

**IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL
TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
BEFORE HIS LORDSHIP: HON. JUSTICE I. M. BUKAR**

SUIT NO. FCT/HC/CV/4147/2012

Date of delivery: 12th February, 2013

BETWEEN:

METROTILES NIGERIA LTD.....PLAINTIFF

AND

EIGHT O. THREE PLUS INTERNATIONAL LTD.....DEFENDANT

Mr. Ejike Nwafor.....for the Plaintiff

Mr. Ikoroha – with him

Mr. C. U. O. Eubelior – holding the brief of

Mr. Ugo Nwafor.....for the Defendant

JUDGMENT

On the 24th day of July, 2012, Metrotiles Nigeria Limited hereinafter referred to as the Plaintiff, applied to the court for the issuance of a writ of summons against Eight O. Three Plus International Limited hereinafter referred to as the defendant, pursuant to Order 21 Rule 1 of the Rules of this court. The writ, together with the accompanying affidavit were considered and the suit was entered for hearing under the undefended list.

Service of the originating process was effected on the defendant on the 9th day of October, 2012 and pursuant to Order 21 Rule 3 (1), the defendant filed its notice of intention to defend

together with a 17 paragraph affidavit. On the 15th day of October, 2012 when the matter came up for hearing, and after listening to the two learned counsel, the court ruled and transferred the suit to the ordinary cause list and ordered for pleadings. The Plaintiff with the leave of court filed its pleading on the 2nd of October, 2012 and same was served on the defendant on the 29th day of October, 2012. The defendant did not file its pleading and after three adjournments, all with hearing notices properly served, the Plaintiff took his lone witness in the person of one Mr. Chris Nwoye and tendered Exhibits PW1 'A' – 'E'.

The Plaintiff's claim is structured in paragraphs 3–13 of its statement of claim which is to the effect that on the 17th day of May, 2011, the defendant awarded a contract for the engineering construction of storm water channelization at the FCDA staff Estate, Galadimawa, Abuja for a total contract sum of ₦11,275,000.00. The agreed duration of the contract was six months and payments shall be in stages. The Plaintiff went to site and carried out substantial part of the work before the defendant unilaterally shut down the site thus preventing the Plaintiff from completing the project. The defendant on its own carried out interim valuation of the work done and came up with the figure of ₦6,315,650.00 but the defendant never paid. After waiting for a period of time, the Plaintiff instructed its solicitors to write a formal demand letter on the 23rd day of January, 2012. On the 7th day of February, 2012, the defendant replied calling for a meeting to seek ways to resolve the issue. The Plaintiff, again through its solicitor responded by a letter dated 8th February, 2012 and suggested date and venue for the proposed

meeting but the defendant failed to show up and failed also to get in touch with Plaintiff. This development led to the institution of this action.

In his written address, the learned Plaintiff's counsel formulated a lone issue for the determination of the court, thus: "whether the Plaintiff has discharged the burden of proof on it by section 135 of the Evidence Act to be entitled to the reliefs sought."

Advancing his argument, the learned counsel submitted that civil cases are decided on the balance of probabilities and preponderance of evidence. He gave the case of *Usman v. K.S.H.A.* (2007)13 NWLR (pt.1044) p.148 at 164. He went further to submit that, in arriving at a decision as to where evidence tilts, the court has to weigh the evidence of the Plaintiff against that of the defendant in an imaginary scale to determine in whose favour the balance of justice tilts. This principles of law, according to the learned counsel, applies where issues were joined by the parties by filing their respective pleadings and proffering evidence on them. He argued that in the instant case, only the Plaintiff filed its pleading and led evidence in support. The learned counsel contended that the implication of this, is that there is nothing on the part of the defendant for the court to evaluate along side the evidence of the Plaintiff. He therefore posed a question thus: In such situation, what measure of proof is required of the Plaintiff to be entitled to judgment? The law under such circumstance is that only a minimal measure of proof is required for the Plaintiff to be entitled to judgment, he asserted. He drew support from the case of *Afribank Nig. Ltd v. Moslad Ent. Ltd* (2008) All FWLR (pt.421) p.877 at 894.

As I stated in the early part of this judgment, the defendant did not file its statement of defence. The action is therefore left undefended. In the case of *Egesimba v. Onuzurueike* (2002)15 NWLR (pt. 791) 466. Ayoola JSC (as he then was) put the position of the law in such situation thus: "where the only pleading filed is the statement of claim, absence of a statement of defence means that no issue is joined." In the absence of any issue joined, the court is entitled to deem every allegation of fact contained in the statement of claim as established without further proof against the defendant. See *Arimi v. Bashorun & Ors.* (1979)1 FNR 226. In *Okoebor v. Police Council* (2003)12 NWLR (pt.834)5 S.C.11, the Supreme Court per Niki Tobi JSC (as he then was) put the position of the law in these words:

"The basic principle of law is that where a defendant fails to file a defence, he will be deemed to have admitted that claim or relief in the statement of claim."

In the instant case, the Plaintiff went ahead to lead evidence on his pleaded facts which was left unchallenged and uncontroverted. I am therefore, prepared to enter judgment in his favour.

The claim as contained in paragraph 14 of the Plaintiff's statement of claim is for:

- (a) A declaration that the Plaintiff is entitled to be paid by the defendant the sum of ₦6,315,650.00 being value of work done for the defendant as per the defendant's interim valuation of 5th December, 2011.
- (b) An Order of court directing the defendant to pay to the Plaintiff the sum of ₦6,315,650.00 being sum due and

owing to the Plaintiff on quantum meruit basis as per the defendant's interim valuation of 5th December, 2011.

Alternatively

- (c) An Order of the court appointing an independent valuer for the purpose of evaluating the work done by the Plaintiff and such value, as in the opinion of the professional valuer is payable on the extent of the job done by the Plaintiff be paid to the Plaintiff.
- (d) General damages in the sum of ₦3,000,000.00.
- (e) Cost of this suit as may be assessed by the Hon. Court.

The law is settled that where a claim is in the alternative, the court should first consider whether the principal or main claim ought to have succeeded. It is only after the court may have found that it could not, for any reason, grant the principal or main claim, that it would now consider the alternative claim. I have in mind the case of G.K.F.I. Nig. Ltd v. NITEL Plc (2009)15 NWLR (pt.1164) 344. In the instant case, the main claim has been made out. The claim made in the alternative cannot therefore be granted.

Accordingly and for all the reasons advanced, I now enter judgment for the Plaintiff as per their prayer in paragraph 14 (a) and (b) of their statement of claim.

Mr. Nwafor - We are very grateful for the industry put into this judgment.

Mr. Ikoroha - We are grateful and we appreciate the reasoning of the court.

SGD

Judge

12th February, 2012