

**IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA  
IN THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY  
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE E. F. IKPONMWEN –  
CHIEF JUDGE**

TUESDAY, 10<sup>TH</sup> APRIL, 2018

SUIT NO. B/360/2015

**BETWEEN:**

BEST BROTHERS INT. NIG. LTD    í . í    í    í    í    í    í    í    CLAIMANT

**AND**

- |  |   |                 |
|--|---|-----------------|
| 1.    MINISTRY OF ENVIRONMENT AND PUBLIC UTILITIES, EDO STATE. | } | í    DEFENDANTS |
| 2.    EDO STATE GOVERNMENT.                                    |   |                 |
| 3.    ATTORNEY GENERAL OF EDO STATE.                           |   |                 |

**J U D G M E N T**

The Claimant instituted this action vide a Writ of Summons filed on 22/12/2015. By the extant statement of claim filed the same day, paragraph 20 thereof, the Claimant claims against the Defendants as follows:

- (a)    The sum of ₦32,136,343.30 (thirty two million, one hundred and thirty six thousand, three hundred and forty three naira, thirty kobo) only, being the sum due to the Claimant as payment for work done in respect of a contract for the construction of drains along 2<sup>nd</sup> East Circular Road (from St Paulø's Church to Sakponba Road), Benin City, awarded to the claimant by the 2<sup>nd</sup> Defendant, through the 1<sup>st</sup> Defendant, since the 23<sup>rd</sup> of March, 2010.
- (b)    An Order entering judgment against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally in the above stated sum.

- (c) An interest at the rate of 10% per month from the date of judgment till final repayment thereof.
- (d) ₦10,000,000.00 (ten million naira) only as general damages for breach of contract.

The Claimant, through the Managing Director of its Company, Dickson Itua opened its case on 13/11/2017 by adopting his statement on oath filed on 22/12/2015. He stated that he bided for and was awarded the contract for the construction of Drains along 2<sup>nd</sup> East Circular Road (from St Paul's Church to Sokponba Road), Benin City, by the Defendant vide a letter dated 11/8/2008. He performed the terms of the contract and on completion of the job, he raised an interim certificate in the sum of ₦32,136,343.30 (thirty two million, one hundred and thirty six thousand, three hundred and forty three naira, thirty kobo) since 23/03/2010 (in respect of the job done in the performance of the contract) and wrote a letter of demand to the 1<sup>st</sup> Defendant dated 26/02/2010 for payment.

The Claimant wrote several demand notices to the 1<sup>st</sup> Defendant in respect of the above payment but did not receive any response. When the 1<sup>st</sup> Defendant refused, neglected and failed to pay the Claimant the above stated sum, the Claimant wrote a letter dated 20<sup>th</sup> May, 2014 to the 2<sup>nd</sup> Defendant informing it of the delay in payment. The Claimant then gave the Defendants a pre-action notice through its Solicitors. He tendered exhibits A, B, C, D1, D2, D4 and E.

Under cross examination by L.N. Garuba Esq., Claimant represented by Dickson Itua, stated that they were paid a mobilization sum when they

got the contract and that the condition for entering into a formal agreement was not fulfilled by both parties. He said they did not complete the contract but had interim certificate for the job done and were waiting for payment.

At the close of the Claimant's case, the Defendants opened their case on 16/11/2017 with DW1, Eigbo Aifuwa adopting his statement on oath filed on 11/3/2016.

Under cross examination by M. O. Ighekpe Esq., DW1 stated that after exhibit B was issued, the Claimant was mobilized to site with 25% of the contract sum, that is, N19,991,660.00 (nineteen million, nine hundred and ninety one thousand, six hundred and sixty naira). They usually supervise the contract after the contractor has been mobilized. Interim Certificate means a certificate that is issued to a contractor after he has done some work on site. The contractor would be given part payment so that he can carry out his job and issued an interim certificate. The Defendants had a resident engineer, Engr. Grey Obasogie who supervised the project, the Assistant Director Flood and Erosion Control, Engr. Martin Ejemai, the Director of Environment at the time of the project Engr. Robert Aghayedo who were mandated to supervise the claimant's work and sign the interim certificate. The interim certificate was for ~~N~~32, 136,342.30 kobo (thirty two million, one hundred and thirty six thousand, three hundred and forty two naira, thirty kobo) which has not been paid till date.

At the close of evidence, both learned counsel adopted their written addresses on 5/2/2018. In his written address filed on 8/01/2018, I. O. Kadiri of counsel to the Defendants raised two issues for determination:

- (i) Whether the terms of the contract in exhibits A are mutually binding on the parties thereto, after being accepted.
- (ii) Whether the suit is not statute barred.

Learned counsel on issue (i) submitted that the general law is to the effect that if the conditions necessary for the formation of contract are fulfilled by the parties thereto, they will be bound by the contract when duly performed. See **Union Bank of Nigeria Ltd v Prof. Ozigi** (1974) 3 NWLR (pt. 333) p. 386. He said that for a valid contract to be formed there must be mutuality of purpose and intention, that is, they must be saying the same thing at the same time. See **Orient Bank Nig Plc v Bilante Inter Ltd** (1997) 8 NWLR (pt. 515) ratio 2 at page 76, paragraphs C ó E. He pointed out that exhibit A which is dated 11/8/2008 was accepted by the Claimant vide exhibit B which is dated 12/8/2008 and therefore submitted that parties are bound by the agreement that they willingly entered into. See **Artra Industries Ltd v Nig Bank for Commerce and Industries** (1997) 1 NWLR (pt. 483) page 574, ratio 10 at page 593, paragraphs F ó G. Hence, Claimant who willingly entered into the terms of the contract in exhibit A committed a breach of the contract when it failed to comply with the 3<sup>rd</sup> term or clause 3 of the contract within the stipulated 3 months period in 2008 till date. He submitted that the law is to the effect that when breach as occasioned by the Claimant, the Defendants have no option than to treat the contract as existing and sue for special performance or hold that the contract is no longer binding on them while retaining the right to sue for the breach. See **Odusoga v Rickets** (1997) 7 NWLR (pt. 511) page 1, Ratio 7.

Learned counsel on issue (ii) submitted that the suit is statute barred contrary to Section 4(1)(a) of the Limitation Law of Bendel State of Nigeria, 1976 as applicable to Edo State. He said the contract was offered, accepted and awarded in August, 2008 while the writ in this suit was filed on 22/12/2015 a period of more than 6 years within which the Claimant may institute this suit which makes the suit statute barred. See **Usman v Baba** (2005) 5 NWLR (pt. 917, 113, ratio 5, **Emiantor v Nig. Army** (1999) 22 LRCN, 3132 at page 3145, paragraphs D ó E, **Ibrahim v Osim** (1987) 4 NWLR, (pt. 67) 965.

Also, at the time of filing this suit on 22/12/2015, the action had already been statute barred and this Honourable court is precluded from entertaining this action. See **Popoola Elabanjo v Chief Ganiat Idowu** (2006) page 335, FWLR, page 5970 at 5983, **Madukolu v Nkemdilim** 1962 2SC, CNLR, 341. He urged this Honourable court to resolve the issues in favour of the Defendants and thereby dismiss the suit in its entirety.

In his written address filed on 8/01/2018, M. O. Ighekpe Esq. of counsel to the Claimant adopted a lone issue for determination to wit: Whether by the preponderance of evidence, the Claimant has proved the claim of the Claimant and entitled to the relief sought.

Learned counsel on the lone issue submitted that arising from the offer and acceptance including the furnishing of consideration by the Defendant amounting to 25% of the contract sum which is N19,921,660 (nineteen million, nine hundred and twenty one naira, six hundred and sixty naira) the contract was validly executed between the Claimant and the

Defendants. See the case of **C.I. Co. Ltd. v S.B. (Nig) Ltd** 2017 AFWLR, (pt. 891) at 900 pp. @ page 902, Ratio 7.

He submitted that where there is evidence to support a party's case, which is unchallenged or uncontroverted by the other party, the court is bound to accept the evidence. See **Ijebu-Ode Local Government v Adedeji Balogun & Co.** (1991) NSCC (vol.22) 1 @ 19, **Obanor v Obanor** (1976) 2 SC 1 @ 46, **Omogbe v Lawani** (1986) 3 ó 4 SC 108 @ 117, **Leadway Ass. Co. Ltd. v Zeco Nig. Ltd** (2001) 9 NWLR (pt. 673) 480 @ 487.

He urged this Honourable court to grant the Claimant's claim and the relief sought.

I have carefully considered the evidence in this case as well as the legal submissions of both learned counsel. I have also examined the exhibits tendered. There are some basic principles that must be followed between parties to a contract. In the case of **Akinyemi v Odu'a Investment Co. Ltd** (2012) 210 LRCN 180 at 203, the Supreme Court per Muhammad JSC (pp 20 ó 21, paragraphs D ó A held as follows:

*“What then is a valid contract? The Black's Law Dictionary, Eight Edition, defines a valid or binding contract to mean an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. It is elementary to state that there are three basic essentials to the creation of a contract: agreement, contractual intention and consideration. And*

*the normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other”.*

In the case of **Babatunde v Bank of the North Ltd & Ors** (2012) 206 LRCN 61 at 83, the Supreme Court stated as follows: *“It is however trite that a court of law must always respect the sanctity of the agreements reached by the parties. It must not make a contract for them or re-write the one they have already made themselves”.* Furthermore, at page 84, the court stated that: *“The law is that written contract agreement freely entered into by the parties is binding on them. A court is equally bound by the terms of any written contract entered into by the parties”.* At page 101 the contract stated thus: *“In the interpretation of contractual transaction, the court will always hold parties bound by the terms of their agreements when construed according to the strict, plain and common meaning of the words in the instrument as they stand”.*

I have therefore considered exhibit A, which appears to me to be the contract document and required for the determination of this case. I reproduce Clause 3 hereunder. It reads thus: **“Please, note that the contract is subject to your entering into a formal agreement with the Ministry and the production of a suitable Performance Bond from a reputable Insurance Company or Bank quoted in the Nigeria Stock Exchange. The completion period of this contract is three (3 No.) months”.**

The portions highlighted by me are very crucial. The implication is that the contractor (the Claimant) has three (3) months within which to

complete the contract failure of which will amount to a breach of contract. See **Nwaolisah v Nwabufoh** SC (2011) 199 LRCN, page 21, per Adekeye JSC. (pp 38 ó 39, paragraphs G ó B) defined a breach of contract as when a party has acted contrary to the terms of the contract either by not performance or by performing the contract not in accordance with its terms or by a wrongful repudiation of the contract. See also **Pan Bisbilder (Nig) Ltd v FBN Ltd** (2000) 1 NWLR, part 642, page 688 (pp 700 ó 701, paragraphs H ó A).

From the above, I find that the Claimant breached Clause 3 of the contract entered into with the Defendants.

On the issue of the suit being statute barred contrary to section 4(1)(a) of the Limitation Law of Bendel State, 1976 as applicable to Edo State, per Onu, JSC (p. 23, paragraphs D ó F) in **Julius Berger (Nig) Plc v Omogui** (2001) 15 NWLR, (pt. 736), page 420 stated that the time for an action in tort of this nature is to be brought within 6 years. In other words, if an action in tort is not commenced within the said 6 years, it is no longer maintainable.

I also find that the Claimant has exceeded the time frame within which to institute an action in respect of the contract against the Defendants and therefore his action is statute barred. See **Adekoya v FHA** (2008) LPELR ó 105 SC where the court held that òA cause of action is said to be statute barred if in respect of its proceedings it cannot be brought because the period laid down by the Limitation Act or Law has elapsed ó per Tobi

JSC (p. 16, paragraphs C ó D). **Osun State Govt. v Dalami Nig Ltd** 2007 (vol. 148) LRCN, page 1313, paragraph F.

In the case of **Alhaji Aliyu Ibrahim v Judicial Service Committee, Kaduna State & Anor** (1998) 12 SCNJ, 255, per Iguh, JSC at pages 31 ó 32 held thus: í the general principle of law is that where a statute provides for the institution of an action within a prescribed period, proceedings shall not be brought after the time prescribed by such statute. Any action that is instituted after the period stipulated by the statute is totally barred as the right of the Plaintiff or the injured person to commence the action would have been extinguished by such law.

From the above findings, it is clear that the Claimant has failed to prove his claim on the preponderance of evidence and balance of probabilities. The Claimant is not entitled to any of the reliefs claimed and his entire case lacks merit.

This contract in my respectful view was not perfected by the claimant as there is no indication that paragraph 3 thereof (exhibit A) was complied with. The interim certificate is not the contract term. If claimant did not perform the contract within 3 months as stipulated in exhibit A and it emphatically stated inter alia thus: õWe write to accept your offer. We promise quality and timely service deliveryö. The acceptance was not subject to any conditions. The offer of the contract exhibit A was very clear as to what will be made available to the claimant when it stated inter alia thus:

*“It has also been approved that you could draw a*

*Mobilization fee of 25% of the contract sum, should*

*You wish to do so”.*

From the evidence it appears uncontroverted that claimant was provided with 25% of the contract sum of ₦19,686,640. To be sure that claimant had the wherewithal to perform the contract, in the said same paragraph 3 of exhibit A, claimant was expected to have produced ãa suitable Performance Bond from a reputable Insurance Company or Bank quoted in the Nigerian Stock Exchangeö. Of course he ignored this and went ahead to continue the contract without completing same within the 3 months period expected and agreed upon with no variation shown expecting to be paid. The contract has been breached by the claimant three months from August 12<sup>th</sup> 2008 when he accepted. The contract did not specially state that its performance would be based on when mobilization is paid. The finding of this court is that the claimant failed to perform in accordance with the terms of the said contract. Parties are bound by the terms of the contract. The court is not expected to look outside exhibits A and B except there is another document that both parties agreed on terms. The opening of paragraph 3 in exhibit A envisages that this exhibit A will only be subject to ãclaimant entering into a formal agreement with the Ministryö. Claimant has not produced any other formal agreement. In my respectful view, exhibit C is not any other formal agreement, rather, it is a certificate not of completion of job but interim certificate of work done far outside the contract period i.e. on 25/3/2010.

On the above, the Claimantø’s case must fail in its entirety.

I find too that the position maintained by learned counsel for the defendants that the case is statute barred has merit. This action is not maintainable in law.

Hon. Justice E. F. Ikponmwen  
Chief Judge.

**Counsel:**

M. O. Ighekpe Esq. í í í í í í í for the Claimant.

I. O. Kadiri Esq. í í í í í í í for the Defendants .