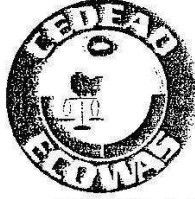


COMMUNITY COURT OF JUSTICE,
ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO

TRIBUNAL DE JUSTIÇA DA COMUNIDADE,
CEDEAO



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**IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY
OF WEST AFRICAN STATES (ECOWAS)**

HOLDEN AT ABUJA, NIGERIA

ON FRIDAY, THE 18TH DAY OF MARCH 2011

BEFORE THEIR LORDSHIPS

HON. JUSTICE HANSINE N. DONLI - PRESIDING

HON. JUSTICE ANTHONY A. BENIN - MEMBER

HON. JUSTICE ELIAM M. POTEY - MEMBER

ASSISTED BY

ATANASE ATANNON - REGISTRAR

SUIT NO. ECW/CCJ/APP/08/08

JUDGMENT NO. ECW/CCJ/JUD/ 05 /11

BETWEEN

PETROSTAR (NIGERIA) LIMITED PLAINTIFF

AND

1. BLACKBERRY NIGERIA LIMITED 1st DEFENDANT

2. IFEANYI PADDY – EKE 2nd DEFENDANT

COUNSEL:

**Chief Emefo Etudo for the Applicant
Edoka Dox Onyeke for the defendants**

PARTIES

1. The plaintiff and the first defendant are both companies incorporated under the laws of the Federal Republic of Nigeria. They have their principal places of business in either Lagos or Abuja. The second defendant is the Managing Director of the first defendant and is a citizen of the Federal Republic of Nigeria. The plaintiff was represented by Barrister Chief Emefo Etudo, whilst the defendants were represented by Barrister Edoke Dox Onyeke who was debriefed and substituted with Barrister Enyinnaya Uwaezuoke.

THE PLAINTIFF'S CASE

2. The Plaintiff avers that it delivered five million litres of Automotive Gas Oil (AGO) to SHELL on credit upon the instruction of the first defendant for a consideration of 485 Million Naira. The first defendant undertook to pay the plaintiff the contract sum from the proceeds received from Shell. However, upon receiving the payment from Shell, the first defendant failed to fulfil its contractual obligation to the Plaintiff.

After subsequent negotiations, the total debt of the first defendant to the plaintiff was reduced to 255 Million Naira. Cheques issued by the first defendant for the 255 Million Naira were not honoured.

3. Plaintiff states further that it then gave a three month grace period to the first defendant to make good the outstanding payment in order to resolve the issue. Plaintiff entered into an agreement with the first defendant for the liquidation of the indebtedness by April 9, 2008. The first defendant then issued a post dated cheque for the entire outstanding amount. Under the said agreement, the second defendant guaranteed the repayment of the amount owed by the first defendant. The said agreement provided that any dispute shall be settled by the Community Court of Justice, ECOWAS.

4. The averments continue that about two weeks to the scheduled date for the first defendant to liquidate its indebtedness to the plaintiff, the second defendant contacted the solicitor to the plaintiff who is also the plaintiff's solicitor in the present proceedings and appealed to him to receive a bribe of

5 Million Naira in order to prevail upon the plaintiff not to pursue the recovery of the 255 Million Naira because the defendants would not be able to settle their indebtedness on the agreed date.

5. According to the plaintiff the second defendant subsequently paid one (1) Million Naira to its solicitor as part of the bribe promised. Thereafter plaintiff's solicitor reported the bribery case to the police. Plaintiff waited until the maturity date of the cheque issued to them by the second defendant and presented the cheque but it was not honoured because he did not have sufficient funds in the account.

6. Plaintiff then wrote to the second defendant demanding the payment of the outstanding debt in seven days. Defendants failed to make payment. Plaintiff alleges that the defendants have defrauded them and as a result suffered immense harm. As a result the plaintiff brought the instant action, claiming jointly and severally against the defendants the following reliefs and orders:

a. A declaration that the agreement between the plaintiff and first defendant dated the 8th August, 2008 is valid;

b. A declaration that the guarantee of the second defendant as contained in the agreement of 08/08/2008 is valid;

c. An order of the Court attaching the properties of the defendants for the satisfaction of the judgment sum; and

d. An order for the payment of damages jointly and severally against the defendants and their agents.

THE DEFENDANTS' CASE

7. Defendants filed a preliminary objection to the suit pursuant to Articles 87 (1) and (2) and 88 (1) of the Rules of this Court asking the Court to strike out or dismiss this suit in its entirety on the ground that this Honourable Court lacks the jurisdiction to hear and determine same. In a ruling dated 27th October 2009 the Court dismissed the preliminary objection and held that it has the jurisdiction to hear and determine the present suit.

8. In the defendants' statement of defence, they put in a general traverse denying every allegation of fact made by the plaintiff in their statement of claim except where such was expressly admitted by them and put plaintiff to strict proof of the allegations thereof. The defendants stated that they had not refused to settle their indebtedness to plaintiff but plaintiff's conduct had frustrated all efforts made by them to settle their indebtedness. Defendants continued that in line with first defendant's business practice it was committed to settling its debts to the plaintiff, and paid 230 Million Naira to the plaintiff, prior to the institution of this suit. Defendants further stated that it entered into negotiations with plaintiff to pay the outstanding sum of 255 Million Naira by instalments.

9. Defendants stated that the agreement dated 9/4/08 on which plaintiff relies heavily was entered into under undue influence, duress and without the benefit of having their solicitors peruse and advise on same before execution. According to defendants, they had to enter into that agreement when plaintiff and its solicitor Mr. Emefo Etudo threatened to use the officers of the Nigerian Police and the Economic and Financial Crimes Commission to arrest the 2nd defendant. Therefore, defendants contest the voluntariness of the said agreement and the issuance of a cheque in the sum of 255 Million Naira in favour of plaintiff as it was done to prevent the unlawful arrest and detention of second defendant.

10. Defendants pleaded emphatically that at no time did they by themselves or through anyone acting for, through or in trust for them offer to bribe plaintiff's solicitor to compromise the recovery of the 255 Million Naira they owed plaintiff. Instead, defendants contend that being desirous of an amicable solution of the issue between the parties, they informed plaintiff's solicitor that the first defendant needed more time to settle the debt it owed the plaintiff because first defendant was expecting some funds from a housing contract it had undertaken, as well as other ventures it had embarked upon which were on the verge of yielding funds. Defendants continue that plaintiff's solicitor by some overt acts pressurised and extorted a total sum of 1.1 Million Naira from defendants in order to prevail upon plaintiff to ~~extend the time given to defendants to settle their indebtedness to plaintiff.~~

11. Defendants' averments continued that it was in a bid to conceal his dishonest action that plaintiff's solicitor connived with police officers to prepare a non-existent case file alleging bribery against the second defendant; and that defendants were not contacted by any police officer to make statements admitting or denying the said charge. No statements were made by any officers of the plaintiff. Defendants also denied the allegations of fraud in its entirety.

12. The defendants concluded their defence by stating that they have not been able to liquidate the debt they owe the plaintiff as a result of the actions taken by plaintiff's solicitors which have culminated in the closure of defendants' business. These acts include writing false petitions to the Economic and Financial Crimes Commission which has resulted in a criminal charge being filed against the defendants and subsequently the incarceration of the second defendant, intimidating the business partners of first defendant to stop carrying on business with them, the cancellation of pending contracts of the first defendant among others.

ORAL PROCEDURE

13. During the hearing of the case plaintiff called four witnesses. The first plaintiff witness (PW1), Captain Toyin Ayilara is a Marine Navigator and presently working with the plaintiff as operations officer in charge of shipping. He stated that he knew the second defendant in this suit, Mr. Ifeanyi Paddy Eke, Managing Director of the first defendant. He continued that sometime in early 2007, the second defendant came to the plaintiff's premises in the company of one Mr. Ogonta, a friend of the plaintiff. PW1 stated further that second defendant came with an LPO from Shell Petroleum Nigeria Ltd for the supply of five million litres of Automotive Gas Oil (AGO).

14. PW1's evidence continued that after the necessary conditions stated by the plaintiff were met by the second defendant, an agreement was reached. A vessel was subsequently hired to convey the five million litres of AGO to Shell Company in Warri, the location scheduled in the agreement. Upon arrival of the product, ~~representatives of Shell and those of Blackberry,~~

together with independent surveyors boarded the vessel and confirmed the volume of AGO supplied. Shell subsequently acknowledged receipt of the AGO and the quantity thereof.

15. He continued his testimony by stating that Mr. Ifeanyi Paddy Eke, the representative of Blackberry Nigeria Ltd later came to Lagos for reconciliation of account. The amount due to Petrostar Nigeria Ltd was Four Hundred and Eighty-Five Million Naira for the five million litres AGO supplied. Shell paid Blackberry but they refused to pay Petrostar. Eventually, only 230 Million Naira was paid by Blackberry to Petrostar, leaving a balance of 255 Million Naira. Mr. Paddy Eke issued a lot of cheques but they were all dishonoured; he then pleaded for an extension of time for him to settle the debt. Mr. Paddy Eke, acting on behalf of Blackberry entered into an agreement with Petrostar to pay the outstanding amount within 90 days from the date of the agreement.

16. PW1 went further to say that on the strength of the agreement made between Petrostar and Blackberry acting through Mr. Paddy Eke, a post dated cheque for the outstanding amount was issued to Petrostar. On the maturity date of the cheque, it was presented for payment but it was dishonoured due to lack of funds in the account. A letter was written to Mr. Paddy Eke to inform him of the dishonoured cheque.

17. PW1 also intimated to the Court that he was a signatory to the agreement that was entered into between Petrostar and Blackberry and that it was not made under duress but freely written by Mr. Paddy Eke himself. He identified copies of the agreement and the cheque that was issued for the outstanding sum of Two Hundred and Fifty-Five Million Naira and they were tendered in evidence by learned counsel to the plaintiff, Exhibits A1 and A2 respectively.

18. Plaintiff's second witness (PW2), Mr. Ndubisi Ekem Mbaanugo is a Chartered Accountant with thirty-four years experience. He stated that he prepared a report on the interest accruing on the amount of indebtedness of 255 Million Naira from August 2007 to December 2010 at the request of his client, the plaintiff herein. He continued that he received the request by letter

from plaintiff's solicitor sometime in May 2008 and identified the letter through its content. The letter was tendered and admitted in evidence without objection by the counsel to the defendants and was marked as Exhibit A3. He went on to identify the computation he made through his signature and stamp and same was tendered in evidence without any objection and marked as Exhibit A4. The computation amounted to 366 Million Naira. Finally, he stated that he forwarded his bill to the plaintiff in the sum of 12.75 Million Naira.

19. The third plaintiff witness, Godwin Nwekoro is a legal practitioner in the law firm of Etudo & Co. He stated that sometime in May 2008 he was directed by his principal to draft three letters addressed to the Managing Director of Petrostar Nigeria Ltd, Nkem Mbanifor & Co and Mr. Ifeanyi Eke of Blackberry Nigeria Ltd respectively. He stated that the letter addressed to the Managing Director of Petrostar Nigeria Ltd was a bill of charges in respect of the subject matter of this case in the sum of 25.5 Million Naira whilst that addressed to Mr. Ifeanyi Eke was a letter of reminder.

20. PW3 continued by saying that he dispatched two documents by DHL to Petrostar and Mr. Ifeanyi Eke respectively after they were signed by his principal. He stated that he went to DHL and collected the proof of service and attached same to the documents. He concluded his testimony by identifying the documents, and same were tendered in evidence without any objection, and were marked as Exhibits A5 and A6 respectively. PW3 concluded his testimony by identifying the two documents, the bill of charges and the letter of reminder.

21. The 4th plaintiff witness (PW4), Mr. Emmanuel Onyekachi is a civil servant working with the Department of Petroleum Resources. He testified that some time in 2007 the Managing Director of Blackberry Nigeria Ltd Mr. Ifeanyi Paddy Eke (second defendant) approached him with an LPO from Shell. PW4 continued that the second defendant intimated to him that he wanted those who had the product for supply so he introduced him to the plaintiff in this case. He stated that the parties entered into a contract though he did not know the details of same.

22. PW4's testimony continued that he was contacted when the payment of the contract sum became a problem; subsequently he found out that Shell had paid the second defendant. He averred that with some pressure the second defendant paid about 200 Million Naira out of a total of 500 Million Naira. Subsequent cheques issued by the second defendant were dishonoured. Eventually an agreement was entered into between the parties for the payment of the outstanding sum. PW4 went on to say that he was there when the agreement was signed by the parties and identified a copy thereof (Exhibit A1). He concluded his evidence by saying that the plaintiff instituted this action when second defendant could not pay the outstanding sum as per the agreement (Exhibit A1) the parties entered into.

23. It is noteworthy that learned counsel to the defendant was not in Court when PW1 gave his testimony despite the fact that defendants had been duly served with the hearing notice. Mr. Patrice Akwara holding brief for counsel to the defendants, Mr. E. D. Onyeke was in Court when the other three plaintiff witnesses, PW2, PW3 and PW4 testified. When learned counsel to the defendants was asked to cross examine the witnesses, he intimated to the Court that he was not in the position to do so.

24. The defendants changed their counsel, Mr. Enyinnaya Uwaezuoke replacing Mr. E.D. Onyeke. Mr. Uwaezuoke appeared in Court on the 27th of September 2010 and asked for an adjournment to enable him put his house in order and to cross examine plaintiff's witnesses. Learned Counsel to the plaintiff objected to this request for adjournment stating the various adjournments that had been given at the instance of the defendants. The Court obliged the defence counsel's request for adjournment, ruling that it was the final adjournment in this suit and that plaintiff should make available its witnesses for cross examination at the expense of defendants. Plaintiff made available its witnesses for cross-examination at its own expense despite the Court's ruling to the effect that the defendants should bear such expense. However, defendants failed to appear in Court on the adjourned date without any excuse communicated to the Court. In the circumstances, the Court had no option but to bring proceedings to a close

Plaintiff further stated that by Exhibit A3 and the testimony of PW2, the bill for the Accountant is 12.75 Million Naira whilst Exhibit A5 shows that the bill for the Solicitor is 25.5 Million Naira; both bills were pleaded. Plaintiff concluded that the special damages pleaded and proved amount to 571,781,321.32 Million Naira, being the principal and interest on same as well as Solicitor's and Accountant's fees. Plaintiff urged the Court to award the special damages pleaded and proved in addition to general damages of 300 Million Naira against defendants for flagrant breach of contract.

29. Plaintiff's arguments continued that the defendants demonstrated throughout the trial that they had no defence to this action. They failed to cross examine plaintiff's witnesses though they were recalled at plaintiff's expense for such cross examination. Defendants also failed to call witnesses of their own to controvert the evidence of plaintiff's witnesses. Plaintiff concluded its address by urging the Court to enter judgment in its favour as per the reliefs claimed.

CONSIDERATION BY THE COURT

30. The issue for consideration in this suit is whether defendants owe plaintiff an amount of 255 Million Naira and if so, whether plaintiff is entitled to interest on the said sum, Solicitor's and Accountant fees as well as general damages.

31. Plaintiff pleaded that defendants owe it an amount of 255 Million Naira and called two witnesses, PW1 and PW4 to testify in support thereof. The evidence of PW1 essentially is that the first defendant paid 230 Million Naira out of a total debt of 485 Million Naira it owed to the plaintiff for the supply of 5 million litres of AGO to Shell Petroleum Development Corporation (SPDC) on behalf of first defendant. PW1 continued that after failed attempts by the first defendant to settle the outstanding sum owed to the plaintiff, the parties voluntarily entered into an agreement (Exhibit A1) whereby second defendant undertook to pay the debt of the first defendant if it failed to. A cheque (Exhibit A2) issued for the outstanding sum of 255 Million Naira was dishonoured when it was presented because defendants did not have sufficient funds in their bank account.

and set a date for judgment as defendants had clearly exhibited an intention not to proceed with the matter.

PLAINTIFF'S WRITTEN ADDRESS

25. Plaintiff stated that sometime in April/May 2007, the defendants entered into an agreement to supply 5 million litres of AGO to Shell Petroleum Development Company (SPDC). Defendants however did not have the AGO so they approached plaintiff who supplied the AGO to Shell on the agreement that defendants would pay plaintiff when they are paid by Shell. The agreed sum to be paid to plaintiff was 485 Million Naira.

26. However, when defendants were paid by Shell, they refused to pay the plaintiff. After repeated demands, defendants only paid 230 Million Naira leaving an outstanding balance of 255 Million Naira. The parties subsequently met in April 2008 and executed an agreement (Exhibit A1) by which defendants had three months to settle their indebtedness to plaintiff, and issued a post dated cheque for the entire amount. However, upon presentation of the cheque (Exhibit A2) it was dishonoured as defendants did not have enough money in their account. A letter was then written to second defendant to inform him of the dishonoured cheque and for him to make good his guarantee to pay the sum if first defendant failed to pay. About three months later, plaintiff instituted this suit.

27. Plaintiff continues that it established its case by calling four witnesses who substantiated the allegations it made in its pleadings and therefore judgment should be entered in its favour. Plaintiff further stated that it is entitled to the principal and the interest pleaded and particularized in its amended statement of claim. Plaintiff says it is entitled to the principal amount of 255 Million Naira as indicated by Exhibits A1 and A2 as well as interest at 25% on the principal as computed by PW2 as of 31/07/2010, which amounts to 278,531,325.32 Million Naira.

28. Further, plaintiff says it is entitled to Solicitor's and Accountant's fee as the parties expressly agreed in their agreement (Exhibit A1) that the cost incurred by the creditors (plaintiff herein) would be borne by the defendants.

32. The testimony of PW4 is to the effect that he introduced second defendant to plaintiff whereupon the parties entered into a contract for the supply of AGO to SPDC. He said he was contacted when the second defendant failed to pay the contract sum to the plaintiff. He further stated that part of the contract sum, about 200 Million Naira was paid to the plaintiff. He continued by saying that a contract (Exhibit A1) was subsequently entered into by the parties by which the outstanding balance was to be paid but the cheque issued to plaintiff for the outstanding sum was returned unpaid. The plaintiff then instituted this action.

33. Defendants in their statement of defence did not deny that they owed the plaintiff. Defendants' contention is that plaintiff's by their conduct have frustrated their efforts in settling their indebtedness to them. The defendants pleaded frustration as a defence and therefore bore the burden of proof in establishing that plaintiff frustrated their efforts in settling their indebtedness to them. After all, it is a cardinal principle of law that he who alleges must prove. The defendants failed to discharge this burden as they failed to produce any evidence to substantiate that claim.

34. Further, defendants contended that they entered into the agreement (Exhibit A1) on which this suit is grounded under threat and undue influence. Defendants further contended that they did not have the benefit of having their solicitor perusing the agreement before it was signed. Having made allegations of threat and undue influence, the defendants bore the burden of proof which they ought to discharge by adducing evidence to support same. However, defendants failed to adduce evidence to prove that they entered into the contract (Exhibit A1) under threat and undue influence. A voluntary agreement entered into by a person of full capacity is binding whether he consults with his solicitor or not. Therefore, the fact that defendants did not have the benefit of their solicitor when they entered into the agreement (Exhibit A1) with the plaintiff is of no legal value or consequence.

35. The evidence of PW1 and PW4 stood uncontroverted despite the fact that defendants' counsel was given every reasonable opportunity to cross

examine the witnesses. The plaintiff made reasonable effort to enable defendants cross examine its witnesses. In so doing the plaintiff produced its witnesses at its own expense for defendants to cross examine them even though the Court had ruled that the expenses in their recall should be borne by defendants. Even then defendants still refused to appear in Court, let alone cross examine these witnesses.

36. The evidence given by PW1 and PW4 was credible and uncontroverted. Exhibits A1 and A2 also buttress the authenticity of their testimonies. In *Chief Ebrimah Manneh v. Republic of The Gambia (2009) CCJLR (Pt 2) 116*, this Court stated that uncontroverted evidence would be accepted. Again, in *Morrow v. Morrow (1914) 2 I.R. 183*, it was held that in a civil case evidence that is not impeached should be acted upon. Therefore, the Court accepts the testimonies of PW1 and PW4 and accordingly finds that the defendants are indebted to the plaintiff in the sum of 255 Million Naira.

37. Having established that the defendants owe plaintiff the sum of 255 Million Naira, we now turn our attention to whether plaintiff is entitled to the other sums claimed namely, interest on the principal sum, Solicitor's and Accountant's fees as well as general damages.

38. Plaintiff claimed Solicitor's fee of 25.5 Million Naira as well as Accountant's fee of 12.75 Million Naira from defendants stating that the payment of such fees was in the contemplation of defendants because it was provided for in the agreement (Exhibit A1) entered into by the parties. Paragraph 4 of Exhibit A1 clearly evidences an intention on the part of the debtor to pay the costs incurred by the creditor towards the recovery of the debt. Paragraph 4 of Exhibit A1 reads in part thus "... any expenses or cost incurred by the creditors towards the recovery of the N 255 Million at a Court shall be for the account of the debtor (the defendants) ... the parties shall not be competent to challenge or contest said bill."

39. Exhibit A1 is an agreement freely entered into by the parties and therefore they ought to be bound by the express terms thereof. Exhibit A3 shows the engagement of an Accountant and the evidence of PW2 showed that the bill for the Accountant is 12.75 Million Naira. Exhibit A5 indicates

that the Solicitor's bill is 25.5 Million Naira. The evidence produced by plaintiff was uncontroverted so we accept it. Since both of these bills were pleaded and uncontroverted evidence was adduced by the plaintiff, the Court accepts the evidence and holds that the plaintiff is entitled to recover them based on the agreement entered into by the parties (Exhibit A1).

40. Plaintiff also claimed that it is entitled to interest of 25% on the principal sum of 255 Million Naira based on the agreement that was entered into by the parties (Exhibit A1). Plaintiff stated that the right to compute interest at 25% is in paragraph 4 of Exhibit A1. Plaintiff stated that the computation of its Accountant as per Exhibit A4, the interest on the 255 Million Naira as at 31/07/2010 amounts to 278,531,325.32 Million Naira. Clearly, Exhibit A1 entitled plaintiff to interest of 25% on the principal sum of 255 Million Naira as defendants agreed to the payment of the said interest if they defaulted in the payment of the principal sum. Since the computation by PW2 was not challenged, it has to be accepted. Plaintiff is therefore entitled to the interest pleaded and proved.

41. Plaintiff also claimed general damages of 300 Million Naira for defendant's flagrant breach of contract. General damages are such as the law implies to have accrued from the act of a wrongful party and are compensatory in nature. General damages are usually awarded for pain and suffering, future problems and crippling effect of an injury, loss of ability to perform various acts, shortening of life span, mental anguish, loss of companionship, loss of reputation, loss of anticipated business and many more. It is always awarded at the discretion of the court having regard to the peculiar circumstances of each case.

42. The Court is not satisfied that any good reason has been proffered to justify the award of general damages in addition to the interest agreed upon which we consider to be an adequate recompense for any loss arising out of the failure to pay the principal sum. The plaintiff, as per Exhibit A1, is entitled to 25% interest on the principal sum to be calculated from 1st August 2010 to the date of this judgment, besides what the court has already said it is entitled to for the period ending 31st July 2010.

DECISION

43. Whereas the plaintiffs have led sufficient evidence to establish their claims, and whereas the defendants failed to lead any contrary evidence notwithstanding all the opportunities given them, the Court decides that the plaintiff shall recover from the defendants the sum of 255 Million Naira being the balance of the AGO supplied to Shell on their behalf, interest at the rate of 25% on the said sum up to date of judgment, Accountant’s fees of 12.75 Million Naira, and Solicitor’s fees of 25.5 Million Naira.

COSTS

44. The plaintiff is entitled to costs in this action. We take note of the fact that the defendants even failed to pay the travelling expenses of the plaintiff’s witnesses who were re-called at their instance. The Chief Registrar is to take this into account in assessing the costs due the plaintiff applying the provisions of Articles 66 – 69 of the Court’s Rules of Procedure.

45. This decision has been given in open court in Abuja this 18th day of March 2011, in the presence of:

1. Hon. Justice H.N. Donli Presiding Judge

2. Hon. Justice Anthony A. Benin Member

3. Hon. Justice Eliam M. Potey..... Member

Assisted by Atanase Atannon Registrar