

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 20<sup>TH</sup> DAY OF  
DECEMBER 2018

SUIT NO MEN/98/2018

ENGR EMMANUEL NWAFOR

PLAINTIFF

VS

MR IFEACHU

DEFENDANT

JUDGEMENT

By his amended claim dated November 5, 2018 and filed on November 7, 2018 the Plaintiff is claiming from the defendant as follows:

1. An Order of this Honourable Court mandating the defendant to refund the sum of N800,000.00 (Eight Hundred Thousand Naira) only plus interest of 15% per annum from the 4<sup>th</sup> day of November 2017 until the judgment debt is paid.

The defendant filed an amended defence dated November 12, 2018 and filed on November 15, 2018 and pleaded not liable to the claim of the plaintiff. During the proceeding, there were two witnesses which was the plaintiff and the defendant. The defendant passed away during the course of the proceedings and the plaintiff counsel applied vide a motion on notice dated and filed on October 16, 2018 to substitute the defendant with Mr Ifeachu. The defendant counsel did not object and the application was granted. Both parties were represented by counsels.

The plaintiff introduced himself as Engineer Emmanuel Nwafor. He lives at No 163b Upper Chime Avenue, New Haven, Enugu. He knows the defendant in the suit. She operates a business at No 180 Ogui Road, Enugu where she sells carpets and other second hand items. He stated in his testimony that on November 2, 2017, he agreed the price of synthetic carpet grass for covering an area of the compound of his in-laws at Abagana, Anambra State. He paid an advance sum of N800,000.00 (Eight Hundred Thousand Naira) only in cash for 8 carpets pending a final decision on whether he would use all the eight carpets, some of them or none. He stated that each carpet cost N200,000.00 and the area to be covered is 50sqm. The defendant issued a receipt for the purchase which was tendered and admitted as exhibit 1. The witness stated in his testimony that

  
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the event planner informed him in a meeting that he would provide the synthetic rug for the entire compound and he went back to the defendant to ask for a refund since he did not need the carpets anymore. The defendant refused to refund the sum he deposited and never mentioned the amount was non-refundable. He borrowed the money for the purchase from a bank at 15% interest per annum. The witness prayed the court to grant the relief sought. The witness was cross examined in court and under cross examination admitted that he made a deposit for 4 carpets and there was no document evidencing the loan facility. The witness also admitted that he did not return to take delivery of the carpets but to ask for refund of the deposit made. Thereafter the plaintiff counsel closed their case.

The defendant introduced herself as Mrs Joy Ifeacho. She lived at No 36 Hill view Street, Independence Layout, Enugu. She is a trader. She knows the plaintiff in the suit. She stated in her testimony that in October 2017 the plaintiff came to her shop with two ladies. They said they came to purchase synthetic carpet grass and asked about the price. She told them it was N300,000.00 per roll and N6,000.00 per square metre. They said they wanted 40 rolls to cover 2000sqm. The plaintiff then entered the shop and after bargaining a price of N200,000.00 was agreed after she also consulted her husband. The plaintiff then left her shop and did not come back until November 2, 2017. On that date, she entered her shop and saw her sales people counting money which they said the plaintiff brought. The sum was confirmed to be N800,000.00. The plaintiff stated it was a deposit for 10 rolls and later said 8 rolls. She prepared a receipt for the transaction which was tendered and admitted as exhibit 2. The agreed sum was N200,000.00 and the plaintiff stated the sum was an advance which was reflected in the purchase receipt. The witness stated she asked the plaintiff when he would come and collect the carpets and he said two weeks. She made arrangements since she had just 1 roll in the store and ordered for additional 7 rolls from Lagos which arrived later. The defendant failed to come after two weeks and came towards month end. The plaintiff now stated that something came up and he came to carry 4 rolls of carpet. She informed the plaintiff that it was not the agreement and that if he intends to carry just 4 rolls it has to be at retail price. The parties later agreed on 3 rolls at N250,000.00 per roll and the plaintiff asked for a refund of N50,000.00 which she told him to return later. The plaintiff left to get a vehicle to carry the three rolls and did not return till the next month. The plaintiff also stated when he came back that they did not want the carpet again and asked for a refund of the N800,000.00. When she failed to oblige him as business is not done that way he threatened her and promised to deal with her. The witness was cross examined in court and thereafter the defendant closed her case.

The Defendant Counsel filed his written address dated September 13, 2018 on September 21, 2018 and was adopted by the Court on November 15, 2018. The defendant Counsel formulated a sole issue for determination as per the suit which is whether the plaintiff proved his case to

  
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entitle him to the reliefs sought and urged the Court to dismiss the plaintiffs' claim and award punitive cost against the plaintiff.

The Plaintiff Counsel filed his written address dated November 6, 2018 and filed on November 7, 2018 and was adopted by the Court on November 15, 2018. The Plaintiff Counsel formulated a sole issue for determination as per their claim and concluded by urging the Court to hold that the plaintiff is entitled to a refund of his money as it would be unjust for the defendant to keep both the money and the carpets which he has no need for. The defendant counsel filed a reply on law dated November 12, 2018 and urged the court to dismiss the claim as lacking merit.

Based on the claim of the plaintiff as well as the facts of the case and applicable law, the court is faced with the two issues for determination:

1. Whether the contract for sale of the carpets was conditional or not.
2. Whether the Plaintiff have proved his case to be entitled to judgement

On issue one above, the plaintiff counsel stated that the plaintiff made it clear in the negotiations that the purpose of the carpets was for an event and that the purchase is contingent upon confirmation if the carpets are required and what quantity is required. The plaintiff in his testimony stated that the payment of N800,000.00 was an advance payment pending when he concluded with the client. The plaintiff stated he was not aware he would not get a refund otherwise he would have pulled out of the contract.

The position of the defendant counsel is that the defendant agreed price with the plaintiff and made four of the carpets available immediately which the plaintiff declined as stated he would return to carry the carpets only for him to return at a later date to ask for a refund. The defendant stated that the plaintiff negotiated price and was given a discount based on the quantity purchased, the carpets were made available and she had to further procure additional carpets to complete the order.

A contract of sale under section 1 of the Sale of Goods Act, 1893, is a contract whereby the seller transfers or agrees to transfer property in goods to the buyer for a money consideration called the price. See *Doak v. Bedford* (1964) 2 Q.B. 587. Under section 1 (2) of the Sale of Goods Act, 1893, a contract of sale may be conditional or absolute. It ought to be stressed from the onset however that a contract of sale reduced into writing, such as Exhibit 1, must be construed and given effect to like any other written contract. See *Coddington v. Paleologo* (1867) L.R. 2 Exch. 193 at 200. So, where any right, duty or liability would arise under a contract of sale by implication of law, such right, duty or liability may be negatived or varied inter alia by the express agreement of the parties. It is principally the intention of the parties, as shown by the terms of the contract, amongst other considerations, which determines the time when the property in the goods, the

*Rajiv Kumar*  
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subject matter of a contract of sale, is transferred or passes to the buyer. Accordingly, section 17(1) of the Act provides that where there is a contract for the sale of specific goods, the property in them is transferred to the buyer at such time as the parties thereto intend it to pass. No difficulty can therefore arise where the contract between the parties expressly states when or at what time the property in such goods passes to the buyer.

Section 17(2) of the Act, however, provides that for the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. See *Nanka-Bruce v. Commonwealth Trust Ltd.* (1926) A.C. 77. *Afrotec Tech. Servo (Nig.) Ltd. v. MIA & Sons Ltd* (2000) 15 NWLR (Pt.692) 730. The court is now bound to evaluate the evidence before the court to discern the intention of the parties based on the terms of the contract, conduct of the parties and circumstance of the case.

The contract between the parties was reduced in writing as exhibit 1 which is the receipt of purchase. It was tendered by the plaintiff. The defendant admitted same and did not challenge or contradict same. The said exhibit is therefore admitted and shall be relied on by the court as valid, subsisting and the basis of the contract between the parties. The court shall also place a high probative value on the exhibit. Upon perusing the said receipt, it is stated clearly that on November 2, 2017 the defendant received from the plaintiff the sum of N800,000.00 being advance payment for 8 rolls of carpets at N200,000.00 per roll with a balance of N800,000.00 to be paid on a date not stated. The receipt also contained the clause "not collected". The above fact is not disputed by either party.

The plaintiff is contending that the payment is subject to confirmation by the client and as such is refundable since no refund after payment is not stated on the receipt. In interpretation of contracts it is trite law that where parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. In the present case the issue of the contract being conditional on confirmation by the client who is not a party to the contract goes to no issue and shall not be relied upon by the court. See: *UNION BANK OF NIGERIA LTD. v. OZIGI* (1994) 3 NWLR (PT.333) 385. The plaintiff admitted under cross examination that no condition is written on exhibit 1. Upon carefully perusing exhibit 1, there is "no subject to" clause or any clause to show condition(s) attached to the contract. The plaintiff admitted in his evidence that he made a deposit for 8 rolls of carpets and further admitted under cross examination that he saw 4 rolls of carpet which the defendant offered to make available for delivery but he declined. The plaintiff had a choice to take delivery which he failed to do on his own accord. The submissions of the plaintiff counsel in his address that the carpets were not available is contrary to the evidence before the court by the plaintiff who stated he made a deposit as an advance payment for the 8

  
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rolls of carpet and not part payment which is refundable. The plaintiff further admitted that the defendant was ready to deliver the carpets but he declined and said he would return on a later date. I therefore hold that the contract between the parties is not conditional and was completed subject to delivery.

On issue 2 above, whether the Plaintiff has proved his case and is entitled to Judgement. The claim of the plaintiff has been set out in the first paragraph of this judgment. In order to effectively determine the issue above, the court would answer the following in the affirmative or otherwise based on the evidence before the court and the evaluation of the said evidence.

- A. If there is a binding and enforceable contract between the parties.
- B. If the plaintiff is entitled to a refund and interest claimed at 15%.

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.

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. *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.

  
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The evidence of the plaintiff lacked cogency. His demeanour leaves a lot to be desired with respect to his knowledge of the transaction. He stated he was an experienced professional but struggled to remember the name of the manager that gave the loan nor the loan details. The witness also could not provide any evidence that he obtained a loan from a commercial bank and stated in open court that the agreement was oral. That the court is expected to believe that a commercial bank in custody of public funds and strictly regulated disburses loans based on oral agreements is mind boggling and unbelievable. There is no cogent or credible evidence that any such loan was obtained by the plaintiff. This goes to the credibility of the witness. I would therefore accord no probative value to his testimony in court.

Let me stated that the evidence of the defendant witness remained consistent, cogent and mostly uncontradicted by the plaintiff. The defendant set out in her testimony the events that occurred, timeline, crucial issues such as how many times the plaintiff visited her shop, the time spent negotiating the purchase price and the reasons the plaintiff did not take delivery of the carpets which were not contradicted by the plaintiff. The plaintiff also failed to provide contrary evidence nor rebut her testimony. The credibility of a witness is enhanced if there is no contrary evidence to his testimony. It is destroyed if there is contrary evidence to his testimony either from independent witness or from previous testimony on oath of the witness himself. If the credibility of a witness is destroyed the evidence he has given loses cogency and probative value. Since the testimony of the plaintiff witness was not contradicted, I will crown it with the toga of credibility. Interestingly, the law gives me the latitude to act and rely on unchallenged evidence, see *Ogunyade V Oshunkeye* (2007) 15 NWLR (pt.1057) 218; *Owners, M/V Gongola Hope V. S.C. (Nig) Ltd* (2007) 15 NWLR (Pt.1056) 189. The position of the law as regards unchallenged evidence is as stated above, for any such evidence that is neither attacked nor discredited, and is relevant to the issues joined ought to be relied upon by a Judge. *Amayo v. Erinmwingbovo* (2006) 11 NWLR (Pt.992) 699.

In resolving issue A above, the parties have already agreed that they entered into a contract for the purchase of 8 rolls of carpet at the cost of N200,000.00 per roll. The plaintiff further admitted that he made a deposit of N800,000.00 for 4 rolls of carpet. The defendant submitted that she received the money and made the carpets available for pickup which the plaintiff chose to pick up at a later date. It is trite law that facts admitted need not be proved, the only issue of the plaintiff stating that the contract was conditional has already been resolved by the court in issue 1. I therefore hold that there is a binding agreement between the parties.

On issue B above, the plaintiff is contending that the contract is conditional on the client go ahead and immediately the event planner informed them in a meeting that he would provide a cheaper alternative, he informed the defendant within 48 hours that he longer required the rolls of

  
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carpet. The defendant contention is that upon the agreement of the parties, she made four rolls of carpet available to which the plaintiff stated he would return back to carry the carpet. She then procured additional 7 rolls of carpet as evidenced by exhibit 2 which was the invoice for additional seven rolls of carpet paid for and supplied. The exhibit was admitted in court and the plaintiff failed to rebut nor contradict same. The said exhibit is therefore admitted and shall be relied on by the court as proof that the defendant procured additional rolls of synthetic carpets to fulfil her obligations in the contract. The court shall also place a high probative value on the exhibit. The court shall therefore rely on same as evidence the carpets were indeed purchased and supplied. It is important to note that there is no evidence before the court that the plaintiff requested for the rolls of carpet paid for and it was not made available, rather the plaintiff is contending that the contract was conditional which this court has already determined otherwise.

Also in furtherance of the agreement, the defendant entered into another contract to fulfil her obligations on the contract with the plaintiff. Whether in a situation where part of a contract has been requisitioned, the purchasers will be obliged to accept and pay for the other part. In *Claddagh Steamship Co Ltd v Steven & Co* 1919 SC (HL) 132 there were two contracts for the sale of two ships. The question was whether, when one of them was requisitioned by the Government, the purchasers were obliged to accept and pay for the other. Their case was that they were not obliged to do so, as the vendors were not able to perform their side of the bargain. It was held that, as the evidence showed that the object of the two contracts was to give effect to an agreement for the sale of the two ships together, the purchasers were entitled to refuse to accept delivery of one ship without the other. There is no evidence of breach on the part of the defendant. The provisions of the sale of goods act as set out is clear that once the contract is complete ownership passes to the purchaser. The only outstanding condition is the payment of the balance of N800,000.00 for the entire eight rolls of carpet. The defendant is not seeking for specific performance so the court would not dwell on the issue. I therefore hold that the plaintiff is not entitled to refund and interest on the deposit made,

Flowing from above, it is clear from the evidence adduced that the defendant has the 8 rolls of carpet available for delivery. The claim of the plaintiff cannot be sustained as the plaintiff has clearly failed to discharge the evidential burden placed on him by virtue of section 131 of the Evidence Act. I therefore dismiss the claim of the plaintiff in its entirety as a claim for interest cannot survive if the plaintiff is not entitled to a refund.

Parties: The Plaintiff is present. The defendant is absent.

Appearances: Plaintiff Counsel is absent.

*Rogers J. Orlov*  
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Appearances: C.M Nwabuko appeared for the defendant as Defendant Counsel.

This is the judgement of the Court.

J. DUGWU  
ASSISTANT CHIEF REGISTRAR

20/12/2018

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checked and found  
correct by me *[Signature]*

*Certification of 8 photos  
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*pd on CR No. 0617293*

CHIEF MAGISTRATE'S COURT

ENUGU

02/12/2019  
DATE