

COURT OF APPEAL CALABAR DIVISION
19TH APRIL, 2011. CA/C/128/2008
CORAM:- K. B. AKAAHS, J. MIKA'ILU, I. O. AKEJU,
I. O. AKEJU, JJCA

1. NSIT IBOM LOCAL GOVT
2. HON. ANIETIE ETUK APPELLANTS
AND
OBONG LAWRENCE UWEM IYOHO RESPONDENT

APPEALS - Issues - Competence - By O.2 r.3 and O.17 r.7 of Court of Appeal Rules - Respondent's issue 2 is incompetent - Since he neither filed cross-appeal - Nor respondent's notice (H1)

MASTER & SERVANT - Retainership - Termination of - Reliefs - Since the retainership agreement was not in perpetuity - The termination can only give rise to damages - And not a declaration that it is null and void (H2)

DAMAGES - Special damages - Award - Propriety - Award of N2.5 million is wrong - Since claim was outside period of agreement (H3)

FACTS

Plaintiff/respondent instituted this action against defendants/appellants at the High court of Akwa-Ibom State, wherein he claimed damages for breach of agreement. The claim was for a wrongful termination of appellant's legal retainership with 1st appellant. The sum of N2, 500, 000.00 (Two Million, Five Hundred Thousand) was also claimed as special damages for the year 2004/2005. At the end of hearing, the court declared the termination as null and void and went ahead to award the above stated sum as special damages. Dissatisfied, defendants appealed to the Court of Appeal, Calabar division.

ISSUE FOR DETERMINATION

WHETHER from the totality of the evidence adduced in the Suit in the court below and the pleadings in the Statement of Claim of the plaintiff thereof, it could be said that the plaintiff had proved "Special Damages" as required by law as to warrant the court below

to have awarded same to him (plaintiff/respondent herein)?

HELD (Unanimously allowing the appeal per **AKAAHS**

JCA)

APPEALS - Issues - Competence

1. On the contrary, there is no cross-appeal from which the respondent could have formulated the so called issue No. 2 which to all intents and purposes is a preliminary objection and no notice to that effect has been filed by the respondent in accordance with Order 2 Rule 3 and Order 17 Rule 7 of the Court of Appeal Rules. Issue 2 in the Respondent's brief is incompetent and it is hereby struck out. (p. 2474 B)

MASTER & SERVANT - Retainership - Termination of

2. The Plaintiff stated in paragraph 12 of the Statement of Claim that the retainership agreement was terminated on 31st October, 2003. The agreement provided for a period of notice of three months to be given if either of the party wanted to terminate the retainership. As rightly pointed out by the learned trial Judge, the retainership agreement was not in perpetuity and since the Plaintiff obtained judgment in Suit Nos. HET/MISC. 261 2003 and HET/MISC. 30/2003, the termination can only give rise to damages and not a declaration that the termination is ultra vires, null and void and of no effect. The declaration granted is wrong and must be set aside.

(p. 2476 D)

DAMAGES - Special damages - Award - Propriety

3. Again the award of N2.5 million Naira representing the retainership for the year 2004/2005 and loss of income for the same period is wrong and must be set aside. The termination took effect in 2003. It could have been lawfully terminated by the 10th April, 2004. By terminating the agreement on 30th October, 2003 the appellants had clearly indicated they were no longer interested in keeping the respondent as a retainer and any damages to be awarded should not exceed

the period 10th April, 2004. There is therefore no justification to claim for retainership beyond 10th April, 2004 or for any services to be rendered beyond that period. If the claim were not outside the period of the agreement, I would have had no hesitation to hold that the respondent was entitled to the award of special damages since they were spelt out in Exhibit A. (p. 2476 F)

REPRESENTATION

No representation

CASES REFERRED TO

Hayes v. Hayes (2000) 3 NWLR (Pt. 648) 276

Ezemba v. Ibeneme (2004) 14 NWLR (Pt. 894) 617

Yusufu v. Dornier Aviation Nig Ltd (2004) 10 NWLR (Pt. 880) 1

Vodlkanal Project Ltd v. Oladele (2004) 6 FWLR 139

Obasuyi & Niger Construction Ltd v. Business Ventures Ltd (2000) SCQR (Pt. 1) 61

John Joseph & Imprest Bakolori Nig Plc v. Alhaji Kabiru & Dahiru Adamu (2002) FWLR (Pt. 91) 1525

RULES REFERRED TO

Court of Appeal Rules, O.2 r. 3, O.17 r. 7

LEAD JUDGMENT BY AKAAHS JCA

This is an appeal against the judgment of the Akwa Ibom State High Court in Suit No. HET/15/2004 delivered on 15/4/2008.

The Plaintiff's claim against the Defendants is for damages for breach of agreement. In the writ of summons and paragraph 19 of the Statement of Claim, the Plaintiff pleaded as follows:

"19. The Plaintiff is affected by the breach of this agreement and has suffered damages. WHEREFORE the Plaintiff claims against the Defendants jointly and severally as follows:

1. A DECLARATION that the Defendants letter Reference No. NBLG/AD/S/57/VOL.11/49 dated 5th August, 2003 purporting to terminate the Plaintiff's legal retainership with the 1st Defendant and every action taken in pursuance of the said letter all amount to a Breach of the Agreement signed by the 1st Defendant and ultra vires

null and void and of no effect whatsoever.

2. *The sum of N2.5million Naira (Two Million, five Hundred Thousand only) being special damages following the wrongful termination of the Plaintiffs appointment for the year 2004/2005.*

PARTICULARS OF SPECIAL DAMAGES

B (a) *N300,000.00 (Three Hundred Thousand Naira) representing an annual Retainership fee payable to the Plaintiff as per paragraph 2 of the Agreement of the parties and such Retainership year commencing on the 11th day of April, 2004 and terminating on the 10th day of April, 2005 next and for every year subsequent until this case is determined, the judgment sum liquidated and the agreement properly terminated.*

D (b) *N2.2million Naira (Two Million, Two Hundred Thousand Naira) only representing annual loss of income as transport to and from court and service charge as per paragraph 3 of agreement signed between the parties and such year commencing on 11th April, 2004 and terminating on 10th April 2005 and so following each subsequent year until this suit is determined, the judgment sum paid and the agreement properly terminated.”*

E The Defendants filed a memorandum of appearance and later sought extension of time to file their Statement of Defence. The application was granted and the defendants who were originally three in number filed a joint statement of defence on 20/11/2007 after the Plaintiff had testified in-chief. The Plaintiff was not cross examined
F from 25/7/2007 when he concluded his testimony up to 28/2/2008 when the matter was adjourned to 15/4/2008 for judgment. Judgment was entered in favour of the plaintiff in the following terms:

G *“Plaintiff is therefore entitled to his claim as per the Writ of Summons as specified in the Statement of Claim to the extent of what the Plaintiff should have been paid between 11th April, 2003 to 10th April, 2005 and the general damages... Consequently judgment is hereby entered in favour of the Plaintiff as per his Statement of Claim in paragraph 19 (1) and (2) thereof”.*

H (See page 69 of the records).

The Defendants were dissatisfied with the judgment and filed their Notice of Appeal on 16/4/2008 containing one ground of appeal from which a sole issue was formulated for determination as follows:-

“WHETHER from the totality of the evidence adduced in the Suit in the court below and the pleadings in the Statement of Claim of the plaintiff thereof, it could be said that the plaintiff had proved “Special Damages” as required by law as to warrant the court below to have awarded same to him (plaintiff/respondent herein)?”

Although the Respondent stated in his brief that he was adopting the sole issue for determination in the appellants’ brief with slight modification. He went further to formulate a second issue. The issues raised by the Respondent in his brief are:

“1. WHETHER from the totality of the evidence adduced in the suit in the court below, the pleadings in the statement of Claim of the Plaintiff thereof as well as the pleadings in the statement of Defence of the Defendants thereof, it could be said that the plaintiff had not proved “Special Damages” as required by law to warrant the court below to have awarded same to him, in the absence of any counter evidence whatsoever from the defendants.

2. WHETHER the ground of appeal not being directly related to the sole issue for determination and being a mere academic question “does not render the appeal incompetent”.

The second issue for determination in the Respondent’s Brief is in the nature of a preliminary objection questioning the relationship between the Ground of Appeal and the issue formulated therefrom. The ground together with the particulars reads as follows:-

1) The Learned Trial Judge erred in Law when he held as follows:

“It is clear that Exh. ‘A’ has been breached by the Defendants, therefore the purported termination of Exh. ‘A’ by the defendants is hereby declared ultra vires, null and void and of no effect whatsoever. Plaintiff is therefore entitled to his claim as per the Writ of Summons.”

PARTICULARS OF ERROR

A. The learned trial judge failed to find as a fact that Exh. ‘A’ purporting to create an obligation between the Plaintiff/Respondent and the 1st Defendant/Appellant is invalid ab initio as same cannot be said to be a legal document in the absence of the common seal of the 1st Defendant/Appellant.

B. The Learned trial Judge failed to hold that Exh. ‘A’ not properly executed cannot create an obligation as to warrant the Plaintiff

to be entitled to his claim as per the Writ of Summons.

C. The order that the Plaintiff is entitled to his claim as per the Writ of Summons means the Plaintiff is entitled to the Special Damages of N2.2million (Two Million, Two Hundred Thousand Naira) without specific proof of same.

B The issue raised for determination is whether the Plaintiff proved special damages to be entitled to judgment. This was covered in the ground of appeal and formed part of the judgment being appealed and it was properly raised. It is therefore a competent issue.

C ***On the contrary, there is no cross-appeal from which the respondent could have formulated the so called issue No. 2 which to all intents and purposes is a preliminary objection and no notice to that effect has been filed by the respondent in accordance with Order 2 Rule 3 and Order 17 Rule 7 of the Court of Appeal Rules. Issue 2 in the Respondent's brief is incompetent and it is hereby struck out.***

D Arguing the only issue in the appeal, learned counsel submitted that from the pleadings and evidence adduced the plaintiff did not prove his case to be entitled to the award of N2.2 million as special damages. He cited and relied on BENJAMIN OBASUYI & NIGER CONSTRUCTION LTD V. BUSINESS VENTURES LTD (2000) SCQR (Pt. 1) 61 in submitting that unlike general damages, special damages are exceptional in their character and connote specific items of loss which the plaintiff alleges are the result of the defendant's act or breach of duty complained of and must be claimed specially and strictly proved. He argued that not only must the plaintiff plead special damage, but he must also give particulars in the Statement of Claim so as to put the Defendant on Notice. He placed reliance on the following cases: VODLKANAL PROJECT LTD. v. MR. RICK OLADELE & 2 ORS (2004) 6 FWLR 139 at 144; JOHN JOSEPH & IMPRESIT BAKOLORI NIG. PLC v. ALHAJI KABIRU & DAHIRU ADAMU (2002) FWLR (Pt. 91) 1525 at 1528 - 1529.

G Learned counsel for the Respondent referred to the Statement of Defence admitting the Agreement which was received in evidence as Exh. 'A', the oral evidence adduced by the Plaintiff and the findings of the learned trial Judge in respect of Clause 3 of Exh. 'A' and contended that since the Defendants did not give any oral testimony to challenge or controvert the Plaintiff's depositions and sworn testi-

mony, they cannot complain about the non particularization of special damages as they were contained in Exh. "A" and the main purport of pleadings and particularizing "special damages" is to obviate any surprise to the opposite party. The case of R.E.A.N. PLC v. ANUMNU (2003) 6 NWLR (pt. 815) 52 was cited in support. On standard of proof required, learned counsel submitted that strict proof does not mean unusual proof but proof by credible evidence worthy of belief which can easily lend itself to quantification and assessment as decided in OLOYEDE v. PLOR (2005) ALL FWLR (Pt. 279) 1277. He further submitted that since the Defendants refused and/or neglected to put up any oral defence thereto and admitted the depositions and statements of the Plaintiff (including the content of Exhibit 'A' the Schedule of Agreement between the parties), he is -

(i) bound by his admission - EZEMBA v. IBENEME (2004) 14 NWLR (Pt. 894) 617;

(ii) deemed to have abandoned his defence -YUSUFU v. DORNIER AVIATION (NIG) LTD. (2004) 10 NWLR (pt. 880) 1; and

(iii) Averments in evidence that are unchallenged and uncontroverted are deemed admitted and could be acted upon by the court - See: HAYES v. HAYES (2000) 3 NWLR (pt. 648) 276; AGBAJE V. IBRU SEA FOODS LTD. (1972) 5 SC 50.

He urged the court to dismiss the appeal.

From the way the appellants approached this case, I am inclined to agree with the Respondent's assertion that the termination of the retainership agreement was ill motivated which was initiated by Bassey Umoh (now deceased) for his own selfish interest. It was terminated because the Plaintiff refused to play ball (i.e. to give the bribe of N150,000.00 which was demanded by Bassey Umoh) and since he refused to succumb to the illegal demand, Mr. Bassey Umoh then used the 2nd Defendant/Appellant, Hon. Anietie S. Etuk, who was then Caretaker Chairman of Nsit Ibom Local Government to terminate the agreement. This is why the Defendants found it difficult to defend the matter in the lower court.

Since this is the scenario which the Plaintiff painted in his averments in the statement of claim, I find myself at a loss as to why he instituted this action after he had obtained judgments in two other suits Nos. HET/MISC 26/2003 and HET/MISC 30/2003 upon which this suit is predicated for he pleaded in paragraphs 15, 16 and 17 of

the Statement of Claim that -

“15. On receipt of the purported letter of Termination of Appointment, the plaintiff, completely overwhelmed with shock and surprise, drove to the house of the 2nd Defendant to complain, and remind the 2nd Defendant that his bills have not been paid since
B year 2002.

16. The 2nd Defendant then promised the plaintiff that he would be paid all his entitlements at the end of October 2003. This promise turned out to be another deceit.

C 17. The Plaintiff, having discovered the deceit, filed two suits in court under the Undefended list and obtained judgment in Suit Nos. HET/MISC. 26/2003 and HET/MISC. 30/2003 for the payment of his retainership fee. Copy of the court’s orders in the 2 suits is hereby pleaded and will be relied upon at the trial of this suit.”

D Public policy will not allow a party to institute actions by installments.

**The Plaintiff stated in paragraph 12 of the Statement of Claim that the retainership agreement was terminated on 31st October, 2003. The agreement provided for a period of notice of three months to be given if either of the party wanted to terminate the retainership. As rightly pointed out by the learned trial Judge, the retainership agreement was not in perpetuity and since the Plaintiff obtained judgment in Suit Nos. HET/MISC. 261 2003 and HET/MISC. 30/2003, the termination
E can only give rise to damages and not a declaration that the termination is ultra vires, null and void and of no effect. The declaration granted is wrong and must be set aside. Again the award of N2.5 million Naira representing the retainership for
F the year 2004/2005 and loss of income for the same period is wrong and must be set aside. The termination took effect in
G 2003. It could have been lawfully terminated by the 10th April, 2004. By terminating the agreement on 30th October, 2003 the appellants had clearly indicated they were no longer
H interested in keeping the respondent as a retainer and any damages to be awarded should not exceed the period 10th April, 2004. See: HADLEY v. BAXENDALE (1854) 9 Exch. 341. There is therefore no justification to claim for retainership beyond 10th April, 2004 or for any services to be rendered beyond that**

period. If the claim were not outside the period of the agreement, I would have had no hesitation to hold that the respondent was entitled to the award of special damages since they were spelt out in Exhibit "A".

I find that the appeal has merit and it is hereby allowed. The judgment of the Aloara Ibom State High Court delivered on 15/4/2008 in Suit No. HET/15/2004 in favour of the Plaintiff/Respondent declaring the termination of the retainership agreement as ultra vires null and void and of no effect whatsoever and awarding the sum of N2.5 million as special damages are hereby set aside. In their place I substitute an order dismissing the Plaintiff's claims as set out in paragraph 19 of the Statement of Claim. I make no order as to costs.

MIKA'ILU JCA

I have read in draft the leading judgment of my learned brother K. B. Akaahs, JCA. I agree that the appeal has merit and I allow it. The judgment of the Akwa Ibom state High court delivered on 15/4/2008 in suit No HET/15/2004 and awarding the sum of N2.5 million as special damages is hereby set aside. An order dismissing the plaintiff's claim as per paragraph 19 of the statement of claim given. No order as to cost is made by me.

AKEJU JCA

I had the opportunity of reading in advance the judgment of my learned brother, Akaahs, JCA. I agree with his reasoning and conclusion therein that the appeal is meritorious. I allow the appeal and abide by the consequential orders. I make no order as to costs.

H