IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)

HOLDEN AT COURT 14, APO ABUJA ON THE 29TH DAY OF SEPTEMBER 2016.

BEFORE THEIR LORDSHIPS:HON. JUSTICE U.P. KEKEMEKE (PRESIDING JUDGE)

HON. JUSTICE V.V. VENDA (HON. JUDGE)

APPEAL NO: CVA/116/15

COURT CLERKS: AMINU ZAKARI

BETWEEN:

MRS. JOY ELE SAMUEL……..……APPELLANT.

AND

CHIEF LOUIS I. ONWUGBENU

(Suing through His Lawful Attorney
(Chinedu Nwosu carrying on Business
(under the Name and Style of Chinedu Nwosu & Co.).....RESPONDENT.

JUDGMENT

The Appellant's Notice of Appeal is dated 10th September, 2015.

By the said Notice of Appeal the Appellant is dissatisfied with the Judgment of the Senior District Court of the Federal Capital Territory delivered by His Worship Odo Celestine Obinna on the 9th day of September, 2015 and doth appeal to this Court on the following grounds:

1. That the Learned Trial Judge erred by denying the Appellant fair hearing when he held that the Respondent proved his case on the preponderance of evidence and was entitled to the reliefs sought.
2. That the Learned Trial Judge erred by striking out the Appellant's Counterclaim in his final judgment on the ground of non-conformity with the Recovery of Premises Act applicable in the Federal Capital Territory.
3. The Learned Trial Judge erred by raising an issue of law *suo moto* in his judgment which he relied upon to strike out the Appellant's Counterclaim without affording the Parties (particularly the Appellant) the opportunity of addressing the Court on the issue.

He prays for an order setting aside the Judgment and an Order for the matter to be heard by a different Judge. The Notice of Appeal and Record of Appeal were served on the Respondent. The Appellant filed his brief of argument dated 18/03/16. Learned Counsel to the Appellant adopted same and urged the Court to allow the appeal.

The Appellant raised two issues for determination:

1. Whether the Trial Judge took into consideration the evidence adduced by the Appellant during the trial of the case and if not whether such non-consideration amounted to a miscarriage of justice.
2. Whether the Trial Judge was justified in raising an issue of law *suo moto* without the Parties addressing the Court on the issue which is Section 16 of Recovery of Premises Act.

On Issue 1, Learned Counsel submits that the Trial Judge deliberately closed his eyes to the salient evidence adduced by the Appellant (as defendant) and this action led to a miscarriage of justice. That Judgment would not have been delivered in favour of the Respondent if the trial Judge had considered the defence and evidence led by the Appellant. Refers to Sections 65 and 66 of the Record of Appeal.

That the Trial Judge however failed to consider the defence of the Appellant that her tenancy expired in 2011 and that she actually made moves to pack out. That she was prevented by the agents of the Respondent from moving her things out of the Plaza refers to page 47 – 48. Also refers to paragraph 6 of the Statement of Defence of the Appellant in the Lower Court. Refers to Pages 15-16 of the Record. That the Trial Court did not consider this piece of evidence in his Judgment. That the said evidence was not controverted or denied by the Respondent but in his Judgment the Senior District Judge said in page 66, lines 4-7:

> ***"The Defendant herself never gave evidence that she was not owing the said arrears of rent. It is her duty to state so in her evidence and not for counsel in his address."***

Learned Appellant's Counsel submits that the Defendant denied owing arrears of rent when she stated that she was ready to vacate the shop but was frustrated as her business was not moving due to a hostile and an unconducive atmosphere.

That Appellant did not willfully overstay or hold over the premises to attract payment of mesne profit neither did she renew her rent. That Appellant in

paragraph 7 of her Statement of Defence Pages 15-16 of records denied paragraphs 9, 10, 11 and 14 of the Claim. That it is therefore surprising for the Trial Judge to hold in his Judgment that the Appellants did not deny owing arrears of rent and based upon same entered Judgment for the Respondent in the sum of N2,450,000. He urges the Court to resolve the issue in favour of the Appellant against the Respondent.

The Respondent also adopted his written brief dated 12th May, 2016 and adopted as his argument in this appeal. The Respondent's Counsel argued that the Trial Court took into consideration the evidence adduced by the Appellant (Defendant) during the trial.

That the Trial Judge was justified in raising an issue of law *suo moto* as contained in Section 16 of the Recovery of Premises Act. That throughout the proceedings, the Appellant did not deny that she overstayed in the premises before vacating in 2013. That DW1 admitted the testimony of PW1. That from the records, it was clear that the Appellant did not deny owing arrears of rent and holding over. That the Trial Judge was right in entering Judgment for the Plaintiff/Respondent.

The Plaintiff's plaint at the Lower Court is contained in pages 1-3 of the Record of Appeal.

The Defendant/Respondent's Statement of Defence is contained in pages 15 - 19 of the Records of Appeal. By paragraph 7 of the Defendant/Respondent's Defence contained in Page 16 of the records, the Appellant denies owing any arrears of rent or service charge or absconded without paying same or that she has not liquidated the said arrears of rent or Service Charge and went further

in paragraph 8 to aver the reasons for her failure to pay,as 'absence of electricity' until 2009 and even after it was connected, the Defendant's shop did not have a meter. That PHCN was billing the Defendant arbitrarily. That there was no water supply.

The Respondent (Plaintiff) evidence is in page 35 of the Records. She gave evidence as PW1 and at page 36 stated clearly that the Appellant (Defendant) was owing N2,450,000. That she stayed a year and 8 months at the expiration of her tenancy.

The Respondent (Plaintiff) was cross-examined on pages 44-45 of the Records. We have carefully gone through same. The PW1 was asked if she was aware that the (Defendant) Respondent's house was locked up several times by AEPB on account of not paying waste disposal fees and she answered that she was not aware. The evidence of DW1 in the Lower Court is in pages 47-51 of the records.

We have also read same with the Judgment that is contained in pages 61-66 of the records.

In civil cases the Court decides the cases on the balance of probabilities or preponderance of evidence. This is done when a trial Court puts on an imaginary scale, the totality of the evidence adduced by the parties before it, before coming to a decision.

See ***ADEDAYO VS. ADUSEI (2004) 4 NWLR (PT. 862) 44.***
FAGBENRO VS. AROBADI (2006) 7 NWLR (PT.978) 174.

Evaluation of relevant and material evidence before the Court and the ascription of probative value to such evidence are the primary function of the Trial Court, which saw, heard and assessed the witnesses while they testified. Where the Trial Court unquestionably evaluates the evidence and justifiably appraises the facts, it is not the Appellate Court to substitute its own views for the views of the Trial Court.

See ***OJOKOLOBO VS. ALAMU (1998) 9 NWLR (PT. 565) 226.GF***

SHA VS. KWAN (2000) 5 SC. 178.

FAGBENRO VS. AROBADI (2006) 7 NWLR (PT.978) 174.

In page 65 of the Record of appeal, the Trial Senior District Judge held:

"I have gone through and considered the evidence of the parties on record as well as submissions of their Counsel on this Claim."

He went further:

> ***"The Defendant during her evidence on Oath did not deny owing the above arrears of rent. The evidence never touched on the issues of arrears of rent throughout her testimony both in-chief and under cross-examination. In otherwords the Defendant did not controvert or deny the fact she is owing the above sum claimed as arrears of rent…."***

The point is that although the Defendant/Appellant denied owing any arrears of rent yet did not give evidence in support of the averments in her statement of Defence. We have noted that what the Defendant owed is not arrears of rent but Mesne profit, her tenancy having expired. The fact remains that there is no miscarriage of justice by reason of the terminology so used. Evaluation of evidence is primarily the function of the Trial Court, it is only where and when it fails to evaluate such evidence properly or at all that an Appellate Court can intervene and reevaluate such evidence otherwise the Appellate Court has no business interfering with the finding of a Trial Court.

See ***ADEDAYO VS. ADUSEI (2004) 4 NWLR (PT.862) 44.***

We have gone through the evidence and the Judgment of the Lower Court. It is our view that the Trial Court properly evaluated the evidence before it and came to the right conclusion.

As it relates to the pronouncement of the Lower Court as touching the Counterclaim is in pages 67 and 68 of the record.

We have equally read same. We do not have any reason whatsoever to disturb the Trial Senior District Judge's conclusion. This issue is resolved in favour of the Respondent against the Appellant.

On issue 2, whether the Trial Judge was justified in raising an issue of law *suo moto* without giving the parties an opportunity to address the Court, Counsel argues that it was wrong for the Trial Court not to have given the parties an opportunity.

It is our view that the Lower Court is right in determining the competence of processes filed before it at any time. If the trial Court raised it *suo moto* during trial of course, the parties would have been given an opportunity to respond to it. But in this case, it is in his Judgment. His conclusion is not perverse and or erroneous. This issue is also resolved in favour of the Respondent against the Appellant.

In totality, it is our view and we so hold that the appeal lacks merit and it is dismissed. We hereby affirm the Judgment of the Court below.

HON. JUSTICE U.P. KEKEMEKE **HON. JUSTICE V.V. VENDA**

(PRESIDING JUDGE) **(HON. JUDGE)**

29/09/16 **29/09/16.**