IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LOKOJA JUDICIAL DIVISION
HOLDEN AT LOKOJA
ON MONDAY, THE 14TH DAY OF NOVEMBER, 2016
BEFORE THE HONOURABLE JUSTICE PHOEBE M. AYUA
JUDGE

SUIT NO: FHC/LKJ/CS/35/2015

BETWEEN:

1. **HIPPO COMPANY NIG. LTD.**
2. **HIPPO OIL AND GAS LTD** } ..... **PLAINTIFFS/ COUNTER DEFENDANTS**

VS

LOWER NIGER RIVER BASIN DEVELOPMENT AUTHORITY ..... **DEFENDANT/COUNTER CLAIMANT**

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JUDGEMENT

This judgement relates to the action instituted by the Plaintiffs by way of Writ of Summons, dated the 05/05/2015 and filed on the same date. The writ was issued on behalf of the Plaintiffs by Sam Akoji, Esq., of Sam Akoji & Co. Adawn Law House) Lokongoma, Lokoja.

The writ was accompanied by a Statement of Claim, Statement on Oath of the Plaintiffs' witness and list of witnesses, list of documents to be relied upon and copies of the documents listed. Upon being served with the Plaintiffs' processes, the Defendant entered a conditional appearance and filed a Statement of Defence and Counter-Claim dated the 06/07/15. The

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Defendant also filed a Statement on oath of each of their two witnesses and other accompanying documents.

At the endorsement on the writ and in the Statement of Claim, the Plaintiffs claim against the Defendants as follows:

1. An Order of this Honourble Court for payment of the sum of N32,175,000.00 (Thirty Two Million, One Hundred and Seventy Five Thousand Naira) being the outstanding contract sum as follows:
   a. The sum of N9,500.000.00 (Nine Million, Five Hundred Thousand Naira) being the value of the Ankpa Township Project which is 100% completed and handed over to the Defendant.
   b. The sum of N1,425,000.00 (One Million, Four Hundred and Twenty Five Thousand Naira) which is representing 15% mobilization payment for the commencement of the Abejukolo Community Project.
   c. The sum of N21,250,000.00 (Twenty One Million, Two Hundred and Fifty Thousand Naira) being the outstanding contract sum due to the 2nd Plaintiff.
2. An Order of this Honourable Court for the sum of N5,000,000.00 (Five Million Naira) to the Plaintiffs for damages/inflation for the delayed payment.
3. The payment of the sum of N2,000,000.00 to the Plaintiffs being legal/professional fees incurred in prosecuting this action.
4. The cost of filing and maintaining this action.

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The hearing of this case commenced on the 08/02/2016. The Plaintiffs called a lone witness, Prince Abdullahi Adejo Obaje, a businessman, doing the business of supply of water, drilling of boreholes for water, etc., whose residential address is at Idah, Kogi State. The PW1 is the Chairman/Chief Executive of the Plaintiffs.

While testifying on oath, the PW1 stated that he had deposed to a statement on oath dated the 05/05/2015 and an additional statement on oath dated the 16/07/2015. He adopted the two statements on oath as his evidence before this Court in this case. PW1 stated that he knows the Defendant in this case. PW1 tendered the documents listed below and all of them were admitted in evidence. The documents are:

1. Exhibit P1 – Constituency Water Project Agreement dated 9th November, 2012.
2. Exhibit P2 -Letter dated 5th November, 2012, addressed to the Managing Director of the Defendant captioned; "Acceptance Letter of Contract Award"
3. Exhibit P3 – Letter of the 2nd Plaintiff to the Defendant dated the 12/01/2008, captioned "Acceptance Letter".
4. Exhibit P4 – Letter to the Chairman/CEO of the 2nd Plaintiff by the Defendant, dated the 06/09/2012.
5. Exhibit P5 – Letter of the Defendant to the MD/CEO of the 1st Plaintiff, dated the 22/10/2012, (Award of Contract).
6. Exhibit P6 – Photocopy of letter dated the 28/12/2007 (Letter of Award of Contract to 2nd Plaintiff).

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7. Exhibit P7A – Letter dated the 25/06/2014 on the letterhead of Sam Akoji & co., being letter of Demand for 1st Plaintiff.
8. Exhibit P7B – Letter of demand for 2nd Plaintiff, dated 25/06/14, on the letterhead of Sam Akoji & Co.
9. Exhibit P8 -Receipt issued to the 2nd Plaintiff by Sam Akoji & Co., dated the 29/10/14.
10. Exhibit P9 – Document titled "HANDING OVER/TAKING OVER FROM HIPPO NIGERIA LIMITED TO OGODO COMMUNITY OF ANKPA LOCAL GOVERNMENT AREA, KOGI STATE" in photocopy dated the 21/12/13.
11. Exhibit P10A – Certificate of Incorporation of the 1st Plaintiff, dated the 18/9/1981.
12. Exhibit P10B – Certificate of Incorporation of the 2nd Plaintiff, dated the 17/05/2000.

The PW1 was then cross-examined by the Defendant's Counsel, M. A. Bello, Esq., under cross examination, the PW1 stated that he became the MD of the 1st Plaintiff when the company was incorporated in 1981. That he was the MD of the 2nd Plaintiff when the Company was incorporated in year 2000. That since 1981 he had been the MD of the 1st Plaintiff and the only one. That Exhibit P1 is the Agreement between the 1st Plaintiff and the Defendant and that the two persons that witnessed the sealing of that agreement were Odediran T. H., as the Managing Director. The PW1 was asked to read paragraph 1.1(c) at page 3 of the Exhibit P1 as well as paragraph 2.9 of page 5 of the same Exhibit P1, and he did. PW1 admitted that two documents were mentioned in paragraph 2.9, namely:

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1. The letter of the Company (1st Plaintiff) giving written notice that they have completed the job.
2. The Defendant to issue a Certificate of job completion if satisfied with the job done.

PW1 stated that in practice, which practice he, PW1, met at the Defendant was that whenever a Contractor completed any job he would go and report to the Defendant verbally that the job has been completed and that the Defendant would send its officials to go and inspect the job but would not issue any certificate of satisfactory job completion. That if the Defendant was satisfied with the job, the Defendant would just pay by e-payment. PW1 admitted that as stated at paragraph 2 of Exhibit P1 he agreed to execute the contract in terms of the agreement, Exhibit P1, and that paragraph 2.9 of Exhibit P1, requires his company 1st Plaintiff to issue a notice of job completion. He admitted that he did not give written notice of job completion, only a verbal notice and that he did not also receive any certificate of job completion for the job done in respect of the other jobs he did for the Defendant. PW1 also agreed that at paragraph 2.13(i) of Exhibit P1, there is an indemnity clause that the contractor shall defend at its own expense any law suit, claiming demand of any nature or kind arising from any of its acts or omissions of its servants, agents or representatives during the pendency of this agreement, etc. PW1 also admitted that paragraph 2.17 at page 7 of Exhibit P1 talks about "Preparation of Final Report" but that he, PW1, did not present any final report of this project in Exhibit P1 to the Defendant as required by paragraph 2.17 of Exhibit P1.

PW1 was shown Exhibit P5, letter of contract award to 1st Plaintiff dated 22/10/12. He admitted that paragraph 4 of Exhibit P5 states that "the contract will be administered in accordance with the terms, conditions and specifications contained in the agreement".

That paragraph 5 of Exhibit P5 states that he was expected to sign a contract agreement with the Authority, the Defendant, before the commencement of the Project and to liaise with the Legal Unit for the signing of the relevant agreement. PW1 was also shown paragraphs 2 and 4 of Exhibit P6 – Photocopy of letter of award of contract to the 2nd Plaintiff. PW1 admitted the content of paragraph 2 of Exhibit P6 but said the agreement referred to in that paragraph was not before the Court and that it must have been lost in transit.

PW1 was also shown Exhibit P9 – the "HANDING OVER/TAKING OVER FROM HIPPO NIGERIA LIMITED TO OGODO COMMUNITY..."
PW1 stated that the persons listed in Exhibit P9 are Community People who were handling the Project. That none of them is a staff of the Defendant and that he would not know whether any of the Community members listed in Exhibit P9 was an Engineer.

PW1 was also shown Exhibit P4 - letter of the Defendant to the 2nd Plaintiff, dated the 06/09/2012. He replied that the money he received through Exhibit P4 were merited by his company because the Defendant's officials inspected the various levels of completion of the Project and paid as appropriate. PW1, however, admitted that he did not show to the Court any document as evidence that he worked for the money paid to him.

PW1 was shown Exhibit P1 again and he admitted that there was nothing in paragraph 2.5 to indicate that a Committee for take over of the Project was to be set up.

PW1 was also shown Exhibit P7A and he admitted that at page 1 thereof reference is made to the handover of the Project to the Defendant and explained further that the handing over of the project to the Community is the same as having over the project to the Defendant, but that he would not say that the Community was the same as the Defendant. PW1 admitted also that the Community members are not signatories to the agreement between the Defendant and the 1st Plaintiff.

Under re-examination of PW1, he admitted that, Exhibit P7A and Exhibit P7B were letters written to the Defendant by his lawyer on his behalf and that Exhibit P4 shows that the Defendant paid the PW1 the amount of N14,750,000.00 but that the amount was not even sufficient payment for the work the 2nd Plaintiff did for the Defendant.

After the re-examination of PW1, the Plaintiff's Counsel applied to close the case of the Plaintiff. The Defendant's Counsel did not object and applied for a date for defence and also stated that the Defendant was contemplating resting her case on the case of the Plaintiffs.

At the next adjourned date, being the 12/04/2015, the Defence Counsel submitted before the Court that the matter was supposed to be for opening of the Defence but that after a review of the evidence of the Plaintiffs, the Defendant has decided to rest her case on the case of the

Plaintiff. He did not call any witness. He applied to close the case of the Defendant and his application was granted. He then prayed the Court to order for filings of written addresses to enable the Counsel on both sides come back on a set date to adopt the written addresses that will have been filed.

The Plaintiffs' Counsel objected to the application of the Defence Counsel that the Court order filing of written address, arguing that by Order 14 Rule 2 of the Federal High Court (Civil Procedure) Rules, 2009, the Defendant having closed its case without giving any evidence, there was no evidence on the side of the Defendant for the Court to review. That by implication, the Defendant was in default of pleadings. That the Defendant filed a Statement of Defence and two written Statements on Oath of two witnesses.

That the said Statements on Oath, having not been adopted, are deemed to have been abandoned and thus, there is no evidence upon which the Plaintiffs can cross-examine the Defendant.

The Court relied on the provisions of Order 22 Rules 1, 2 and 3 of the Federal High Court (Civil Procedure) Rules, 2009, to overrule the objection of the Plaintiffs' Counsel. The Court ordered the parties to file their written addresses.

On the 23/09/2016, the Counsel for the parties adopted their written addresses. The Plaintiffs' written address, dated the 04/05/2016, was filed

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on the same date, and served on the 24/06/2016. The Defendant's written address, dated the 27/06/2016, was filed on the 29/06/2016.

PLAINTIFFS' SUBMISSION IN SUPPORT OF THEIR CASE

In the written address of learned Counsel for the Plaintiffs, three issues were formulated for determination, to wit:

1. *Whether by the failure/refusal and/or neglect of the Defendant to call evidence in this matter, the Defendant should be adjudged as having no defence to the action and judgement should therefore be entered for the Plaintiffs accordingly?*
2. *Whether the Plaintiffs have proved by credible evidence that they are entitled to the reliefs sought in the action.*
3. *Whether the Defendant is not liable to pay the Plaintiffs damages 'inflation and legal professional fees?*

Issue 1

Whether by the failure/refusal and/or neglect of the Defendant to call evidence in this matter, the Defendant should be adjudged as having no defence to the action and judgement should therefore be entered for the Plaintiffs accordingly?

Learned Counsel answered the above issue in the affirmative. He submitted that failure or neglect of the Defendant to call evidence in this matter is a clear manifestation that they do not have any credible evidence to this action.

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He referred to the statement of Defence and submitted that while at paragraph 3 thereof, the Defendant averred that there was no contract between the Plaintiffs and the Defendant, at paragraph 4 of the same Statement of Defence the Defendant tacitly admitted that there was a contract between the parties for which consideration was furnished but whether the contract was executed "at all" or "according to specification", the Defendant would not know. That at paragraph 5 of the same Statement of Defence, the Defendant admitted paying 60% of the cost of the Project "but that the 2nd Plaintiff did not execute the Project at all". Learned Counsel submitted that all that is contrary to the Defendant's position, conveyed to the Plaintiff in Exhibit "P4"; the Plaintiff's letter of 06/09/2012, stating, *inter alia*, "the balance of 40% would only be paid on confirmation of the completion of the project". He argued that one can only complete what had been started. That, moreover, at paragraph 12 of the Statement of Defence, the Defendant initially admitted the fact that the Plaintiffs are "long term customers of the Defendant".

The Plaintiff's Counsel then submitted that the contradictions in the Defendant's statement of Defence are material and that this indicates that they have nothing to hold in defence. That this accounts for why they are shielding the witnesses from adopting their statements so that they would not face the fire of cross examination.

Learned Counsel submitted that, the Plaintiffs had, in proof of their case called a lone witness and tendered twelve documents before closing their

case. That the Defendant elected, on their part, not to call evidence but to rest their case on that of the Plaintiffs. That even though the Defendant had, on the 06/07/2015, filed a statement of Defence and two statements on oath of Rasaq Tunle Rahaman and Joseph Foluso Olawole, the Defendant chose to abandon the same by refusing to call the two witnesses to adopt their statements on oath and be cross-examined. It was the submission of Counsel that it is trite that the said pleadings filed by the Defendant on the 06/07/2015, which the Defendant abandoned, does not constitute evidence. He relied on the Supreme Court case of ***AIYEOLA v. PEDRO*** (2014)44 WRM 1 at 17 and the Court of Appeal case of ***ACTION CONGRESS OF NIGERIA v. HARRISON*** (2012) 22 WRN 75 at 78. Otherwise, cited in support of the above point are:

- AFEWAI MICROFINANCE BANK LTD. V. SEACOS (NIG.) LTD. (2014) 27 WRN 83 at 86 Ratio 1.
- AMACHIE V. INEC (2008) 10 WRN 1 at 69 Ratio 45.
- LADOTUN v. OYEWUMI (2008) 35 WRN 58 at 62.
- MOBIL PROD. (NIG.) UNLIMITED v. UDO (2008) 36 WRN 53 at 66.

Learned Counsel urged the Court not to make any finding on the averments in the Statement of Defence since they are not backed by evidence, the Statements on Oath having been abandoned by the witnesses. That such abandoned averments must be struck out by the Court. That the implication is that the matter is undefended, the Defendant having no evidence to be considered.

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Furthermore, learned Counsel submitted that the Defendant's witnesses' Statements on Oath having not been adopted by them, cannot be treated as affidavit evidence or any form of evidence at all. He relied on the cases of ***SPLINTERS (NIG.) LTD. v. OASIS FINANCE (LTD.)*** (2013) 145 at 155. ***MBANEFO v. MOLOKWU*** (2014) 15 WRN 35 at 46; ***OKONKWO v. KANO AGR. SUPPLY CO. LTD.*** (2013) 8 WRN 69 at 72-73; ***JIMOH V. AYANDOYE*** (2012) 26 WRN 32 at 39 Ratio 5, ***NCN v. INEC*** (SUPRA).

Learned Counsel urged this Honourable Court to hold that the Defendants having not given evidence in support of their pleadings are deemed to have accepted the facts adduced by the Plaintiffs notwithstanding their general traverse and to rely on the unchallenged and uncontroverted evidence of the Plaintiffs in this matter.

In addition, it was the submission of Counsel that the action of the Defendant in calling no evidence is tantamount to admission. That this implies that the entire evidence of the Plaintiffs witness contained in the Statement on Oath dated the 05/05/2015 and Additional Statement on Oath dated the 16/07/2015, having not been challenged by the Defence, is deemed to have been admitted. He submitted that it is trite that a fact which is admitted needs no further proof and the same would be taken as established. He stated that the Defendant is bound by the evidence called by the Plaintiffs which amounts to admission. He relied on the case of ***IDOGHOR v. IDOGHOR*** (2014) 14 WRN 164 at 168.

Learned Counsel also submitted that the Court is to restrict itself to pleadings filed by the parties and evidence adduced in support of the

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same to make findings on issues in controversy and relied on the case if ***ADETULE v. ADETULE*** (2015) 32 WRN 37 at 41.

Again, it was the submission of Counsel that the Court is duty bound to consider the totality of the evidence led by each party and then place it on an imaginary scale of justice to see which of the two sides of the scale of justice it is tilting to. He cited in aid, the case of ***LAGGA v. SARUMA (2008) 50 WRN 52 at 70***. He also submitted that this Court can only exercise this duty of considering evidence before it in favour of the Plaintiffs as the Defendant has no evidence before this Court. That the scale of justice here is one sided and so must naturally tilt on the side of the Plaintiffs.

Learned Counsel argued that the submission of Counsel, no matter how brilliant cannot be a substitute for credible evidence. He relied on the case of ***JOSHUA v. ALI*** (2015) 33 WRN 77 at 90.

He further argued that the Defendant's Counsel's submission in written address can never be substituted for evidence as arguments of Counsel in written address must be based on facts established by the evidence on record by the parties themselves; but that there is no evidence on record for the Defendant.

As regards the Counter Claim of the Defendant, learned Plaintiffs' Counsel submitted that the same was filed but also abandoned. That the Counter Claim is as baseless as the Statement of Defence, hence it was

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abandoned. That a Counter Claim is an independent and distinct action which needs to be distinctly proved. He relied on the case of ***IHE KWOABA v. OYEDEJI*** (2013) 28 WRN 97 at 102.

He argued further that, evidence having not been led on those facts raised in the Counter Claim, the said Counter Claim is bound to fail. This Court was urged to so hold.

In conclusion on issue 1, learned Counsel urged this Court to resolve issue 1 in favour of the Plaintiffs and enter judgement as per the reliefs sought in the Claim as the Claim has not been rebutted by the Defendant.

Issue 2

Whether the Plaintiffs have proved by credible evidence that they are entitled to the reliefs sought in the action.

Learned Counsel submitted that in a civil case such as the one in hand, the general principle is that the Plaintiffs have the onus of proving that they are entitled to the reliefs sought. That the Court, in consideration of the matter, engages an imaginary scale of justice in order to determine in whose favour the scale tilts on a preponderance of evidence. That the Plaintiffs have argued under issue 1 that the failure of the Defendant to call evidence is an indication of the fact that the Defendant has no meaningful defence to this action. That the scale of justice is only tilting on the side of the Plaintiffs. That from the Statement of Defence, filed by the Defendant, it is clear that the Defendant has no defence to the action. That at paragraph 1 of the Statement of Defence, the Defendant allegedly

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denied paragraphs 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Statement of Claim.

That paragraphs 1, 6, 7, 8, 9, 10, 11, 12, 16 and 19 of the Statement of Claim are purely documentary. That the averments of the Plaintiffs in those paragraphs are backed up by documents to confirm their position. That Exhibits P2, P3, P4, P5, P6, P7A, P7B, P8, P9, P10A and P10B are all relevant and prove the position of the Plaintiffs as averred in the Statement of Claim. Learned Counsel illustrated that the fact that there are letters of award of contract issued to the Plaintiffs is covered by Exhibits P5 and P6. That the Plaintiffs accepted the various awards is proved by Exhibits P2 and P3. That the fact that mobilization/part consideration was furnished to the 2nd Plaintiff is proved by Exhibit P4. That the fact that the Plaintiffs are registered companies is also covered by Exhibits P10A and P10B. That the fact the Community has taken over the completed borehole is also covered by Exhibit P9. That the hiring of Sam Akoji, & Co., to prosecute this case for the Plaintiffs is proved by Exhibit P8 and that Exhibit P1, P2, P3, P4, P5 and P6 demonstrate that there is a valid and subsisting contract between the parties. That, on the other hand, the Defendant has not put up by way of evidence any fact to contradict or disprove the facts relating to this matter. That the cases cited under issue 1 by the Plaintiffs' Counsel to show the effect of failure of the Defendant to call evidence in this matter are all relevant here. That it is trite that documents tendered and admitted in evidence in Court are like words uttered and do speak for themselves. He relied on ***OGUNDELE***

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& ANOR v. AGIRI & ANOR (2009) 12 S.C. (Pt.1) 135. He argued that even if the statements on oath were to be adopted, the evidence will not change the position of the Plaintiff' case because documentary evidence cannot be altered, modified or varied by oral evidence. He cited in aid the case of ***FBN PLC. v. NWADIALU & SONS LTD.*** (2015) 22 WRN 103 at 125 and ***FEDA v. KUDA ENGR. AND CONSTR. CO. LTD.*** (2014) 34 WRN 72 at 83.

Furthermore, learned Counsel argued that as for paragraphs 13, 14, 15, 17 and 18 of the Statement of Claim which are not documentary, the testimony of the Plaintiffs is credible and ought to be given evidential weight in the assessment and/or consideration of this matter. That from the contradictory positions of the Defendant as shown in the averments at paragraphs 3, 4, 5, 8, 10, 12, 13 and 15 of the Statement of Defence, the Defendant appears not to have any records to fall back to on these transactions. Learned counsel copied out paragraphs 4, 5, and a portion of Exhibit P4 and pointed out the Defendant's own contradiction. He then relied on the case of ***AJONGE v. NWACHUKWU*** (2011) 16 WRN 38 at 45, per Garba, JCA, to urge the Court to reject the contradictory evidence of the Defendant.

Learned Counsel also relied on Exhibit P1, a contract agreement executed in respect of the 1st Plaintiff's contract with the Defendant, dated the 09/11/12 and submitted that the contract provides for how payment is to be effected in clause 2.8 of the contract agreement.

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That clause 2.8A provides for 15% mobilization while clause 2.8B provides for payment to the contractor on the basis of valuation of work executed. That the Plaintiffs valuation or measure of work done is 100% for the Ankpa Township Project and 2nd Plaintiff's work done is put at 95%. He referred to paragraph 14 of the Statement of Claim. He also argued that just as the Defendant ignored to issue a contract agreement in respect of the 2nd Plaintiff, the Defendant also failed to inspect and certify the work that was done despite repeated demands. That the Defendant's speculative position denying justification for payments to the 2nd Plaintiff because 2nd Plaintiff did not execute the Project according to specification or at all is expressed at paragraphs 4 and 5 of the Statement of Defence. That the Defendant's averments at paragraphs 4 and 5 of the Statement of Defence are a reflection of failure on her part to perform their supervisory roles in the contract for which the Plaintiffs cannot be responsible. That as at today, whether the Plaintiffs have executed the Project "at all" or "executed the project according to specifications", the Defendant does not know. That on the part of the Plaintiffs and as averred at paragraph 14 of the Statement of Claim, the Plaintiffs' performance is assessed at 95% and that this has not been countered or challenged by the Defendants.

That the implication of the above, going by clause 2.8b of the Contract Agreement is that the 2nd Plaintiff is entitled to payment for the 95% of the contract sum, having performed 95% of the contract. That the 1st Plaintiff is also entitled to 100% payment in respect of the Ankpa Township Project which is fully performed and delivered.

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Learned Counsel, maintained that from the evidence adduced at trial, the Plaintiffs have been able to prove that there exists between the Plaintiffs and the Defendants a valid and subsisting contract for the construction of two complete package constituency water projects at Ankpa township and Abejukolo community and drilling of two boreholes in complete package at Efin Community and Ulaja Community for which part consideration was furnished.

Learned Counsel relied on the definition of contract, in the case of ***EMORI v. ESUKU*** (2013) 4 WRN 90 at 94 and submitted that the five ingredients of a valid contract are present in the contract between the two parties herein. They are:

1. Offer
2. Acceptance
3. Consideration
4. Intention to create legal relationship
5. Capacity to contract.

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That the Plaintiffs, in proof of their claim, showed these five basic ingredients in the contract between them and the Defendant. He cited the Supreme Court case of ***BILANTE INTERNATIONAL LTD. v. N.D.I.C. (2012) 9 WRN 1 at 8*** and submitted that from the evidence led, documentary evidence tendered and accepted by the Court and oral testimony in line with pleaded facts by the Plaintiffs, it is clear that a binding contract exists between the Plaintiffs and the Defendant for which

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the Plaintiffs seek enforcement of the same. He cited in support, the case of ***OGUNDELE & ANOR v. AGIRI & ANOR*** (2009) 12 S.C. (PT.1) 135. He submitted in conclusion under issue two that a thorough review of these documents, Exhibits before the Court, reveal that the Plaintiffs have a prima facie case against the Defendant and for this reason, the Court be urged to resolve issue 2 in favour of the Plaintiffs.

Issue 3

Whether the Defendant is not liable to pay the Plaintiffs damages/inflation and legal/professional fees?

Learned Plaintiffs' Counsel submitted that in pursuance to the contract between the plaintiffs and the Defendant and due to non-release of funds by the Defendant in compliance with the terms of the contract, the Plaintiff had to source for alternative means of funding in order to complete the projects, so as not to lose what was on ground.

That this alternative source of funding was at an interest rate of 20% per annum. That the Plaintiffs had made several demands on the Defendant for the payment of the outstanding contract sum but the Defendant has neglected and/or refused to pay. He relied on the case of ***BILANTE INTERNATIONAL LTD. v. N.D.I.C.*** (supra) where the Supreme court held that "Damages follow breach of contract and is payable by the party responsible for the breach".

He argued further that the essence of damages is to compensate the successful party for the loss incurred in the litigation. That the position of the law is that costs follow events and that a successful party should not

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be deprived of costs. He relied on the case of ***MASTER HOLDING (NIG.) LTD. & 1 OR. v. EMEKA OKEFIENA*** (2011) 38 WRN 50 at 54. He submitted that the Plaintiff has incurred losses as follows:

a. Legal/Professional fees of his Solicitors.
b. The cost of filing and maintenance of this action.
c. The losses associated with time such as inconveniences and inflation.
d. Cost of borrowed funds to execute the contract.

That the Plaintiff should be entitled to costs including but not limited to professional fees, the cost of filing and maintaining of this action and cost of funding. He relied on the cases of ***MASTER HOLDINGS (NIG.) LTD. v. NWANDU*** (2011) 38 WRN 50 at 76-77 and ***ADVERT-ANGE LTD. v. ESCADE VENTURES LTD.*** (2013) 46 WRN 172.

In conclusion, learned Counsel urged this court to resolve issue 3 in favour of the plaintiffs and to hold that the plaintiffs are entitled to damages/inflation of the sum of N5m for the delayed payments and the sum of N2m being legal/professional fees as endorsed in the statement of claim, more so that this is not contested as by the Defendant.

DEFENDANT'S ARGUMENT IN OPPOSITION TO THE CLAIM OF THE PLAINTIFFS.

Learned Counsel for the Defendant in his written address, submitted in the "introduction" section thereof that this case ought to be decided on the pleadings, the evidence/oral and documentary, and the applicable law not on Counsel's fanciful submissions which cannot take the place of evidence. That it is trite that Courts do not decide cases on mere conjecture or

speculation, being courts of facts established before them and law applicable to the subject. He cited in aid the case of ***CHA BASAYA v. ANWASI*** (2010) 10 NWLR (PT.1201) 163 at 189 per FABIYI, JSC and the case of ***AGIP (NIG.) LTD. v. AGIP PETROLI INTERNATIONAL*** (2010) 5 NW;R (PT.1187) 348.

He urged the Court not to pay attention to the fact of the case as related by the Plaintiffs in their final written address.

Learned Counsel then raised three issues for the determination of this Court. They are:

1. *Whether the Defendant's failure to call her witnesses in support of he Statement of Defence automatically entitles the Plaintiffs to judgement on their Claim?*

2. *Whether on the state of the pleadings, the evidence and the extant law, the Plaintiffs have proved their case against the Defendant as required by law?*

3. *Whether the Defendant is entitled to judgement on her Counter Claim?*

Learned Counsel argued issues I and II together and answered each in the negative. He submitted that the Defendant's case is a wholesale denial of the Plaintiff's statement of Claim as can be garnered from paragraphs 1-13 of the Statement of Defence. That the burden of proof is on the Plaintiffs to prove their case as averred in the Statement of Claim. He relied on sections 131-133 of the Evidence Act, 2011 and the case of ***ONIBUDO v. AKIBU*** (1982) 7 S.C. (Peprint) 29 at 42. He further submitted that mere averments, without proof of the facts pleaded in statement of Claim are

not proof of the facts if the facts are not admitted in the statement of Defence. That a Plaintiff is to rely on the strength of his own case and not on the weakness of the Defendant's case. He relied on the following cases.

- FEBSON FITNESS CENTRE v. CAPPA H. LTD. (2015) 6 NWLR (PT.1455) 263 AT 284 C.
- ADEJUMO v. OLAWAIYE (2014) 12 NWLR (PT.1421) 252 at 260 SC.
- OGOLO v. FUBARA (2003) 5 SC 141.
- FAGBUARA v. AIYINBAMI (2015) 6 NWLR (PT.1455) 358.
- UJUATUONU v. ANAMBRA STATE GOVERNMENT (2010) 6 NWLR 405 At 416, per TSAMIYA, JCA.
- OBAWOLE & ANOR v. WILLIAMS & ANOR (1996) 10 NWLR (PT. 477) 146, Per BELGORE, JSC (as he then was).
- ADIGHIJE v. NWAOGU (2010) 12 NWLR (PT.1209) 419 at 45911-46013, Per OGUNWUMIJU, JCA.
- ONIBUDO v. AKIBU (SUPRA)

Learned Counsel maintained that the assertion of the Plaintiffs that the Defendant abandoned his pleading does not automatically entitle the Plaintiffs to judgement. That the Plaintiffs must adduce cogent and credible evidence in support of their claim. He referred to the cases of ***OLUYEDE v. ACCESS BANK PLC*** (2015) 17 NWLR (PT.1489) 596 at 607, F-H; ***ORJI v. UGOCHUKWU*** (2009) 14 NWLR (1161) 207 at 308; ***ODI v. IYALA*** (2004) 4 SC (PT.1) 20; ***IHEANACHO v. CHIGBERE*** (2004) 7 SC (PT.11) 49 and ***OMISORE v. AREGBESOLA*** (2015) 15 NWLR (PT.82) 205 and 322 Per OGUNBIYI, JSC and NWEZE, JSC at 281.

It was the submission of learned Counsel that the present case is on all fours with the case of ***OMISORE v. AREGBESOLA*** (supra) because in an attempt to discharge the burden cast on them, the Plaintiffs called their

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lone witness, Prince Abdullahi A. A. Obaje. That the testimony of the said witness on the 08/02/16 was laced with falsehood. That the witness adopted his Statement on Oath of 05/05/2015 and Additional Statement on Oath of 16/07/2015 as his evidence after taking his oath in the witness box. That the witness, PW1, described himself as the Chairman/Chief Executive Officer of the Plaintiffs. That PW1 was extensively cross-examined and the case of the Plaintiffs thoroughly discredited and demolished. That a review of the evidence of the witness would show that the Plaintiff's case is feeble and incredible that no reasonable tribunal will accord it any credit or can PW1 be regarded as a witness of truth in that the evidence of the witness is full of inconsistencies and irreconcilable material contradictions as follows:

1. That the PW1 testified in paragraph 1 of his Statement on Oath and additional Statement on Oath that he was the Chairman/Chief Executive Officer of the Plaintiffs and under cross examination claimed to have been the Chairman/CEO of 1st and 2nd Plaintiffs since Incorporation of either Company. But that Exhibit P1, executed on the 09/11/2012, was co-executed on behalf of the 1st Plaintiff by her Managing Director, ODEDIRAN T. H., showing that the claim of PW1 that he has been the Chairman/Chief Executive Officer of the 1st Plaintiff since inception is not true. That the explanation of PW1 that ODEDIRAN T. H. was only representing him on that occasion cannot avail him as no oral evidence can be tendered to controvert the contents of documents. He relied on ***OLUYEDE v. ACCESS BANK PLC*** (supra) at 607 F-H.

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2. That PW1 testified at paragraph 9 and 12 of his statement on oath concerning a mobilization fee of 15% specified in each letter of award and that only the 2nd Plaintiff was paid the mobilization, whereas the fact is that only the 1st Plaintiff's letter of award (Exhibit P5) alluded to such mobilization fee. That Exhibit P6 addressed to the 2nd Plaintiff has no such provision.

3. That PW1 testified in paragraph 10 of his statement on oath that in compliance with clause 2.5 of Exhibit P1, the Defendant set up a Committee of Five (5) members of the community who were given the responsibility for the supervision and eventual management of the project upon completion but then under cross-examination he admitted that the clause contains nothing about a committee to be set up for taking delivery of the project and that none of the persons in Exhibit P9 is a staff of the Defendant and that he would not know if any of them was an Engineer. That Exhibit P9 shows that the so-called Committee was unilaterally set up by the Plaintiffs. That procedure is contrary to Exhibit P1 which PW1 tendered which specified that the contractor has agreed with the employer to diligently execute the project in accordance with the terms set forth therein, further providing in clause 1.1(c) that "engineer" shall mean the duly designated representative of the employer saddled with the duty to supervise the project.

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4. That PW1 testified in the paragraph 4 of Exhibit P7A that the Ankpa Township Project has been 100% completed and handed over to the Defendant, but testified per contra in Exhibit P9 that the completed project was handed over to the Community through its representative, Abdul Augustine, by the contractor's representative, Sheu Egene. That the PW1 also gave evidence vica voce under cross examination that the persons over to whom the project was handed have no relationship with the Defendant.

5. That PW1 admitted under cross examination that he had nothing to show that the contracts were executed by the Plaintiffs or that payment made to the 2nd Plaintiff was earned or justified – evidence in proof of paragraphs 4, 5, and 8 of the statement of Defence.

6. The only explanation of PW1 for the failure to abide by the terms of Exhibit P1 is that it was not the practice of the Defendant to enforce such contractual provisions. That is a contradiction of clauses 3, 4, and 6 of Exhibit P5 and destroys the Plaintiffs' case.

7. That PW1 also admitted under cross examination that he could not remember whether any agreement was executed between the Defendant and the 2nd Plaintiff, while at paragraph 3 of Exhibit P7B written by her Counsel made reference to such contract executed on 22nd day of April, 2008. That this piece of evidence is unreliable on the ground of self contradiction. That the Defendant will invoke

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section 167 of the Evidence Act, 2011 on the 2nd Plaintiff's failure to tender the said agreement of 22/04/2008, on the ground that if produced, the document would have been unfavourable to the 2nd Plaintiff.

Learned Counsel relied on the *latin maxim allegans contraria non est audiendus* (one who contradicts himself is not to be heard) and urged the Court not to rely on the evidence of the Plaintiffs and their sole witness. He cited in aid the cases of:

- EZEMBA V. IBENEME (2004) 7 S.C. (PT.1) 45 at 56, Per Edoze, JSC and
- AYANWALE & ORS V. ATANDA & ANOR (1988) 1 S.C. At 3-5, Per OBASEKI, JSC.
- AZUBUIKE V. DIAMOND BANK PLC (2014) 3 NWLR (PT.1393) 116.
- OLODO V. JOSIAH (2010) 12 NWLR (PT. 11) 510 at 517, PER FABIYI, JSC.
- THANNI V. SHAIBU (1977) 2 SC. REPRINT 46 at 64-65, Per SOWEMIMO, JSC.

In addition, learned Counsel submitted that the law is trite that parties are bound by their pleadings and are not permitted to give evidence at variance with their pleadings. He relied on ***OKAGEUE V. ROMAINE*** (1982) 5 SC (REPPINT) 66 at 73-75 Per, IDIGBE, JSC and ***MONKOM & 2 ORS. V. ODILI*** (2009) 11 NWLR 213 at 223 Paragraph 27, Per OMOIRI, JCA, (of blessed memory).

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He submitted that the PW1 is not entitled to the honour of credibility on account of several contradictory pieces of evidence given on oath by him and on material parts of their case. It was the submission of the Counsel also that the quality or probative value of evidence given by a party to a civil suit is determined by five factors as enunciated by the Supreme Court in ***ODOFIN v. MOGAJI*** (1978) 1 LRN 212 at 213 -4, Per Fatail-Williams, JSC, (as he then was).

Learned Counsel also referred to the cases of ***NWANKWOALA v. STATE*** (2006) 7 SC (PT.III) 1; ***ANYAWWU v. UZOWUAKA*** (2009) 13 NWLR (PT.1159) 445 at 486 D-F.

Learned Counsel argued that in the present case, the evidence adduced in support of the Plaintiffs' case does not have any probative value to warrant any weight being awarded it. That the documents tendered in support of the Plaintiffs' case are rather in support of the Defendant's case. That Exhibit P1 stated clear provisions in clauses 2.8 (a)(b) and (c) 2.9, 2.10, 2.11, 2.17(1) and 2.21 which impose specific obligations on the 1st Plaintiff which the 1st Plaintiff did not satisfy.

He urged the Court to rely on the documentary evidence e.g. Exhibit P1 as a hanger to assess oral testimony. He relied on ***LAWAL v. ADEBAYO*** (2009); ***BFI GROUP CORPORATION v. BUREAU OF PUBLIC ENTERPRISES*** (2012) 7 SC (PT.111) 1.

It was also argued that for a Plaintiff to succeed in an action for breach of contract, as in the instant case, he must establish that there was in

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existence an enforceable contract and that there was performance of the said contract by him and breach by the Defendant. He relied on ***BABINGTON ASHAYE v. E.M.A.G. ENT. (NIG.) LTD.*** (2011) 10 NWLR (PT.1256) 479 at 525.

Learned Counsel submitted that the Plaintiffs are harping on failure to pay without proving the existence of the contract and performance of the contract they want to enforce. That the Plaintiffs did not prove the requirements of clauses 2.8(a)(b) and (c), 2.9, 2.10, 2.11, 2.17(1), 2.21 of Exhibit P1 to entitle them to judgement.

This Court was then invited to hold that the Defendant's failure to call her witnesses to testify does not automatically entitle the Plaintiffs to judgement and that the Plaintiffs have not proved their case against the Defendant through the evidence tendered by them as the evidence was discredited under cross-examination.

That the Plaintiffs had a duty to prove their case against the Defendant but that they failed to do so, despite the joinder of issues with them in the statement of Defence.

Furthermore, the learned Counsel argued that the Plaintiff's suit is a claim for special damages which the law requires must be specifically pleaded and strictly proved by credible evidence of such character as would satisfy the Court that the Plaintiff is indeed entitled to the award of the same. He relied on the following cases.

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1. NGILARI v. MOTHERCAT (1999) 12 SC (PT.II) 1 At 17.
2. NEKA B.B.B. MANUFACTURING CO. LTD. v. ACB LTD. (2004) 1 SC (PT.1) 32 at 37, 53, 54 and 56.
3. SHELL PETROLEUM DEV. CO. LTD. v. TIEBO VII (2005) 3-4 SC 137 at 162.
4. ADIM v. NBC LTD. (2010) 3-5 SC. (PT. III) 155 at 169-171.

It was argued that the evidence adduced by the Plaintiffs in this case is not of such probative value and quality required to obtain judgement. That despite paragraphs 2 and 3 of Exhibit P6, the 2nd Plaintiff had no agreement executed to govern the project execution and thus did not tender any. That the 1st Plaintiff that tendered Exhibit P1 completely lost sight of clauses 2.8(a)(b) and (c) 2.9, 2.10, 2.11, 2.17(1), 2.21 thereof and the recital to Exhibit P1 and therefore failed to attach on the agreement and did not plead or tender any evidence of compliance "Bill of Engineering Measurements and Evaluation" as required. The Court was urged to hold that the Claim has not been proved.

Learned Counsel also argued that paragraphs 4 and 5 of the Statement of Defence are not an admission but averments denying the Plaintiff's execution of the contracts either at all, or in accordance to specifications. That in the face of that denial, the Plaintiff had the duty to prove that the relevant project was (1) executed and (2) according to specification. That proof of execution according to specification entitles the Plaintiff to judgement for the contract sum but proof of mere execution without accordance with specification may only entitle the Plaintiff to damages on *quantum meruit*. That there was no proof of either. That Exhibit P4 has

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nowhere shown that the job was commenced nor the fraction of the job for which payment was made. That the insinuation that "one can only complete what had been started" is Counsel's mere fanciful conjecture in written address as there is no such evidence on record. That it is trite that a brilliant address of Counsel on an issue does not take the place of evidence. He relied on the case of ***KOTUN v. OLASEWERE*** (2010) 1 NWLP (PT. 1175) 411 at 436. That Courts of law do not decide cases on speculation and relied on ***AGIP (NIG.) LTD. v. AGIP PETROLI INT.L*** (supra). That PW1 gave evidence under cross examination that he has nothing to show that the payment made to the 2nd Plaintiff was otherwise justified. That this amounts to admission against self interest and the Defendant need not rebut it. He cited in support, the case of ***OMISORE v. AREGBESOLA*** (supra).

It was the contention of learned Counsel that, moreover, Exhibits P4 and P5 provide that formal agreements to be signed would govern the contracts. That one was signed by the 2nd Plaintiff but not tendered, while the 1st Plaintiff did not comply with its provisions in any respect, yet in Exhibit P2 the Plaintiff, "accepted the conditions stated in (Defendant's) letter of offer". That Exhibit P9 also shows that the purported project was handed over to the Community not to the Defendant as required by Exhibit P1 and averred in the Statement of Claim and in the oral evidence of PW1. That having failed to prove their case, there was no justification for the Plaintiffs to make reference to the Statement on Oath of the Defendant's witnesses who did not show up to adopt them. It was submitted that the

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Plaintiffs cannot approbate and reprobate as the law cannot allow the Plaintiff to, in one breath urge the Court to strike out the Statement of Defence because no evidence was tendered in support thereof, and in another refer to evidence which was never tendered through adoption by the deponents. He referred to the dictum of Pats. Acholonu, JSC (of blessed memory) in ***DUKE v. AKPABUYO LOCAL GOVERNMENT*** (2005) 12 SC (PT.1) 1 at 4.

That the Plaintiffs submitted at page 12 of their written address that the Defendant pleaded at paragraph 3 of the Statement of Defence that there are no contracts between the Plaintiffs and the Defendant which is not true. That in any event, pleadings do no constitute evidence. That the purported visit of Pasaq Funle Rahman to the sites cannot be evidence before this Court in the face of the evidence of PW1 under cross examination that he had nothing to show that the projects were executed or that the payment made to the 2nd Plaintiff was justified. That there are no requisite certificates of completion of job to prove due execution of the projects as provided in Exhibit P1. That the Plaintiffs should prove their case before a consideration of the defence arises.

Learned Counsel also contended that the submission at page 14 of the Plaintiffs' written address about the level of work done is liable to be discountenanced by this Court in that a Community reading of clauses 2.5, 2.8, 2.9 and 2.11 of Exhibit P1 will show that the power to evaluate the volume of work done is clearly vested in the Defendant and not the 1st Plaintiff. That the prerogative to inspect the project and give a pass mark

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belongs to the Defendant who is the employer and expected to pay for the job.

The Court was urged to resolve these issues in favour of the Defendant against the Plaintiffs.

Issue III

Whether the Defendant is not entitled to judgement on her Counter-Claim.

Learned Counsel submitted that this issue ought to be answered in the affirmative and resolved in favour of the Defendant. That the 2nd Plaintiff had proved under cross-examination that she had nothing to show for the sum of N14,750,000.00 paid to her by the Defendant. That this goes to prove the Defendant's averment at paragraph 5 of the Statement of Defence and paragraph 2 of the Counter Claim. He relied on ***ODI v. IYALA*** (supra), per TOBI, JSC at pages 32-33.

It was the further submission of Counsel that since the 2nd Plaintiff had admitted that the sum of N14,750,000.00 was paid to her and that she has nothing to show for the payment. That it is trite that admitted facts are no longer issues between the parties and require no further proof. That the Defendant's claim for refund for failure of consideration is therefore made out and requires no further evidence from the Defendant. He cited in aid ***JITTE V. OKPULOR*** (2016) 2 NWLR (PT.1497) 542 at 567 (SC). This Court was urged to resolve Issue III against the Plaintiffs and grant the Counter-Claim.

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Learned Counsel submitted, On the Plaintiffs' Claim for damages and legal fees, that those claims are not made out either in law or in equity. That the Plaintiffs pleaded at paragraph 15 of their statement of Claim that they sought alternative means of funding to complete the projects at 20% interest rate per annum.

That the same averment was repeated at paragraph 16 of the Statement on Oath of PW1, without any details of the lender, the date and amount of the loan, the security given, the loan agreement entered with the lender, etc.

That at paragraph 9 of the Statement of Defence, the Defendant denies that any money was borrowed. That the Plaintiff's have the burden to prove that a loan was obtained which they failed to do. He relied on ***OLUYEDE v. ACCESS BANK PLC.*** (supra) and ***NATIONAL UNIVERSITIES COMMISSION V. ALLI*** (2013), Per UWA, JCA. That the Plaintiffs' failed to prove the case they brought to Court as such they cannot claim for the professional/legal cost of prosecuting the suit especially in the face of clause 2.13(i) of Exhibit P1. He urged the Court to so hold.

PLAINTIFFS' REPLY ON POINTS OF LAW.

In their Reply on Points of law to the Defendant's final written address, the Plaintiffs' Counsel submitted that by stating that the "case ought to be decided on the pleadings, the evidence (oral and documentary) and the applicable law, not on fanciful submissions..." the Defendant has admitted that the case is to be determined on the pleadings, evidence and applicable

law, whereas, the Defendant has no pleadings or evidence before this Court, having abandoned their pleadings.

Learned Counsel submitted that it is trite that what is admitted requires no further proof and that the Defendant has shot itself in the foot by this admission. That the Plaintiffs' case is not one of mere averments but a case supported with evidence, oral and documentary. That the Plaintiff pleaded and tendered 12 documents in support of their Claim. That the Defendant did not object to any of these documents. That the Plaintiffs' also called a witness who testified and gave evidence. That documents when tendered and admitted speak for themselves. He relied on the case of ***YARO v. MANU*** (2014) 526 WRN 42 at 62.

It was the submission of learned Counsel that it is clear from the evidence before the Court that the Plaintiffs were awarded contracts by the Defendant, that they performed their obligations under the contracts and the Defendant has refused or failed to pay for the services rendered to them.

Learned Counsel contended that the Defendant, in support of its position to abandon their pleadings/evidence, relied on the cases ***of UJUATUONU v. ANAMBRA STATE GOVT.*** (2010) (supra), ***OMISORE v. AREGBESOLA*** (2015) (supra) and ***AYANWALE & 3 ORS v. ATANDA & ANOR*** (1988)(supra) whereas these cases are distinguishable from the instant case in that they all have multiple Defendants. That in the case in hand, the Defendant is only one and having abandoned their pleadings, the

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imaginary scale of justice must therefore tilt in favour of the Plaintiffs. That again, in those cases, the evidence of some of the other Defendants proved the cases of others who saw no need to give further evidence. That the case of ***ORJI v. OGOCHUKWU*** (2009) 14 NWLR (PT.1161) 207, cited by the Defendant's Counsel at page 6 of their written address supports the case of the Plaintiffs. That in that case, the Court of Appeal gave two conditions that may entitle the Defendant to judgement even without pleadings. They are:

i. Where the Plaintiff fails to call evidence on the material facts of the case or the Plaintiffs evidence is so unreasonable that no reasonable tribunal can accept his evidence.
ii. If the Defendant through cross-examination and tendering of document through the Plaintiff's witness destroys and discredits the Plaintiff's case.

Learned Counsel submitted that neither of these conditions apply in the present case. That the Plaintiff's case so reasonable and believable. That the Defendant also failed to tender any document through the Plaintiff's witness in destruction of their case.

Furthermore, learned Counsel referred to the case of ***OLODO v. JOSIAH*** (2010) 12 NWLR (PT.11) 510 at 517, cited by the Defendant at page 12 of their written address and submitted that it is not applicable in the present case. That the principle that the Plaintiff cannot rely on the weakness of the Defendant's case is strictly applied in cases of declaration of title to land. That in the OLODO case the Appellant and their witnesses gave a

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conflicting history of the Appellants' root of title to the land, the subject matter of the dispute, but that there is no such dispute in the instant case.

It was also the submission of Plaintiffs' Counsel that the case of ***ODOFIN v. MOGAJI*** (1978) supra, cited by the Defence Counsel actually supports the case of the Plaintiffs. That the Defendant admits that it has no evidence to be weighed, having abandoned their pleadings. That judgement must therefore be entered for the Plaintiffs.

Learned Counsel also submitted that it is not correct as submitted by the Defendant in its final written address that there are contradictions in the evidence of the Plaintiff. That the Plaintiff's testimony in the Statement on Oath to the effect that he is the Chairman and Chief Executive of the companies still stands. That there is nothing wrong in Mr. Odediran T. H. being the Managing Director of the same company, as the PW1 gave evidence that he is the Chairman/Chief Executive Officer of the Companies and not the MD of the company.

It was also argued that the testimony of PW1 at paragraphs 9 and 2 regarding mobilization of 15% has nothing to do with inconsistency. That if Exhibit P6 had no such provision and the 2nd Plaintiff is mobilized, that would not amount to inconsistency. That, afterall, clause 3 of the said Exhibit P6 provides that:

> Other relevant documents and information required for the execution of the contract projects would be delivered... to the Plaintiff by the

Executive Director. That 15% mobilization is one of the other relevant information required and that this was paid to the Plaintiff.

It was also submitted that Exhibit P9 is a relevant document which was pleaded and with no objection by the Defence, was admitted in evidence. That whether it was not in compliance with clause 2.5 of Exhibit P1 or not does not amount to contradiction, but, probably, raises the question of the weight to be attached to it.

Learned Counsel also contended that the practical approach is that, borehole projects, when completed are handed over to leaders of the benefitting communities. That the action of the Plaintiff in handing over the boreholes to community leaders was in compliance with the directive of the Defendant. That it is at the commencement of the contract that these leaders are shown the siting of the project which is determined by the contractors (the Plaintiffs herein) and principal (the Defendant herein). That if the Defendant had testified, the Court would have been in the position to confirm that the action of the Plaintiffs is on the instruction of the Defendant. That there is, therefore, to contradiction, therein.

It was also argued that the Defendant failed to issue a certificate of performance/valuation, but that nothing stopped the Defendant from inviting the Court to the locus to see the project if they assert that the contractors did not execute the contract. That the PW1 had answered in a re-examination question that the payment made so far for that project was not enough for the jobs executed. That the re-examination was to clear the

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ambiguity that the payment made to the 2nd Plaintiff was justified. That there is no issue of contradiction there.

In addition learned Counsel contended that it is not true that the Plaintiff's witness proffered explanation for their failure to abide by the terms of Exhibit P1. That the testimony of the Plaintiffs under that heading was direct and positive, pointing, unambiguously, to the fact that the Defendant abdicated in their responsibility to issue valuation certificate to the Plaintiffs. That this cannot amount to contradiction.

In further response to the Defendants final written address, it was submitted that the fact that offer and acceptance were concluded and part consideration furnished on this contract is not in doubt. That execution of an agreement is not an absolute requirement for a contract to be binding on the parties. That section 167 of the Evidence Act, 2011 was quoted out of context by the Defendant in that there is overwhelming evidence of the fact that the Defendant is indebted to the Plaintiffs in respect of this matter.

That assuming but not conceding that there may have been minor inaccuracies and the discrepancies in the testimony of PW1, such minor discrepancies do not touch the justice or substance of the case and do not amount to material contradictions and so cannot shake the credibility of the witness. He relied on the cases of ***ADEMU v. ADEMU*** (2013) 45 WRN 53 at 57 and ***OJEABUO v. FRN*** (2014) 25 WRN 135 at 161.

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It was argued that if there are any discrepancies at all in the testimony of the Plaintiffs' witness, they do not touch the substance of the case of breach of contract between the parties. That the material issues in this trial are that there was offer and acceptance between the parties, that there was part consideration furnished by the Defendant to the Plaintiffs and that there is also performance of the contracts by the Plaintiffs. That the Plaintiffs tendered 12 documents in support of their case and none contradicts the other. That the documentary evidence speaks louder than oral evidence on the issues in contention and are preferred. He again cited in aid the case of ***YARO v. NANU*** (supra). That the evidence of the Plaintiffs in this case are admissible and that all the Plaintiffs' documentary evidence were admitted with no objection from the Defence. That the documents were relevant, credible and conclusive to the effect that the contracts having been duly awarded were performed. That the evidence of the Plaintiffs is more probable than that given by the Defendants, which in fact did not give any evidence.

In further reply to the final written address of the Defendant, the Plaintiffs argued that although the Defendant alleged that there was clause 2.8 in Exhibit P1, yet the Defendant went ahead and paid to the 1st Plaintiff the 15% mobilization of contract sum, even when the 1st Plaintiff did not fulfill the obligation stated therein. That this amounts to a waiver on the part of the Defendant of clause 2.8 of Exhibit P1. He relied on the cases of ***NIG. PORTS PLC. v. DUNCAN MARITIME VEROTURES (NIG.) LTD.*** (2011) 6 WPN 88 at 92 and ***AUTO IMPORT EXPORT v. ADEBAYO*** (supra).

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Let me point out, immediately, that the above point of argument is a muddle-up because by their showing at paragraph 11 of the Statement of Claim and paragraph 12 of the Statement on Oath of PW1, 15% mobilization was never paid to the 1st Plaintiff.

That clause 2.11 stipulates that the project site be accessible and that in the present case, it is. That details of the specific location of the project site was indicated in the letter of award of the contract which is already in evidence.

That by virtue of clause 2.9, the 1st Plaintiff gave enough notice of the completion of the job to the Defendant via exhibit P7a; particularly paragraph 4 thereof. This Court was urged to discountenance the submission of the Defendant that Exhibit P7a is not the same as what is referred too in clause 2.9. That such submission is based on technicality, whereas the general rule is that equity looks to the substance rather than form. That the cases of ***LAWAL v. ADEBAYO*** (supra) and ***BFI GROUP CORPORATION v. BPE*** (supra) cited by the Defendant in their final written address support the case of the Plaintiff.

Learned Plaintiffs' Counsel again argued that in line with clause 2.17 the 1st Plaintiff submitted a Final Report through the aforementioned letters. He urged this Court to discountenance the Defendant's submission in paragraph 3.13 of their final written address. That the case of ***BABINGTON ASHAYE v. E. N. A. ENT. (NIG.) LTD.*** was cited out of context by the Defendants.

It was the submission of Counsel, also, that by paragraph 3.15 and 3.16 of the Defendant's final written address, the defendant is misrepresenting a claim for breach of contract as one for special damages. That the Plaintiffs case is a claim for breach of contract which is different from that of special damages. He relied on the case of ***NMA INC. v. NMA*** (2013) 29 WRN 28 at 43. That the cases of ***NGILARI V. MOTHERCAT*** (supra), ***NEKA B.B.B. MANUFACTURING CO. LTD. v. ACB LTD.*** (supra); ***SHELL PETROLEUM DEV. CO. LTD. v. TAEBO VII*** (supra) and ***ADIM v. MBC LTD.*** (supra) were cited out of context and not relevant.

Learned Counsel also pointed out that paragraph 3-18 of the Defendant's Final Written Address is a misrepresentation in that the Plaintiffs never approbated and reprobated. That the Plaintiffs did not anywhere in their written address admit that the Defendant has any evidence before this Court, nor did the Plaintiffs state that pleadings constitute evidence. That the Plaintiffs merely canvassed that even if the Defendant's pleadings were evidence, it was full of material contradictions.

Finally, learned Counsel submitted again that the Defendant abandoned their pleadings without calling evidence in support of the counter-claim and that the purported counter-claim has failed. That a counter-claim is a district action, totally different the present action.

In conclusion, he submitted that the Plaintiffs' case has merit and urged this Court to enter judgement for the Plaintiffs, accordingly.

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RESOLUTION OF THE ISSUES

Facts of the case.

The Plaintiffs are limited liability companies registered with the Corporate Affairs Commission carrying on business as contractors in drilling of boreholes, etc. See Exhibit P10A and P10B, herein. By a letter dated 22/10/12, a contract was awarded by the Defendant via Exhibit P5 to the 1st Plaintiff for the construction of two complete package constituency water projects, namely:

1. Ankpa Township for the sum of N9,500,000.00.
2. Abejukolo Community for the sum of N9,500,000.00

The 1st Plaintiff accepted this offer via letter of acceptance dated the 5/11/12 (Exhibit P2). A "Constituency Water Project Agreement" was executed by the parties. See Exhibit P1. The 2nd Plaintiff was also awarded a contract on 28/12/2007 for the drilling of boreholes, in two communities as follows:

1. Efin Community for the sum of N12,500,000.00
2. Ulaja Community for the sum of N12,500,000.00

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See Exhibit P6. By Exhibit P3, the 2nd Plaintiff accepted the offer. The Defendant caused part consideration to be paid to the 2nd Plaintiff in the sum of N14,750,000.00. The 2nd Plaintiff also admitted that mobilization fee of 15% of the contract sum was paid to her while the 1st Plaintiff was not given mobilization fee of 15%. The 1st and 2nd Plaintiffs, based on offer and acceptance, commenced work on the projects. The 1st Plaintiff alleges that the Water Project at the Ankpa Township had been completed and handed over to a Committee of 5 members set up by the Defendant. The 1st

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Plaintiff also alleges that because mobilization of 15% was not paid to her, it could not commence work at the Abejukolo Community Water Project.

The 2nd Plaintiff alleges that the boreholes at Efin and Ulaja Communities are almost completed and that the borehole at Efin Community is already in use because the community chief provided a temporary source of power supply. That the borehole at Ulaja Community is almost completed and what remains is the procurement and installation of power generating set and reticulation. The Plaintiffs therefore claim the sum of N32,175,000.00 as the outstanding contract sum, N5,000,000.00 as damages/inflation for the delayed payments and N2m being legal/professional fees incurred in prosecuting this suit. See the writ of summons and paragraph 19(i)(a)(b) and (c) (ii) – of the Statement of Claim as well as paragraphs 17-20 of the Statement on Oath of Prince Abdullahi, A. A. Obaje, Plaintiff's witness (PW1 herein).

The Plaintiffs called a lone witness and tendered twelve documentary Exhibits in support of their case. The Defendant did not call any witness even though the Defendant had filed pleadings (Statement of Defence) and written Statements on Oath of two witnesses. He, however, thoroughly cross-examined the Plaintiff's witness.

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ISSUES FOR DETERMINATION

Parties on both sides, each deposited three issues for determination. The issues are similar and for reasons of coordinated articulation, the issues formulated by the Defendant in her written address will be taken as issues

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for determination in this judgement. For ease of reference, I will copy the said issues hereunder, again, as follows:

Issue 1:

1. *Whether the Defendant's failure to call her witnesses in support of her Statement of Defence automatically entitles the Plaintiffs to judgement on their claim.*
2. *Whether on the state of the pleadings, the evidence and the extant law, the Plaintiffs have proved their case against the Defendant.*
3. *Whether the Defendant is not entitled to judgement on her counter-claim.*

Learned Counsel for the Plaintiffs answers Issue 1 in the affirmative. He argued that by not calling evidence in this matter, it shows that the Defendant has no credible defence to this action and as such judgement be entered in favour of the Plaintiffs. The learned Counsel tried to rely on averments in the Statement of Defence to canvass that the Defendant has contradicted herself by stating in one breath that three was no contract between the Plaintiffs and the Defendants and in another, tacitly admitting that there were contracts between the parties and that 60% of the cost of the project was paid to the 2nd Plaintiff.

But again, the Plaintiff's Counsel correctly stated the position of the law that pleadings is not synonymous with evidence and so cannot be construed as such in the determination of the merit or otherwise of a case; and that pleadings cannot constitute evidence. See ***AIYEOLA v. PEDRO*** (2014) (supra); ***ACN v. HARRISON*** (2012) (supra).

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It was also argued that witness statement on oath not having been duly adopted and based on an abandoned statement of Defence cannot be elevated to the level of affidavit evidence at all. See ***MBANEFO v. MOLOKUN*** (2014). That the Defendant, therefore, has no evidence before the Court to be weighed on the imaginary scale.

It appears, however, that the above position of the law has been taken further as was evident in the Supreme Court decision in the case of ***OMISORE v. AREGBESOLA*** (2015) (supra), a case cited by the Defendant's Counsel. In that case, the 3rd Defendant did not call any evidence before the trial tribunal but did cross examine the witnesses of the Petitioners. The Supreme Court held, per Nweze, JSC, in his leading judgement at page 251, that:

> *It remains to be added that it has long been settled that evidence obtained in cross-examination on matters pleaded, that is, on matters on which issues were joined (as was the case at the tribunal), is admissible. In effect, the argument that third Respondent had no evidence before the trial Tribunal is incorrect.*
>
> *The argument would have been impregnable if the pieces of evidence Chief Awomolo, SAN, elicited from the Petitioners Witnesses in cross-examination were not supported by the pleading of either party.*

Furthermore, at page 299, His Lordship stated thus:

> *There was the complaint that the 3rd Respondent – INEC did not call witnesses to clear itself. There was no cause to call on the 3rd*

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Respondent to call witnesses as it devastated the evidence of the Appellants through cross-examination which is a vital tool for perforating falsehood if properly employed, as herein.

In similar vein, Ogunbiyi, JSC, in the same OMISORE case, at Pp.321-322 on the same point stated as follows:

It is trite law and well established that the fact of non-calling of any evidence by the 3rd Respondent did not affect his case adversely, in any way. In other words, by the very act of cross-examining the witnesses of the petitioners, the 3rd Respondent had given evidence.... It is also an established principle of law that where an evidence has been thoroughly discredited during cross-examination so much so that there is nothing left for purpose of weighing on an imaginary scale for consideration then such will certainly need no rebuttal. The two lower Courts, for instance, found the evidence of PW1, PW15 and PW38 upon which the Appellants rely, to be unreliable.

In the present case, the Defendant filed a Statement of Defence and also cross-examined the Plaintiff's witness, PW12 on the issues joined and pleaded in the statement of Defence and indeed the Statement of Claim. See the record of proceedings of this Court in this case of 08/02/2016 wherein the PW1 took his oath, adopted his Statement on Oath and additional Statement on Oath, gave evidence-in-chief and tendered 12 documentary Exhibits which were all, with no objection by the Defendant, admitted in evidence. Thereafter, the PW1 was cross-examined on the

documents/Exhibits in line with the denial of the Defendant at paragraphs 9-13 of the Statement of Defence and the averments of the Plaintiffs at paragraphs 1, 6, 19 of the Statement of Claim.

In essence, based on the fact that the Defendant filed a Statement of Defence and did cross-examine the Plaintiffs' Witness, PW1, in line with the pleadings in the Statement of Defence and Statement of Claim, I hold that the Defendant has adduced evidence before this Court. By not calling the earlier listed witnesses to adopt their written Statements on Oath, the Defendant merely abandoned the Statements on Oath and discarded the idea of calling those witnesses and I so hold.

In his reply address to the Defendant's Written Address on Issue 1, learned Counsel for the Plaintiffs submitted that the case of ***OMISORE v. AREGBESOLA*** was distinguishable from the facts of the present case in that in the OMISOPE case, there were more than one Defendant and that the cases of the other Defendants proved the cases of others who saw no need to give further evidence. I do not agree with the above submission of the Plaintiffs' Counsel. This is because the Supreme Court was emphatic in debunking the claim that the 3rd Respondent did not call evidence and so it had no defence, when the Court held that the cross-examination of the witnesses of the Petitioners at the trial tribunal which accorded with issues joined and pleaded in the Statement of Claim and Statement of Defence of the 3rd Respondent amounted to evidence in that case for the 3rd Respondent.

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Since I have held that the Defendant also, by virtue of his having cross-examined the PW1, has evidence before this Court in this case, it cannot therefore, be the position that by the Defendant not having called witnesses the Plaintiffs are automatically entitled to judgement in their favour. Issue 1 is therefore determined in the negative against the Plaintiffs and in favour of the Defendant.

Issue 2

> *Whether on the state of the pleadings, the evidence and the extant law the Plaintiffs have proved their case against the Defendant.*

In the present case, the Plaintiffs have proved before this Court that there exists a binding contract between the parties as pleaded and confirmed by the PW1 and Exhibits P1, P2, P3, P4, P5 and P6. The Defendant did not object to the admission of the above mentioned documents. The Defendant also did not cross-examine the PW1 along the line of trying to elicit evidence that there was no contract between the parties.

The Plaintiffs averred in their statement of claim that they have executed the contracts to near completion but the Defendant has failed to honour her obligation to pay to the Plaintiffs the outstanding contract sum. See paragraphs 2-16 of the Statement of Claim and paragraphs 2-19 of the witness written Statement on Oath of PW1.

The Defendant denies that the Plaintiffs have executed the contracts as no such completed project has been handed over to the Defendant by the Plaintiffs as stipulated in the contract agreement.

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It is trite law that the burden of proof of a case is borne by he who asserts the affirmative, in this case, the Plaintiffs. See sections 131-133 of the Evidence Act, 2011. It is also trite that mere agglomeration of facts or averments in pleadings without proof of the same with credible evidence, especially, where such facts are not admitted in the Statement of Defence, are not proof of the facts. It is the bounden duty of the Plaintiffs to prove their case and not rely on the weakness of the Defendant's case, even when the Defendant did not lead evidence. See the cases of ***ONIBUDO v. AKIBU*** (1982) 7 SC (Reprint) 29; ***EZEMBA v. IBENEME*** (2004) 7 SC (PT.1) 45 at 62; ***FEBSON FITNESS CENTRE v. CAPPA H.LTD*** (2015) 6 NWLP (PT.1455)263 at 284 C; ***FAGBUARO v. AKINBAMI*** (2015 6 NWLR (PT.1455) 358 at 372 G-H; ***OMORREGBE v. LAWAN*** (1998) 7 SCNJ 246 at 255.

In the statement of Claim, the 1st Plaintiff went to great length to state facts showing that upon the award of the contract and acceptance of the same, the 1st Plaintiff set to work. That even though the mobilization of 15% agreed upon was not made available to the 1st Plaintiff, it went ahead and sourced money at exorbitant interest rate of 20% to commence and complete the borehole at Ankpa Township and handed over the same to the Defendant. The Defendant denied these facts and during cross-examination of the Plaintiffs' Witness was able to establish that no such completed project was ever handed over to the Defendant. This is because the PW1 admitted under cross-examination that the contract agreement Exhibit P1 did not mention anything in clauses 2.5 about the Defendant setting up a committee for taking delivery of the project whereas, at

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paragraph 10 of his Statement on Oath he stated that in compliance with clause 2.5 of Exhibit P1, the Defendant set up a committee of 5 of the community members who were given the responsibility of the supervision and eventual management of the project upon completion. PW1 also admitted that none of the persons in Exhibit P9, the Committee supposedly set up by the Defendant, was a Staff/Engineer of the Defendant.

This shows, as pointed out by the Defence Counsel in his written address and I agree with him, that the Plaintiffs unilaterally constituted the so-called committee and handed over the purported completed project to it. This is contrary to the terms of the contract agreement by the parties, Exhibit P1 which was tendered by the Plaintiffs whereby it was agreed that the Contractor would diligently execute the project in accordance with the terms and conditions set forth therein. Moreover, clause 1.1(c) of the Exhibit P1 also provides that "engineer" shall mean the duly designated representative of the employer saddled with the duty to supervise the project.

Under clause 2.9 of Exhibit P1, it is provided as follows:

> *When the contractor considers that the project has been partially or fully completed and has satisfactorily met the terms of this agreement, it shall give written notice, in that regard to the employer. If satisfied, the employer shall issue a certificate of completion in respect of the project or part thereof.*

It is clear to me that, clause 2.9 stipulates that a written notice be given to the Employer (Defendant) by the 1st Plaintiff upon completion or partial completion of the project. Under cross examination, the PW1 on behalf of

the 1st Plaintiff admitted that he did not deliver any such written notice of completion of job to the Defendant and that he did not also receive any certificate of completion in respect of the project or part thereof. PW1 admitted that he had no evidence to show the Court that the Plaintiffs performed the contracts or that the payment made to the 2nd Plaintiff was earned or otherwise justified. The PW1 explained that failure to abide by the terms of Exhibit P1 was because it was not the practice of the Defendant to enforce such contractual provisions.

That in practice, whenever, a contractor completed a project, such contractor would verbally inform the Defendant so and that the Defendant would send an Engineer to inspect the project and if satisfied with the job done the Defendant would pay the contractor by e-payment without issuing any certificate of completion of job. PW1 stated further that it was the practice he met on ground at the Defendant's system and that he followed it.

Again, the 1st Plaintiff claims that although there is provision in clause 2.8 of Exhibit P1 that the Contractor shall be paid 15% of the contract sum as mobilization fee, such fee was not paid to the 1st Plaintiff up until the date of filing this suit. A close look at Exhibit P1, however, reveals that there is a condition precedent to be fulfilled by the 1st Plaintiff before the mobilization fee of 15% would be paid by the Defendant, to wit: an Advance Payment Guarantee Bond from a reputable Bank or Insurance Company acceptable to the employer.

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In the present case the 1st Plaintiff did not show to the Court evidence of compliance with this condition precedent in order to enable it claim the mobilization fee of 15% as per paragraph 19(iii) of the Statement of Claim.

On the whole it appears glaring that the 1st Plaintiff did not follow the terms and conditions of Exhibit P1, the contract agreement, in its bid to claim outstanding contract sum for projects allegedly executed by it. Little wonder that the Defendant is left in doubt as to whether the 1st Plaintiff executed the project at all or if executed, whether it was executed according to specifications. The oral explanation of the PW1 that the practice of the Defendants was to accept verbal notice of completion of job by a contractor and then goes ahead to pay the contract sum by e-payment without issuing a certificate of job completion is at variance with the clauses in Exhibit P1, a written document. It is the law that parties are bound by documents they have freely subscribed to. See the case of ***ALPHONSUS A. UDO vs. GOVT. OF AKWA IBOM STATE & 2 ORS*** (2012) LPELR – 19727.

In that case, the Court of Appeal Per, Akeju, JCA, on the above point relied on the decision of the Supreme Court of Nigeria in the case of ***IDO NIBOYE-OBU v. NNPC*** (2003) FWLR (Pt.146) 95 at 1007, per Niki Tobi, JSC, stated as follows:

> *A party who has opened his heart, mind and eye to enter into an agreement is clearly bound by the terms of the agreement and he cannot seek for better terms midstream or when the agreement is a subject of litigation, when things are no longer at ease. Although a party may seek for better terms, the Court is bound by the original*

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terms of the agreement and will interpret them in the interest of justice.

In the present case, the 1st Plaintiff seeks to contradict or vary the content of Exhibit P1 by trying to read into it a verbal explanation. That is not permitted at law. In the case of ***UDO v. GOVT. OF AKWA IBOM STATE*** (supra), Tine Tur, JCA, held that:

> *No oral evidence may be adduced to contradict, alter, add to or vary the contents of Exhibit "O" (a document). See* **UNION BANK OF NIG. LTD. v. OZIGI** *(1994) 3 SCNJ 41 and* ***NADUMERE v. OKAFOR*** *(1996) 4 SCNJ 71.*

Similarly, in the case of ***BFI GROUP CORPORATION v. BUREAU OF PUBLIC ENTERPRISES*** (2012) 7 SC (PT.111) 1; (2012) LPELR – 9339 SC, the Supreme Court held, per Fabiyi, JSC, that:

> *When there is conflict in the evidence of witnesses, documentary evidence will serve as a hanger on which the truth shall be resolved. Documents tendered as Exhibits are very vital as they do not embark on falsehood like some mortal beings. See* ***OLUJINLE v. ADEAGBO*** *(1988) 2 NWLR (PT. 75) 238.*

In the present case, this Court prefers to rely on Exhibit P1 which requires the Contractor, 1st Plaintiff, to give a written notice of completion of project and the employer, the Defendant, to give the certificate of completion of job upon being satisfied, rather than the oral testimony of PW1 to the effect that the 1st Plaintiff could give verbal notice of completion of project to the Defendant and the Defendant will also give verbal recognition of completion of the project and not a written certificate to that effect and

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pay the contractor by e-payment. The PW1 also admitted that he did not present a final report on the project execution to the employer as stipulated in clause 2.17(1) of the Exhibit P1.

On the whole it has been shown in the evaluation of the pleadings, evidence and extant law in relation to proof of the case of he who asserts the affirmative, the 1st Plaintiff in this case, that the 1st Plaintiff did not comply with terms and conditions of the contract between it and the Defendant to entitle it to claim for the payment of the 15% of the contract sum as mobilization fee or payment for the execution of the project at the Ankpa Township. The 1st Plaintiff has not adduced evidence before this Court that it has executed the contract and has not also shown, assuming but not conceding that it did execute the project, that it complied with the procedure laid down to notify the Defendant of job completion and the necessary report thereon and I so hold.

The Plaintiffs in paragraph 19(iii) also claim the refund of the sum of N2m against the Defendant being legal/professional fees incurred in prosecuting this action. With respect to the 1st Plaintiff, the Contract Agreement, Exhibit P1, specifically states in clause 2.7 that the contractor shall defend at its on expense any law suits, claims demand of any nature or kind arising from any of its acts or omissions or its servants, agents or representative, during the pendency of this agreement.

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The wording of the clause is clear and unambiguous. The 1st Plaintiff cannot claim the payment of N2m as legal/professional fees for prosecuting this action and I so hold.

As regards the contract agreement between the 2nd Plaintiff and the Defendant, there is evidence of offer, acceptance and consideration. The 2nd Plaintiff also avers in the Statement of Claim that it had been paid the sum of N14,750,000 as part payment for the project and that the said project has been executed up to the level of 95% completion. The 2nd Plaintiff's witness PW1, admitted under cross examination that he had no evidence to show the Court that he executed the job and therefore earned the part payment to him of N14,750,000.00. Learned Counsel for the Defendant argued that as the Defendant had no evidence to show the Court that the Plaintiff earned payment of that sum of money to him, it means that the payment of the N14,750,000.00 was not justified.

In the situation of the 2nd Plaintiff and the Defendant, there is no written agreement presented before this Court in that regard. The PW1 had stated under cross examination that Exhibit P6, the letter of contract award to the 2nd Plaintiff reads at paragraph 2 that:

> *You will execute an Agreement containing all the details pertaining to the Contract Award with the Authority.*

In response to the above quoted paragraph 4 of Exhibit P6, the PW1 said that the Agreement was not before the Court and that it must have been lost in transit.

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PW1 stated that the sum of N14,750,000.00 he received via Exhibit P4 from the Defendant was merited by the 2nd Plaintiff because the Defendant's officials inspected the various levels of the project and paid as appropriate. He, however, admitted that he had not shown to the Court any document as evidence that the 2nd Plaintiff worked for the money paid to him.

There is no written agreement before this Court to enable the Court decipher the nature of the terms and conditions governing the contract between the 2nd Plaintiff and the Defendant like we have in respect of the contract between the 1st Plaintiff and the Defendant.

To my mind, however, it is not in doubt that a binding contract exists between the parties by virtue of Exhibits P6, P3 and P4. It is evident from these Exhibits that there was an offer (Exb.P6) to the 2nd Plaintiff who also accepted the offer via Exhibit P3 and the Defendant gave part consideration as Per Exhibit P4. By Exhibit P7B, it shows that the sum of N14,750,000.00 which had been paid to the 2nd Plaintiff was not sufficient for the execution of the project. This much the PW1 stated during re-examination.

The Defence Counsel has argued that the failure of the 2nd Plaintiff to produce the agreement of 22 April, 2008, referred to in Exhibit P7B at paragraph 3 thereof, being a letter written by the Plaintiff's Counsel is self-contradicting. He thus, invoked Section 167 of the Evidence Act, 2011, to

submit that the said agreement of 22/04/2008 if produced, would have been unfavourable to the 2nd Plaintiff.

The Learned Plaintiffs' Counsel, in his Reply Address contended that execution of an agreement is not an absolute requirement for a contract to be binding on the parties. That section 167 of the Evidence Act, 2011 was referred to out of context.

Well, I agree that once there is offer, acceptance, consideration, capacity to contract, and intention to enter into legal relationship, it is sufficient evidence that a contract exists between the parties. See the case of ***EMORI v. ESUKU*** (2013) 4 WRN 90 at 94 cited by the Plaintiff's Counsel. By paying to the 2nd Plaintiff, mobilization fee and other payments amounting to the sum of N14,750,000.00 shows that there was consideration and clear intention for the parties to enter into legal relationship. Moreover, by Exhibit P4, the Defendant stated that the sum of N14,750,000.00 paid to the 2nd Plaintiff was about 60% of the contract sum and that the balance of 40% would only be paid on confirmation of the completion of the project.

In the said Exhibit P4, the 2nd Plaintiff was enjoined to endeavour to intimate the Authority on the status of the project.

There is no document from the 2nd Plaintiff giving an analysis of the status of the project to the Defendant. The letter written to the Defendant by the 2nd Plaintiff's Solicitor, dated the 25/06/2014, is more like a demand letter

and notice of intention to sue the Defendant if he failed to pay the outstanding contract sum.

I believe that since it was the 2nd Plaintiff's Solicitor that made reference to that contract agreement between the 2nd Plaintiff and the Defendant, and yet did not tender it before the Court, it is a proper situation to invoke Section 167(d) of the Evidence Act, 2011. See the case of ***ONWUJUBA v. OBIENU*** (1991) 4 NWLR (PT.183) 16 SC.

In essence, the 2nd Plaintiff has withheld the evidence, the contract agreement, which could have assisted the Court in determining whether the 2nd Plaintiff complied with the terms and conditions of the agreement in execution of the contract. The 2nd Plaintiff has also failed in adducing credible evidence to show to the Court that it indeed executed the project as the PW1 stated that he had no document to show to the Court that the 2nd Plaintiff had worked for the money paid to him.

The Defendant has denied that the 2nd Plaintiff executed the projects for which part of the money was paid to the 2nd Plaintiff by the Defendant.

Therefore, I hold that the Plaintiff has not adduced credible evidence before this Court to prove his claim that the 1st and 2nd Plaintiffs executed the projects, and are thus entitled to claim the sum of N32,175,000.00 as outstanding contract sum and the sum of N5m as damages/inflation for delayed payments and N2m as Legal/Professional fees for prosecuting this action. See ***NMC v. ALLI*** (2013).

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Issue No.2 is determined in favour of the Defendant, against the Plaintiffs. Having held that the Plaintiffs have failed to prove conclusively their case as to entitle them to the reliefs sought. I have also further looked at Exhibit P1 and in clause 2.74(ii) there is provision for termination of the contract with 1st Plaintiff but there seems to be a mistake in the wording of the clause. I have also looked at clause 2.10. By clause 2.10, which provides for termination of contract, Notice of 7 days is required to be given to the other party. In this case, there is no such notice emanating from one party to the other. The Contract between the 1st Plaintiff and the Defendant, therefore, still subsists. Similarly, looking at Exhibits P6, P3 and P4, the Contract between the 2nd Plaintiff and the Defendant still subsists. The parties, in my view, will do well to look at Exhibit P1 and Exhibit P4 again and go back to the round table in order to resolve their dispute and I so hold.

ISSUE III

Whether the Defendant is not entitled to judgement on her counter-claim.

On this issue, the burden of proof lies on the Defendant. Defendant submitted that it is entitled to judgement on its counter claim. That the Defendant had pointed out at paragraph 3.7(v) of its final written address, that the Plaintiff had admitted under cross examination that it had nothing to show for the sum of N14,750,000.00 paid to her by the Defendant. That this admission has the effect of proving the Defendant's averment at paragraph 5 of the Statement of Defence and paragraph 2 of the Counter

Claim. He relied on the case of ***ODI v. IYALA,*** (2004)4 SC (PT.1) 20, where the Supreme Court held that there is no better evidence against a party than one from a witness called by him who gives evidence contrary to the case of the party.

In the more recent case than ODI's case, the Supreme Court, Per, NIKI TOBI, JSC, in ***ODUTOLA v. PAPERSACK NIG. LTD.***, (2006) 18 NWLR (1012) 470 at 494 C-P, held that admission against interest, in order to be valid in favour of the adverse party, must not only indicate or reflect the material evidence before the Court, it must also vindicate and reflect the legal position; where admission against interest does not reflect the legal position it will be regarded as superfluous. And a Court of law is entitled not to assign probative value to it. In the present case, the Defendant has not shown how the admission of the 2nd Plaintiff with regard to Exhibit P4 vindicates the material evidence before this Court against him. Exhibit P4 shows that payment was made to the 2nd Plaintiff by the Defendant for part of the work done with a promise to pay the other part upon the completion of the job by the 2nd Plaintiff. The admission of the 2nd Plaintiff that it did not have evidence before the Court to show that he earned the money paid to him is not conclusive evidence that the 2nd Plaintiff did not perform the contract in the face of Exhibit P4 which emanated from the Defendant. See the case of ***ODUTOLA v. PAPERSACK NIG. LTD.*** (2006) (supra).

To my mind, the Defendant has failed to adduce evidence sufficient to prove his Counter Claim. See the case of ***ODOFIN v. MOGAJI*** (supra)

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where the Supreme Court listed the ingredients for determining which party has a better case, as follows:

> *Whether the evidence is admissible...relevant...credible... and whether it is more probable than that given by the other party;*

The Counter Claim, therefore, fails because the evidence relied upon by the Defendant to prove it is not conclusive and I so hold.

This shall be the judgement of this Court in this case.

JUDGE
FEDERAL HIGH COURT
LOKOJA

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Hon. Justice Phoebe Msuean Ayua
Judge
14th day of November, 2016

Parties: The parties are all absent from Court.

Appearances: Sam Akoji, Esq., (with him, G. O. Salifu, Miss), for the Plaintiffs and M. A. Bello, Esq., for the Defendant.

JUDGE
FEDERAL HIGH COURT
LOKOJA

Hon. Justice Phoebe Msuean Ayua
Judge
14th day of November, 2016

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RANK HEO (GD)
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