attached and marked as Exhibit "G".
13. That the 2nd Claimant's personal property of five (5) bedroom duplex used as collateral for the loan is in danger of being mortgaged by the lender, consequent upon the failure, neglect and or refusal of the Defendant to liquidate his indebtedness in accordance with their understanding.
14. The Claimants have made several unsuccessful demands on the Defendant for the liquidation of the said sum which is increasing on a monthly basis.

DECISION OF THE COURT:

SOLE ISSUE FOR DETERMINATION

“Whether the Claimant has established a case to be entitled to the reliefs sought”

The Defendant did not appear before this court neither did they file a notice of intention to defend as required by the rules of this court. In the circumstance of this case, where the Defendants failed and neglected to file any counter process in opposition to the evidence adduced by the Claimant, the case of the Claimant remains unchallenged, uncontroverted and not rebuttable. see the case of: ***ASAFI SEA FOOD V. ALRAINE [NIG] LTD [2002] NWLR [PT.781] 353.***

Where evidence is uncontroverted, the onus of proof is satisfied on a minimal proof since there is nothing on the other side of the scale see ***BURAIMOH V BAMGBOSE (1989) 2 NWLR (PT 109) 352.***

In ***CHIEF MAURICE UDO IDUNG & ANOR v. THE COMMISSIONER OFPOLICE & ORS (2017) LPELR-42333(CA)***

"It is well known in law that failure of a party to challenge or controvert depositions in affidavit of his opponent by filing a counter-affidavit, reply or further and better affidavit is deemed to have accepted the facts deposed in the affidavit. AYOOLA VS. BARUWA (1999) 11 NWLR (PT. 628) 595; COMPTROLLER, NIGERIA PRISON SERVICE V. ADEKANYE (1999) 10 NWLR (PT. 623) 400. When an affidavit is unchallenged, the trial Court is at liberty to accept it as true and correct." Per ADAH, JCA (Pp. 22-23, paras. E-A)

However, this court before it arrives at its decision must still consider the evidence of the Applicant, irrespective of the fact that the Respondent failed to file his defence to the Originating Motion. The burden still rests on the Applicant to prove his case even though the requirement is minimal proof.

A Claimant must succeed upon the strength of his case and not on the weakness of the defence, although he is entitled to rely on evidence revealed in such weakness to strengthen his case. See ***OTUNBA ABDULLATEEF OWOYEMI V PRINCE OLADELE ADEKOYA 2013 12 SCNJ 131.***

In ***REV. POLYCARP MATHEW ODIONG v. ASSISTANT INSPECTOR GENERAL OF POLICE, ZONE 6, CALABAR (2013) LPELR-20698(CA) (P. 42, paras. A-D)***

"Although the facts deposed to by an applicant are not challenged by a respondent, the Court still has a duty to consider and weigh the affidavit evidence before it in order to ensure that they can ground the Order sought by the applicant. An unchallenged affidavit which contains obvious falsehood or is self-contradictory cannot sustain the case of the applicant. In other words, the evidence contained in the unchallenged affidavit must be cogent and strong enough to sustain the case of the applicant. See: *Ogojeifo vs. Ogojeifo (2006) 1 S. C. (PT.1) 157.*"

The case of the Claimants in a nutshell is that based on the understanding they had with the Defendant, they obtained a credit facility with Wealth Partners Cooperative Society for the sum of N5,000,000.00 and remitted the amount to the Defendant who was to use same as equity contribution for another loan he was processing with Norrenberger Eurobond Note a Micro Finance Bank. The tenor for the loan was (1) month, but immediately the Defendant received the money on 10th December, 2021 he became evasive and unreachable and has not repaid the said sum till date and the 2nd Claimant is expected to repay the facility he obtained from the Wealth Partners Cooperative Society or forfeit his property which is his five (5) bedroom duplex within the 1st Claimant's Estate at Dakibiyu with the lender. Exhibit A captures the terms of the agreement between the parties as follows;

“(A).That PARTY B shall use the N6,000,000.00 (Six Million Naira) to be raised from a Private lender, to pay the equity to the Micro finance Bank for the disbursementof the N35,000,000.00(Thirty-Five Million Naira) loan within one week of receiving the6,000,000.00(Six Million Naira).

(B). That PARTY B shall give PARTY A, a postdated cheque of N7,200,000(Seven Million, Two Hundred Thousand Naira)only, as collateral orcomfort for the N6,000,000.00 (Six Million Naira) loan borrowed for payment of equity.

(C). PARTY A shall take the sum of N150,000.00 (One Hundred and FiftyThousand Naira Only).

(D). Upon the disbursement of the loan of N35,000,000.00 (Thirty-Five Million Naira) by theMicrofinance Bank, PARTY B shall give PARTY A the sum ofN10,000,000.00 (Ten Million Naira) only as loan and this loan shallbe paid back within 12 months from the date of disbursement.

(E). Party A shall give party B postdated cheques in the sum of the loanamount of N10,000,000.00 (Ten Million Naira) plus the accrued interest”.

Exhibit B is the offer for loan granted claimant by the Wealth Partners Co-operative.According to paragraph 12 of the Affidavit in support of this suit, the Defendant became unreachable when it was time to repay the loan to the Claimant.The cheque which he issued was returned for lack of sufficient funds and this precipitated the claimant applying to Wealth Partners Co-operative for an extension of time and grace, this letter was tendered as Exhibit D.According to paragraphs 13 and 14 of the affidavit in support, the Defendant made an undertaking on 8th March, 2022 pleading for time to enable him return the loan with interest on or before 31st March, 2022 and issued another cheque of N9,150,000.00. The second cheque was also returned unpaid for lack of funds.

The Demand letter dated 28th March, 2022 has not been responded to by the Defendant. Exhibit E being a letter of undertaking requesting for more time dated 8th March 2022 appears to be an admission of indebtedness.

Section 20 of the Evidence Act defines an admission as;

“An admission is a statement, oral or documentary or conduct which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, hereafter mentioned in this Act.

Section 21 (1) statements made by a party to the proceeding or by an agent to any such party, whom the court regards in the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions”

The Supreme Court decision of **CAPPA & D’ALBERTO LTD V DEJI AKINTILO P (2003) 9 NWLR (PT 824) P. 49 OR (2003) LPLER 829 (SC) @ P. 14 PARAS B-D** defined Admission thus Per Tobi JSC as he then was:

“Admission is a statement oral or written (expressed or implied) which is made by a party or his agent to a civil proceeding which statement is averse to his case. It is admissible as evidence against the maker as the truth of the fact asserted in the statement”

The admission of the Defendant goes further to buttress the case of the Plaintiff.

It is trite law that he who asserts must prove. In ***Ojoh v. Kamalu (2005) 18NWLR (Pt. 958) Pg. 523 at 565 Paras.F – G Per Tobi JSC held;***

"it is trite law that he who asserts must prove the correctness of his assertion.

The onus was on the Claimant to prove by credible evidence this claim and discharge the burden. In light of the foregoing, I hold that the defendant has not discharged the evidential burden placed on him by virtue of Sections 131, 132 and 133 of the Evidence Act, 2011 as amended.

In ***INEME v. INEC & ORS CITATION: (2013) LPELR-21415(CA) @ PER OTISI, J.C.A. @ Pp. 19-21, Paras. F-C ;***

"The Appellant has rightly submitted that the burden of proof lies on him who asserts. In civil cases, while the general burden of proof in the sense of establishing his case lies on the plaintiff, such a burden is not static. There may be instances in which, on the state of the pleadings, the burden of proof lies on the defendant. As the case progresses, it may become the duty of the defendant to call evidence in proof or rebuttal of some particular point which may arise in the case. See; Section 131, 132, 133, and 136 of the Evidence Act 2011, which provide thus:

131.

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

132. 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.

133.

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

(2) If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.

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(1) The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact

shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other.

(2) In considering the amount of evidence necessary to shift the burden of proof, regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

The burden of proof shifted from the Claimants to the Defendant because the Plaintiffs asserted by proving with documentary and affidavit evidence that the Defendant had breached the terms of Exhibit A.

The fact that no evidence was adduced for the Defendant to prove their case does not mean that his case fails. This is because it is trite law that a plaintiff must succeed upon the strength of his case and not on the weakness of the defence, although he is entitled to rely on evidence revealed in such weakness to strengthen his case. See ***OTUNBA ABDULLATEEF OWOYEMI V PRINCE OLADELE ADEKOYA 2013 12 SCNJ 131*** and I so hold.

In ***ORJI V DORJI TEXTILES (2009) 12 SC (PT III) PAGE 73 @ P. 112*** the apex court held that;

"It is elementary law that civil matters are determined on the preponderance of evidence, and balance of probability. The law is also that he who asserts must prove it and where enough and relevant evidence are not adduced then it is he who has failed to produce the evidence that will fail his case.

The burden is not static for it shifts from one party to another.”

Emphasis mine

It is undisputed that there is an agreement between both parties and the terms of that agreement, Exhibit A is before this court. The terms of this agreement afford this court opportunity to ascertain a breach of contract.

The Claimant has responsibly discharged the necessary evidential burden placed on him by the law as can be seen in his given evidence, although uncontradicted, unquestioned and uncontested by the Defendant who was totally absent without due reasons to this court and more so, inspite of several hearing notices being served on him by the Claimants.

I find that the evidence of the Claimant remains unchallenged and uncontroverted, I accept same as true. I hereby determine the issue in favour of the Claimant as against the defendant. Therefore, I enter judgment in favour of the claimant and against the Defendant.

In light of the foregoing, I hold that the Plaintiff has discharged the evidential burden placed on him by virtue of Sections 131, 132 and 133 of the Evidence Act, 2011 as amended.

The Claimants are entitled to reliefs A to D as contained in the plaint. I award cost of N200,000 against the Defendant.

**HON. JUSTICE NJIDEKA KENECHUKWU
NWOSU-IHEME
[JUDGE]**

Appearance of Counsel:

1. B. F. Adesina for the Claimant.
2. Defendant was absent and unrepresented.