IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS

COURT: 28

DATE:-7TH DECEMBER, 2022

FCT/HC/CV/2696/2021

BETWEEN

MR. NWACHUKWU VICTOR NJOTEH------- **CLAIMANT**

AND

MR. OLUFUNSHO ALABI-------- **DEFENDANT**

JUDGMENT

This suit was filed by the Claimant on 15th October,2021 vide a writ of summons, seeking the following reliefs:-

i. A Declaration that the attack by the Defendant's dog on the Claimant was unlawful, negligent, irresponsible, traumatic and life endangering.
ii. A Declaration that the continued habitation of the Defendant's dog in spite of the attack on the Claimant and other residents is unlawful and irresponsible and a recurring violation of the resident's safety.
iii. A Declaration that the continued habitation of the dog in the estate compound by the Defendant poses a huge threat to life and potential grievous bodily harm to the Claimant and his young family as well as the other residents of the estate.
iv. A Declaration that the vicious attack by the Defendant's dog caused a severe psychological trauma, physical pain and economic ordeal on the Claimant.
v. An Order of this Honourable Court for the immediate confiscation of the concerned dog from the estate or its environs.
vi. An Order of this Honourable Court granting the sum of Fifteen Million Naira (N15, 000,000.00) against the defendant in favour of the

Claimant for cost of the ongoing treatments and recommended skin graft surgery on the Claimant's leg as a result of the physical injury caused by the unprovoked attack by the Defendant's dog.

vii. An Order of this Honourable Court granting the compensatory sum of Twenty Five Million Naira (₦25, 000,000.00) as general damages against the defendant in favour of the Claimant for the psychological trauma, economic loss and the permanent physical and mental scar on the Claimant as a result of the unprovoked attack of the Defendant's dog on him.

viii. An Order of this Honourable Court awarding the sum of One Million, Five Hundred Thousand Naira, only (₦15,000,000) against the Defendant being the cost of this suit.

ix. And for such other Order(s) as the Honourable Court may deem fit to make in the circumstances of this suit.

A summary of the Claimant's pleadings is that the Claimant was attacked by the Defendant's dog (called Max) on 3rd August 2021 at about 6:30am along the Estate street at Plot 260 Adamu Ciroma Crescent, Jabi, Abuja, in which both the Claimant and the Defendant reside.

The dog bit the Defendant left leg with very deep cuts and tore his jeans to shred. It only took the intervention of the dog handler and Defendant's driver, Mr. Adebisi, for the Claimant to escape further biting by the dog.

The Claimant also averred that the dog had previously attacked one Late Mr. Otache, one of the Estate Security men, sometime in September/October, 2020, and also attempted to attack one Prof. Bolaji's son, who luckily escaped unhurt.

The Claimant stated that after the attack on him by the Defendant's dog, the Defendant directed his driver to rush the Claimant to the Hospital for initial treatment, of which bills were sorted by Defendant. Thereafter the Defendant did not make any further attempt to reach the Claimant to inquire about his state of health, and refused to accede to the Claimant's demand for compensation and disposal of the Dog.

The Claimant averred that he has suffered physical and mental torture, and that his work and family have suffered as result of the injuries sustained by the dog bite and the attendant cost of receiving treatment at the Nisa Premier Hospital, Jabi, Abuja.

The Defendant's filed an amended statement of defence on 24/03/2022. In his defence, the Defendant stated that the incidence of 3rd August, 2021, occurred as a result of the Claimant's decision to play with a dog he was not familiar with and in the process got the dog provoked. He further claimed that the dog is a Caucasian dog and not a wild dog, which is friendly and sensitive to smell.

The Defendant further denied earlier attack by his dog on Late Mr. Otache as claimed by the Claimant.

He stated that he footed the Claimant's medical bills after the attack, and further visited the Claimant at the Hospital and at his house, with subsequent follow up visits on the Claimant by the defendant's mother. The Defendant further averred that he has always ensured that his dog max is taken to veterinary doctor for the purpose of being vaccinated with Anti-Rabies injections Tetanus injections and deworming respectively.

The Defendant claim that the Claimant made outrageous monetary demand and ordered that the dog be killed. He pleaded that he is a civil servant and a common salary earner, and that his take home pay for 20 years cannot pay the outrageous/humungous amount being demanded for by the Claimant as compensatory sum.

The Claimant filed an amended reply to the Defendant's Statement of Defence and a further witness statement on oath on 4th April,2022, wherein he denied the averments in the Defendant's Statement of Defence.

The Claimant called three (3) witness (PW1 – PW3). On 7th April, 2022, PW1, who is the Claimant himself adopted his witness statement on oath and tendered seven documentary evidences which were admitted in evidence as follows:-

i. Four Pictures showing the injuries sustained by the Claimant as a result of the dog bit – Exhibit 1
ii. A medical report from Nisa premier Hospital dated 3rd August 2021 – Exhibit 2
iii. A letter from the Claimant to his employer dated 4th August 2021 – Exhibit 3
iv. A letter of demand by the Claimant through his solicitors Frank Molokwu & Co., dated 4th October, 2021 – Exhibit 4

v. Reciept of Payment made by the Claimant to his solicitor Frank Molokwu & Co dated 4/10/2021 – Exhibit 5
vi. An invoice of Sale Incentives for the year 2021 dated 10th June, 2021 – Exhibit 6
vii. An invoice from the Claimant's dermatologists dated 22nd February 2022 – Exhibit 7

During cross examination, PW1 maintained that the scars on his body were caused by the injuries sustained from the dog bite. He also denied that the Defendant paid for his treatment at the Nisa Premier Hospital. When asked to show proof of the treatment paid for by him at the Hospital, PW1 related that most of the payments were made in cash and through POS, and due to the pains he was passing through, he could not keep the receipts.

He stated that the Defendant only made payment for anti-bacteria and a few injections on the first day he was taken to the hospital, and that the Defendant's payment did not cover cost of going for dressing of the wounds. Counsel to the Defendant also asked for evidence of the payment in exhibit 7 to the Claimant's solicitor, to which PW1 stated that the payment was made in cash.

PW1 admitted during cross examination that exhibit 7 was prepared during the pendency of this suit.

When confronted on what caused the death of Late Mr. Otache, PW1 stated that Mr. Otache's death may have been associated with the alleged attack by the defendant's dog. He however acknowledged that there was no medical report to confirm that fact.

PW1 also stated during cross examination that the Defendant's dog was removed from the Estate four months after this suit commenced.

PW2, one Mr. Ishaiya Maiduka testified on 8th April, 2022, and was cross examined by the Defendant's counsel. PW2's testimony is that he is a security personnel at one of the blocks within the estate, and that he witnessed the attack and biting of the Claimant by the Defendant's dog on 3rd August 2021.

On 14th April, 2022, PW3, one Danladi Celestine Ahmed adopted his witness statement on oath, and was cross examined accordingly. His testimony is that as security man in the Claimant's estate, he witnessed the defendant's dog attack on the late Mr. Owoichoo Otache, who was then his

colleague. In his statement on oath, the Late Mr. Otache did not provoke the dog nor stand on its way, yet the dog forcefully pulled itself out of the grip of its trainer and bit the Late Otache, causing him deep cuts and injuries.

The Defendant opened his defence on 14th April 2022, and on that date, DW1, the Defendant himself, adopted his witness statement on oath, and was cross examined by Counsel to the Claimant.

During Cross Examination, DW1 stated that he was not around when the dog attacked the Claimant; that he was told that the Claimant provoked the dog, leading to the attack. DW1 also admitted during cross examination that his dog had earlier attacked Mr. Otache, and that he rushed him to the hospital, the same way he directed the Claimant to be rushed to the hospital after the attack.

On 7th June, 2021, DW2, one Mr. Adebisi Lawrence, who claims to be the dog handler, adopted his witness statement on oath, and tendered three (3) exhibits namely six (6) receipts (exhibit DW1), dog record book (exhibit DW2) and the Defendant's ay slip (DW3).

During cross examination, DW2 stated that on 3rd August 2021, when the said incident occurred, he removed the dog from its cage and released it inside the Defendant's compound, in other to clean the dog's cage. He admitted that the Claimant was not inside the Defendant's compound, when the dog attacked the Claimant. However, he claimed that the Claimant played with the dog, which provoked the dog to bite the Claimant.

At the close of hearing, parties filed their final written addresses and same was adopted on 28th October, 2022.

Learned counsel to the Defendant in his final written address, raised four issues for the courts determination to wit:-

i. Whether this Honourable Court can conveniently rely on exhibits 1 and 7 respectively tendered by the Claimant (PW1) having failed to comply with the mandatory requirements of section 84(1) and (2) (a) – (d) of the Evidence Act 2011.
ii. Whether this Honourable Court can rely on the further witness statement on oath filed on the 4th April, 2022 in the face of a fundamental defect.

iii. Whether this Honourable Court can accept the originating process (writ of summon) filed in this suit accompanied by a pre-action counselling certificate only signed by the Claimant counsel contrary to the provision of Order 2 Rules 2 (2) (a) (b) (c) (d) (e) (3) (4) and Rule 8 making such non-compliance a fundamental defect that cannot be waived or overlooked.

iv. Whether having regards to the facts and circumstances of this case, the Claimant has proved his case to be entitled to the reliefs/claims being sought before this Honourable Court.

On issue 1, learned counsel submitted on behalf of the defendant that, a computer generated document can only be admissible in evidence upon compliance with the requirement of section 84 of the Evidence Act 2011. He faulted the non-calling of evidence to establish how exhibit 1 was produced, as required in sub paragraphs (a) – (d) of subsection 84(2) of the Evidence Act, 2011. Relying on the decision in ***KUBOR V. DICKSON***, counsel urged the court not to rely on exhibit PW1, and to expunge same.

Counsel also cited the case of ***BABAN LUNGU & ANOR V. ZAREWA & ORS (2013 LPELR- 20726 (CA)*** in arguing that a mere certificate of compliance is not enough. That it is the duty of the party tendering a computer generated evidence to tie the certificate of compliance with the evidence sought to be tendered.

Counsel further asked the court to expunge exhibit 7 as the Claimant merely dumped the document on the court without specifically relating the said letter to the case. Moreover, the Claimant had admitted under cross examination that he never physically met with the Doctor from which exhibit 7 emanated and was never medically examined by the purported dermatologist Doctor.

Counsel also raised doubt as to the genuineness of exhibit 3, as there is no evidence before the court showing that the letter (exhibit 3) was received by his employer or acknowledged. Also, the letter was written by the Claimant using the letter head of his employer.

On issue 2, counsel argued that where a document or a court process is not signed, that document or court process becomes worthless. ***EDILCO (NIG.) LTD V. U.B.A PLC (2000) FWLR (PT. 21) 792.*** He urged the court not to confer any evidential value on the further witness statement

on oath filed on 4th April,2022 as same was not signed by the deponent contrary to the requirement of section 117(4) of the Evidence Act 2011.
On issue 3, counsel maintained that the originating process used by the Claimant in commencing this action is incompetent, as the pre-action counselling certificate was only signed by the Claimant Counsel without the litigant signing his column, contrary to Order 2, Rules 2(a)-(e), 3, 4 and 8 of the FCT High Court Rules, 2018.
On issue 4, Counsel submitted that the claimant's action is not founded on the tort of negligence, as the Claimant failed to specifically plead same, and as a result, the Claimant is deemed to abandon everything that has to do with negligence in this matter. Counsel argued that the claims/reliefs sought by the Claimant are based on unpleaded and speculative evidence, which goes to no issue.
Counsel maintained that failure of the Claimant to plead negligence, has made it impossible for the Claimant to be entitled to any relief for negligence whether or not the Defendant's dog bit the Claimant. According to the learned counsel, the only live issue before this court is the case of the treated injury or the injury the Claimant sustained on the 3rd August 2021 as a result of dog bit and not damages for negligent, as the claim for damages as a result of negligence has been excluded/omitted from the statement of claim.
Counsel went further to argue that even if the court is mindful towards granting Relief No.1 as one that borders on negligence, the basic requirement of the law for proving negligence has not been established by the claimant. Counsel maintained that the Defendant did not fail in the duty of care owed the Claimant, having testified that he took all measures to prevent the incident of 3rd August, 2021, but that the Claimant provoked the dog.
On the injury sustained by the Claimant, counsel argued on behalf of the Defendant that the said injury was a mild and not serious one, and that the Claimant was immediately treated on the same day the incident occurred, and all the medical bills was fully paid by the Defendant himself, as evidenced by exhibits DW1.
Counsel discarded reliefs 2, 3 and 5 as mere academic exercise, on grounds that there is no tangible or practical value or reason for seeking

the relief by the Claimant, as the dog in question had already been taken away on the Defendant's instruction as a Guard dog by K-9 Military Police.
Counsel also asked the Court to refuse relief 6 sought by the Claimant, as the Claimant failed to show the court the state of leg injury sustained that needed Skin Grafting Surgery. More so, being a special damage, the Claimant failed to specifically prove his entitlement to relief 6.
Counsel also contend that the Claimant failed to prove his entitlement to Relief 4, as it is only a medical report that can prove psychological trauma and physical pain. Counsel cited the case of ***TECNO MECH (NIG) LTD V. OGUNBAYO (2000) 1 NWLR (PT. 639) 150 (CA).*** Counsel also reasoned that the Claimant never suffered any economic ordeal, as there is no evidence that his remuneration was stopped and he did not tell the court what he should have made.
Similarly, counsel urged the court to refuse relief 7 sought by the Claimant, because the item is a special damage which must be specifically proved, and which the Claimant have failed to prove.
Counsel further argued that the Claimant is not entitled to relief 8, because he failed to prove how the said amount was paid to his lawyer.
The Defendant urged the court to dismiss the claims/reliefs of the Claimant in its entirety.
On his own part, the counsel to the Claimant responded to all the issues raised by the Defendant in their written address, starting from the issue of the admissibility of exhibit PW1. He referred the court to its own record of proceedings and submitted that the said exhibits was tendered along with certificate of compliance in line with section 84 of the Evidence Act.
Counsel further clarified that the Claimant was assessed virtually through video before a specialist Doctor of Blount Memorial Hospital in USA, leading to a recommendation for a skin graft surgery, which is the basis for relief 7.
He further maintained that exhibit 3 was sent through mail.
On the issue of non-signing of the Claimant's further witness statement on oath, counsel invited the court to look at its record, and it will confirm that the Claimant duly signed his further witness statement on oath.
Counsel further argued that the Pre-Action Counselling Certificate (Form 6) as provided in the appendix to the Civil Procedure Rules 2018 of the FCT

High Court, specifically provides for it to be signed solely by the legal practitioner with his/her name.

Contrary to the Defendant's argument, counsel to the Claimant submitted that what the law requires, is for the Claimant to plead facts which gave rise to negligence, and not just to plead the word "negligence", and that the Claimant did plead those facts***. ABUBAKAR & ANOR V. JOH JOSEPH (2008) 34 (PT. 2) NSCQR 1195 @P.1227.***

Counsel also argued that DW2 contradicted himself when he claimed that the Claimant provoked the dog by trying to play with it, and at the same time, he said that it was his timely arrival at the scene of incident that saved the situation. He reasoned how DW2 knew that the Claimant tried to play with the dog, when he was not at the scene before the attack.

On the issue of the Claimants entitlement to damages for the physical and mental suffering suffered as a result of the dog bit, counsel submitted that it is a trite principle of law that once a Claimant has successfully shown and proved that he suffered personal injury resulting from the breach of duty of care owed him by the defendant, the claim for pain and suffering must be considered and no principle can be laid down upon which damages for pain and suffering can be awarded in terms of the quantum. He further submitted that the Claimant did not need to prove that he suffered trauma in such circumstances where an accident has been established as it is a natural consequence from such an evet. Counsel cited the case of S.C.C Nig. Ltd v Elemadu (2005) 7 NWLR Pt.923 @p.28, in support of his argument that medical evidence is not required to justify claim for pain and suffering resulting from injuries sustained from accident.

Counsel to the Claimant then went further to raise the following issues for determination:-

i. Whether the defendant owes the Claimant a duty of care
ii. Whether the duty of care was breached
iii. Whether the Claimant suffered damages as a result of the breach
iv. Whether the Claimant is entitled to his claim

Counsel argued exhaustively, citing several authorities in an attempt to establish that the defendant breached the duty of care owed the Claimant and that the Claimant has suffered damages as result of that breach.

I have carefully read through all the arguments of the Claimant's counsel on those issues raised above, as well as the Defendant's reply on points of law to the Claimant's Written address which was filed on 27th October,2022, and for want of time, I will at this point proceed to determine this suit and in doing so, I will adopt the issues raised by the Defendant in his written address to wit:-

i. Whether this Honourable Court can conveniently rely on exhibits 1 and 7 respectively tendered by the Claimant (PW1) having failed to comply with the mandatory requirements of section 84(1) and (2) (a) – (d) of the Evidence Act 2011.
ii. Whether this Honourable Court can rely on the further witness statement on oath filed on the 4/4/2022 in the face of a fundamental defect.
iii. Whether this Honourable Court can accept the originating process (writ of summon) filed in this suit accompanied by a pre-action counselling certificate only signed by the Claimant counsel contrary to the provision of Order 2 Rules 2 (2) (a) (b) (c) (d) (e) (3) (4) and Rule 8 making such non-compliance a fundamental defect that cannot be waived or overlooked.
iv. Whether having regards to the facts and circumstances of this case, the Claimant has proved his case to be entitled to the reliefs/claims being sought before this Honourable Court.

On issue 1, section 84(4) is very clear on the mode of establishing compliance with section 84 (2) of the Evidence Act.

According to Section 84(4):

"In any proceedings where it is desired to give a statement in evidence by virtue of this Section, a certificate (a) identifying the document containing the statement and describing the manner in which it was produced; or (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; or (c) dealing with any of the matters to which the conditions mentioned in Subsection (2) above relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter

stated in the certificate; and for the purpose of this Subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

Section 84 (supra) consecrates two methods of proof, either by oral evidence under Section 84(1) and (2) or by a certificate under Section 84(4). In either case, the conditions stipulated in Section 84(2) must be satisfied. However, this is subject to the power of the Judge to require oral evidence in addition to the certificate. As the eminent Lord Griffith explained in the case ***R V. SHEPHERD [1992] UKHL J1216-2***:

> *"... Proof that the computer is reliable can be provided in two ways: either by calling oral evidence or by tendering a written certificate... subject to the power of the Judge to require oral evidence. It is understandable that if a certificate is to be relied upon it should show on its face that it is signed by a person who from his job description can confidently be expected to be in a person to give reliable evidence about the operation of the computer."*

During hearing in this case on the 7th day of April, the Claimant tendered exhibits 1 and 7 which were admitted by this court without any objection whatsoever by the Defendant. On exhibit 1, this court was satisfied with its level of compliance with section 84 of the Evidence Act and it stated thus:-

> *" The 4 pictures with attached certificate of compliance as provided in section 84(4) of the Evidence Act bearing the name of the Claimant and the Defendant is received in evidence and marked as exhibit 1"*

The above statement by the court is clear and unequivocal and should lay to rest any speculation as to the admissibility of exhibit 1. The argument of the Defendant that evidence ought to be called in addition to a certificate of compliance duly signed, to establish how exhibit 1 was produced, is not correct. As stated in the case of R v. Shepherd(supra) which was also adopted in the Nigerian case of ***BRILA ENERGY LTD v. FRN (2018) LPELR-43926(CA*)**, it is solely at the discretion of the court to require additional oral evidence if it is not satisfied with the written certificate of compliance. It is not a requirement of the law that oral evidence must be

called in addition to the certificate of compliance signed by a person who operated the computer, this is because proof of compliance with section 84 of the Evidence Act can be done in two ways: either by oral evidence under Section 84(1) and (2) or by a certificate under Section 84(4). I so hold!

Also, exhibit 7 was tendered on the same date without any objection from the Defendant. It was accordingly admitted in evidence. The reason why the said evidence was admitted is because it was relevant and it was pleaded. I refer the Defendant to take a look at paragraph 39 of the Claimant's statement of claim, wherein the claimant stated that the Hospital has informed him that he has to undergo a major skin graft surgery if he should have the skin of his left leg totally repaired and normalized.

However, there is a revelation which was made by the PW1 during the heat of cross examination concerning exhibit 7, which I consider quite instructive as it relates to the admissibility and reliance which this court should place on exhibit 7. Counsel to the Defendant asked PW1 during cross examination: ***"Exhibit 7 was prepared during the pendency of this suit",*** and the PW1 answered ***"Yes".***

The effect of PW1's admission is that exhibit 7 was procured for the purpose of this proceedings. The law is very clear on the effect of such of evidence. The law is trite, that evidence procured during the pendency or in anticipation of a case is not admissible in law. See ***ABDULLAHI VS HASHIM (1999)4 NWRL (PT.600)638 AT 645; ANYAWU VS UZOWUOLA (2009)13 NWLR (PT.H59)445 AT 476.***

This Court wishes to state that the idea of after-thought in law is to curb the incidence of manufacturing evidence that did not exist before/during the pendency of the suit and to make it look as if it existed before or during the pendency of the suit. When the Court finds that a document did not exist before/during the pendency of the case yet the party who seeks to tender it wants to make it look as if it existed, the Court has no business, for the purpose of justice, admitting such document.

In view of the admission of PW1 and other valid concerns raised by the Defendant, I hereby expunge exhibit 7 as inadmissible and shall place no reliance on it. I so hold!

On issue 2 which bothers on whether this Honourable Court can rely on the further witness statement on oath filed on the 4/4/2022 in the face of a fundamental defect, I think that the defendant would have saved the precious time of this Honourable court if he had verbally raised the issue in court, because that would have afforded the court an opportunity to show the Defendant from the Court's record, that the Claimant's further witness statement on oath filed on 4th April, 2022 was signed by the deponent in accordance with the law. I do not know why the copy served on the Defendant was not signed. Perhaps it is a mistake, which I believe is not fundamental enough to render the further witness statement on oath defective. This is because there is evidence from the court's copy that the Deponent actually signed the further witness statement on oath before the commissioner for oaths on the 4th day of April 2022. I believe this should lay issue 2 to rest, so that the court can move on to more critical issues.

I will however, for obvious reasons delve into issues number 3 which was raised by the learned defence counsel in his address. That is the competence or incompetence of the Claimant's suit in view of the non-compliance with the express provision of Order 2 Rules 2 (2) (a) (b) (c) (d) (e) (3) (4) and Rule 8 of the FCT High Court Rules. Whilst being mindful of the current position of the Courts to do substantial justice and not to sacrifice substantial justice on the altar of technicalities, I do note that by virtue of form 6 in the appendix to the FCT High Court Rules, 2018, what the Rule requires is that the Certificate of Pre-Action Counseling be signed by the Claimant's counsel. See also the case of ***AUDU & ORS V. DANGANA (2022) LPELR-57341(CA)***. There is no requirement either by the Rules or any other Statute that the certificate must be co-signed by the Claimant himself. The argument of the Defendant's counsel on this issue is baseless and a calculated attempt to distract the court into a fruitless voyage of unnecessary technicality. The Pre- Action counselling certificate having been signed by the Claimant's Solicitor, Sir Frank Molokwu Esq, the Claimant's suit is competent, I so hold!

Issue 4 is the gamut of this case, and I intend to critically consider based on the facts and evidence tendered by the Claimant, whether he is entitled to all the reliefs sought.

The general rule is that, a person keeps an animal at his own risk, and is liable for any injury or damage done by it. There are two classifications of animals under which a keeper may be held liable; namely dangerous and non- dangerous animals.

Dangerous animal are species whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage that they may cause is likely to be severe.

A legal action brought to make an owner, keeper controller or custodian of a dangerous animal liable for it, or for its conduct is known as "a scienter action" i.e. an action for a *farae naturae.* Ferae naturae means 'wild nature' i.e. an animal of wild nature.

A non-dangerous animal is an animal that is tamed by nature. It is an animal that is *mansuetae naturae* i.e. tame by nature or an animal that is not normally dangerous, though they have a savage disposition. Examples include camel, dog, cat, goat and so forth.

In this case, the Defendant claims that the dog called max, which bit the Claimant is a Caucasian dog, and by its nature is friendly and not wild. This means that the dog can be categorized as a non-dangerous animal.

However, DW1 during cross examination, admitted that this dog had earlier attacked the late Mr. Otache, and that he rushed him to the hospital, the same way he directed the Claimant to be rushed to the hospital after the attack.

For the owner of a non-dangerous animal to be liable, it must be established that the particular animal had a vicious tendency (scienter) and that the keeper knew of that tendency.

In ***Daryani v Njoku (1965) 2 All NLR 53,*** the defendant's dog bit the plaintiff. Evidence was given that the dog had on a previous occasion bit a housemaid and the incident was reported to the wife of the defendant. The court held that the defendant was liable. The knowledge of the vicious propensity of the dog by the wife was imputed to the husband, as the wife was expected to tell him as a matter of course, that being the purpose of lodging the report with her.

Having established that the Defendant in this case had knowledge of the vicious tendency of his dog called Max, it follows that the Defendant owed

the plaintiff and of course all his neighbor, a duty of care to restrain or keep the dog in such a manner as to avoid it causing injury to others.
Now, the question is, did the Defendant breach this duty of care?
To answer this question, I invite the parties to follow along as I recap the following questions and answers given by the DW2 during cross examination:

> **"*Smart Ukoha Esq: Was the dog inside the dog house when it attacked the Claimant?***
> ***DW2: The dog was not in the cage on the 3rd of August 2021. I was supposed to clean the dog house. I had to wash out the cage with chemical. I brought out the dog out of its cage. I released the dog inside the compound and clean the cage with chemical.***
> ***Smart Ukoha Esq: The Defendant has a compound that has a gate.***
> ***DW2: Yes***
> ***Smart Ukoha Esq: Was the dog inside the defendant's compound which has the gate when the dog attacked the Claimant?***
> ***DW2: No***
> **Smart Ukoha Esq: Was the Claimant inside the dog's house when it attacked the Claimant?**
> **DW2: No**
> **Smart Ukoha Esq: Where you at the scene when the dog attacked the claimant?**
> **DW2: I was at the scene."**

From the foregoing, it is obvious that the Claimant did not trespass into the compound of the Defendant; he did not trespass into the space of the dog, rather, it was the Defendant who let loose a dog which he clearly knew had a vicious tendency. He breached this duty of care by negligently allowing the dog to step out of the Defendant's compound into the street commonly shared by the Defendant and the Claimant as well as other estate residents.

This act of negligence to me, has been sufficiently pleaded from the facts of the Claimant's originating process, and the testimonies of PW1 and PW2. What the law requires is for the Plaintiff to plead acts of negligence, and not the word "negligence". See ***ROYAL UNITED (NIG) LTD v. STERLING BANK (2018) LPELR-50839(CA)***

The Defendant has failed in disproving that it did not breach the duty of care owed the Claimant. The claim by DW2 that the Claimant provoked the dog by playing with it, is unbelievable and a failed attempt to justify the Defendant's negligent act.

How can the same DW2 who claimed to have been inside cleaning the dog's cage, and who also stated that it was his timely arrival at the scene of incident that saved the situation, turn around to state that the Claimant was playing with the dog? When did he see the Claimant playing with the dog? Assuming the Defendant played with the dog at all, does that serve as a defence to the Defendants for their negligent conduct? These are thought provoking questions that calls to question the credibility of the testimony of DW2.

It is my considered opinion that the Defendant breached the duty of care owed the Claimant, when he negligently released his dog outside his gated premises, leading to the attack on the Claimant by the dog. I so hold!

Having resolved that the duty of care owed the Claimant was breached by the Defendant, the last question which must be considered, is whether the Claimant suffered damages as a result of that breach and if he is entitled to the reliefs sought by him.

On the issue of damages, negligence is only actionable if actual damage is proved. There is no right of action for nominal damages in the tort of negligence. Indeed, negligence alone does not give a cause of action; damage alone does not give a cause of action; the two must co-exist. In negligence actions, the measure of damages is that the injured party is to be placed back, so far as money can do it, in the same position as he would have been in had it not been for the defendant's negligence. The dominant rule of law is the principle of restitution in integrum.

In negligence cases, damages are also divided into general and special damages. General damages are those damages which the law presumes to flow from the negligence of which the plaintiff has complained. These

damages must be specifically averred to have been suffered and must be proved. See ***EZEANI V EJIDIKE (1964) 1 ALL NLR 402***. The assessment of damages should be based on the pleadings and evidence, and where there is no evidence to support a claim for damages, the claim should be dismissed. *See* ***W.A.E.C. V KOROYE (1977) 2 S.C. 45; DUMEZ V OGBOLI (1972) S.C. 196; MESSENGERS V NWACHUKWU (2004) 6 SCNJ 56***

Relief VI, sought by the Claimant is a special damage, which the law requires strict prove of same. The Claimant failed to tender receipts or other evidence of the total sums expended by him, to prove that he is entitle to the award of Fifteen Million Naira (₦15, 000,000.00) against the defendant for cost of the ongoing treatments and recommended skin graft surgery on the Claimant's leg as a result of the physical injury caused by the unprovoked attack by the Defendant's dog. In view of this, Relief VI is hereby refused. I so hold!

Nevertheless, the Claimant is entitled to general damages for the psychological trauma, economic loss and and the permanent physical and mental scar on the Claimant as a result of the unprovoked attack of the Defendant's dog on him. See ***C & C CONSTRUCTION COMPANY LIMITED V. OKHAI (2003) 18 NWLR PT.851 @P.79.***

The sum of ₦2,000,000.00 Is hereby awarded to the Claimant against the Defendant as a result of the unprovoked attack of the Defendant's dog on him. This amount is to be paid in four tranches within a period of 6 months, taking into consideration, the Defendant's source of income as a civil servant. Effective from 31st December, 2022 to 31st May, 2023

Relief VII is hereby refused. Parties to bear their costs of prosecuting and defending this suit.

Reliefs I to V are hereby granted.

HON. JUSTICE M.S IDRIS
(Presiding Judge)

Appearance

Smart Ukoha:- For the Claimant.

Bamidele Ibironke:- Appearing with Kenneth Ezewuize for the Defendant.