

IN THE MAGISTRATE'S COURT OF ENUGU STATE OF NIGERIA
IN THE ENUGU NORTH MAGISTERIAL DISTRICT
HOLDEN AT ENUGU

BEFORE HIS WORSHIP K. O EZE, CHIEF MAGISTRATE GD. 2 ON THURSDAY THE 11TH DAY OF JULY
2018

SUIT NO MEN/578/2017

ANIKWE RAPHEAL

PLAINTIFF

VS

UNION HOMES SAVINGS AND LOANS PLC

DEFENDANT

JUDGEMENT

By his summons to obtain judgment by default summon dated August 16, 2017 and filed on the same date the Plaintiff is claiming from the Defendant as follows:

- (a) The sum of N2,275,613.14 (Two Million Two Hundred and Seventy-Five Thousand Six Hundred and Thirteen Naira Fourteen Kobo) only being the liquidated amount owed by the defendant to the plaintiff as per the deposit made by the plaintiff to the defendant which is outstanding.
- (b) 12.5% interest per annum on the principal sum of N2,000,000.00 (Two Million Naira) only as previously agreed between the parties from August 1, 2017 until the judgment sum is paid.
- (c) The cost of the litigation.

The plaintiff sought the leave of court to issue summons to obtain judgment by default on personal service and the Court granted the application. The plaintiff also filed an eighteen paragraph affidavit in support of claim on the default summons sworn on August 16, 2017 with annexures marked exhibits A, A1, B, C & C1.

The defendant was duly served and the affidavit of service dated September 8, 2017 was filed in the court as proof of service. The defendant filed a notice of intention to defend dated September 22, 2017 and supported by a 12 paragraph affidavit dated on the same date. Order VII of the Magistrate Court Rules CAP 113, Revised Laws of Enugu State 2004 provides for default summons and the procedure to be adopted by a plaintiff. Order 7, Rule (1) (3) states and I quote "A summon

Rapheal Anikwe
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in the form or to the effect given in form 21 in the first schedule shall not be issued, without leave of the Magistrate, where the amount claimed exceeds forty naira, unless the action is for the price, value or hire of goods which, or some part of which were sold and delivered or let on hire to the defendant to be used or dealt with in the way of his trade or profession or calling". Rule 3 further states "where the defendant shall have given notice of defence the Magistrate shall, upon an affidavit disclosing a legal defence or defence upon the merit and satisfactorily explaining the defendant's neglect, allow the defendant to defend upon such terms as he may think just".

The court thereafter delivered its ruling on October 17, 2017 and in accordance with the provisions of Order VII Rule 3 of the Magistrate Court rules transferred the matter to the general cause list for hearing.

The plaintiff counsel called the plaintiff as its only witness. The plaintiff introduced himself as Anikwe Raphael. He lives at No 10 Upper Housing, Abakpa Nike, Enugu. He stated in his testimony that he knows the defendant and opened an account with the defendant. He paid a total sum of N2,000,000.00 to the defendant in two instalments of 1,000,000.00 each in 2003 and 2004. The deposit receipts were tendered and admitted as exhibits 1 and 2. He also stated that the defendant agreed to pay interest at 12.5% per annum on the deposit which was paid into his Union Bank account. The statement of account of the witness was tendered and admitted as exhibit 3. He stated that he needed the funds to support his business and demanded for a refund of his principal deposit. His demand letter to the defendant dated June 12, 2017 was tendered and admitted as exhibit 4. The plaintiff urged the court to grant the reliefs as per the claim. The witness was cross examined in court and under cross examination admitted that he made the deposits into the defendant's account in Union Bank from his Union Bank account. He also stated that he was issued the receipts by the defendant. The witness was discharged after cross examination and the plaintiff closed its case. The matter was thereafter adjourned for defence to open on November 15, 2017.

The defendant failed to open its defence rather applied to court for time to settle the matter. The plaintiff counsel did not object and the court adjourned the matter on several occasions on the instance of the defendant for the parties to explore settlement. After several adjournments without reaching any settlement, the court ordered the defendant to file terms of settlement or open its defence. The defendant failed to proceed and upon the application of the plaintiff counsel, foreclosed the defendant from opening its defence and adjourned for judgment in accordance with the provisions of Order IX Rule 15 of the Magistrate Court rules.

The defendant therefore failed to enter its defence or call on any witnesses. The plaintiff counsel in his address stated that the plaintiffs case is unchallenged and as such the court is at the liberty to enter judgment in favour of the plaintiff as per his claim and evidence. He referred to Nigerian

Bottling Company & Anor v Abubakar (2006) FWLR PT 335 PG 122 @ 147. He relied on the strength of this authority and the fact the defendant was given ample opportunity to counter claim or enter a defence which they failed to urge the court to enter judgment in favour of the plaintiff. He also reminded the court that in the course of proceedings, the defendant made a total payment of N1,300,000.00 (One Million Three Hundred Thousand Naira) only.

The court will then dwell on the merit of the plaintiff's case. The court has formulated a sole issue for determination, whether the Plaintiff has proved his case and is entitled to Judgement.

The court has to bear in mind that the law provides that he who asserts must prove in accordance with section 131 of the evidence Act 2011 CAP E14 Revised LFN. Also the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. Sections 132 and 133 Evidence Act (Supra). Where evidence called by a party in a civil case is neither challenged nor contradicted the onus of proof on that party is discharged. See Fagbero v Arobadi (2006) 7 NWLR (Pt.978) 172. In civil cases burden of proof shall be discharged on the balance of probabilities. Section 134 Evidence Act (supra). Where evidence given by a party to any proceedings was not challenged by the opposite party who, like in the instant case, had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it. Okoebor v. Police Council (2003) 12 NWLR (Pt.834) 444. Evidence which is unchallenged and uncontradicted, if credible, ought to be accepted as there is nothing on the other side to balance. See Adejumo v. Ayantegbe (1989) 3 NWLR (Pt. 110)417. Furthermore, if the evidence led on the facts pleaded is admissible, relevant, uncontradicted and not discredited by cross-examination, a court can legally rely and act on it. Egbunike v. ACB Ltd (1995) 2 NWLR (Pt.375)34.

Before a judge in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he must put the totality of the testimony adduced by both parties on an imaginary scale. He shall weigh one side against the other and then decide upon the preponderance of credible evidence which weighs more. It was held that if a trial court heard two versions of an essential fact and one looked more probable, then it will be bound to believe the more probable evidence. The court should neither create nor conjecture these probabilities. The trial Judge, should consider both carefully and decide on the balance of probabilities which of the assertions to accept. MARCUS UKAEGBU & ORS V. MARK NWOLOLO (2009) 3 NWLR (Pt. 1127) 194 S.C.

On the first arm of the claim the plaintiff is claiming the sum of N2,275,613.14 (Two Million Two Hundred and Seventy-Five Thousand Six Hundred and Thirteen Naira Fourteen Kobo) only being the total principal contribution of the plaintiff to the defendant together with the interest due and payable. The crucial issue for the plaintiff to succeed in his claim is that he must adduce evidence that is congruent with the claim. The Plaintiff is relying on his evidence to prove his claim. The plaintiff tendered exhibit 1 dated July 27, 2003 and exhibit 2 dated February 23, 2004


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as proof that the deposit was made. This was not contradicted by the defendant. The plaintiff also tendered exhibit 3 as proof of payments by the defendant into the Union bank account of the plaintiff. The said bank statement contains various inflows into the account for different sums which were described as interest payment from the defendant. Furthermore, the plaintiff also tendered exhibit 4 as proof that he has made a demand for payment of his principal sum and accrued interest which remained due and unpaid. The defendant failed to adduce any credible or cogent evidence to challenge or contradict the evidence of the plaintiff. Under cross examination, the defendant counsel stated that the defendant was in merger talks with a third party. This in the mind of the court constitutes no form of defence in the present circumstance. The court would therefore accept the evidence of the plaintiff as cogent, credible, unchallenged and uncontradicted. The court would also attach a high probative value to the evidence as being cogent and credible. I therefore hold that the plaintiff is entitled to the sum of N2,275,613.14 (Two Million Two Hundred and Seventy-Five Thousand Six Hundred and Thirteen Naira Fourteen Kobo) only less the N1,300,000.00 (One Million Three Hundred Thousand Naira) only the plaintiff admitted the defendant paid in the course of the proceedings. The plaintiff is therefore entitled to the sum of N975,613.14 (Nine Hundred and Seventy-Five Thousand Six Hundred and Thirteen Naira Fourteen Kobo) only being the outstanding principal and accrued interest in favour of the plaintiff.

On the second arm of the claim, the plaintiff is claiming interest at 12.5% per annum on the outstanding sum. The total outstanding sum is N700,000.00 (Seven Hundred Thousand Naira) only. There is no evidence before the court that the defendant has varied the interest rate. Both exhibits 1 and 2 and the testimony of the plaintiff remains sacrosanct with respect to the interest rate. I therefore hold that the plaintiff is entitled to interest at 12.5% per annum of the outstanding sum of N700,000.00 until full liquidation of the principal sum.

On the third arm of the claim. The Plaintiff is claiming cost of litigation. The plaintiff submitted that the defendant is aware that he has no defence and merely allowed the plaintiff to spend his money instituting this action. The defendant did not challenge or refute the submissions of the plaintiff. The award of cost is entirely at the discretion of the court; costs follow the event in litigation. It follows that a successful party is entitled to costs unless there are special reasons why he should be deprived of his entitlement. In making an award of costs the court must act judiciously and judicially. That is to say with correct and convincing reasons. See *Anyaegbunam v. Osaka* (1993) 5 NWLR pt.294 p.449. *Obayagbona v. Obazee* 1972 5 SC p.247. I therefore hold that the plaintiff is entitled to reasonable cost.

Dr. S. S. Uwak
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Flowing from above, I hereby make the following order:

1. The defendant is hereby order to pay the sum of N975,613.14 (Nine Hundred and Seventy-Five Thousand Six Hundred and Thirteen Naira Fourteen Kobo) only to the plaintiff being the principal contribution of the plaintiff together with the accrued interest on or before August 31, 2018.
2. Interest at the rate of 12.5% per annum on the outstanding principal sum of N700,000.00 (Seven Hundred Thousand Naira) only until the full liquidation of the principal sum.
3. Cost of litigation of N50,000.00 (Fifty Thousand Naira) only

Parties: The Plaintiff is present.

Appearances: Emeka Anosike appeared for the plaintiff as Plaintiff Counsel. The defendant was represented by A.CN Agugbue.

This is the judgment of the Court.

J. O. UGWU
ASSISTANT CHIEF REGISTRAR

SGD
K.O. EZE
CHIEF MAG. 2
ENUGU NORTH
12/07/2018

Checked and found correct by me

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#250*

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pd on CR No. 0617293
CHIEF MAGISTRATE'S COURT

02/12/2019

DATE