

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI, ABUJA**

BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS

COURT: 28

DATE: 11TH OCTOBER, 2022

FCT/HC/CV/641/2021

BETWEEN

**1. WEST NORTH MINING LIMITED
2. S.T MECHANICAL & ELECTRICAL
ENGINEERING COMPANY LTD**

CLAIMANTS

AND

**1. THE CHIEF OF ARMY STAFF
2. THE NIGERIAN ARMY
3. THE NIGERIAN ARMY COUNCIL
4. ENGR. LAWAN UMAR MUSTAPHA**

DEFENDANTS

JUDGMENT

This suit was commenced by a writ of summons filed on 4th March, 2021, seeking for the reliefs as contained on the writ.

The summary of the Claimant's case as can be gleaned from the statement of claim, is that the 2nd Claimant gave out its excavator on hire to the 4th Defendant who is alleged to have acted as an agent of the 1st – 3rd Defendants, at a consideration of One Million Five Hundred Thousand Naira (₦1, 500,000.00). The said excavator was conveyed on a truck belonging to the 1st Claimant and known as low bed truck on 24th July 2019 from Abuja to Maiduguri, Borno State. According to their agreement,

the low bed truck was to carry the excavator from Abuja to Maiduguri, Borno State, for the Defendants use, and also return it back to Abuja, after ten (10) days.

However, on the way to Maiduguri, Borno State, some armed personnel of the 1st -3rd Defendants allegedly forced the driver of the 1st Claimant low bed truck to make a detour and not to head further to Maiduguri, Borno State Capital, the agreed destination in the contract of hire, but to proceed to another place called Mallam Fatori. On reaching there, the armed men of the 1st -3rd Defendants offloaded the 2nd Claimant's excavator, and loaded army vehicles, arms and ammunition and armed personnel onto the 1st Claimant's low bed truck and directed the low bed truck driver to drive same from one war zone to another in the North Eastern part of Nigeria under strict and tight security not to escape together with his assistant driver. They used the Claimant's low bed truck to prosecute Boko Haram war in the North Eastern part of Nigeria, and the Claimants driver and assistant driver were detained by the armed personnel of the Defendants in their custody before they finally escape.

As a result, the Claimants wrote two letters to the 1st Defendant complaining the unlawful seizure of their truck and excavator, to which they replied six months after. In their reply, they stated that the 1st Claimant low bed truck bogged down at a place called Tumour, Niger Republic. The Defendants finally released the low bed truck to the claimants on 18th day of October, 2020, one(1) year, two(2) months and even(7) days after.

The 1st, 2nd and 3rd Defendants filed a joint memorandum of appearance on 24th August 2021, as well their statement of defence. In response, the Claimant's filed a reply to the Defendants Joint Statement of Defence dated 27th October, 2021.

On 17th November 2021, hearing commenced on this suit. On that date, the Claimant's witness (PW1), Segun Taiwo adopted

his witness statement on oath, and through him, the following documents were tendered and admitted in evidence:-

- i. A photocopy of an agreement for hiring of excavator 320DL dated 24th July,2019 – Exhibit 1
- ii. Six (6) letters written by the claimants to the 1st Defendant – Exhibit 2A
- iii. Letter from the Headquarters of the Nigerian Army dated 20th January,2020 – Exhibit. 2B
- iv. Copies of the low bed rock truck photograph. – Exhibit 2C
- v. Four (4) copies of cash receipts – Exhibit 2D
- vi. Lagos State Hackney Permit Truck – Exhibit 2E
- vii. Three Certificates of compliance from Rabbi Computers Global Tech- Exhibit 2F.

PW1 was cross examined by Counsel to 1st -3rd Defendant on that date. On the next adjourned date, the 4th Defendant was neither in Court nor represented despite being served with hearing notices. He was therefore foreclosed from cross examining PW1.

On 17th February, 2022, the 1st – 3rd Defendants opened its defence and called one Lieutenant Ubong N. Nelson (DW1), a legal officer of the Nigerian Army as a witness. When hearing of defence came up on 5th April, 2022, the Defendant's through DW1 tendered a photocopy of a letter dated 20th January,2020 written in reply to the claimant's letter, which was admitted in evidence in exhibit 3. DW1 was accordingly cross examined by Counsel to the Claimants.

The 1st to 3rd Defendants filed their joint written address on 3rd June,2022, while the Claimant filed on 7th September,2022, and sought the Court's leave to file same out of time. The 4th Defendant was foreclosed from filing a written address having not appeared nor filed any process.

On 13th day of September, 2022, parties adopted their written addresses.

Now, the 1st – 3rd Defendants in their joint written address raised two issues for the Court's determination:-

A. Whether going by the evidence on record before the trial Court, the claimants have been able to prove the existence of any contractual agreement between them and the Defendants for which the Defendants are in breach so as to entitle the claimants to the declarations, reliefs and damages claimed by the claimants before the trial Court.

B. Whether Exhibit 2B/3 constitutes the letter appointing the 4th Defendant as an agent of the 1st, 2nd and 3rd Defendants for the Hire of the Claimants excavator and low bed truck for the use of the 1st, 2nd and 3rd Defendants at Maiduguri and anywhere else.

Addressing issue A, learned Counsel to the 1st to 3rd Defendants, G. W. Nanbol, Esq, maintained that going by the evidence on record, there was no contractual agreement between the Claimants and the 1st – 3rd Defendants for the hire of the Claimant's excavator and Low Bed Truck. He referred to exhibit 1 and pointed out that the purported agreement was signed between one Jane Jacob and Abdullahi Mohammed Samnaka and not between any of the Claimant's and the 1st – 3rd Defendants. Counsel cited some legal authorities in support of his argument that the 1st – 3rd Defendants were not privy to the contract between the Claimant and those named in exhibit 1, and therefore cannot be said to be in breach of same. Counsel on behalf of the 1st – 3rd Defendants denied ever contracting Abdullahi Mohammed Samnaka to enter into any agreements with any of the Claimant's for the hire of their excavator or low bed truck.

On issue B, Counsel argued on behalf of the 1st to 3rd Defendants that exhibits 2B/3 is a mere reply to the Claimant's letter of 27th August, 2019, and does not constitute an instrument appointing the 4th Defendant as an agent of the 1st – 3rd Defendants.

Counsel further argued that exhibit 1 is legally inadmissible as they were not tendered through the makers, i.e., Jane Jacob and Abdullahi Samnaka. Counsel cited the case of **Flash Odds Ltd v. Akatugba (2001) 9 NWLR (Pt. 717) p.46 at 43**, and urged the Court not to attach probative value to exhibit 1.

On the part of the Claimants, two issues were raised thus:-

- i. Whether the 4th Defendant is not the agent of the 1st - 3rd Defendants in respect of the subject matter in dispute; whether 1st - 3rd Defendants as the principals not liable for the act of the 4th Defendant who is their agent in relation to the subject matter.
- ii. Whether the claimants have not proved their claims.

On issue I, learned Counsel to the Claimants, Blessing John Nwayen Esq, revealed that at the time of formation of exhibit 1, the 4th Defendant did not disclose the names of the 1st - 3rd Defendants as his principals, that it was at the point when the excavator and low bed truck was not returned on the due date, that the 4th Defendant opened up and revealed the true identities of the main hirers as the 1st to 3rd Defendants whom he only acted for as agent. In a bid to persuade the Court to agree that the 4th Defendant acted as an agent of the 1st - 3rd Defendants, Counsel referred to paragraph 2 and 3 of exhibits 2B/3 where the Defendant's stated that

"The Headquarters Sector 3 entered into a valid agreement with one Engr. Lawan (the 4th Defendant) who in turned rented the low bed truck and excavator from the petitioner."

Counsel argued on behalf of the Claimants that agency relationship can be created by a written agreement or by implication or surrounding circumstances of a case. She maintained that the 4th Defendant acted as an agent of the 1st - 3rd Defendant, and merely sent one Abdullahi Samnaka to sign

the handwritten contract of hire (exh.1). Counsel referred the Court to the case of **UBA v. Johnson (2010) All FWLR (Pt 525) CA 313 p. 334 paras E-F**, where the Court held that

"In general, no formalities are required for the formation of agency as an agent may be appointed by deed, by writing or by words of mouth and operation of law or estoppel which will prevent the person who benefits from the act of agency to deny the relationship".

Counsel questioned the right of the 1st -3rd Defendants who benefited from the hiring of the excavator and low bed truck to now turn around to deny having any contractual relations with the Claimants. Counsel further relied on several judicial authorities, especially the case of **Ogboyaga v. Naebe (2016) All FWLR (Pt. 820) 1310 p. 1326 paras A-D** to argue that

"The authority of an agent can be implied from the circumstances of the case, and that an agent need not be authorized in writing, and need not to disclose the principal he acts on his behalf".

Counsel maintained that the 4th Defendant, being an agent was merely joined as a nominal party in this suit and not as a necessary party; that the 1st to 3rd Defendants should be made to bear liability for the breach of contract and damage to the truck.

On issue II, Counsel argued on behalf of the Claimants that they have established their main claim which is prayer four (4) on the writ, having specifically pleaded the specific damages sought, in paragraphs 35 – 43 of their statement of claim and paragraphs 37 (a) – (p) of their witness statement on oath. Counsel also referred to exhibit 1, where it was stated that the subject matter

of the contract was to be hired for a period of 10 days at the sum of ₦1, 500,000.

Counsel also maintained that the failure of the Defendants to cross examine PW1 on the said facts, implied tacit acceptance and admittance of the said specific claims. Counsel recommended the decision of the apex Court in the case of ***OLOWU V. BUILDING STOCK LTD (2020) ALL FWLR (PT. 1071) SC 536 P.612 paragraph G***, to the Court.

Learned Counsel to the Claimants further stated that from exhibits 2B/3, it can be said that the 1st – 3rd Defendants admitted to being in custody of the low bed truck from the date of the expiration of the hire being 2nd day of August, 2019 to 18th day of October, 2020, being a period of one (1) year two (2) months and seven (7) days.

In conclusion, Counsel urged the Court to grant the claimants all the reliefs sought.

I have undertaken a thorough study of the facts in issue, and it is my opinion that a sole issue can satisfactorily answer the questions raised by both parties. The issue I have formulated in resolving this dispute is:-

“Whether from the totality of the facts presented and evidence adduced before this Honourable Court, there exists any contractual relationship between the Claimants and the 1st to 3rd Defendant, and if there is any contractual relationship, whether the 1st – 3rd Defendants are in breach of such, thereby making the Claimants entitled to the reliefs sought.”

Going by the elementary definition of contract, it is understood that a contract is an agreement between two persons, which the law will enforce. . A contract is an agreement between parties,

which creates mutual legal obligations between them identifiable with the essential ingredients of offer, acceptance, consideration and intention to enter into legal relations. When all those elements co-exist, parties have created a valid and enforceable contract between them.

A contract as is known, relates to only the parties engaged in the relationship to the exclusion of all others. In the same vein, any contractual liability ensuing therefrom, should naturally concern the parties without bringing in a third party with whom the party imputing the liability did not contract. In effect, liability in contract lies within the contractually related group. So, responsibilities or obligations arising under a contract cannot be imposed on any other person except the parties to it. ***Chuba Ikpeagu v. A.C.B [1965]N.M.L.R p.374***

The law of agency relationship is however an exception to this hallowed doctrine of privity of contract. Considering the facts and evidence presented in this case, particularly exhibit 1, 2B/3, can an agency relationship be presumed between the 4th Defendant and the 1st – 3rd Defendants?

The Nigerian Court of Appeal has in ***MIKANO INTERNATIONAL LTD VS. EHUMADU(2013)1 CLRN 83***, clarified that:

"Agency is the relationship that exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other who consents to represent the former or so to act. The one who is to be represented or on whose behalf the act is to be done is called the principal and the one who is to represent or act is called the agent. Any person other than

the principal and the agent may be called a third party. The basic idea behind the law of agency is that the law recognizes that a person need not always do things that change his legal relations in person, and he may use the services of another person to change them or to do something during the course of which they may be changed. The long and short of it is that the law recognizes that in some circumstances, the agent can affect the principal's legal position by certain acts which, though performed by the agent, are not really to be treated as the agents own acts but as acts of the principal.:"

Furthermore, in ***VULCAN GASES LTD VS. G.F. INDUSTRIES GASVEN WERTUNG A.G., (2001)5 SC (PT. 1)1***, the Nigerian Supreme Court held that the relationship of principal and agent may arise in five ways, namely, by express appointment, whether orally or by letter of appointment or indeed, by a power of attorney; ratification of the agent's acts by the principal; through the doctrine of estoppel; by implication of law in the case of agency by necessity; and by presumption of law in the case of co-habitation.

The question that begs for answer is if exhibit 1, 2B/3, reveals any scintilla of an agency relationship between the 4th Defendant and the 1st – 3rd Defendant, either expressly or by implication.

Exhibit 1 is an agreement purportedly signed by the secretary of the 2nd Claimant and one Mr. Abdulahi M. There is nothing on the face of it to suggest any contractual relationship between the signatory and the 1st – 3rd Defendant, or to even suggest that the signatory, Mr. AbdulahiM. Signed on behalf of the 4th Defendant, who is claimed to have been appointed by the 1st –

3rd Defendant to rent a truck for them. This is not to say that the mere non-disclosure of the name(s) of an alleged principal at the time of entering the contract, renders an agency relationship invalid. Not at all! The Supreme Court in **YESUFU VS. KUPPER INTERNATIONAL (1996)4 SCNJ 40** held that even where an agent contracts in his own name but really on behalf of the principal, the other party to the contract can generally on discovering the real principal sue the him/her as undisclosed principal on the contract.

My worry however, with exhibit 1, is that no effort was made to call the parties who signed the purported agreement to testify to the authenticity of the document, and the document was not tendered by the maker. During Cross examination of PW1, Counsel to the 1st – 3rd Defendant asked him if he signed exhibit 1 or witnessed when the document was executed, to which he answered in the negative. Section 83 (1) of the Evidence Act generally mandates that a person tendering a document should be the maker of such document, or at least lay proper foundation as to the whereabouts of the makers, **KATE ENTERPRISES LTD V DAEWOO (NIG) LTD (1985) 2 NWLR (PT 5) 127**. It is very difficult to believe that exhibit 1 reveals any scintilla of contractual relationship between the Claimants and the 1st – 3rd Defendants. I therefore refuse to place any reliance on it. I so hold!

We now turn attention to exhibit 2B/3 which is a letter written by the 2nd Defendant to the Claimants in response to their letter of 27th and 28th August, 2019. I have dispassionately and keenly read the contents of the said letter. I find paragraph 2 quite instructive. It reads

“...Headquarters Sector 3 Operation Lafiya Dole entered into a valid contractual agreement with one Engr. Lawan to come with a low bed with auxiliary and excavate a distance of

about 6 kilometers at troops location in Mallam Fatori. The engineer was paid for hiring the low bed to the location as well as excavation work. Own personnel only came in to provide security for the movement of the vehicle.”

From the wordings of exhibit 2B/3, can an agency relationship between the 4th Defendant and the 1st – 3rd Defendants be presumed? In my opinion, what exhibit 2B/3 reveals is the existence of a contract for service between the 4th and the 1st – 3rd Defendants, the 4th Defendant in this case acting as an independent contractor. An independent contractor is a person who contracts with another to do something but who is not controlled by the employer in the manner of performance of the contract. In **ADEWUNMI V. PLASTEX (NIG.) (1986) LPELR - 164 (SC), (1986) 3 NWLR (PT. 32) 767 at 790 (D - F)**, the Supreme Court stated that:

“The test distinguishing an independent contractor from a servant or agent is the degree of control which the employer is entitled to exercise. An independent contractor is one who is not bound generally to obey such orders as his employer may from time to time give, but is free to act as he thinks fit within the terms of his contract”.

As the name implies, the independent contractor is legally autonomous. For instance, a plumber who is placed on a salary to work for a building contractor is an employee and agent of the contractor. But a plumber who hires himself out to repair pipes in people’s homes is an independent contractor. If you hire a lawyer to settle a dispute, that person is not your employee or your servant; she is an independent contractor.

In **PERFORMING RIGHT SOCIETY LTD. V. MITCHELL & BOOKER PALAIS DE DANSE LTD. (1924) I K. B. 702 at PP. 765, MCCARDIE J, referring to POLLOCK ON TORTS 12TH ED. PP. 79, 80**, expressed it graphically and clearly when he said,

"A servant is a person subject to the command of his master as to the manner in which he shall do his work... An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand."

Having opined that the 4th Defendant was an independent contractor, the next question that arises therefrom for the purpose of detecting the 1st to 3rd Defendants' liability is whether a sub-relationship of agency has been created as a result.

In **MOBIL OIL V. BARBEDOS CARS LTD[2016] LPELR-41603(CA)**, the Court of Appeal held that:

"It is a well-established general principle of law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants and agents, even though the acts are done in carrying out the works for his benefit."

This general rule is, however, subject to some qualifications. One of such exceptions is where the work involves extra-hazardous acts, that is, acts which, in their very nature involve in the eyes of the law special danger to others; of such acts the causing of fire and explosions are obvious established instances,

or where the works involve dangerous substances, a person is equally bound by an inescapable duty.

In determining the liability of an employer over the acts of an independent contractor, the Court will examine the express language used in the contract document as evidence in determining whether an agency relationship exists. The nature of the relationship between an employer and a contractor does not depend only on the terminology the parties choose to use in describing their relationship but on the true nature of the agreement and the exact circumstances of the relationship which can only be disclosed by the express language used in the contract document. See ***NIGER PROGRESS LTD. V. NORTH EAST LINE CORPORATION (1989) LPELR - 1996 (SC), (1989) 3 NWLR (PT. 107) 68.*** The 1st to 3rd Defendants through DW1 sought to prove that the 4th Defendant was a mere independent contractor. No document was tendered to disclose the language, the nature and the terms of the contract between the 1st -3rd Defendants and the 4th Defendant.

However from a critical perusal of Exhibit 2B/3, it is clear that the 1st – 3rd Defendants merely contracted the 4th Defendant to carry out excavation work for them and paid him to bring the equipment's for that work. They were not privy to how, who and where the 4th Defendant got the equipment's for carrying out the task. The Claimants have not been able to convincingly proof the existence of a contractual relationship between them and the 1st to 3rd Defendant's. In my humble opinion, no matter how sympathetic and emotionally provoking, the case of the Claimants is, it would be unreasonable, abhorrent and obnoxious to drag the 1st to 3rd Defendants into an arrangement they were not privy to. I so hold!

Having not had any contractual relationship with the Claimants, the 1st – 3rd Defendants cannot be said to have breached any contract whatsoever. Therefore, reliefs 4 to 8 of the Claimant's claim fails. Also, reliefs 1 to 3 cannot succeed because the facts

and evidence adduced in support of those claims are mere hearsay evidence, and nothing more. The claimants alleged that low bed truck and excavator were unlawfully diverted and detained by the officers of the 1st – 3rd Defendant, however, during cross examination, PW1 was asked if he knew the armed personnel of the 1st – 3rd Defendants who diverted the low bed truck, and he admitted that he was not there.

It will be pertinent to affirm succinctly here what is and what amounts to hearsay evidence. Our law reports are replete with the emphasis on settled position of the law on this subject. See the case of **Obot v State (2014) LPELR – 23130 (CA)** where the Court of Appeal aptly held that;

"Hearsay evidence is evidence which does not derive its value solely from the credit given to the witness himself but which rests also, in part, on the veracity and competence of some other person. Thus, where a third party relates a story to another as proof of the contents of a statement, such story is hearsay". See also

ADETA V NIGERIAN ARMY (2016) LPELR-40235(CA) and JUDICIAL SERVICE COMMISSION V OMO (1990) 6 NWLR (PT 157) 407 CA

It was further held that:-

"a testimony will be regarded as hearsay where the person making the statement is not the one who either saw it, heard it, perceived it or gave it as his own personal opinion but rather as what was said to him (by) another person (sic)" per FASANMI, JCA IN SALISU V AMUSAN (2010) LPELR – 9103 (CA).

Even, the Apex Court validates this position in **OLALEKAN V THE STATE (2001) LPELR – 2561 (SC)**, when KARIBI-WHYTE, JSC, held that:

"It is well established law that the evidence of a statement made to a witness by a person who is not called as a witness is called "hearsay" if the object of such evidence is to establish the truth of what is contained in the statement..."

The Supreme Court affirmed the law with judicial finality when it held that *"neither the Court nor the consent of the parties is capable of making such evidence admissible in law."*

The Claimants ought to have called the Driver and Assistant Driver to testify in Court, how the 1st – 3rd Defendants diverted the low bed trucks and held them hostage, because as required by **Section 126 Evidence Act 2011**, **oral evidence must**, in all cases whatever, be direct. If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it.

In the light of the foregoing, the Claimants suit is accordingly dismissed.

For the avoidance of doubt it becomes imperative on the part of this Court to emphasize on the cross examination conducted by the Defendant Counsel, where PW1 during cross examination categorically in different question put to him by the 1st to 3rd Defendants that none of the Defendant, signed the purported contractual agreement and PW1 went further to add that same was not prepared in the presence of the 1st to 3rd Defendant. Moreso it is always the claim of the Claimant that determines the issue to be determined by a Court of law in this respect the Claimant Counsel failed by way of preponderance of evidence to

establish the Claimant against the 1st -3rd Defendant. It is trite that he who assert must proof. On the part of the defence same have graphically told the Court how the incident occurred. Also the cross examination conducted by the Claimant Counsel have not in any way change the narrative of the Claimant.

I have no doubt in my mind. I have thoroughly gone through the whole process filed by the Claimant in the cause of writing this judgment. I have equally and strictly relied on the evidence adduced by the Claimant's witnesses in this trial I am of the firm view that the Claimant failed to establish the claim brought against the Defendants in this matter. From the claimant it was clearly shown that the 4th Defendant acted as an agent to the 1st, 2nd and 3rd Defendant in this case from the entire evidence adduced in this trial this issues was not supported by cogent evidence to established the relationship between the 4th Defendant and the 1st, 2nd and 3rd Defendant in respect of the contractual relationship that was said to exist as claimed by the Claimant from the entire evidence of PWI In this trial. His adopted witness statement on oath by his humble self was materially destroyed during cross examination. This can be seen from the content of this judgment. I have carefully and exhaustively treated all the issues raised by the Claimant. I am convincingly satisfied that the Claimant failed to established any relationship between the Claimant and the 1st, 2nd and 3rd Defendant. It is on this note I so hold. He who wants equity must apply the principle of equity. The Supreme Court has said substantive justice should be the bedrock of any judgment. the Supreme Court said in the interest of justice and fair play the Court cannot shy away from doing substantial justice without any undue regard to technicalities thus the Court will not allow technicalities to prevent it from doing substantive justice see **ABUBAKAR VS YAR ADUA (2008) 4 NWLR (pt 1078) 465. AMEACH VS INEC (2008) 5 NWLR (pt1080) 227 and**

***MAGIT VS UNIVERSITY OF AGRICULTURE MARYLAND
(2005)19 NWLR (pt 959) 211.***

**HON. JUSTICE M.S IDRIS
(HON. JUDGE)**

APPEARANCE

R.I Oloyede:- Appearing with Aisha Akilu

G.W Nanbol:- Appearing for the 1st, 2nd and 3rd Defendant.