**UMORU YAU ENTERPRISES NIGERIA LIMITED AND ANOTHER**

**V.**

**OLIVER ANUGWOM**

IN THE COURT OF APPEAL OF NIGERIA

THE 25TH DAY OF JANUARY, 1994

CA/J/27/92

**LEX (1994) - CA/J/27/92**

OTHER CITATIONS

2PLR/1994/91 (SC)

*[1994] 3 NWLR (PT.334)*

**BEFORE THEIR LORDSHIPS**

OBINNAYA ANUNOBI OKEZIE, JCA

RABIU DANLAMI MUHAMMAD, JCA

ADRIAN CHUKWUEMEKA ORAH, JCA

**BETWEEN**

1. UMORU YAU ENTERPRISES NIG. LTD

2. UMORU YAU - Appellant(s)

AND

OLIVER ANUGWOM - Respondent(s)

**ORIGINATING COURT**

NA

**REPRESENTATION**

O. MAKANJUOLA - For Appellant

AND

Respondent absent and unrepresented - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

COMMERCIAL LAW – CONTRACT: - Contract for supply of goods for satisfaction of contract to a third party – Advanced payment in anticipation of supply – Failure to supply goods on time leading to termination of contract by third party – Claim for balance on contract sum by supplier – Evidence of undersupply of items ordered and of receipt of some parts of the goods – Relevance of in the computation of sum outstanding

ETHICS – LEGAL PRACTITIONER: Formulation of issues for determination – Verbose and windy statements– Attitude of court thereto

**PRACTICE AND PROCEDURE ISSUES**

PLEADINGS - RELIEF:- Duty of party to plead and prove case - Whether the Court has the power to make a case for a party different from that put forward by the party.

JUDGMENT AND ORDER - RELIEF:- Duty of court where a party fails to plead the appropriate relief available - Whether the court can award a relief not asked for by parties

**MAIN JUDGMENT**

MUHAMMAD, J.C.A. (DELIVERING THE LEADING JUDGMENT):

Sometime in June 1987 the Plateau State Polytechnic asked one David Habbakkuk to supply it with 16 electric typewriters. He contacted his friend, the second appellant herein, a dealer in typewriters to supply him with same. The second appellant had none in stock. They got in touch with the respondent who was the plaintiff at the lower court, to supply them with the typewriters. After negotiations the respondent agreed to supply the typewriters within two weeks. The respondent asked for and was given N34.000.00 as deposit by the appellants. It was agreed that the respondent would supply the typewriters on or before 9/7/87.

The respondent did not supply the typewriters until 28/7/87 and instead of supplying 16 typewriters as agreed, he supplied only 14. Meanwhile the Plateau State Polytechnic has revoked the contract. The appellants all the same took delivery of the typewriters. The appellants then displayed the typewriters in their shop for sale. The respondent also sent his brothers who collected five typewriters to sell at Onitsha.

On 14/9/87 the respondent took out a writ of summons against the appellants claiming the balance of the said typewriters. In his statement of claim he asked for the following reliefs:-

"WHEREOF, the plaintiff claims from the defendants jointly and severally the sum of N24.100.00 being the balance of the said sale of Electrical typewriters bought by the defendants on 25/7/87 and 27/7/87 respectively from the plaintiff and cost of this action".

Pleadings were duly filed and served. In the defence filed by the appellants, they set up counter-claim against the respondent's action for N44.000.00 being   money paid to the respondent as deposit for supply of 16 typewriters which were never supplied and for loss of profit.

At the hearing of the case the respondent as plaintiff testified on his own behalf. The 2nd appellant testified and one other witness testified on behalf of the appellants. At the end of the trial, the learned trial Judge Soluade, J. gave judgment in favour of the respondent and dismissed the appellant's counter-claim. The trial Judge held that time was not of the essence of the contract. He continued:-

"Since time was not of essence of the contract and the defendant accepted the goods without protest as to the type delivered, he is deemed to have waived his right as to time and description.

In respect of the balance of N24.00.00 being claimed by the plaintiff, the evidence of D.W.1 is that the plaintiff sent his brothers Cletus and Duru to collect 5 typewriters which were taken to Onitsha this I believe. The price of each items is N3.000.00 and as such what the plaintiff is now entitled to is N24,000.00 -N15,000.00 i.e. N9,000.00".

Dissatisfied, the appellant's appealed to this court on two grounds of appeal viz:-

"(1) The judgment of the learned trial Judge is unreasonable, unwarranted and cannot be supported having regard to the weight of evidence.

(2) The learned trial Judge erred in law when he awarded the sum of N9,000.00 jointly and severally against the defendants, the learned trial Judge having found in the same judgment that price of each is N3,000.00.

PARTICULARS OF ERROR

(a) That the whole typewriters supplied by the plaintiff was 14 at agreed price of N3,000.00 per one.

(b) That the value of the whole contract shall be N42,000.00 and not N58,100.00.

(c) The defendants having paid to the plaintiff the sum of N34,000.00 as deposit and the learned trial Judge stated in his judgment that brothers of the plaintiff carried away 5 typewriters at N3,000.00 per one and the total value is N 15,000.00 making a total sum of N49.000.00 in possession of the plaintiff.

(d) That the value of the typewriters being N42.000.00 and the plaintiff having been paid N49,000.00, it is the plaintiff to refund to the defendant the sum of N7,000.00 being amount overpaid to the plaintiff."

The appellants filed their brief of argument in which they formulated two issues for determination. The respondent did not file any brief.

At the hearing of the appeal, the respondent even though served, was neither in court nor represented. Counsel for the appellant urged us to invoke the provision Order 3 rule 26 and hear the appeal since the respondent has been served. We agreed and asked the counsel for the appellant to argue the appeal. Counsel then adopted the appellant's brief in its entirety and urged us to allow the appeal.

The issues formulated by the appellants are long winding and verbose. They are a classical example of what an issue should not be. I reproduce them below:-

“(1) The learned Judge having accepted the evidence that the cost of each typewriter to be N3,000.00 and also accepted the evidence that the brothers of the plaintiff/respondent took away 5 typewriters on the instruction of the plaintiff/respondent to Onitsha for the sale, can the learned trial Judge still award N9,000.00 in favour of the respondent taking into consideration the total value of typewriters  at the rate of N3,000.00 per one which is N42,000.00, the deposit of N34,000.00 and also the value of 5 typewriters taken by the brothers of the respondent totalling N15,000.00?

(2) Having regard to the evidence adduced and the fact that the court believed the evidence of D.W.1 that the plaintiff/respondent instructed his two brothers Cletus and Duru to collect 5 typewriters  which were taken to Onitsha for sale, whether in view of the accepted evidence above, the court can still reject the evidence of D.W.1 to the effect that D.W.1 accepted the typewriters when they were delivered outside the period agreed upon by the parties only because the parties agreed to put the typewriters in the showroom of D.W.1 for sale and no more for the purpose it was ordered  originally?"

It was submitted in the appellant's brief that the calculation of the trial Judge was wrong having found that 14 typewriters were delivered at N3,000.00 per unit.

The total cost of the typewriters was N42,000.00 Since 5 typewriters were taken by the respondent's brothers, the appellants were to pay only N27 ,000.00 being the cost of the nine typewriters. Since the appellants have already given the respondent  N34,000.00 and the total cost of nine typewriters is N27 ,000.00, the appellant have overpaid the respondent by N7,000.00 and are entitled to a refund of the said N7,000.00. Relying on the following cases:- Kinday v. Military Governor Gongola State (1988) 2 NWLR (Pt. 77) 445 at 447; Nwosu v. Board of Customs and Excise (1988)5 NWLR (Pt. 93)225 at 226-227 and Afolayan v. Ogunrinde (1990) 1 NWLR (Pt. 127) 369 at 374, 393, he urged the court to accept the findings of the lower court  as to the issue of the price of each typewriter and the fact that the respondent's brothers have collected 5 typewriters from the appellants.

On the second issue it was submitted that the court below having accepted the evidence of P.W.1 in respect of the fact that the respondent's brothers have collected 5 typewriters on the instruction of the respondent, the trial Judge cannot reject D.W.1 evidence with regards to the fact that he only accepted the typewriters to put them in the showroom for sale as agreed and not for the purpose it was ordered for. It was further submitted that the reasonable inference that could be drawn from the evidence was that the respondent having failed to deliver in time gave the typewriters to the appellants to sell for him. It was also submitted that the issue of contract to supply typewriters did not arise again. The court should have treated the matter as purely breach of contract. Since the respondent was in breach of the contract, the appellants were entitled to the refund of their deposit plus 10% interest. He therefore urged us in the alternative to award N44,000.00 to the appellants.

In conclusion counsel for the appellants urged us to allow the appeal and set aside the judgments of the lower court to give whatever verdict we consider appropriate in the circumstance having regard to the facts of the case.

I have carefully considered the evidence adduced by both parties at the lower court. I am in complete agreement with the learned trial Judge that from the conduct of the appellants time was not of the essence of the contract. The Plateau State Polytechnic by its letter dated 8/6/87 informed Hammy and Sons that if by 11/6/87 the typewriters were not supplied the contract would be terminated. It is instructive to note that the appellants did not even place order with the respondent until 16/6/87. On 17/6/87 the respondent replied and promised to supply the typewriters within two weeks from the date the appellant paid a 50% deposit. See Exhibit 'C'. The deposit was not paid until 24/6/87 and it was agreed by both parties that the respondent would deliver the typewriters on or before 9/7/87. The Polytechnic revoked the contract on 1/7/87 see Exhibit 'J'. The Polytechnic has therefore terminated the contract before the date agreed by the parties that the respondent should deliver the typewriters. This was to the knowledge of the appellant and he did nothing. Even if the respondent had delivered on 9/7/87 the appellant could not have delivered them to the Polytechnic because the contract has already been terminated. The appellants in my view, cannot hinge the supply of the typewriters to his contract with the polytechnic. It has already been terminated before the date they agreed that the respondent should deliver. Moreover, when the respondent delivered the typewriters about twenty days outside the agreed date they accepted them. I quite agree with the learned Judge when he said the appellant is deemed to have waived his right as to time and description; and also agree that the counter-claim has no basis.

I will now revert to the first issue. The trial Judge found that the agreed price per each typewriter was N3,000.00. The respondent supplied 14 typewriters. The respondent later collected 5 typewriters through his brothers Cletus and Duru. The respondent was therefore to pay for only 9 typewriters which amounted to N27,000.00. The appellants have already deposited N34,000.00 with the respondent.

Based on his own finding, it is my opinion that the trial Judge was wrong in awarding N9,000.00 to the respondent.

The relief sought by the appellants are:-

"(a) That the appeal be allowed and the judgment of the lower court be set aside.

(b) That the respondent be ordered to pay to the appellants the sum of N7.000.00 representing the amount overpaid to the respondent."

I don't think it will be proper to order the respondent to pay the sum of N7,000.00 to the appellants since they did not claim for any refund at the lower court.

What they did was to counter-claim for the return of the entire N34,000.00 paid by them to the respondent plus loss of profit. The counter-claim was dismissed.

The courts do not award what has not been asked for by parties.

In the circumstances the appeal succeeds in part. I affirm the decision of the lower court that the counter-claim has no basis. The lower court was however wrong in awarding the sum of N9,000.00 to the respondent. The award of N9,000.00 is accordingly set aside. I make no order as to costs.

**OKEZIE, J.C.A.:**

I have a preview of the judgment now delivered by my learned brother Mohammad, J.C.A. I agree with his reasoning and conclusion. I dismiss the counter-claim. I abide by the consequential orders made in the lead judgment.

**ORAH, J.C.A.:**

I have read in draft the lead judgment of my learned brother R.D. Muhammad, J.C.A., just delivered. I agree with the reasons and conclusions reached in the judgment.

It is a cardinal principle of law, that courts of law do not award or grant reliefs not claimed or sought. Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514, nor is it a father Christmas, awarding damages above what it found was the damages claimed (Ekpenyong v. Nyong (1975) 2 S.C. 71 at P. 80. The Court is without power to make a case for a party different from that put forward: United Bank of Africa Ltd & Anor v. Mrs Ngozi Achoru (1990) 10 SCNJ 17 at 24; (1990) NWLR (Pt. 156) 245; Samson Achonma v. Aserin Unosi (1965) NMLR 321 at 323; Ademola v. William Odudu (1990) 10 SCJN 52 at 64; (1990) 6 NWLR (Pt. 157) 384.

On the above authorities, I also hold that the lower court was wrong in awarding the sum of N9,000.00 to the respondent. For the same reason, I also set aside the said award of N9,000.00 to the respondent.

For the reasons and conclusions reached in the lead judgment I also hold, that the counter-claim has no basis. This appeal succeeds in part.

I abide by the consequential order of costs contained in the lead judgment.

Appeal allowed in part