

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE SABONGIDDA-ORA JUDICIAL DIVISION HOLDEN AT SABONGIDDA-ORA
BEFORE HIS LORDSHIP, HON. JUSTICE N.A. IMOUKHUEDE
JUDGE ON TUESDAY THE 13TH DAY OF JUNE, 2017

B E T W E E N: SUIT NO. B/349/2010

PLANNING DEVELOPMENT CONSTRUCTION
LIMITED CLAIMANT

A N D

ECOBANK NIGERIA PLC DEFENDANT

J U D G M E N T

The Claimant claims against the Defendant as follows:-

- (a) The sum of N26,512,837.38 (Twenty six million, five hundred and twelve thousand, eight hundred and thirty seven Naira, thirty eight kobo) being the balance due from the Defendant to the Claimant for work done and materials supplied by the Claimant for the Defendant at the Defendant's request.
- (b) N50,000,000.00 (Fifty million Naira) being general damages for breach of contract.
- (c) 21% (Twenty one percent) interest per annum on the above sums of money until payment or judgment and 10% (Ten percent) interest per annum after Judgment.

The Defendant counter claims as follows:

The sum of N17,710,915.12 (Seventeen million, seven hundred and ten thousand, nine hundred and fifteen Naira, twelve kobo) being the difference arising from a reconciliation of accounts in respect of the monies advanced to the Claimant by

the Defendant for construction contracts awarded to the Claimant by the Defendant and actual work done by the Claimant.

The Defendant also claims 21% interest per annum on the above sum of money from 2008 till judgment and 10% interest per annum after Judgment.

On the 8th of July 2013 CW1, Mr Isaac Omorogbe gave evidence and testified that he is an Architect by training, a Consulting Architect and that he has all the necessary academic and professional qualifications in Architecture. CW1 testified that he knows both the Claimant and the Defendant in this case. CW1 testified that at various times between 2007 and 2008, the Claimant acting through its Managing Director, Engineer Achebo Patrick commissioned him to carry out architectural designs of the Defendant's proposed Branches in Oba Market Road, Benin City, Royal Market Road, Ekpoma Branch, Isele-Uku/Ubulu-Uku Road, Ogbedubo Quarters, Amocha Local Government Area, Ozoro Branch, Ihama Road Branch, G.R.A., Benin City etc., which design work he duly carried out and delivered them to the Claimant. CW1 testified that stage 1 is the preparation of the sketch and stage II which is the preparation of the details of the job and did not carry out the supervision of the job at the site because there were problems in delivering physical possession of the site to the Claimant and due to problems of title and court injunctions which made them not to commence construction works on the various sites mentioned above. CW1 testified that before commencing his work for the various architectural drawings, he was provided briefs with specifications from the Defendant and he was given Survey Plan and sites plans for the proposed various Branches like Isele-Uku, Ozoro, Ekpoma and Ihama Road, G.R.A., Benin City. CW1 testified that as a professional Architect, he was paid based on recognized scale of charges, like the Professional scale of fees.

CW1 testified that he duly visited the various sites mentioned, before he commenced the design of the proposed branches since the topography and other peculiar nature of each site determine the nature of the design. CW1 testified that he can recognize the various jobs he carried out for the Claimant on behalf of the Defendant. Architectural designs of the Defendant's proposed Branches in Oba Market Road, Benin City, Royal Market Road, Ekpoma Branch, Isele-Uku/Ubulu-Uku Road, Ogbedubo Quarters, Amocha Local Government Area, Ozoro Branch, Ihama Road Branch, G.R.A., Benin City were admitted and marked as Exhibit A. Architectural design for Oba Market Road Branch was admitted and marked Exhibit 'B'. The Architectural design for the proposed Ekpoma Branch was admitted and marked Exhibit 'C'. The Architectural drawing for the proposed Ozoro Branch was admitted and marked Exhibit 'D'. The architectural drawing for the proposed Ihama Road Branch, GRA, Benin City was admitted and marked as Exhibit 'E'. The Professional scale of fees for Consultants in Construction Industry was admitted and marked Exhibit 'F'.

Under cross examination by Counsel to the Defendant, Professor N.A. Inegbedion, CW1 stated that it is a requirement of his profession that any document prepared by him as an architect should be sealed with his professional seal. CW1 stated that the seal should contain information that he is a registered architect. CW1 stated that Exhibit 'E' the pages he is shown are not architectural drawings. CW1 stated that at page 1 there is an architectural seal and also at pages 4-8. CW1 stated that page 3 is not his seal and he does not know whose seal it is. CW1 stated that, from pages 4-8 are not his seal but his Principal's seal. CW1 stated that it is not correct that his Principal made it. CW1 stated that he does not know if it was after he prepared Exhibit E that the Claimant bid for

the contract. CW1 stated that he does not know the nature of the contract between the Claimant and Defendant.

CW2, Meyrick Uyinmwun testified that he is a Quantity Surveyor and holds the Higher National Diploma in Quantity Survey, that he is also a corporate and Chartered Member of the Institution of Nigerian Quantity Surveyors and he also holds an MBA Degree. CW2 testifies that he knows both the Claimant and the Defendant in this case. CW2 testifies that the Claimant informed him through its Managing Director, Engr. Achebo Patrick that the Defendant had commissioned the Claimant to build its Branch Offices for it at Edo and Delta States. CW2 testified that as a Chartered Quantity Surveyor, the Claimant invited him to prepare the Bill of Quantities (BOQ) upon which the award of the various contracts in connection with the said transaction between the Claimant and the Defendant were based. CW2 testified that he duly prepared the said various Bill of Quantities for the said contracts between the Claimant and the Defendant. CW2 testifies that at the various stages of the said various jobs the Claimant was executing for the Defendant, the Claimant instructed him to prepare the Statement of Claim for the value of work that had been done. CW2 testified that he duly went to the various sites to quantify the amount of the work done. CW2 testified that he was paid for the aforementioned jobs the Claimant invited him to do. CW2 testified that he was paid based on the Scale of Fees for Professionals as formulated by the appropriate authority in Nigeria. CW2 testified that his Bill of Quantities are based on the architectural and structural drawings as agreed between the Claimant and the Defendant based on standard practice.

Under cross examination by Counsel to the Defendant, CW2 stated that the Scale of Fees is Federal Government Approved for Professionals. CW2 testified

that the Scale of Fees is not limited to the public sector that it also applies to the Private sector. CW2 testified that they use Exhibit F as their charges and that he was paid based on Exhibit 'F'. CW2 testified that he did not see the letter of award of contract between the Claimant and the Defendant. CW2 testified that he was given the drawings on which he prepared his Bills of Quantities on which the contract was based. CW2 testified that he does not know whether the Claimant and the Defendant agreed that payment should be made in terms of Exhibit 'F'. CW2 testified that Exhibit F has different sections applicable to different professionals. CW2 testified that Page 23 of Exhibit 'F' relates to Quantity Surveyors at Table 18. CW2 testified that Architects, Mechanical Engineers, Structural Engineers and Quantity Surveyor worked on the project. CW2 testified that every one of them are Prime Consultants. CW2 testified that he did not work under anybody in the project. CW2 testified that he was given the architectural drawings. CW2 testified that he used the drawings to prepare his Bill of Quantity.

ENGR. ACHEBO PATRICK, Managing Director and the Chief Executive Officer (CEO) of the Claimant gave evidence and testified that the Claimant is a Limited Liability Company incorporated under the Companies and Allied Matters Act, Laws of the Federation of Nigeria 1990 (as amended). Claimant testified that it is an Engineering and Construction Company and has its registered or corporate office at No. 69, Mission Road, Benin City, Edo State. The Claimant testified that the Defendant is a Public Limited Company incorporated under the Companies and Allied Matters Act Laws of the Federation of Nigeria 1990 (as amended). It is also an authorized Banker under the Bank and other Financial Institutions Act. The Claimant testified that the Defendant has many business offices throughout Nigeria including its business offices in Benin City, Edo State of Nigeria. The

Claimant testified that the Defendant acquired the defunct Oceanic Bank International Plc who was the initial Defendant in this suit. The Claimant testified that the Defendant acquired both its assets and liabilities, this suit inclusive. The Claimant testified that the Defendant on several occasions requested for the services of the Claimant as Engineering, Construction and Building Contractors which services the Claimant made available to the Defendant in its branch expansion programme and further states that in this direction, the Claimant and the Defendant had enjoyed very cordial beneficial and healthy business relationship. The Claimant testified that the Claimant has successfully constructed branch offices for the Defendant in many states and cities among which are the Defendant's branch offices in Benin City, Enugu and Delta State. The Claimant testified that in rendering its professional services to the Defendant as aforementioned, the Claimant employed the highest quality materials and the best possible workmanship, which services the Defendant had always appreciated with regular payments. The Claimant testified that in all these building contracts the Claimant executed for the Defendant, the Defendant only delivered the Survey and Site Plans to it and that the Architectural, structural Drawings and the Bill of Quantities were prepared by the Claimant, which the Claimant did by bringing the relevant services of requisite and highly skilled professionals.

The Claimant testified that in most cases the Defendant only delivered photocopies of the Survey and site plans to the Claimant and retained the originals, especially in respect of Ekpoma and Ihama Road Contracts. The Claimant testified that the Claimant prepared each Architectural and Structural Drawings to fit the local topography and dimension of each site the Defendant delivered to it and states that in all these specific situations the Defendant only

provided the briefs for standardization. The Claimant testified that in the few cases where there were partial failures of execution of contracts, they were wholly due to the fault of the Defendant, for instance, in Ekpoma, Ozoro main town, Ihama Road in Benin City and in Isele-Uku town, the Defendant's agents went to purchase encumbered landed property and the respective Survey Plans in respect of each said encumbered parcels of land were delivered to the Claimant to prepare contract documentations like Bills of Quantities, Architectural and Structural Drawings which requests on each occasion the Claimant duly carried out before it was told by the Defendant that physical possession of the said parcels of land could not be delivered to it due to unresolved encumbrances. The Claimant testified that in the case of Ekpoma proposed branch, the Claimant had already mobilized to site before it was warned by the High Court officials to vacate the site and was shown various Court processes evidencing the pendency of action relating to the said land in the High court. The Claimant testified that consequently, he kept his men and materials mobilized in Ekpoma awaiting speedy resolution of the legal problems, which problems have not been resolved till date. The Claimant testified that before he was served with the said Injunction Orders that were attached to Form 128, the Claimant had already fully mobilized to site and had also demolished the existing structures on the said land at Ekpoma after the offer to do so by one Chief Lucky Omiunu had been rejected by the Defendant. The Claimant testified that in the case of Ozoro main town, the Claimant was later instructed to remobilize its men and materials to the Ozoro Polytechnic site without a kobo mobilization fee from the Defendant and that the said Ozoro Polytechnic branch has virtually been completed except for the installation of sensitive devices like safe which the Defendant carries out by itself

or special agents. The Digital photographs ,Survey plans for Ekpoma, Benin City and Ozoro were admitted and marked Exhibits G, G1 and G2.The Claimant testified that it is not part of the Claimant's contract with the Defendant to provide landed property for the Defendant as the Defendant was expected to deliver quiet and peaceful possession of all parcels of land on which branch offices are to be built to the Claimant. The Claimant testified that for each encumbered parcel of land in which the Defendant could not deliver quiet and peaceful possession to the Claimant after firm instruction to the Claimant to commence design and construction works on each of such parcels of land, the Claimant always incur various costs and damages like preparation of contract documents like Bill of Quantities, Architectural and Structural Drawings , and in each case, it has also mobilized men and materials to site, which men and materials the Claimant could not utilize for other jobs it secured from elsewhere, especially as the contract was still on going. The Claimant testified that the paid every professional and other experts he hired for each job which could not be fully executed, due to the constraints aforementioned . The Claimant testified that among other expenses he always incurs at every site he carried out construction works for the Defendant are community settlement which involves payment of money to youths and elders of the Community where the land is situate and costs of approval of Building Plan and tendered a document which was admitted and marked Exhibit M. The Claimant testified that in computing what he deems reasonable to pay the Claimant, the Defendant did not put into consideration these pre contract expenses and other losses occasioned by the inability of the Defendant to deliver possession of proposed sites to the Claimant for full execution of the building contract

The Claimant testified that by a letter dated 22nd October, 2009, he made as an interim demand on the Defendant to make payments to it on executed and ongoing contracts and in doing so he took into consideration the fact that the projects were on going. Letter was admitted and marked Exhibit L. The Claimant testified that the Defendant replied in a letter dated March, 1st, 2010 which was admitted and marked Exhibit N. The Claimant testified that to his utter dismay and amazement, the Defendant's reply to Exhibit L misrepresented the facts and started making set off and counterclaim as if Exhibit L was written under terminal situations and circumstances.

The Claimant testified that and further states that in Exhibit L the Claimant did not claim for the following:-

- a. Cost of the design and preparation of the drawings.
- b. Community settlements before work could commence on site.
- c. Mobilization of men and materials to site and other works.
- d. Terminal claims and entitlement were not made in the hope that on going project would continue to conclusion.

The Claimant testified that in his letter to the Defendant through its Solicitors S.O. Agwinede & Co. REF. NO. SOA/GEN/VOL.1/38/3/10 dated the 24th day of March, 2010 which was admitted and marked Exhibit P, made the circumstances under which the said letter was written abundantly clear to the Defendant and consequently the Claimant was constrained to make its demands in the said letter. The Claimant testified that the nature and extent of the job carried out on Benson Idahosa University branch and Ozoro Polytechnic Branch are clearly captured in digital photographs for graphical expression of the said nature and extent of the said job carried out by the Claimant for the Defendant at the

Defendant's request in order to show the inequitable and unrealistic valuation put on the said jobs by the Defendant and its agents. The said photographs were admitted as Exhibits Q to Q3 and Exhibit K respectively. The Claimant testified that in clear demonstration of the fact that Exhibit L was not written under terminal situation, the Claimant was awarded other jobs by the Defendant in Benin City and elsewhere, these jobs include the relocation of ATM/Gate House at PPMC Branch and Ramat Park Branch which was admitted and marked Exhibit R. The Claimant testified that he graphically explained his claims in his letter of 28th December, 2009 which was admitted and marked Exhibit S and referred to Appendix 'A', 'B' and 'C' attached to the said letter. The Claimant testified that he had already fully mobilized to site and had also demolished the existing structures on the said land at Ekpoma after the offer to do so by one Chief Lucky Omiunu had been rejected by the Defendant before he was served with Form 128 and Court orders which were admitted and marked Exhibit H, H1, H2 and H3. The Claimant testified that by Exhibit L, he made an interim demand on the Defendant to make payments to it on executed and on going contracts and further states that in doing so the Claimant took into consideration the fact that the projects were ongoing. The Claimant testified that his solicitor wrote a letter to the Defendant dated 16th of February, 2010 is admitted and marked Exhibit M.

Under cross examination by Counsel to the Defendant, the Claimant stated that there was an agreed amount for the construction of the ATM/Gate house at Ramat Park Branch, Benin City and PPMC Ikpoba Hill. The Claimant stated that an email sent to him gave the approval. The Claimant stated that the Bill of Quantities has the amount. The Claimant stated that there was no agreement initially for the construction of Benson Idahosa University and Ozoro Polytechnic.

The Claimant stated that as at the time he came to Court there was an agreed amount. The Claimant stated that he was also given a contract to construct the Ozoro main town branch. The Claimant stated that he could not execute it because of the dispute on the land. The Claimant stated that the contract was for the sum of N78,000,000.00 (Seventy eight Million Naira) for which he was advanced N31,200,000.00 (Thirty one Million, two hundred thousand Naira). The Claimant stated that because of the dispute he was asked to use the money for the Ozoro Polytechnic Branch. The Claimant stated that he was also given money for and cost of construction was N45, 000,000.00 (Forty five Million Naira). The Claimant stated that he was also given the contract for Isele-Uku Branch estimated at N47,000,000.00 (Forty seven Million Naira) and that he was also advanced N18,000,000. The Claimant stated that he was also awarded a contract of N70,000,000.00 (Seventy Million Naira) for Ihama Branch and was advanced the sum of N28,000,000.00 (Twenty eight Million Naira). The Claimant stated that these branches have not been completed at the time he came to Court. The Claimant stated that in Ozoro Polytechnic he had done his own part of the job, that what was left was the Defendant to install their security items. The Claimant stated that he had not handed over Ozoro Polytechnic to the Defendant. The Claimant stated that in Ekpoma they had commenced construction before he received the court injunction. The Claimant stated that they had demolished the existing building and removed the materials. The Claimant stated that they created access to the site and had set out the building. The Claimant stated that they brought materials and equipment on site before they were served with the court order. The Claimant stated that they had not dug the foundation of the main building. The Claimant stated that at Ihama Road they had commenced

preliminary works which is part of construction, they had cleared the site and then some thugs came to chase them out. Claimant stated that for Isele-Uku Branch, the Bank got encumbered land, that they had mobilized men and materials to the site but that they were chased out and they reported the matter to the Defendant. Claimant stated that for Isele-Uku, Ekpoma, Ihama, Benin City, Ozoro branches the sum of N96,000,000.00 (Ninety six Million Naira) was advanced to him. Claimant stated that they did not have meetings to reconcile. Claimant stated that at the time he wrote, Mrs. Ibru had been removed. Claimant stated that he was the one who wrote to the Defendant. Claimant stated that there was never a time they tried to reconcile accounts. Claimant stated that they had discussions on the letter he submitted to them and thereafter he continued the work and they awarded him more jobs. Claimant stated that he is aware that the Defendants claim that he is owing them N17,000,000.00 (Seventeen Million Naira). Claimant stated that in these four projects the contract that he entered into with the Defendants are written, in the contract between himself and the Defendant, there is no where that it is written that the payment shall be in compliance with the approved fees. The Claimant stated that the BOQ and architectural drawings are documents that are needed in order for the Defendant to award the contract. The Claimant stated that contract is based on design and build.

That was the case for the Claimant. On the 15th of December 2015 the Defence opened its case by calling its only witness DW1, Mrs. Patience Aghayere Omokhuiwho testified that the Claimant submitted its profile to the Defendant Bank and sought to be pre-qualified as one of the Bank's building contractors during the Bank's branch expansion programme and that was the basis of the

Defendant's business relationship with the Claimant. DW1 testified that the Claimant executed jobs for the Defendant in Benin City and Enugu. DW1 testified that the Defendant is not aware that the Claimant has completed and handed over any job to the Defendant in Delta State and denies any such completion and handover. DW1 testified that the Claimant is under an obligation to comply with the Defendant's standards on materials and workmanship. DW1 testified that the quality of work done by the Claimant is a reflection of the close monitoring and supervision of the Claimant in order to ensure compliance with the Defendant's standards. DW1 testified that with reference to paragraph 6 of the Statement of Claim, the Defendant states that the Claimant and its other contractors are always given electronic copies of prototype designs of the building to be constructed subject to any amendment to be made by the contractors but under the supervision of the Defendant's professionals. DW1 testified that this was done in this case. DW1 testified that she knows that the Defendant adopts a 'Design and Build' contract procurement method, which places the responsibility of all designs and project execution on the Claimant. DW1 testified that the Defendant does not only provide brief for standardization, it also supervises the designs from inception to completion. DW1 testified that the concept of the 'Design and Build' contract it has with the Claimant is such that it requires the Claimant to visit the location to access the site before the commencement of the design which the Claimant failed to do in this case. DW1 testified that in the case of Ekpoma proposed branch, the contract for its construction was awarded to the Claimant for the sum of N45,000,000.00 (Forty five Million Naira) out of which the sum of N18,000,000.00 (Eighteen Million Naira) has been advanced to the Claimant, the contract document was admitted and marked Exhibit T. DW1 testified that the

before the Claimant could mobilize to site, he was informed of a court injunction from Ekpoma High Court restraining the Defendant from entering the land and accordingly instructed to stay away from the land. DW1 testified that the Claimant still holds on to the N18,000,000.00 (Eighteen Million Naira) advance payment made to it. DW1 testified that the contract for the construction of Ozoro main town branch of the Defendant Bank was awarded to the Claimant for the sum of N78,000,000.00 (Seventy eight Million Naira) contract document was admitted and marked Exhibit U. DW1 testified that out of which the sum of N31,200,000.00 (Thirty one Million, two hundred thousand Naira) only was advanced to the Claimant. DW1 testified that the Claimant was unable to mobilize to site because the Defendant could not get vacant possession. DW1 testified that the Claimant was then advised to use the funds advanced for the construction of the Ozoro Polytechnic proposed Branch until a final reconciliation of all unused funds advanced to the Claimant for the Defendant's projects. DW1 testified that the Defendant is unaware of the virtual completion of the Ozoro Polytechnic branch by the Claimant. DW1 testified that in all its locations where the land is in dispute and the Defendant could not consequently take possession, the Claimant was advanced 40% of the contract sum and for which the Claimant has not refunded any amount till date. DW1 testified that arising from these land disputes Claimant did not mobilize men and materials to site since the Defendant could not obtain possession of the sites. DW1 testified that these locations are in Ekpoma, Ihama Road, Isele-Uku and Ozoro Town. The contract document for Ihama Road was admitted marked Exhibit V. DW1 testified that in all, the Claimant has been advanced the total sum of N96,000,000.00 (Ninety Six Million Naira) only for projects in respect of which the Claimant has not yet commenced

or completed any work. DW1 testified that this colossal amount is still in the Claimant's possession. DW1 testified that the two parties carried out a joint inspection and valuation on the site of the Benson Idahosa University Branch and the Ozoro Polytechnic Branch in order to ascertain the Claimant's claims and which the Defendants found unsupportable. DW1 testified that in a reconciliation of accounts between the two parties, and in respect of all the contracts awarded to the Claimant, the Defendant discovered a difference of N17,710,915.12 (Seventeen Million, seven hundred and ten thousand nine hundred and fifteen Naira, twelve kobo) due to the Defendant from the Claimant. Under cross examination by Counsel to the Claimant, DW1 after being shown Exhibit N, admitted that her statement in paragraph 2 of her witness deposition is not correct, DW1 was also shown Exhibit 'A'. DW1 stated that it is true that in Ekpoma, Ozoro and Ihama, GRA, Benin City the projects could not be completed because of land disputes. DW1 stated that she has visited Ozoro Polytechnic Branch. DW1 stated that the work there is not almost completed and there was a joint inspection done on the project. DW1 stated that the roof was leaking, the ATM not completed, no windows etc. DW1 stated that she cannot tell if Exhibit K is a picture of Ozoro Polytechnic. DW1 stated that she is aware that there were two proposed branches for Ozoro; Ozoro town and Ozoro Polytechnic. DW1 stated that the Claimant was given 40% for mobilization for Ekpoma, Ihama, Iseluku and Ozoro, but there was no vacant possession in those four locations so the Claimant was now told to build the one in Ozoro Polytechnic, the money was with him and he was told that at completion stage they will net off. DW1 stated that they asked the Claimant to use the 40% mobilization given for Ozoro town to build the Ozoro Polytechnic Branch. DW1 stated that she is not aware that the

Claimant carried out demolition work on the existing building in Ekpoma. DW1 is shown Exhibit 'N' and reads that status of work is demolition in Ekpoma. DW1 stated that she is now aware that demolition was carried out from Exhibit 'N'. DW1 stated that there was a meeting between the Claimant and the Defendant before they arrived at the figures. DW1 stated that the Bank is an organization and an going concern and that she knows about the case.

Counsel to both parties filed written addresses. Due to the length of both addresses I am unable to reproduce same hereunder but will refer to Counsel's submission in making my decisions. Counsel to the Defendant, Professor Inegbedion formulated the following issues for determination :

Whether the Claimant has proved its case on the balance of probability?

Whether the Claimant is entitled to damages?

Whether the Defendant has proved its counter-claim in the sum of N17,710,915.12 (Seventeen Million, seven hundred and ten thousand, nine hundred and fifteen Naira twelve kobo)?

Counsel to the Claimant, S.O. Agwinede Esq formulated the following issues for determination:

- a. Whether from the oral and documentary evidence adduced in this case, the Claimant has established its case on preponderance of evidence to entitle it to judgment in this case?
- b. Whether there is a cognizable, valid and competent counterclaim before this Court in this case

There is no dispute to the following facts:

1. That both parties enjoyed a business relation where the Claimant had executed many projects for the Defendant during their branch expansion programme.
2. That the Defendant awarded contract to the Claimant for the construction of their buildings in Ekpoma, Ihama Road, Benin City, Ozoro town and Iseleuku
3. That the Claimant was not able to execute the aforementioned projects due to dispute on the land as the Defendant was not able to hand over peaceful possession of the land.
4. That contracts were signed and the Claimant was mobilized with a total sum of N96m
5. On the 22nd of October 2009, Claimant wrote Exhibit L to the Defendant where he admitted that N96 million had been paid to him as mobilization for the following projects
 - i. IseleUku
 - ii. Ekpoma
 - iii. Ihama Road Benin City
 - iv. Ozoro town.

CW2 testified that he prepared the statement of claim for the value of works done on various sites Exhibit S.CW2 however did not give evidence in Court on the said document. He did not lead evidence in court on how he arrived at the figures. The figures were highly contested by the Defendants who presented their own figures in their evidence. The Court is not an investigating authority.

CW1 and CW2 did not give evidence in Court of how much they were paid by the Claimant, their assertion is that their fees is based on Exhibit F. I find the evidence of CW1 and CW2 difficult to believe, why was their fees that they claimed was shrouded in mystery such they could not come out with in open evidence in Court .Instead they tied it up with Exhibit F.I have looked at Exhibit F which clearly states that it is for public sector and a guideline for the private sector. There is no evidence before me that the Claimant and Defendant agreed to use Exhibit F as a guideline for payment of consultants.

I believe DW1 when she said that due to the colossal amount of N96 million in the Claimant's possession, both parties carried out a joint inspection and evaluation on the Ozoro Polytechnic Branch and Benson Idahosa University Branch. The Claimant's alleged expenditure was highly contested by the Defendant. I believe DW1 when she said that there was reconciliation of accounts between the Claimant and the Defendant before they arrived at the figures. I do not believe Claimant when he insists that there was no reconciliation meeting between the Defendant and himself .His evidence is incredulous considering the huge amount of N96 million that had been mobilized to him over frustrated contracts. A careful look at the second schedule of Exhibit N shows that the Defendant had taken into consideration all the Claimant's pre contract claims and even the demolition of existing structure done at Ekpoma. The Defendant made provision of N1,000,000 each as approved designs, BOQ and site inspection for IseleUku, Ihama Road, Ekpoma, and Ozoro town .The Defendant also made provisions for the performance bond and work men insurance paid by Claimant as N481,750, N717,500; N461,250; N799,500 respectively. In the case of Ekpoma the Defendant made a provision for N1,455,000 for demolition of existing

structures. These provisions take account of Claimant's claim of work done, so I believe DW1 when she said that both parties held inspection and reconciliation meetings to evaluate the work done by the Claimant. I believe that Exhibit N schedule 3 is a fair assessment by both parties of work carried out and reflects that a joint inspection and reconciliation was carried out by both parties.

Exhibit L which was tendered by the Claimant further assessed work done by him for which he had not been paid as N79, 317,080 leaving a balance of N16,682,920 with him. However Exhibit S which was written three months later came with a claim of N26, 512,837.38 being owed Claimant by the Defendant. An analysis of his Claim shows that he was claiming for direct loss and damage at N55,596,375 which includes loss of profit for work not carried out. The evidence before this Court is that the contract was frustrated by disputes as to title to land. There is agreement that mobilization fee of N96 million was paid to Claimant. Defendant stated in Exhibit N that both parties met on two occasions to reconcile accounts, this the Claimant denied. I do not believe the evidence of the Claimant when he said that there was no reconciliation of account between the Defendant and himself. I do not believe that the Defendant would ignore such a huge amount of N96 million paid as mobilization fee to the Claimant. The Defendant's evidence is more probable and convincing that there was a reconciliation of accounts between both parties. In Exhibit L, the Claimant admitted that an outstanding amount of N16,682,920 was with him, this in consonance with Exhibit N which reconciled the outstanding amount to be N17.7million if work on Ozoro Polytechnic is completed. Claimant in his evidence stated that Ozoro Polytechnic Branch is completed save installation of security

devices. I have balanced the evidence of the Claimant and Defendant on the proverbial scale and I find the Defendant's evidence more believable.

Claimant based his claim for payment of Architect, Quantity Surveyor and Structural Engineer on Exhibit F. The Architect and Quantity Surveyor gave evidence before the Court as CW1 and CW2 respectively, they never stated the amount paid by the Claimant to them neither did they tender a Bill of Cost nor did the Claimant tender receipts issued by them. Schedule to Exhibit N which is titled Reconciliation of Accounts with Messrs PDC concedes N1million each for designs , BOQ and site inspections for each project. It also concedes performance bond and workmen insurance also paid by the Claimant. These amounts have been taken into consideration before arriving at an amount of N17million to be refunded to the Defendant. The Claimant's claim is vague and the court is not expected to investigate his claim. The Claimant has not been able to prove his claim before this Court- from admitting in Exhibit L that he is owing N16,682,920an outstanding balance with him, he came about a further claim of N26 million in Exhibit S, being owed him by the Defendant within 3months of writing Exhibit L, when there was evidence that work could not be carried out on the four projects due to lack of vacant possession.

Since there was a reconciliation of accounts between the parties, the Claimant ought to have led evidence on the reconciliation but it seems that the Claimant has something to hide.CW2 who claimed he made the statement of expenditure never gave evidence explaining Exhibit S and how he came about the calculations. I find that Exhibit S is an afterthought by the Claimant and I so hold. The court has been left to carry out its own investigations which it is not supposed to do.

I do not believe the Claimant as a witness of truth and his denial of there ever being a joint inspection and evaluation is an attempt to avoid accounting for the N16,682,920 which he admitted in Exhibit L. I find Exhibit L to be an admission of the Claimant that N16,682,920 of the Defendant's mobilization was still with him after giving an account of the N96 million advanced to him and I so hold.

The evidence before this Court is that the Defendant could not handover peaceable possession of the four sites due to dispute.

Exhibit S contains a Claim of N55,596,375 as direct loss and or damage which includes claims of loss of profit. The Claimant is claiming loss of profit on work not carried out at 15%. If the work was not carried out due to frustration of contract how then can Claimant be claiming 15% profit for work not done? That does not make sense to me. CW2 who claims he was the maker of the account never explained how he arrived at that amount.

In *A.G. Oyo State vs. Fairlake Hotels (No.2)* (1989) NWLR Part 121 Page 255 at p284 also reported in (1988) 12 SC Part 1, the Supreme Court Per Agbaje JSC said thus: "This court recently in *Uwa Printers Ltd. vs. Investment Trust Ltd.* (1988) 5 NWLR Part 92 Page 110, and earlier on in *J. K. Odumosu vs. ACE* (1976) 11 SC 55 has held that anticipated profit must be established by evidence. The onus is evidently on the plaintiff to prove its anticipated profit. A priori, the onus is on the plaintiff to establish the accuracy of the projected gross profit ... So if for any reason evidence which would help the trial court to assess the accuracy of the projected profit is inadequate, lacking or not convincing, it is the plaintiff who will fail in its claim for anticipated profits".

"In the case of Zenith Plastics Industry Ltd. vs. Samotech Ltd. (2007) 16 NWLR Part 1060 Page 315 at P344 Rhodes Vivour JCA (as he then was) held that claims for loss of profit or anticipated profit represent a loss that has crystallized into special damages which must be strictly proved."

*LABIM LIMITED & ANOR V. THE CHAIRMAN, ONA ARA LOCAL GOVERNMENT & ANOR (2013) LPELR-21115(CA)*DANIEL-KALIO, J.C.A held inter alia

"Profit is the excess of returns over expenditure. The appellants conception of profit from the evidence adduced by them included expenditure i.e. payments due artisans and workers. They clearly were not able to establish accurately what the anticipated profit is. Issue one with regard to anticipated profit is resolved against the appellants....It is a firmly established rule that special damages must not only be expressly and fully pleaded, but must be strictly proved by credible and satisfactory evidence. In this case the anticipated profit was not strictly pleaded."

The Claimant's Claim for anticipated profit as contained in Exhibit S having crystalised into special damages ought to have been specially pleaded and proved by concrete and cogent evidence which the Claimant has failed to do.

I have weighed the evidence of the Claimant and the Defendant on the proverbial scale of justice and I find the evidence of the Defendant more probable and believable and I so hold see the case of MOGAJI V. ODOFIN (1978) 4 SC 198.

The Claimant's Claim therefore fails and is dismissed.

On the issue of the Defendant's Counter Claim, Counsel to the Claimant submitted that there is no cognizable, valid and competent counterclaim before this Court because of the Defendant's failure to pay the filing fees for the Counter Claim.

In its overwhelming desire to ensure that substantial justice is what every Court in the land should promote, the Supreme Court has on 13th February 2009, shifted from the position it held in *ONWUGBUFOR VS. OKOYE*(1996) 1 NWLR (pt 424) 252 concerning filing fees. In the case of *ALLOYSIUS AKPAJI VS. FRANCIS UDEMBA* (2009) 2 SCNJ 202, a similar situation to the case in hand, the Registrar of the trial Court, omitted to make an appropriate assessment for a counter-affidavit. The case was concluded at the trial Court with that anomaly and the issue only surfaced at the Court of Appeal, where the Respondent filed an application to pay for the appropriate fees. The Supreme Court, per Ogbuagu J.S.C. in a very pungent and decisive manner, held at page 209, that it is now firmly settled that even the failure to pay filing fees does not raise issue of jurisdiction and the failure to fulfill the provisions of the High Court Rules in that regard is a mere irregularity which when not taken timeously or when acquiesced in becomes incapable of affecting the proceedings in any way.

Order 5 rule 1 of the High Court Civil Procedure Rules direct that

- 1) Where in beginning or purporting to begin any proceeding there has been by reason of anything done or left undone been a failure to comply with the requirements of these rules, the failure shall not nullify the proceedings.

On the above recent Supreme Court authority to which I align myself , I hold that non payment of filing fees for the Counter Claim cannot affect the proceedings in any way.

The Defendant Counter Claimed for the sum of N17,710,915 due the Defendant by the Claimant. The Claimant admitted to having N16,682,920 of the Defendant's mobilization fees with him. Ozde Distilleries Ltd V Diamond Bank plc 2013 18 WRN 165 Iyizoba JCA

The law is trite that where a Plaintiff claims more than he can prove, he is awarded a lesser amount see Hatson Nig Ltd V ACB Plc 2002 12 NWLR (782) 623, 2002 FWLR(119)1476. Contrary to the contention of the Appellant , this trite principle of law is not confined to claims of interest only. As long as there is evidence in proof of the lesser amount, the Court will grant it in place of the higher amount claimed. This does not turn the Court into a Father Christmas....there was evidence in support. I find that the Counter Claim of the Defendant succeeds and the Claimant is ordered to refund the balance of Defendant's mobilization fee in the sum of N16,682,920 to the Defendant.

2. 10% interest per annum is awarded from the date of Judgment.

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HON. JUSTICE N. A. IMOUKHUEDE,
J U D G E
13 /6/2017

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Counsel for the Claimant

Professor N.A. Inegbedion
Counsel for the Defendant.