IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
BEFORE HIS LORDSHIP: HON. JUSTICE V.V.M VENDA.
ON WEDNESDAY 8TH DAY OF MAY, 2019

SUIT NO: FCT/HC/CV/1957/16

BETWEEN:

FUTUNE NIGERIA LIMITED _____PLAINTIFF

AND

MATHAN NIGERIA LIMITED_____DEFENDANT

JUDGMENT

This suit was commenced by a Writ of Summons dated and filed on the 13/06/16.

With the leave of court, the writ and statement of claim were amended and filed on the 9th day of October 2017.

The claimant is a Limited Liability Company with its office address at No 4 Bamako Street Wuse Zone 1, Abuja. The Defendant also, is a Limited Liability Company with its office at Plot 2587, Rudoff Close, Off Katsina-Ala Crescent, Maitama, Abuja.

The claimants' claim against the Defendant is:

1. An Order directing the Defendant to pay the Plaintiff an arrears of rent in the sum of N16,000,000.00 (Sixteen Million Naira) only to cover the period of 1st February 2013 to 31st January 2015.
2. Mesne profit in the sum of N2,000,000.00 (Two Million Naira) only per month from 1st February 2015 till the December 12th 2016.
3. An Order directing the Defendant to return the missing items of fitting and fixtures as per the inventory of fittings and fixtures taken as mentioned in paragraph 20 of this statement of claim or pay the present market prevailing cost of the fittings and fixtures thereof.
4. Interest of 10% of the Judgment sum per annum from the date of the award until the final liquidation of the Judgment sum.
5. Cost of filing this suit at the suit at the sum of N250,000.00 (Two Hundred and Fifty Thousand Naira) only.

The Defendant, on the 27/2/2018 and upon leave sought and obtained, filed a 15 paragraph statement of defence deemed filed on 23/4/18.

Trial in this case commenced on the 12th of February 2018, with **Baba Gana Ali Alkali** as claimant's sole witness.

In his evidence on oath, PW1 informed the court that the Defendant is a tenant of the Plaintiff and signed a tenancy agreement in respect of the subject property to wit: Plot 2587, Rudolf Close, Off Katsina-Ala Crescent, Maitama, Abuja (herein referred to as the subject property) on February 1, 2011 and has been a sitting tenant since then.

That both parties agreed to operate on the terms and conditions of the said tenancy agreement specifically paragraph 3 (of the tenant's covenants in page 2 of the agreement) which states that the Defendant shall be paying its tenancy in advance.

Witness states that at the eve of expiration of the term created by the said tenancy agreement, the Plaintiff's real estate agent (Anche & Partners Ltd) served the Defendant a rent review/renewal notice dated 15/08/2012 and intimated the Defendant that the Defendant's tenancy on the subject property will expire on 31st January 2013 and that the Plaintiff is willing to renew the tenancy for another further term of two (2) years. That the rent is reviewed to N14,000,000.00 (Fourteen Million Naira) per duplex, which is N28,000,000.00 (Twenty Eight Million Naira) per annum, totalling N56,000,000.00 (Fifty Six Million Naira) for 2 years.

PW1 states further that subsequently, the said **Mr Anche Chumb,** the Managing Director of the Plaintiff's real estate agent died and

the Plaintiff, via a letter dated January 28th 2013 intimate the Defendant of this incidence and added that all enquires/correspondence should be forwarded to the Plaintiff directly. PW1 states that consequent upon a meeting he had with senator Atan; the Managing Director and **Anthony** Orji, the Executive Director (admin) of the Defendant, he brought down the renewed rent from N14,000,000.00 (Fourteen Million Naira) to N12,000,000.00 (twelve Million Naira) per duplex/per annum and the said Executive Director (admin) was instructed to prepare payment with understanding that the payment was for one year certain as negotiations for purchase of another property by the Defendant was at an advanced stage.

That surprisingly, the Defendant paid the sum of N32,000,000.00 (Thirty Two Million Naira) to the Plaintiff instead of N24,000,000.00 (Twenty Four Million Naira) as agreed in the February 2013 meeting.

Furthermore, that he (PW1) wrote a letter dated 2nd December 2013 to seek clarification on the exact renewal duration of the tenancy of the subject property and that if another year is contemplated, an additional payment of the sum of N16,000,000.00 (Sixteen Million Naira) is to be made to cover renewal duration till January 31st 2015.

That he wrote another letter to the Defendant dated January 16th 2014 reiterating their position as per the letter dated 2nd December 2013 and demanding for additional payment of the sum of N16,000,000.00 to cover renewal till January 31st 2015 and suggested 20th January 2014 for a meeting because the date suggested by the Defendant had been overtaken by events.

According toPW1, the Defendant did not respond to the letter so the proposed meeting between the parties did not take place and the Defendant did not pay the additional N16,000,000.00 (sixteen Million Naira) to cover renewal duration till January 31 2015 but continued stay on the subject property even after the expiration of the 2 years tenancy period that expired 31st January 2015.

That Defendant continued to hold cover the subject property since the expiration date of January 31st 2015 till December 15, 2016 when PW1 realized that the Defendant had moved out of the property without any notification to the Plaintiff to take over and safe guard the subject matter. Witness told the court that he discovered also that some of the subject property fittings and fixtures were not within the subject premises.

That on 15th December 2016 the Plaintiff representatives and that of the Defendant's jointly conducted an inspection of the subject property, took inventory and put down the list of all the missing items which the Managing Director of the Defendant promised to make good, the loss of said missing fittings and fixtures.

That the Defendant has still not made the said refund even after exercising patience and diligence on his part. He states that the Defendant proved unwilling, unserious in their commitment to pay accrued rent, calculated amount for holding over and cost of the lost fittings and fixtures hence the commencement of the action.

Witness tendered and relied on all the documents which were admitted in evidence as follows:

1. The tenancy agreement between Fortune Nigeria Limited and Mathan Nigeria Limited dated 1st day of February 2011 as Exhibit 1.
2. Letter dated 28/01/2013 is exhibit 2.
3. Letter dated 2/12/13 is exhibit 3.
4. Letter dated 16/1/2014 is exhibit 4.
5. Document titled 'list of inventory of fittings and fixtures' is marked as exhibit 5 while the attachment at back acknowledge on Gaji and associates headed paper is exhibit 5 (a).
6. Letter dated 15/08/12 on Arche & Partners headed paper is exhibit 6.

He prayed the court to look at the exhibits and prevail on the Defendant to pay the rent arrears he owes the Plaintiff and replace the missing fixtures and fittings in the subject property.

Under cross examination PW1 stated that the original rent given to the Defendant was in February 2011 to expire in 2013 and from 2013, additional 2 years to expire on 31/01/2015. PW1 stated that the N16,000,000.00 he is claiming is for the last two years and his mesne profit is from February 2015 to December 2016 because that was the day the property was surrendered to the Plaintiff.

There was no re-examination of PW1.

Defendant filed a statement of defence dated 26th February 2018 and filed on the 27th February 2018 wherein, Defendant contends that before, during or after the trial of this suit that same is incompetent and was instituted without following the due process of law by abiding with mandatory conditions precedent to the institution of this action.

Defendant also admits paragraph 2 of the claim only to the extent that it is a registered company.

He stated that the Defendant has not refused to pay the accumulated outstanding rent but it has been trying to restore the outstanding unresolved issues with the Plaintiff without success.

That the Defendant was a tenant of the Plaintiff at Plot 2587, Rudolf Close; Off Katsina Ala Crescent, Maitama, Abuja (herein referred to as subject property/premises) by virtue of a tenancy

agreement dated 1st February 2011 for a 2 year term which lapsed on 31st January 2013 whereof the Defendant is no longer a tenant of the Plaintiff and has since vacated the subject premises in June 2016 as the Plaintiffs Managing Director **Arch Baba Gana Ali Alkali** computed the Defendants indebtedness to the Plaintiff on the 7th July 2016 on the Plaintiffs letter to the Defendant dated January 14 2016 and received by the Defendant on the 18th January 2016.

That the Defendant duly notified the Plaintiff of its vacation of the subject premises in June 2016, the consequence of same being the Plaintiffs Managing Directors aforementioned computations on the 7t July 2016.

That all the fittings and fixtures were complete and properly placed as at the time the Defendant vacated the subject premises but parties could not agree on a convenient time for inspection of the property until sometime in December 2016 and that the Managing Director of the Defendant did not promise the Plaintiff to make good any loss of the Plaintiffs fitting and fixtures as the Defendant has not refused to pay the accumulated outstanding rent but it has been trying to resolve all outstanding issues without success with the Plaintiff.

He tendered in evidence a Letter dated 14/1/16 signed by Architect Baba Gana Ali Alkali endorsed on the 7/7/16 as Exhibit D1 and prayed the court to dismiss the Plaintiffs case.

Under cross examination, DW1 stated that the Defendant rented a property from the Plaintiff but vacated same since June 2016, and that the letter authored by the Plaintiff and dated 14/01/16 was delivered to him (DW1) outside Maitama guest house Abuja on the day of computation which was 7/7/16 about 6 months after the letter was written. That he brought it to the knowledge of the Plaintiff then by re-affirmation to their earlier notice to him that the Defendant had vacated that subject premises sometime in June and that Defendant does not owe the Plaintiff from June.

Furthermore that the Plaintiff's representative **Arch Baba Gana Ali Alkali** apologized for not making out time to come for a formal handing over and both parties arrived at the figure which was endorsed. That the relationship between the Plaintiff and the Defendant was formal up to a certain time but that the Defendant did not formally write to the Plaintiff to inform him of the Defendant's intention to vacate the subject premises.

That the meeting both parties to this suit had on the 15/12/16 was for inspection and he is not aware that AMAC sealed the subject premises before the 15/12/16 as when the Defendant was in occupation of the subject premises AMAC did not seal the property until they vacated same in June.

That both parties agreed to go and take inventory at the said premises the following week but Plaintiff never came till

December when the Plaintiffs came to take the keys to the subject premises. DW1 stated that on the 15/12/16 when the inventory was taken, one **Simon Ado Gwarfa** (a junior staff of the Defendant) endorsed on the missing items in the presence of DW1 but added that he told the Plaintiff that if they had come earlier for the inventory, all these issues would not have arisen and that from June to December 2016 Defendant invited the Plaintiff to come and collect the keys but the Plaintiff kept saying they were coming, but never came till December.

There was no re-examination of DW1.

Wherefore, parties were granted leave to file their final written addresses.

In his written address adopted as his oral submission before the court, counsel on behalf of the Defendant raised a sole issue for determination viz:

> Whether in view of the totality of pleadings and evidence the Plaintiff is entitled to the reliefs sought?

Defendant counsel submitted that it has become elementary position of the law that parties are bound by their pleadings and that averments in pleadings not supported by evidence go to no issue. Counsel cited **ACHONO VS OKUWOBI (2017) ALL FWLR (pt 905) 1294 @ 1326 and ADDEH VS ONAKOMAIYA (2017) ALL FWLR (pt 907 @ 1706.**

Counsel submitted that the Plaintiff's claim in relief 2 of the statement of claim dated 6th October 2017 is not supported in the Plaintiff pleading and that Plaintiffs averment in paragraph 14 of its pleadings is at variance with the deposition of the paragraph 15 of PW1's statement on oath.

Counsel submits that evidence at variance with pleadings go to no issue and shall be discountenanced by the court. Citing **OKOKO VS DAKOLO (2006) LPELR 2461** counsel on behalf of the Defendant states that the Defendant joined issues with the Plaintiff on the period Defendant vacated the subject premises in paragraph 5 of its statement of defence as was confirmed and admitted by PW1 under cross examination. Also that DW1 on the 7th July 2016 informed the Plaintiff that Defendant moved out of the subject premises. That Exhibit D1 also shows admission by the Plaintiff through the computation of the total indebtedness of the Defendant in the letter after confirming that the Defendant had moved out of the subject premises. Counsel argued that the computation made by the PW1 on exhibit D1 as to the total indebtedness of the Defendant is N50 Million and PW1's attempt to vary the clear content of Exhibit D1 should not be allowed. He cited **F.B.N PLC VS M.O NWADIALY & SONS LTD (2016) 18 NWLR (pt 1543) 1 @ 48.**

He contends that the evidence of PW1 with respect to the time the

Defendant vacated the subject premises is contradictory. In one breath PW1 denied knowledge of the fact that the Defendant vacated the property as at 7th July 2016, in another, he admitted upon further cross examination that they were told by the DW1 on the same day that the Defendant had moved out of the property.

Counsel argued that the proper approach when a witness gives contradictory evidence on the same issue is to discountenance both. He cited **OMEREDE VS ELEAZU & ORS (1996) 6 NWLR (pt 452) 1 (SC) and EGBUCHE VS EGBUCHE (2013) LPELR 22512.**

That the evidence of the Defendant in paragraph 8 of Defendants witness statement on oath was unchallenged. Citing **APUUN VS R.T.N.S.K.T (2017) ALL FWLR (pt 867) 600 @ 612; CONOIL PLC VS NWUKE (2017) ALL FWLR (pt. 916) 1499 @ 1520** counsel to Defendant urged the court to rely on the uncontroverted evidence in finding in favour of the Defendant.

In addition to answering the sole issue for determination, counsel on behalf of Defendant contends that the Plaintiffs Writ of Summons and statement of claim are incompetent on the ground(s) that same are not titled and marked "AMMENDED" as required by the Rules of this Honourable Court and that the Writ of Summons and statement of claim are not endorsed as mandatorily required by Order 24 Rule 6 HC of FCT (Civil Procedure) Rules 2004.

Counsel argued that where a law or rules has prescribed a mode of doing something, only that mode and no other shall be acceptable in doing such thing and cited **FGN VS IEBRA ENERGY LTD (2002) 18 NWLR pt 798) 162 @ 200-2001.**

He contends that the provision of Order 24 Rule 6 which is impair material with Order 25 Rule 6 of the 2018 Rules of court is mandatory and the court cannot remain helpless in the face of the obvious breach of same by the Plaintiff.

Counsel urged the court to up hold this Preliminary Objection and dismiss the Plaintiffs suit for no-compliance with the mandatory provisions of the Rules of this Honourable Court.

In the Plaintiffs final written address, counsel on behalf of the Plaintiff formulated a sole issue for determination viz:

> Whether from the totality of the pleadings and testimonies before this Honourable Court the Plaintiff has proved its case on the preponderance of evidence and entitled to the reliefs sought.

Counsel on behalf of the Plaintiff submits that the Defendant had in its pleading and testimony admitted the larger part of the Plaintiffs claim thereby lifting the burden of proof off the shoulders of the Plaintiff.

He cited: **RILWAN & PARTNERS VS SKYE BANK PLC (2015) 1 NWLR (pt. 1441) pg. 437 @ 461** and **AKINLAGU VS OSHOGBO**

(2006) 12 NWLR pt 993 pg. 60 @ pg. 84 paragraph B-C and submits that the Defendant in paragraph 7 of the statement of defence and 11 of the witness statement on oath admitted to owing an outstanding rent (though without specifying the amount). Counsel also submits that the Defendant admitted the Plaintiffs claim in the sum of N50 Million contained at the foot of the Plaintiffs letter dated 12th January 2016 and marked as Exhibit D1; the same N50 Million which is a summation of the sum of N16 Million; the unpaid balance from 2013/2015 rent and also the sum of N34 Million for holding over from 1st February 2015 to June 2016.

He submits that the act of the Defendant mentioned in paragraphs 4.3 to 4.5 are clear and unequivocal admission of its liability in respect of a part of Plaintiffs claim to the tune of N62 Million ie N16 Million as rent arrears and N34 Million being part mesne profit for holding over.

Counsel submits further that once the court found that a Defendant has admitted some facts that prove the subsistence of the Plaintiffs claim the only option available to the court is enter judgment in favour of the Plaintiff and cited **ATM PLC VS BVT LTD (2007) NWLR pt 1015 pg 259 @ 283** and Order 20 Rule 4 High Court Rules.

He submits further that paragraph 6 of the Defendants statement of defence is to the effect that the Defendant vacated the premises

without proper handing over to the Plaintiff or formally notifying the Plaintiff as also confirmed by DW1 in his cross examination. It is trite that a tenant is not considered to have delivered vacant possession unless where the tenant formally handed over the premises to the landlord or his agent after expiration of his tenancy or at the end of holding over. Counsel cited **AJAX VS AINA (1976) LLR 152; ASOSRAPO VS ORAIAJA (1976) 5 CCHCJ 1405.**

Counsel submits that where a tenant abandons a demise premises without handing over vacant possession to the landlord, the tenant is liable for all the loss the landlord incurred. He cited **FASHEUN VS PHARCO (NIG) LTD. (1965) 2 ALL NLR 216** and urged the court to grant the prayers of the Plaintiff.

On the issue of the Preliminary Objection raised by the Defendant, counsel on behalf of the Plaintiff submit that the Rules of court are meant to be obeyed but where there is a non-deliberate failure to comply with the said Rules, the law is that the court should treat such failure as an irregularity and shall not nullify a proceeding.

Counsel cited Order 5 Rule 1 High Court Rules and the case of **OBICHEFU VS GOVERNOR IMO STATE (2008) 18 NWLR pt. 1106 pg. 22 @ 48.**

Counsel added that the Defendants Preliminary Objection at this stage of the proceeding is a mere gimmick and undue resort to

technicalities and an attempt to clog the wheels of justice but should the court see merit in same, counsel submits that the application cannot be considered at this stage as the Defendant failed to make the application within reasonable time. Counsel cited Order 5 Rule 2 (1) High Court Rules and **OJO VS INEC (2008) 13 NWLR part 1105 pg 577 at pg. 603 – 604** paragraphs H – A and urged the court to dismiss the application in its entirety, while granting their reliefs sought.

In considering the issues in this case, it shall be pertinent to have regard to the question raised in the Preliminary Objection of the Defendant to the adjudication of this case, same having been well reviewed above to the effect that the Plaintiff's Writ of Summons and statement of claim are incompetent before the court on grounds that the said processes are not titled and marked "Amended" as required by the rules of this Honourable Court. Secondly, that the Writ of Summons and statement of claim are not endorsed as required by Order 24 Rule 6 of the High Court of FCT Civil Procedure Rules, 2004.

On this I will like to say that the court's copy is properly endorsed.

Order 1 Rule (1) of the High Court of the FCT (Civil Procedure) Rules 2018 provides thus:

(1) These rules shall apply to all proceedings including all part-heard cases, causes and matters in respect of steps to be further taken in such cases, causes and matters.

The court shall give such directions, as may be necessary or expedient to ensure conformity with the requirement of these rules.

Ordinarily I would have thought that the rules under which counsel raised his objection are extinct while failing to do so under the existing rules. However it is imperative to note that this suit was commenced in 2016, therefore under the 2004 Rules.

I assume this informs why the objection is also brought under the 2004 and not only under the 2018 Rules.

To do justice to the issue I will look at it from the view point of not only the 2004 rules but also the 2018 Rules:

Order 2 of the High Court of the FCT Abuja (Civil Procedure) Rules 2004 states:

(1) Where in commencing proceedings, or at any stage in the course of a proceedings, there appears a failure to comply with the provisions of these Rules, in respect of time, place, manner, form or content or other, **the failure may be treated as an irregularity, which shall not nullify the respective proceedings, document, Judgment or Order.**

(2) A court may, on the ground of a failure to comply,-

(a) Set aside either wholly or in part, the proceedings in which the failure occurred or any step taken in a

proceedings or any document, Judgment or Order in it; or

(b) Exercise its powers under these Rules to allow amendments (if any) to be made; or

(c) Make any Order dealing with the proceedings generally as it thinks just, on such terms as to costs.

(3) An application to set aside for irregularity:-

(a) May be made by summons or motion on notice, and the grounds of objection shall be stated in the summons or notice of motion; and

(b) Shall not be allowed unless it is made within a reasonable time **before the Applicant takes any fresh step** after noticing the irregularity.

A similar provision is made in the 2018 Rules of the FCT High Court Civil Procedure and in Order 5 of same thus:

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

(2) Where at any stage in the course of or in connection with any proceedings there has, by reason of anything done or left undone, been a failure to comply with the requirements as to time, place, manner, or form, **such failure may be treated as an irregularity.** The court

may give any direction as he thinks fit to regularise such steps.

(3) The court shall not wholly set aside any proceedings or writ or other originating process by which they were begun on the ground that the proceedings were required by any of this Rules to be begun by an originating process other than the one used.

2. (1) An application to set aside for irregularity any step taken in the course of any proceedings may be allowed where it is made within a reasonable time and before the party applying **has taken any fresh step** after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection shall be stated.

My understanding of these Rules is that, while in the 2004 Rules, where there appears to be a failure to comply with the provisions of the Rules, the court has a discretion to set aside, either wholly or in part, the proceeding in which the failure occurred, the 2018 Rules precludes the court from wholly setting aside such proceedings as such failure shall not nullify the proceedings. See Order 5, Rules 1 and 3 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules, 2018.

This comparative analysis is made to bring out the justice in this case.

In both Rules, it is provided that, this kind of failure to comply with the Rules of court may be treated as an irregularity. See Order 2 Rule 1 of the 2004 Rules (supra) and Order 5 Rule 2 of the 2018 Rules (supra).

The Defendant in his reply to the claimant's submission on the issue at hand submits further that the Obichefu case cited by the claimant's counsel is not applicable as it is clearly stated in **HONEYWELL FLOUR MILLS PLC VS ECOBANK (NIG.) LTD (2016) 16 NWLR pt. (1539) 387 @ 436** that where the rules have prescribed a mode of doing a thing, only that mode and no other shall be acceptable and where the said mode is not followed such cannot be overlooked as a mere irregularity.

Agreed that in a plethora of authorities the courts have held that Rules of court are meant to be obeyed, and some authorities have gone further to state that Rules of court are not meant to decorate the pages of the books wherein they appear but meant to be and must be obeyed. This is buttressed by the cases of **DENCA SERVICES LTD VS IFEANYI CHUKWU OSUNDU COMPANY LTD & ORS (2013) LPELR-22005 (CA)**, and **ARU & ORS VS OHAFIA LINE SERVICES LTD (2014) LPELR-23158 (CA)** where the court held in the latter, that:

> "It should be noted that Rules of court are not for mere decoration, rather they are meant to be observed, followed and used as a guide to the litigant, counsel as well as the

> court itself. It is my humble view therefore that, in these circumstances the provisions of Order 3 Rule 3 regarding frontloading would be rendered ineffective if Order 28 Rule 4 of the Federal High Court, (Civil Procedure) Rules 2000 were not applied,...

These cases to mention but a few surfice.

It must be noted however that the courts have found and held that non-compliance with rules of court in certain cases only amount to irregularity which will not nullify the proceedings. These are circumstances where either the rules themselves have accommodated human errors or mistakes which the courts have severally held not to be visited on a litigant, or, where the non compliance does not go to the root of the case. Thus in several other cases the courts have held that Rules of court should not be used to enslave their users:

In **ASIEGBU VS ACCESS BANK PLC & ORS (2016) LPELR-41056 (CA)** the court held:

> The rules of court are made as aids to the courts to help the course of justice and not masters of the court.
>
> For the courts to read the Rules in the absolute without recourse to the justice of the cause will be making the courts slavish to the Rules and this clearly is not the reason for the

enactment of the Rules of courts. See ODIYEMI VS AGBEDE (supra) UTC LTED VS PAMOTEL (supra).

I shall not bring this issue to a close without making reference to Two, out of the many pronouncements of the Supreme Court on this issue.

In **OTU VS ACB INTER'L BANK PLC (2008) LPELR-2827 (SC)** the court held:-

> I think the essence of court rules is to facilitate the courts in arriving at justice without undue adherence to technicalities.

Similarly the Apex Court held in **BBN (NIG) LTD VS OLAYIWOLA & SONS LTD & ANOR** thus:-

> Rules of court are made to enable the court meet the ends of justice. They are not immutable and cannot be construed in the absolute terms.

I adopt these holdings accordingly.

As mandatory, therefore, as rules of court may appear to be, they are, at the same time not as sacrosanct as mandatory statutory provisions, same which go to the very root of a case.

In my opinion, the bottom line is that, the test for the consideration of the issue of none compliance should be "has the none compliance occasioned a miscarriage of justice?"

Applying this test to the instant case, it is clear that no miscarriage of justice is occasioned, even as the Defendants themselves have not alleged any. The presence or absence of a miscarriage of justice makes the big difference.

One important fact that must not be overlooked is the fact that while the Defendant has raised eye brows on the fact that the claimant failed to comply with Rules of court in amending his processes, he (Defendant) himself is equally guilty of same oversight/mistake.

Order 5 Rule 2(1) and (2) of the 2018 Rules require that where a party intends the court to set aside any step taken in the course of any proceedings, such should be made within reasonable time. Reasonable time in this context is "before the party applying has taken any fresh step after becoming aware of the irregularity.

In the instant case the Defendant took a step before raising the issue. In my opinion, filing a final written address wherein this objection was raised amounts to taking a step. Defendant ought to have followed the provisions of sub rule (2) and made the application by summons or by motion with the grounds of objection, set and allowed the court to rule on it one way or the other.

You cannot put something on nothing and expect it to stand. See **AKPENE VS BARDAY BANK OF NIGERIA LTD & ANOR (1977)**

LPELR-386 (SC) where Obaseki, JSC referred to Lord Denning's judgment in **MACFOY VS UNITED AFRICA COMPANY LTD. (1961) 3 W.L.R 1405 @ 1409** on this.

The law is that the objection should be brought timely so that the court can give direction as he thinks fit to regularise the irregularity, (see Order 5 Rule 1 (2) of the Rules of Civil Procedure of the FCT High Court 2018) and not to bring an objection as a tool to totally blow out a case for an irregularity that could be regularised and the case looked into on its merit. Looking into a case on its merit to logical conclusion could be seen as substantial justice done to the case.

In the light of the above, I find on this issue that the objection is not proper before the court albeit too late in the day of the case. None compliance, both under the 2004 and the 2018 Rules, state that such be treated as an irregularity and that an application to set aside same be brought by way of summons or motion for the court to pronounce upon it. See Order 5 Rule 2 (2) of the 2018 Rules read together with Order 1 Rule 1 of same. Being an irregularity, same does not require that the writ be set aside. It is an irregularity.

Also one cannot make wrong use of a rule which gives one power and so making use of same wrongly desire to be made right to the

detriment of another, who is equally being accused of being incompetent before the court.

In the circumstance, I am of the view that the objection itself, not being brought in line with the provisions of the Rules on the issue, cannot be based upon, to deny the Plaintiff the opportunity of being heard on the marrit of his case.

This Preliminary Objection is therefore dismissed for the reasons that I have proffered above.

Now to the main issues for determination.

Both the claimant's and Defendant's counsel have raised the issue for determination in this case to be whether on the totality of the pleadings and evidence before the court, the claimant is entitled to the reliefs sought. While the Defendant argues that the evidence is at variance with the pleadings, the claimant posits that they are not and that the standard of proof is on a preponderance of evidence.

Section 134 of the Evidence Act 2011 provides:

> The burden of proof shall be discharged on the balance of probabilities in all civil proceedings. See also **OKEREKE VS UMAHI & ORS (2015) LPELR-40687 (CA).**

In **INTERDRILL (NIG.) LTD & ANOR VS UBA PLC (2017) LPELR-41907 (SC)** the court, per Rhodes- Vivour, JSC held:

> Section 134 of the Evidence Act states that burden of proof in civil cases shall be discharged on the balance of probabilities or preponderance of evidence means that in civil proceedings judgment is given to the party with the greater weight or stronger evidence.

Much earlier in legal time the same Appex Court held in **TORTI VS UKPABI & ORS (1984) LPELR-3259 (SC)** thus:

> Clearly, I am far more inclined to the view that a civil case is a civil case and that the standard of proof in a civil case remains constant in the sense that the standard of proof therein is one based on balance of probabilities. To raise it any higher is to do injury to litigants and to the evidence law.

The standard of proof in all civil cases remains "on a balance of probabilities or on a preponderance of evidence." I do follow in agreement, that, to raise the standard higher than that will be regarded as injustice.

It will be pertinent to note that proof on a balance of probability is not similar to proof beyond reasonable doubt. Even at that, the courts have held that proof beyond reasonable doubt is not the same as proof beyond all iota of doubt. Thus in **ADAMU VS STATE (2016) LPELR-41174 (CA)** the court held:

> It must however be stated that proof beyond reasonable doubt is not "proof to the hilt" and is thus not synonymous

with proof beyond all iota of doubt. This is because absolute certainty is impossible in any human adventure including the administration of justice. Proof beyond reasonable doubt thus simply means establishing the guilt of the Defendant with compelling and conclusive evidence to a degree of compulsion which is consistent with a high degree of probability....

Also in **ADOGA VS STATE (2014) LPELR – 22944 (CA)** it was held:

Proof beyond reasonable doubt does not evince proof beyond all iota of doubt.

I have carefully looked at the piece of evidence complained about with its corresponding pleadings.

In the pleadings the Plaintiff averred that the Defendant continued to hold over the premises since the expiration date of January 31st, 2015 till around October 2016, while this matter was pending without renewal or payment of rent or any payment whatsoever.

When we say "on or about" a particular date, it connotes a period of time which is not ascertained with certainty.

When the pleading says till around October 2016 it means; "give and take," or "plus or minus" but that the event referred to

occurred around October 2016. In his evidence however he is specific that it was in December 2016. I don't see this as a situation where evidence can be said to be at variance with the pleadings. The difference is not far from mere human errors.

Pleading is like skeleton upon which flesh of evidence is built, to result in a positive judgment. See **OSHIBANJO VS ODUNLAMI & ANOR (2015) LPELR-25863 (CA)** Per Nimpar, JCA PP.29-30, paragraphs F-B. Witness gave a time gap ie around October but gave evidence that it was in December, I don't think this is out of the way. I resolve this line of argument in favour of the Plaintiff.

The next line of argument is with respect to the time the Defendant vacated the premises, which is also the bone of contention in this case.

For this, my view of same is that, while the Plaintiff claims and ascerts that the Defendant vacated the premises in December 2016 the Defendant vehemently contends that position and ascerts that he vacated the premises in June 2016 to the knowledge of the Plaintiff.

Any claim from July 2016 to December 2016 is vehemently denied and contended by the Defendant.

In his final written address Defendant's counsel relied heavily on exhibit D1 which they tendered to support their case to the effect

that the Defendant's indebtedness to the Plaintiff is only N50 Million Naira, contrary to the Plaintiff's claim.

It is an established principle of law that facts in a pleading which are not denied are deemed admitted. Thus in the case of **MUHAMMED & ORS VS IGP & ORS (2010) LPELR-4555 (CA)** the court cited the Supreme Court decision in **OKE VS AYEDUN (1986) 2 NWLR (pt 23) 548** where it was held:

> It is a principle of pleadings that a fact which is not denied is deemed to have been admitted....

Similarly in **HASSAN VS OBODOEZE & ORS (2012) LPELR-14355 (CA)** the court held:

> The principle of law has been well laid down that facts not denied in a pleading are deemed admitted.

In the instant case also the Defendant's quarrel is as regards the claim of the Plaintiff from June 2016 to December 2016. They are not denying the claim from 1st February 2015 to June 2016 which come up to 17 months.

The mesne profit on this comes up to N34,000,000.00 plus the main rent arrears of N16,000,000.00 bringing it to a total of N50,000,000.00 (fifty million naira) only which is admitted by the Defendant and supported by exhibit D1 tendered by them.

Having not denied this head of claim, I think the Plaintiff is entitled to same. See Section 123 of the Evidence Act 2011 and

the case of **JITTE & ORS VS OKPULOR (2015) LPELR – 25983 (SC)** where court held:

> The law is trite and well settled that facts admitted are no longer issues between the parties.

In the circumstance therefore I hereby award the Plaintiff the said sum of N50,000,000.00 (fifty million naira) only, being the rent arrears from 1st February 2013 to 31st January 2015.

I Order the Defendant to pay same accordingly and forthwith.

As for the mesne profit from July 2016 to December 2016, the evidence before the court shows that parties have joined issues on this and evidence led to prove same. While the Plaintiff claims mesne profit from July 2016 to December 2016, PW1 who testified for the Plaintiff answered under cross examination as follows:

Q. From 2013 there was additional 2 years rent.

A. It was one year but later we agreed for the two years. The 2nd two years expired on 31/01/2015.

Q. Is it from the last two years that you are claiming the sum of N16,000,000.00

A. Yes

Q. So your mesne profit is from February 2015 to December 2016 – 2 years.

A. Yes

Q. Why are you claiming from February 2015 to December 2016?

A. That was the day that the property was surrendered to us.

Q. Cast your mind back to sometime in January 2016 you had a meeting with the Defendant's representative with respect to the expiration of the rent and the need for them to vacate the property.

A. Yes, that is correct.

Q. As that time their rent expired in that January 2016.

A. Yes.

Q. As at that time you made it known to them you were not going to renew their rent.

A. Yes we did.

Q. Where did you hold the meeting; the first meeting?

A. It was not on the property.

Q. Where was the 2nd meeting held?

A. The 2nd meeting was held outside the premises in front of Maitama Guest inn now, because the premise was locked.

Q. As at the time you had the 1st meeting you knew that the Defendant was no longer on the premises.

A. He told us that he will be leaving the property but the property was under seal.

Q. As at the time you had the 2nd meeting in June you could tell that the Defendant was no longer on the property having told

you in January that they will move. By June did you confirm if they were still there or not?

A. By June we did not confirm whether they had moved out. But the property was sealed that was why we held the meeting outside the property, in front of it.

Q. Is it not correct to say that by the time you held the meeting Tony Orji told you that they had moved out of the property?

A. He told us they had moved most of their staff outside the building and the property is now sealed by AMAC and they are trying to reconcile their bills with them.

Q. I put it to you sir that they told you that they have left the property and you confirmed that they were no longer on the property. I mean you knew that they are no longer there as at 07/07/16.

A. I cannot confirm that, because I did not have access into the premises because it was sealed.

Q. I also put it to you again that you knew that as at 07/07/16 the Defendants were no longer on the premises and you also confirmed that in writing.

A. We were told that they had vacated but we did not confirm.

Q. On January 14/2016 you wrote a letter to the Defendant.

A. Yes. We wrote a letter.

Q. You also remember that on that letter you confirmed to the Defendant their total indebtedness to the Plaintiff.

A. Yes.

Q. If you see the letter, I am sure you can identify it.

A. Yes.

Q. (Permission to show him the letter.)

Court: Proceed.

Q. Is that the letter of 14/01/16 which you wrote with endorsement dated 07/07/16.

A. Yes it is.

Wale: We seek to tender the letter. It is original. The witness has identified it as his letter.

Abdulrahaman: No objection.

Court: The letter dated 14/01/16 and signed by Architect **Baba Gana Ali Alkhali** endorsed on the 07/07/16 is admitted as exhibit D1.

Q. You have confirmed the endorsement at the foot of the letter to be yours.

A. Yes.

Q. It is correct that, that was the total indebtedness to the Plaintiff as at June 2016.

A. Yes. As at the time we wrote the letter that was the total indebtedness.

Q. How much.

A. N50M as at July 2016.

Q. And that N50m is made up of arrears of rent and mesne profit.

A. Yes.

Q. Are you aware that your total claim as at now is for both total rent arrears and mesne profit is N18m.

A. No.

Q. Tell the court your total claim of rent arrears and mesne profit that you are clamming before this court.

A. From what we have, the total claim before the court is N56m. It is contained on our amended writ, dated 9/10/17.

Q. I put it to you that the sum of N50,000,000.= that was claimed in exhibit D1 was claimed after you confirmed that the Defendant had vacated the premises.

A. No, it is not correct.

Q. I put it to you that you have not told the court the truth.

A. No. I have told the truth.

Wale: That is all for the witness.

It is obvious from the above that the Plaintiff knew or had reason to know or believe that as at 07/07/2016 the Defendant was no longer on the premises. Under cross examination, the Plaintiff's witness agreed that as at January 2016 the Plaintiff made it clear to the Defendant that he was no longer going to renew the tenancy.

That to my mind means the Plaintiff meant that the Defendant should leave the premises. According to the Defendant, it was during one of the meetings with a representative of the Plaintiff that he DW1 informed the Plaintiff's representative that the

Defendant had vacated the premises since June 2016. That the said Plaintiff's representative apologised for failing to make out time to come for a formal hand over.

Wherefore both of them arrived at the figure at the foot of exhibit D1 which is N50m.

DW1 conceded to the fact that they did not formally write to the Plaintiff to inform them that they have vacated the premises though the relationship between the Plaintiff and the Defendant is a formal one.

I wish to say here that the Plaintiff has not denied and has infact agreed that he informed the Defendant that he was no longer going to renew their tenancy.

He himself took the step of pushing the Defendant out. He told the Defendant verbally that he was not going to renew the tenant's tenancy, and the Defendant also informed him verbally that they had vacated. Though paragraph 13 of the Tenant's covenant talks of 3 months notice, it is not stated whether this will be done verbally or in writing. The Plaintiff started by orally telling them not to renew.

I do not see the Defendant having done something out of the way.

The essence of giving a formal notice is to have evidence that the Plaintiff was told that the Defendant had vacated. In the instant case it was even the Plaintiff who no longer wanted the Defendant

to renew the rent in the first place. I believe the Plaintiff actually meant the Defendant to move out when he told them not to renew the tenancy again. He should be expecting them to move.

Again, I note that the Plaintiff's representative is said to have apologised for failing to make out time to come for a formal hand over. This fact is not denied, and there is no contrary evidence to it. If the Plaintiff's representative has failed to come for the formal hand over, it cannot be blamed on the Defendant. This is however only as it affects the fact of handing over to the Plaintiff, the keys to the premises. There is also no denial of knowledge of being so informed. Facts not specifically denied are deemed admitted. See **OLOWOFOYEKU VS OLOWOFOYEKU (2010) LPELR-11865 (CA).**

I find that the Defendant vacated the premises in June 2016 and informed the Plaintiff of it, but that the Plaintiff failed to make himself available for the hand over.

The Defendant shall not, in the circumstance be required to pay mesne profit from July 2016 to December 2016. The endorsement at the foot of exhibit D1 exonerates the Defendant of this issue.

Concerning the fittings and fixtures on the demised premises, I think, even only the reasonable man's test could be applied to find that the Defendant did not exercise due care.

The tenant's **covenant** with the Landlord, contained in clauses 4, 7 & 8 of exhibit 1 is as follows:

4. To maintain the demised premises and the **contents** and fixtures therein in good repairs and condition and to carry out such internal and external repairs and decorations as may be necessary prior to vacating the demised premises.

7. At the expiration or sooner determination of the agreement hereby created or any extension thereof to peaceably surrender and yield up possession of the demised premises to the Landlord in good and tenantable repairs.

8. At the expiration of the tenancy, the tenant shall before vacating the premises **restore all** alterations and modification that have been made to the premises to its initial state and condition and effect all necessary repairs accordingly.

These are covenant the Defendant himself made with the Plaintiff/Landlord.

He has not told the court that when he was leaving the premises, he complied with any or all of the requirements stated above ie, maintained the premises, the contents and fixtures, in good repaired state, as covenanted.

I therefore believe they did not. But assuming they did, is it not only wise that they made better effort to hand over to the Plaintiff while

their repairs were still looking good than sit down and wait for a Landlord whom they claim continued saying he was coming but never came, till December? What negligence.

If the Plaintiff said he was coming and did not come, after a while, Defendant ought to have gone to him to ensure he came to see that the demised premises had been restored and kept neat before they (Defendants) vacated.

I see this failure as negligent and a show of lack of due care which is fatal.

There is no evidence that as at June when the Defendant vacated the premises he put back the building, and the fixtures and fitting to tenantable state as covenanted. As the Defendant had not handed over the premises to the care of the Plaintiff he still had a duty of care over same, even though he had informed the Plaintiff that he had moved out. He still needed to inform him also that he had restored the premises to its tenantable state, which he did not.

He ought not to have abandoned the premises without taking any measure to ensure its security.

The allegation that the fixtures and fitting had been vandalized is not denied by the Defendant either. The vandalisation is not proved to be any fault of the Plaintiff. To abandon the property

without making efforts or putting measures in place to ensure that the security of the fixtures and fittings are properly secured, to my mind, is negligent of the Defendant and is fatal.

After informing the Plaintiff that he (Defendant) had vacated and after the Plaintiff's failure to come for a formal hand over, there was no harm in the Defendant going over to the Plaintiff for the hand over seeing that the fixtures and the fittings were all under his care by the covenants in the agreement. In my opinion he bears total responsibility for the state of the fixtures and fittings.
In the circumstance I order the Defendant to put all the fixtures and fittings back to their original state in line with clauses 4, 7 & 8 of exhibit 1, which they are bound by.

An agreement once entered into is binding on both parties. See **KWARA CO-OPERATIVE FEDERATION & ORS VS YUSUF (2014) LPELR – 23793 (CA.**

Now, to the issue of 10% interest on the judgment sum. The law is quite settled that interest can only be paid if it forms part of the agreement and even at that it must be specifically pleaded and proved. See **MINAJ HOLDINGS LTD VS AMCON (2015) LPELR-24650 (CA).**

I have looked at the agreement between the parties and have not seen where the issue of interest was made part of same.

It was pleaded but no evidence led on it. This claim on interest cannot succeed. Same hereby fails.

I order parties to bear their own cost.

Signed
Hon. Judge
08/05/19

APPEARANCES

1. **U. M. ABDULRAHAMAN ESQ.** for Plaintiff.
2. **WALE BALOGUN ESQ** for Defendant.

AUTHORITIES

1. **ACHONO VS OKUWOBI (2017) ALL FWLR (pt 905) 1294 @ 1326**
2. **ADDEH VS ONAKOMAIYA (2017) ALL FWLR (pt 907 @ 1706.**
3. **OKOKO VS DAKOLO (2006) LPELR 2461**
4. **F.B.N PLC VS M.O NWADIALY & SONS LTD (2016) 18 NWLR (pt 1543) 1 @ 48.**
5. **OMEREDE VS ELEAZU & ORS (1996) 6 NWLR (pt 452) 1 (SC)**
6. **EGBUCHE VS EGBUCHE (2013) LPELR 22512.**
7. **APUUN VS R.T.N.S.K.T (2017) ALL FWLR (pt 867) 600 @ 612;**
8. **CONOIL PLC VS NWUKE (2017) ALL FWLR (pt. 916) 1499 @ 1520**
9. **FGN VS IEBRA ENERGY LTD (2002) 18 NWLR pt 798) 162 @ 200-2001.**

10. **RILWAN & PARTNERS VS SKYE BANK PLC (2015) 1 NWLR (pt. 1441) pg. 437 @ 461**
11. **AKINLAGU VS OSHOGBO (2006) 12 NWLR pt 993 pg. 60 @ pg. 84**
12. **ATM PLC VS BVT LTD (2007) NWLR pt 1015 pg 259 @ 283**
13. **AJAX VS AINA (1976) LLR 152; ASOSRAPO VS ORAIAJA (1976) 5 CCHCJ 1405.**
14. **FASHEUN VS PHARCO (NIG) LTD. (1965) 2 ALL NLR 216**
15. **OBICHEFU VS GOVERNOR IMO STATE (2008) 18 NWLR pt. 1106 pg. 22 @ 48.**
16. **High Court of the FCT (Civil Procedure) Rules 2018**
17. **OJO VS INEC (2008) 13 NWLR part 1105 pg 577 at pg. 603 – 604.**
18. **HONEYWELL FLOUR MILLS PLC VS ECOBANK (NIG.) LTD (2016) 16 NWLR pt. (1539) 387 @ 436**.
19. **DENCA SERVICES LTD VS IFEANYI CHUKWU OSUNDU COMPANY LTD & ORS (2013) LPELR-22005 (CA)**,
20. **ARU & ORS VS OHAFIA LINE SERVICES LTD (2014) LPELR-23158 (CA).**
21. **ASIEGBU VS ACCESS BANK PLC & ORS (2016) LPELR-41056 (CA)**
22. **OTU VS ACB INTER'L BANK PLC (2008) LPELR-2827 (SC)**
23. **BBN (NIG) LTD VS OLAYIWOLA & SONS LTD & ANOR**

24. **AKPENE VS BARDAY BANK OF NIGERIA LTD & ANOR (1977) LPELR-386 (SC).**
25. **MACFOY VS UNITED AFRICA COMPANY LTD. (1961) 3 W.L.R 1405 @ 1409**
26. **OKEREKE VS UMAHI & ORS (2015) LPELR-40687 (CA).**
27. **INTERDRILL (NIG.) LTD & ANOR VS UBA PLC (2017) LPELR-41907 (SC)**
28. **TORTI VS UKPABI & ORS (1984) LPELR-3259 (SC)**
29. **ADAMU VS STATE (2016) LPELR-41174 (CA)**
30. **ADOGA VS STATE (2014) LPELR – 22944 (CA)**
31. **OSHIBANJO VS ODUNLAMI & ANOR (2015) LPELR-25863 (CA)**
32. **MUHAMMED & ORS VS IGP & ORS (2010) LPELR-4555 (CA)**
33. **OKE VS AYEDUN (1986) 2 NWLR (pt 23) 548**
34. **HASSAN VS OBODOEZE & ORS (2012) LPELR-14355 (CA)**
35. **JITTE & ORS VS OKPULOR (2015) LPELR – 25983 (SC)**
36. **OLOWOFOYEKU VS OLOWOFOYEKU (2010) LPELR-11865 (CA)**
37. **KWARA CO-OPERATIVE FEDERATION & ORS VS YUSUF (2014) LPELR – 23793 (CA.**
38. **MINAJ HOLDINGS LTD VS AMCON (2015) LPELR-24650 (CA).**

RULING/JUDGMENT

Upon being granted leave to goon with the case learned counsel to the 1st Respondent/Applicant informed the Court of their intention to move their motion dated and filed on the 11/05/2011 which was brought pursuant to the inherent jurisdiction of the Court as provided for by section 6 (6) of the 1999 constitution of the Federal Republic of Nigeria. Praying for the following orders:

An order of this Court dismissing the sustentative suit on the ground that this Court lacks the jurisdiction to entertain same.

And for such further orders as the Court may deem fit to make in the circumstance and the grounds upon which the application was brought were that:

There is an earlier suit on the same subject matter pending before Justice Kutigi of High Court 29 Wuse Zone 5, Abuja with motion No. M/4331/11 dated 21/03/2011 and filed on 22/03/2011.

Following this present suit to continue will amount to abuse of Court process.

Counsel further submitted that they have also filed and will relied on all the averment in their paragraphs affidavit in support of the motion on notice deposed to by one Doris Eze a litigation secretary in their firm and a certify true copy of processes filed in Justice Kutigi's Court motion number: M/4331/11 between Dr. Ikenna Ihezub Vs Inspector General police & 3 Ors annexed and marked as exhibit 'A' that they also filed a written address and same was adopted as their oral argument in this suit.

Finally counsel urge the Court to dismiss the suit. Because the Respondent/Applicant in this suit is also the Applicant in the case before Justice Kutigi's Court while 2nd and 3rd Respondents in this suit were also Respondent with two others. And same were the subject matter of these two suits pending before Courts of co-ordinate jurisdiction at the same time.

Counsel submit that this amount to an abuse of Court process and referred the Court to the case of Onalaja Vs Oshinubi Cited in his written address.

Applicant/Respondent counsel did not file a counter affidavit but respond on point of law by opposing the said application and submitted that it is a ploy to delay hearing of their application which rules of Court frown at. He further submitted that the parties subject matter, and reliefs sought were not the same and referred the Court to page 12 of the annexture under the heading 1 preliminary statement where the car registration number: is JHMCM 56894-CO

35926 whereas in the application before this Court the car Reg. No. is BV 645 RSH.

Learned counsel to the Applicant/Respondent further stated that in the suit before Court 29 of the High Court of FCT. N1,000,000.00k damages was claimed against all the Respondents and Applicant in this suit who the 1st Respondent in the above mentioned case whereas the Applicant in the instant suit is claiming N10,000,000.00 against the 1st Respondent alone. Learned counsel to the Applicant/Respondent cited the case of Ubeng Vs Usua (2006) 12 NWLR (pt 994) 244 at pg 255 Paragraph E – H Ratio 1 and urge the Court to dismiss the application because there is no evidence that the Applicant/Respondent in this suit has instituted several suits against the Respondents.

Further more learned counsel to the Applicant/Respondent adopted the argument of 2nd and 3rd Respondents counsel where they assert that the parties, subject matter and the reliefs sought in the two different suits before the two different Courts pending at the same time were not the same. He submitted that the authorities relied upon by the 1st Respondent do not apply in this suit and referred the Court to the case of Ette Vs Edoho (2009) 8 NWLR (pt 114) 601 at 603 Ratio 3.

Again learned counsel to the Applicant/Respondent argued that the Court can hear his application that day even as the 1st Respondent/Applicant which ought to have file a counter affidavit by that time is yet to do same. Also referred the Court to order 8 rule 4 of the Fundamental Human Right Enforcement procedure rules and the case of Abia State University Vs Chima Anya Ibe (1996) 1 NWLR (pt 439) 646 at 660.

Finally, learned counsel urged the Court to dismiss the preliminary objection of the 1st Respondent/Applicant and grant their reliefs as contained in the Applicant motion on notice dated 24/03/11 and filed the same date.

Going through the processes filed by all the parties and their oral submission on point of law, it is trite principle of law that once as issue of jurisdiction is

raised that the Court should first decide on it first. This is because if at the end, it is found out that Court acted without jurisdiction all the proceedings shall be rendered null and void see the case of Madukolu Vs Nkemdilim (1962) 2 SCNLR R 341 and Arowolo Vs Adsina (2011) 2 NWLR (pt 1231) 315. It is on that strength that the issue of jurisdiction as raised by the 1st Respondent shall be considered first.

We have earlier on stated the prayer of the 1st Respondent/Applicant in his motion to dismiss suit for lack of jurisdiction on the ground that the suit is an abuse of judicial process that there is a similar suit between the parties pending before Justice Kutigi's Court in High Court 29.

This been the contention of the 1st Respondent/Applicant, thus the term abuse of Judicial process has been Judicially defined to mean that the process of the Court has not been used bonefide and properly. It also connotes the employment of judicial process by a party in improper use to the irritation and annoyance of his opponent and the efficient and effective administration of Justice see the case of Umeh Vs Iwu (2008) 8 NWLR (pt 1089) 225. In order to sustain a charge of abuse of process there must Co-exhibit inter alia

(a) A multiplicity of suits
(b)Between the same opponents,
(c) On the same subject matter, and
(d) On the same issues.

It is against this backdrop of these laid down condition that there arises the need to glance through the aforesaid suits No: M/4611/11: Miss Chika Ogu Vs Dr. Ikenna Ihezvo & 2 Ors and suit No: M/4331/11 Dr. Ikenna Ihezvo Vs I.G.P & 3 Ors. It is obvious from the faces of the two suit that the parties are not the same as a result both parties are entitled to initate and air their grievance at the law Courts as when there is a right, their must be a remedy.

On the question of the same subject matter in both aforesaid suits. The instance suit No: M/4611/11 has been instituted for a relief against the 2nd and 3rd Respondent to release her car Honda Accord with registration number Abuja BV 645 RSH which was detained upon the instigation by the 1st Respondent and Ten Million Naira (10,000,000.00) against the 1st Respondent as exemplary damages for the unwarranted and malicious infringement of the Applicant's Fundamental Rights. Whereas suit No: M/4331/11 on the other hand is a declaration against the Inspector General of Police and 3 Ors that the continuous detention of the Applicant's vehicle, a red 2004 Honda Accord with Vehicle identification number JHMCM 56894 CO35926 by the Respondents is illegal, unconstitutional, oppressive and a gross violation of the Applicant's Fundamental Rights as guaranteed by section 44 (1) of the constitution of the FRN 1999; an order releasing the said Applicant's vehicle being detained by the Respondents, and an order awarding the sum of One Million Naira (N1,000,000.00) only against the Respondents jointly and severally being general damages for the violation of the Applicant's Fundamental Rights.

In views of the above the subject matter in issue in suit No: M/4611/11 is the releasing of 2004 Honda Accord car with registration number Abuja BV 645 RSH to the Applicant and the particulars were exhibited as per exhibits 'G', 'A', 'J' 'K' in the Applicant's paragraph 32 of her affidavit in support of the motion and N10,000,000.00k exemplary damages. While on the other hand the subject matter in issue in suit No: M/4331/11 is a recovered stolen car from the suspects (Names Unknown) and N1,000,000.00 general damages. It is difficult here to state that both suits were the same to sustain charge of abuse of Court process in addition base on the careful perusal/appraisal of the two suits, the contending issues in both suits are not the same.

It is therefore in the interest of Justice that the application for dismissal of the instant suit is hereby refused since there is no prove to show any abuse of Court process by the 1st Respondent/Applicant.

SUBSTATIVE CASE

The Applicant in this suit brought an application dated 24/03/2011 and filed the same day to enforce her Fundamental Human Rights against the

Respondents pursuant to sections 44, 46 (1) and (2) of the 1999 constitution of the Federal Republic of Nigeria (as Amended) and order 2, Rules 1,2 and 3 of the Fundamental Rights (Enforcement Procedure) Rules 2009 seeking the following reliefs:

> A declaration that the seizure and or detention of the Applicant's Honda Accord car with registration number Abuja, BV 645 RSH since October, 29th 2010 by the 2nd and 3rd Respondents on a false allegation and instigation of the 1st Respondent is unlawful unwarranted and contrary to section 44 of the constitution of the Federal Republic of Nigeria.
>
> An order directing the 2nd and 3rd Respondent to release the said Honda Accord car with registration number Abuja, BV 645 RSH to the Applicant forth with without my conditions whatsoever.
>
> Ten Million Naira (10,000,000.00k) against the 1st Respondent as exemplary damages for the unwarranted and malicious infringement of the applicant's Fundamental Rights.
>
> And for such further order or orders as this Honourable Court may deem fit to make in the circumstance.

The Applicant also filed and relied on her statement of fact which was brought pursuant to order 2 Rule 3 of the Fundamental Rights (Enforcement Procedure) Rules 2009, 38 paragraphs in support of the motion on notice deposed to by the Applicant she relied on all the averment and the attached exhibits thereto and marked as follows:-

(i) A copy of the invitation card to the traditional wedding ceremony between the 1st Respondent and her sister. Marked Exhibit A.
(ii) Two pictures of the traditional wedding ceremony between the 1st Respondent and her sister. Marked Exhibits B and B1.
(iii) A copy of the Applicant's statement of account from United Bank for Africa Plc Domiciliary Account Number 049013000472 showing two transfers of $4,500 to Salome Chizoba Ogu. Marked Exhibit C.

(iv) Teller showing deposit of the sum of N140,000 into Zimus Resources Limited account with intercontinental Bank Plc. Marked Exhibit D.

(v) Teller showing deposit of the sum of N130,000 into Zimus Resources Limited account with Intercontinental Bank Plc. E.

(vi) A copy of the Applicants statement of account from United Bank for Africa Plc Account Number 049002001874 showing transfer of N47,200 to Callistus Onyenaobi. Marked Exhibit F.

(vii) Shipping documents given to the Applicant by Fano Shipping Agencies Limited covering the two 2004 Honda Accord vehicles and two other vehicles. Marked Exhibit G.

(viii) Copies of Vehicle License and proof of Ownership Certificate for Honda Accord with registration number BG 16 GWA. Marked jointly as Exhibit H.

(ix) Copies of registration papers for Honda Accord with registration number BV 645 RSH (the subject matter of this suit). Marked jointly as Exhibit J.

(x) Picture showing the 1st Respondent and his wife standing in front of the Honda Accord with registration number BV 645 RSH at the family house of the Applicant in Aboh Mbaise, Imo State in April 2010. Marked Exhibit K.

Finally a written address in support of the Applicant's application was equally filed by learned counsel to the Applicant. Formulating one issue for determination **'whether the Respondents have violated the Fundamental Right of the Applicant to own and keep movable property so as to warrant a grant of the reliefs sought by the Applicant'.**

Counsel affirm the lone issue formulated by him and referred the Court to provisions of section 44 (1) of the constitution of the Federal Republic of Nigeria which provides that 'No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquire compulsorily in any party of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:

(a) Requires the prompt payment of compensation therefor; and

(b) Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a Court of law or tribunal or body having jurisdiction in that part of Nigeria.

Learned counsel to the Applicant/Respondent contend that the Applicant has put before the Court evidence to enable the Court hold that the Honda Accord car with registration number BV 645 RSH belongs to the Applicant and she is entitled to a protection of her right to own same. Even though they were not unmindful of the limitation placed by the provisions of section 44(2)(k) of the constitution which provides as follows:

(2) Nothing in subsection (1) of this section shall be construed as affecting any general law –
(k) relating to the temporary taking possession of property for the purpose of any examination, investigation or enquiry;

Counsel further urge the Court to hold that the continued seizure and or detention of the Honda Accord car the subject matter of this suit since October 29, 2010 without charging anybody to Court for any offence or releasing the car to the Applicant by the 2nd and 3rd Respondents is unreasonable and can no longer qualify as **'temporary taking possession of a property for the purpose of any examination, investigation or enquiry'.** Counsel referred the Court to the case of Nawa Vs A.G. Cross River State (2008) ALL FWLR (pt 401) pg 807 at 840 where it was held that it is the duty of Court to safe guard the Rights and liberties of individual and to protect him from any abuse or misuse of power.

Learned counsel to the Applicant also submitted that the Applicant has made out a case against the 1st Respondent through the averment in her affidavit and the documents attached as exhibits for the violation of her right to own and keep movable property by the Respondents and urge the Court to grant all the reliefs sought particularly the relief of Ten Million Naira (N10,000,000.00k) exemplary damages against the 1st Respondent. On this counsel referred the Court to the cases of Odogu Vs A.G. Federation & Ors (2000) 2 HRLRA 82 and Jimoh Vs A.G. Federation (1998) 1 HRLRA 513.

Learned counsel to the Applicant/Respondent moved his motion in terms of the motion paper on the 12/05/2011 and further relied on the 2nd and 3rd Respondent Counter Affidavit especially paragraph 5(iii) and 5(vii) and urge the Court to grant their reliefs as prayed because all their facts and the attached exhibits were unchallenged by the Respondents.

Learned counsel to the 1st Respondent/Applicant submitted that they do not file any Counter Affidavit to enable them contradict the Applicant/Respondents position but choose to reply on point of law.

Counsel then referred the Court to Exhibit 'G' where at the 2nd page the name of the 1st Respondent/Applicant appears at the column of Exporter /Importer. Counsel then submitted that the 1st Respondent is the owner of the said vehicle and has not transferred his ownership to the Applicant/Respondent even from the attached exhibits to the motion.

By way of response to the 3rd relief ieN10,000,00k exemplary damages sought by the Applicant/Respondent against 1st Respondent, counsel further submit that the 1st Respondent/Applicant did not violate her Fundamental Human Rights but rather contest the vehicle's ownership with her and that if the Court so hold, it wasn't with malice because there were several letters from him to the police to investigate his stolen car. Counsel urge the Court to be guided by principle of fair play in its ruling.

In another breath learned counsel to the 2nd and 3rd Respondent also informed the Court that they opposed the 1st relief sought by the Applicant/Respondent against the 2nd and 3rd Respondent and in view of their opposition they filed and relied on 8 paragraphs Counter Affidavit deposed to by on Jonah Wutu police officer and litigation clerk in the legal department of the Force C.I.D. Abuja. In further opposition to the said relief one, counsel to the 2nd and 3rd Respondent having filed also adopted his written address where it contended that up till that day, 1st Respondent is still contesting the ownership of the said vehicle with the Applicant/Respondent and that their action was not actuated

by malafide but promise to handover the car to the true owner when a Court of competent jurisdiction ordered same.

Finally counsel urge the Court to dismiss relief one sought by the Applicant/Respondent against 2nd and 3rd Respondent but conceded to the 2nd relief and stated that the 3rd relief do not affect them.