IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

COURT CLERKS: T. P. SALLAH & ORS

COURT NUMBER: HIGH COURT NO. 13

DATE: 26/09/2019
FCT/HC/CV/2074/18

ELIS FURO DAWARI
(TRADING UNDER THE NAME AND
STYLE OF FAIRBRIDGE ATTORNEYS) …. CLAIMANT

AND

ALHAJI HALADU MOHAMMED … DEFENDANT

JUDGMENT

The Claimant commenced this action against the Defendant by a writ of Summons accompanied with a statement of claim filed on 12th June,2018 seeking the following reliefs:-

a. A Declaration that the Defendant is in breach of the Tenancy Agreement dated 23rd November, 2015 entered into between him and the Claimant.
b. An Order compelling the Defendant to pay the Claimant the sum of N4,998,000 (Four Million, Nine Hundred and Ninety-Eight Thousand Naira) being arrears of rent and illegal occupation of property for the period November 22nd, 2017 to May 22nd, 2018.

c. An Order ejecting the Defendant and granting the Claimant possession of the (5) five bedroom duplex with two (2) rooms boys quarters, the Defendant is currently unlawfully occupying in the Claimant's property situate at Kwa Fall Street, Plot 1914, Maitama Extension, Abuja, FCT.
d. A Declaration that the Claimant is entitle (sic) to mesne profit in the sum of N833,000.00 Monthly from the Defendant from June, 2018 until the Defendant delivers possession of the demised premises to him.
e. The sum of N500,000.00 as cost of this suit.
f. 10% of the judgment sum until the entire judgment sum is liquidated.

The processes in this suit were served on the Defendant on the 9th July,2018. Consequently, the Defendant filed his memorandum of appearance and statement of defence on 17th August, 2018 but dated 16thAugust, 2018. The statement of defence was subsequently amended pursuant to an orderof this Court granted on 23rd of January, 2019.

Pleadings having been duly joined and exchanged, on the 5th day of November, 2018 the claimant commenced trial by calling two witnesses.

PW1 isone Patrick Etim and he adopted his witness statement on oath deposed to on 12th June, 2018 while PW2, Anthony Biosetestified pursuant to a subpoena issued and served on him to produce a document.

On the otherhand, the Defendant in his defencetestified in person as DW1. DW1 adopted his witness statement on oath deposed to sometimes in January, as his evidence in this case. DW2 is a subpoenaed witness and on the 4th March, 2019 he produced and tendered before the Court statement of account of Fasaam Global Connect Nigeria Limited together with a certification and then left. The following documents were tendered and admitted in evidence in the course of trial thus:-

1. Tenancy Agreement between Fairbridge Attorneys and Alh. Haladu Mohammed is Exhibit 1.

2. Exhibit 2 isa copy of notice to tenant of owner's intention to recover possession.
3. Exhibit 3 is theWitness Statement on Oath of the Defendant deposed to on 17th August, 2018.
4. Statement of Account of Fasaam Global Connect Nigeria. Limited with Zenith Bank Plc is Exhibit 4; and
5. Exhibit 4(a) is theCertificate Compliancepursuant to Section 84 of the Evidence Act (2011) as amended.

In his brief oral evidence in support of the Claimant's case, PW1 testified that he works for the Claimant. He adopted his witness statement on oath deposed to on 12th June,2018 as his oral testimony before the Court. It is PW1's evidence-in-chief that the Plaintiff is the property owner of Plot 1914, Maitama Extension, Abuja-FCT comprising of a five-bedroom duplex with two boys quarters (hereinafter referred to as the Demised Premises). It is further the Claimant's case that the Defendant is a tenant in the Demised Premises having held same of the Claimant for a period of two years certain commencing from 23rd November,2015 to 22nd November,2017 at agreed annual rent of N10,000,000 for which the Defendant had paid a total sum of N20,000,000. The Claimant and the Defendant had entered into a formal tenancy agreement dated 23rd November,2015 which embodied the terms and conditions of the tenancy relationship between parties. The said tenancy agreement was admitted in evidence at the trial of this matter as Exhibit 1. PW1 testified that the Defendant however did not pay any further rent after the expiration of the term on 22nd November,2017 but continued to hold over the Demised Premises till date of this action. That the Claimant orally demanded rent from the Defendant who wilfully and deliberately refused to pay same. That the Claimant consequently caused his solicitor, Anthony Biose Esq (PW2) to issue and serve the Defendant with a 7 days notice of owner's intention to recover possession in accordance with the tenancy. Despite serving the notice, the Defendant failed to yield up vacant possession. It is further the Claimant's case that he needs the Demised Premises for personal use

as he intends to use same as office space for his legal practice. That the Claimant is entitled to arrears of rent of N4,998,000 from the Defendant for the period 22nd November,2017 to 22nd April,2018. That the Claimant is also entitled to *mesne* profit of the sum of N833,000 monthly from the Defendant from 22nd November,2017 until the Defendant hands over possession of the Demised Premises to the Claimant.

PW2's testimony which he gave pursuant to a subpoena is to the effect that he served the Defendant the original copy of 7-days notice of owner's intention to recover possession which he pasted on the Demised Premises rented by the Defendant. That the notice was produced in copies. Exhibit 2 was admitted in evidence as a copy of said notice.

The Defendant in support of his defence to the claim against him, adopted his witness statement on oath of 21st January, 2019 as his oral testimony in this case.His testimony is that he had earlier deposed to a witness statement on oath in this case on 17th August,2018. That the Claimant is not the owner of the Demised Premises but had presented himself as an employee of Fairbridge Attorneys who purportedly was the owner of the Demised Premises. The Defendant's defence is that he had paid the sum of N20,800,000 to the Claimant on 16th November,2015 in anticipation of buying the Demised Premises from Fairbridge Attorneys. That the Claimant had misrepresented to the him that Fairbridge Attorneys was the owner of the Demised Premises while the Claimant was an employee of Fairbridge Attorneys who was willing to sell same to the Defendant. That the Claimant had persuaded the Defendant to pay the sum of N20,800,000 to Fairbridge Attorney's so that the Defendant can enter into possession of the property pending when both Fairbridge Attorneys and the Defendant will agree on the actual sale price to be paid. The Defendant (DW1) testified that after paying the sum to the Claimant, he (Defendant) discovered that the Demised Premises does not belong to Fairbridge

Attorney nor is it a legal entity with whom he could enter an agreement with. That he never entered into a tenancy agreement with the Claimant. That he was unduly influenced by the Claimant to enter into an agreement with Fairbridge Attorney who falsely claimed to be owner/landlord of the Demised Premises after payment of the N20,800,000 by him. That despite his request for disclosure of the true owner of the Demised Premises and copies of title documents, the Claimant failed to produce same even after 2 years had passed. His defence is that he did not hold over the Demised Premises but merely waited for the Claimant to disclose the true owner of same as promised by the Claimant. That the Claimant thereafter claimed that the Demised Premises would be sold for the sum of N250,000,000 which the Defendant agreed to pay and consequently sold his property at Mpape to make up this sum. Although the Defendant still requested for title documents to the Demised Premises, the Claimant failed to produce same. The Defendant testified that he was however surprised when he was served with the originating processes in this suit by which the Claimant is claiming arrears of rent. That he was never served with any 7-days notice or any other notice.

It is further the Defendant's defence that he had made enquiries in respect of the Demised Premises at the Abuja Geographic and Information System (AGIS) and discovered that the title documents do not bear the name of Fairbridge Attorney or that of the Claimant as the owner of the property. That the Certificate of Occupancy covering the Demised Premises also covered two properties owned by the same owner i.e. one IssahDagogo. That the transaction was thus put on hold. The Defendant testified that the Claimant actually represented to him that the N20,800,000 shall be deducted from the sale price of N250,000,000 to encourage the Defendant to buy the property. The Defendant denies that the Claimant is entitled to arrears of rent or *mesne* profit.

DW2 appeared before this Court pursuant to a subpoena and produced the statement of account of one Fasaam Global Connect Nigeria. Limited with Zenith Bank Plc which was admitted in evidence at trial as Exhibit 4, while a certificate pursuant to Section 84 of the Evidence Act 2011 was further admitted in evidence as Exhibit 4a.

At the close of evidence by both parties, final written address was ordered to be filed and exchanged by parties. The Defendant's final written address dated 22nd March, 2019 was filed on 23rd March, 2019 while the Counsel to the Plaintiff filed his final written address on 1st April, 2019.

The learned Counsel for the Defendant formulated the following issues for determination:-

(1) Whether the claimant has proved his case to entitle him to the reliefs sought
(2) Whether exhibit 3 should not be discountenanced by the Court.

Counsel to the claimant on the otherhand set out one issue for determination thus:-

> *"Whether the claimant has proved his case in accordance with the law."*

In arguing the issues distilled for determinationlearned Counsel to the Defendant submitted that civil cases are generally decided on preponderance of evidence and balance of probabilities. He posited that 'he who asserts must prove'.Counsel submitted that the witness statement on oath adopted by PW1 at trial does not constitute cogent and credible evidence as same is grossly incompetent. He submitted that the said witness statement on oath contains prayers, arguments and conclusionsin clear violation of Section 126 and 115 of the Evidence Act 2011. He contended that the statement on oath was not deposed to by the Claimant himself but one Patrick Etim (i.e. PW1) who did not disclose the source of his information. He submitted that the witness statement on oath of PW1 is hearsay and has no probative value as it is not admissible in law. He relied on the case of ***OKEREKE V. UMAHI (2016) 11 NWLR (pt1524) P. 438.*** He said that PW1 had admitted

that he is not the Claimant i.e. Ellis FuroDawari and further admitted that he is not the owner of the Demised Premises nor is his signature on the tenancy agreement Exhibit 1. He urged this Court to expunge the statement on oath of PW1 from the record or refuse to attach any probative value to it. Counsel further submitted that Exhibit 1, the tenancy agreement is incompetent and unenforceable as it has no specific commencement date and the person who signed is unknown. He contended that it is not enough to sign the document without indicating the name of such person. He submitted therefore that Exhibit 1 does not qualify as a tenancy agreement capable of enforcement.

Counsel to the Defendant further submitted that the Claimant failed to provide a link between him and the tenancy Agreement Exhibit 1 as there is nowhere in Exhibit 1 that the Claimant's name is mentioned. He submitted that the Claimant failed to establish the source of his right to institute this matter and urged this Court to dismiss same as being incompetent. He further contended that the Claimant failed to deny or controvert the issue raised in the Amended Statement of Defence as to the purpose of the money paid and ownership of the Demised Premises. He further urged this Court to discountenance and expunge Exhibit 3 from its record as it was not pleaded by the Claimant and is no longer relevant to the instant proceedings. Counsel submitted that the Claimant failed to prove that 7-days notice of owner's intention to recover possession was duly served on the Defendant as the Claimant clearly admitted under cross-examination that there is no evidence of service of same on the Defendant. He therefore urged this Court to discountenance the 7-days notice of owner's intention to recover possession admitted in evidence at trial as Exhibit 2. He submitted that having failed to prove his case at all, the Claimant is not entitled to any of the reliefs sought. Counsel urged this Court to dismiss the instant suit.

In his own address, learned Counsel to the Claimant submitted that the tenancy relationship (as evidenced by Exhibit 1) between the Claimant and the Defendant had been effectively determined by pasting the 7-days notice of intention to recover possession on the door of the Demised Premises in accordance with agreement of parties. He further contended that the Claimant can establish his case through any witness without proving same personally. He relied on the case of ***NJOEMENA V. UGBOMA & ANOR (2014) LPELR 22494CA***and other cases. He submitted that PW1's evidence is receivable in law as an employee of Fairbridge Attorneys. On the admissibility of Exhibit 1, he contended that the law is settled that a court does not possess the power to expunge the very document it had earlier admitted. He also contended that the name of the person who signed Exhibit 1 need not be stated. He submitted that the tenancy agreement Exhibit 1 was entered into on 23rd November,2015 for a period of two years certain and the service of Exhibit 2 was therefore valid. It is Counsel's submission that this date is the commencement date of the two years tenancy. He relied on the case of ***AKPAN & ANOR V. AKPAN & ANOR (2014) LPELR-22637(CA)*** for this position. He urged this Court to discountenance the Defendant's defence and enter judgment for the Claimant.

Having briefly considered the submissions of both Counsel in their respective final written addresses, I will now proceed to consider and resolve the contending issues raised therein.

Firstly, on the issue raised by Defendant's Counsel as to whether the Claimant has been able to link himself to the subject matter of this suit i.e. the Demised Premises such as to have the right to institute the instant suit in respect of same, I am of the opinion that this relates to the Claimant's standing to sue. In other words, the Claimant's *locus standi*.

The law is that where a person institutes an action to claim a relief, which on the facts of the case is enforceable by another person, then the former, cannot succeed because of

lack of *locus standi*. – see ***BEWAJI V. OBASANJO (2008) 9 NWLR (pt 1093) P. 540*** *and* ***A.G., ANAMBRA STATE V. A.-G., FED. (2007) 12 NWLR (pt 1047) P.4****.* It is however elementary position of law that in determining the issue of *locus standi* it is only the Plaintiff's statement of claim that will be considered. – see the case of ***AYORINDE V. KUFORIJI (2007) 4 NWLR (pt 1024) P. 341****.*
Now I have perused the statement of claim of the claimant in this instant suit. By paragraph 1 of the statement the claimant disclosed his interest as the owner of the demised premises and by paragraphs 2,3 and 4 of the statement of claim, the claimant further avers facts as to his tenancy relationship with the Defendant vide exhibit 1. Thus,the Claimant in this case is described as "Ellis FuroDawari (trading under the name and style of Fairbridge Attorneys)". The Defendant in this case has not denied having dealings with the Claimant in respect of the subject matter of this case i.e. the Demised Premises. Neither has he denied entering into the tenancy agreement Exhibit 1 with Fairbridge Attorneys in respect of the Demised Premises. In otherwords by the claimant's pleadings at paragraphs 1,2,3 and 4 and exhibit 1 the Claimant in the instant suit, sues, not in his business name i.e. Fairbridge Attorneys but in his own name and as trading under the name and style of his business name. See the case of ***SLB CONSORTIUM LTD. VS. NNPC (2011) 9 NWLR Pt. 1252 P. 317*** where the Supreme Court held that a legal practitioner cannot sue in his business name only i.e. 'ADEWALE ADESOKAN & CO' but as follows 'ADEWALE ADESOKAN (Trading under the name and style of ADEWALE ADESOKAN & CO.).

I am therefore of the considered view that from the claimant's statement of claim, the Claimant has shown that he has the right to institute this suit against the Defendant in respect of the subject matter of this suit i.e. the Demised Premises in the capacity in which he has instituted this suit. It however appears to me that the Defendant's grouse is that he did not know that Ellis FuroDawari (whom he knew

and dealt with) was trading under the name and style of Fairbridge Attorneys (whom he also knew) at the time of the transaction between parties. This fact, even if true, does not however deny the Claimant the right to institute this suit in the capacity in which he has instituted same. Learned Counsel to the Defendant's objection that the Claimant lacks the capacity to institute the instant suit has no substance and the objection is accordingly dismissed.

On PW1's witness statement on oath being incompetent, I agree with Counsel to the Defendant that by virtue of **Section 115(1) and (2) of the Evidence Act 2011** an affidavit *must not* contain extraneous matters such as objections, prayers, legal arguments or conclusions. This principle is however inapplicable to the instant case simply because the principles guiding affidavit evidence is different from those applicable to witness statements on oath. The **High Court of the FCT, Abuja (Civil Procedure) Rules 2018** require a witness statement on oath to be adopted in Court by the witness at the trial of the matter. PW1 did exactly that at the trial of this matter on 5th November,2018. The Defendant's Counsel did not raise any objection to PW1's statement on oath at the time. Having adopted same, PW1's witness statement on oath ceased to be a mere document but effectively became his oral evidence before this Court. See the cases of ***BUSAYO OLUWOLE OKE V. NATHANIEL AGUNBIADE & ORS.(2011) LPELR-3897(CA)*** *and* ***CHRISTIAN ONYENWE & ANOR V. CHIEF GODWIN ANAEJIONU (2014) LPELR-22495(CA)***.Further Counsel to the Defendant's reference to principles applicable to affidavits in the instant case is highly misconceived.In the case of ***BARR.IHUOMA E. UDEAGHA & ANOR V. MATTHEW OMEGARA & ORS. (2010) LPELR-3856(CA*)** where the Court of Appeal held as follows;

> *"Let us not forget that statements of witnesses which are adopted during oral evidence on oath are different from mere affidavit evidence which stand on their own*

without any oral backup and which are not subjected to cross-examination. It is such affidavit evidence which do not meet the requirements of S.90 of the Evidence Act that are intrinsically inadmissible."

The objection that PW1's statement on oath bediscountenanced or no weight be attached to same has no merit and the objection is equally dismissed.

Counsel to the Defendant has also posited that PW1, rather than the Claimant, testified at the trial and PW1's testimony amounts to inadmissible hearsay evidence as submitted at paragraphs 4.11-4.20 of his final written address and he cited plethora of judicial authorities therein. Unfortunately all the judicial authorities cited by the Defendant's Counsel are not relevant to the fact in issues.

I, am not aware of any law that requires the Claimant to testify personally in support of his case if he can competently and conveniently prove his case by calling other witnesses to testify. It is in fact the position of the law that a plaintiff, and indeed any party, need not himself appear at the trial to testify if it is possible for him to produce evidence at the trial to establish his case. – see the case of **IGYUSE V. OCHOLI (1997) 2 NWLR (pt. 487) P. 352**.

In the case of ***ADEKUNLE V IBRU, (2018)LPELR 44119***, *the Court of Appeal held "in the first place, there is no rule of law known to me with mandates that a party to a suit in Court, as in the instant case, the Respondent must personally be present in Court to testify and tender documentary evidence in support of his or her case, in as much as the party's case be proved or disproved by other persons other than the litigant as done in the instant case, through documentary evidence."*

Also on objection raised by Defendant's Counsel to the evidence of PW1, the position of the law is that evidence of a witness who is not giving evidence of what he knew or did personally but of what he was told by another person amounts to hearsay. The general rule is that hearsay

evidence is inadmissible. – see ***OKHUAROBO V. AIGBE (2002) 9 NWLR (pt. 771) P. 29 at P. 70 paragraphs. B-C, JOLAYEMI V. ALAOYE (2004) 12 NWLR (pt. 887) P. 322 at P. 341 paragraph*** *and* ***OJO V. GHARORO (2006) 10 NWLR (pt. 987) P. 173 at PP. 198-199 paragraphs H-D.***

PW1 had stated in his evidence-in-chief before this Court that he works with the firm of Fairbridge Attorneys (the Claimant). He was in fact cross-examined extensively on this and he stated under cross-examination that he had been working with Fairbridge Attorneys since January, 2015 before the tenancy relationship in respect of the Demised Premises was created between parties. It does not appear to me that PW1 gave evidence of facts which were not within his personal knowledge. Even if he did, being an employee of the Claimant's firm, PW1's evidence on matters relating to the Claimant would fall within the exceptions to the general rule of inadmissible hearsay evidence. – see the case of ***KATE ENT. LTD. V. DAEWOO (NIG) LTD. (1985) 21 NWLR (pt. 5) P. 116,SALEH V. BANK OF THE NORTH LTD. (2006) 6 NWLR (pt. 976) P. 316, COMET S.A. (NIG.) LTD. V. BABBIT LTD. (2001) 7 NWLR (pt. 712) P. 442*** *and* ***S.T.B. LTD. V. INTERDRILL NIG. LTD. (2007) ALL FWLR (pt. 366) P. 757***which cases deal withevidence admitted on the principle of corporate personality as an exception to the general rule of inadmissible hearsay evidence.

Counsel to the Defendant's contention that PW1's evidence be expunged is therefore misconceived and ought to be discountenanced.Accordingly, the objection of the Defendant's Counsel is hereby dismissed.

Counsel to the Defendant has urged this Court to discountenance and expunge Exhibit 3 from the record because it is neither pleaded nor relevant to this case.

Let me state from the onset that this Court has an absolute right, and indeed duty, in law to attach no weight or even go as far as to expunge from record a document which it had wrongly admitted in evidence. – see the case of ***AHEMBE ACHO V. IORYINA UKAGYE(2013) LPELR-21181(CA)***. This is underscored by the position of the law that that legally inadmissible evidence which is wrongly admitted by a trial court cannot be used to form the basis of a just judgment. – see ***BAYODE AFOLABI V. CHIEF SAMUEL FEHINTOLA ALAREMU (2011) LPELR-8894(CA)***.

In fact, in the case of ***SHANU V. AFRIBANK (NIG.)PLC. (2002) 17 NWLR (pt.795) P. 185,*** the position of the Supreme Court is that even if objection had been raised to the admissibility of a document but the court had admitted same by overruling that said objection, the court must reject a legally inadmissible evidence when giving its final judgment even if that amounts to overruling itself to do so. This is clearly an exception to the principle of *functus officio*.

In the instant case Exhibit 3 is a witness statement on oath which the Defendant admittedly deposed to on 17/8/18 and filed in this case. Exhibit 3 had been filed by the Defendant before he eventually filed and adopted another witness statement on oath as his evidence in this case. Exhibit 3 is thus the Defendant's previous statement on oath, even though not adopted by him as his evidence.

The three main criteria governing the admissibility of a document in evidence are;

1. Whether the facts relating to the document have been pleaded
2. Whether it is relevant and
3. Whether it is admissible in law

See ***MR. S. ANAJA V. UNITED BANK FOR AFRICA PLC (2011) 15 NWLR (pt.1270) P. 377 at P. 404 paragraphs. D-F***.

The facts deposed to in Exhibit 3 are facts relating to those facts which form the crux of the Claimant's pleadings. The facts relating to Exhibit 3 have therefore been sufficiently pleaded by the Claimant. It is the law that the Claimant need not specifically mention the witness statement on oath Exhibit 3 in his pleadings. – see the case of ***ODUNSI V. BAMGBOLA (1995) 1 NWLR (pt. 374) P. 641***whereit was held that where facts in support of a document are pleaded the document need not be pleaded. See also ***F.B.N. PLC V. ONIYANGI (2000) 1 NWLR (pt. 661) P. 497***.

In view of the contents of Exhibit 3, I am of the view that the document is relevant. Under **Section 232 of the Evidence Act 2011** the previous written statement of a witness may be used to contradict and discredit him under cross-examination on the condition that his attention is drawn to his said previous written statement and to such part of it sought to be used to contradict him. See the case of ***STATE V. EDO (1991) 7 NWLR (pt. 201) P. 98.****See also the case of* ***GODWIN PIUS V. THE STATE (2012) LPELR-9304(CA)***where the Court of Appeal held as follows;

> *"The law is settled that where a party intends to contradict a witness with a previous statement in writing made by that witness, the written statement must be produced in Court and the witness duly confronted with it."*

In the instant case, DW1confirmed under cross-examination that Exhibit 3 was deposed to by him. His attention was further drawn to the contents of Exhibit 3, particularly paragraph 3 thereof. Under crossexamination by the claimant's Counsel, DW1 testified as follows:-

> *"I can identify the statement I refer to at paragraph 3. This is my witness statement on oath I deposed to on 17th August, 2018. It is my signature on the witness statement on oath deposed on 17th August, 2018"*

From the evidence elicited from DW1 on exhibit 3 under cross examination, it supports the facts contained in the statement of claim and thus admissible. In the circumstances, Exhibit 3 has complied with the conditions laid out for its admissibility (as previous written statement under **Section 232 of the Evidence Act 2011**). Hence, therefore I hold the view that Exhibit 3 is legally admissible and ought not to be expunged from this Court's record. There is absolutely no reason to disturb this Court's Ruling of 4th March, 2019 on this same issue. Counsel's submissions purporting the inadmissibility of Exhibit 3 ought, once again, to be rejected by this Court. Accordingly Counsel's objection is hereby discountenanced.

Having resolved all the objections raised by the Defendant's Counsel in favour of the claimant, by the first relief of his Statement of Claim, the Claimant seeks a declaration that the Defendant is in breach of a tenancy agreement dated 23rd November,2015 between him and the Defendant. Exhibit 1 was produced before this Court as the said tenancy agreement. Now, the Defendant has not denied executing Exhibit 1 with Fairbridge Attorneys even though his position is that the Claimant is not a party to Exhibit 1. I had already resolved this objection that the Claimant can bring the instant suit in conjunction with his business/firm name 'Fairbridge Attorneys' as he has done presently.

I have looked at Exhibit 1. It is a tenancy agreement made on 23rd November, 2015 between Fairbridge Attorneys (the Claimant) as the landlord and the Defendant as tenant in respect of the Demised Premises. Byexhibit 1, the Claimant and the Defendant agreed that the Demised Premises will be rented from the Claimant by the Defendant for a term of two years certain. It is not in dispute that the Defendant took

possession of the Demised Premises pursuant to Exhibit 1. There is no contest as to that. It is not also in dispute that the Defendant has remained in said possession of the Demised Premises till date.

Counsel to the Defendant has contended that Exhibit 1 is incompetent and unenforceable for two reasons i.e. it has no commencement date and the person who signed is not disclosed.

It is trite law that for a lease agreement to be valid, there must be among other essentials, agreement on the date of commencement of the term. In the absence of this date, validity will not be given to the agreement. – see the cases of ***B. MANFAG. (NIG.) LTD. V. M/S.O.I. LTD. (2007) 14 NWLR (pt. 1053) P. 109***, ***OKECHUKWU V. ONUORAH (2000) 15 NWLR (pt. 691) P. 597*** *and* ***ALHAJA RISIKAT ALADE V. CHRISTIANA ADEJUMOKE SOFOLARIN & ORS (2015) LPELR-25008(CA***).

In ***AMIZU V. NZERIBE (1989) 4 NWLR (pt. 118) P. 755*** it was held that for any agreement to be effective, there must be a date of execution or a date when the agreement will become operative. Any agreement which bears no date of execution or the date when it comes into operation is invalid and unenforceable.

In the instant case, it is not specifically stated that the two years tenancy created vide Exhibit 1 is to commence on any specific date. Exhibit 1 however carries a date of execution which is 23rd November,2015.

In the case of ***ANIETI ISAAC AKPAN & ANOR V. CYRIL OKON AKPAN & ANOR(2014) LPELR-22637(CA)*** the Court of Appeal held as follows;

> *"For a lease to be valid and enforceable, it must have a date of commencement. Where there is no date for*

commencement, the date of the document is, therefore, deemed as the commencement date. Exhibit C also had the term of years contained therein. The lease was for 22 years."

Pursuant to the above, the date of execution of Exhibit 1 (i.e. the date it was made) which is 23rd November,2015 is deemed to be the commencement date of the two years term certain created by Exhibit 1 in favour of the Defendant in the Demised Premises. Counsel to the Defendant's contention that Exhibit 1 has no commencement date is thus misconceived and it is accordingly discountenanced.

Exhibit 1 shows that it was signed on behalf of the 'landlord' Fairbridge Attorneys. Although the names of the persons who signed for the Claimant's business is not stated, it is my humble opinion that it suffices that it was signed on behalf of the Claimant. The Claimant has not denied the execution of Exhibit 1. He has not denied being bound by same. Had Exhibit 1 not been signed at all, then it would have been a different matter as it would have been worthless as an unsigned document.

In the instant case, Exhibit 1 was executed by both the Claimant and the Defendant. The Defendant took possession of the Demised Premises pursuant to Exhibit 1 and has remained in possession of same even beyond the term created by Exhibit 1. I will however come to this later. Suffice it to say that the Defendant has thus taken maximum benefit of Exhibit 1 executed between himself and the Claimant. He cannot, under the circumstances, now turn around to contend that Exhibit 1 was ineffective or unenforceable *ab initio*. It is inequitable and morally despicable for a person who has benefited from an agreement to turn round and say that the agreement is null and void *ab initio*. The courts of law are also courts of equity and will not allow such unjust enrichment. – see the cases of ***ADEDEJI V. NATIONAL BANK OF NIGERIA LTD (1989)***

***1 NWLR (pt. 96) P. 212**, **AWOJUGBAGBE V. CHINUKWE (1995) 4 NWLR (pt. 390) P. 379**, **BATALHA V. WEST CONST. CO. LTD. (2001) 18 NWLR (pt. 744) P. 95** and **ABEL OGUNTUWASE V. HON. TOPE JEGEDE (2015) LPELR-24826(CA)**.* I therefore hold the view that Counsel to the Defendant's contention as to the unenforceability of Exhibit 1 is hereby discountenanced. The Defendant who is a party to Exhibit 1, hold the view that having executed same, can and ought to be held bound byExhibit 1 in the circumstances and I so hold.

Exhibit 1 clearly supports the Claimant's case. It is a settled principle of law that where documentary evidence supports oral testimony, such oral evidence becomes more credible as documentary evidence serves as a hanger from which to assess oral testimony. – see the Supreme Court's decisions in the cases of ***BUNGE V. THE GOVERNOR OF RIVERS STATE (2006) 12 NWLR (pt. 995) P. 573**, **EGHAREVBA V. OSAGIE (2009) 18 NWLR (pt. 1173) P. 299** and **UKEJE V. UKEJE (2014) 11 NWLR (pt. 1418) P. 384**.*

Now, the tenancy term created by Exhibit 1 in the Demised Premises in favour of the Defendant is for two years certain commencing from 23rd November, 2015. It is not in dispute that the Defendant did not renew his tenancy at the end of the two year term created by Exhibit 1 which expired on 22nd November,17. Exhibit 1 provides at paragraph 3(d) as follows;

(d) At the expiration or sooner determination of the term hereby granted,
the tenant shall peaceably yield up possession of the Demised Property to the Landlord in good and tenantable condition, fair wear and tear exempted.

It is not in dispute that despite the expiration of his tenancy term, the Defendant however remained in possession of the Demised Premises till date without handing over same to the

Claimant.This is a clear breach of the terms of the tenancy agreement Exhibit 1 between him and the Claimant.Abreach of contract connotes that the party in breach had acted contrary to the terms of the contract either by non-performance, or by performing the contract not in accordance with its terms or by a wrongful repudiation of the contract. It is committed when a party to the contract without lawful excuse fails, neglects or refuses to perform an obligation he undertook in the contract or either performs the obligation defectively or incapacitates himself from performing the contract. – see the cases of ***PAN BISBILDER (NIG.) LTD V. F.B.N. LTD. (2000) 1 NWLR (pt. 642) P. 684***, ***OBAJIMI V. ADEDIJI (2008) 3 NWLR (pt. 1073) P. 1,KEMTAS NIG.LTD. V. FAB ANIEH NIG.LTD. (2007) ALL FWLR (pt. 384) P. 320*** *and***OBMIAMI *BRICK & STONE (NIG.)LTD. V. A.C.B. LTD. (1992) 3 NWLR (pt. 2290 P. 260.***

The Defendant's defence to the Claimant's case is that the sum of N20,800,000which he paid to the Claimant was deposit for the purchase of the Demised Premises (for him to enter possession) pending an agreement on the actual purchase price. That the Claimant had 'misinterpreted' to him that Fairbridge Attorneys was the owner of the Demised Premises but he discovered that the title documents to the Demised Premises carries the name of a different person as the owner. In other words, the Defendant's defence to the Claimant's claim is that what was intended by parties was not a tenancy in respect of the Demised Premises but an agreement for sale of same.

Under cross-examination however, the Defendant was confronted with Exhibit 3 which is his witness statement on oath made previously in this suit. His attention was drawn to paragraph 3 of Exhibit 3 his previous statement on oath and he insisted that the N20 Million he paid to the Claimant was not for rent. I have looked at Exhibit 3 which is the

Defendant's own written statement on oath. At paragraph 3 of Exhibit 3 the Defendant had deposed on oath as follows;

3. *That I paid N20,000,000 (i.e. N10,000,000 per annum) for two (2) years as rent to the Landlord through the Plaintiff who acted as the solicitors to the Landlord. That I further state that the Plaintiff insisted I paid him N800,000.00 as agency fee and claimed that the agency fee belongs to him while the rent belongs to the Landlord. My Statement of Account lends credence to this fact.*

The Defendant further deposed on oath at paragraph 4 of Exhibit 3 as follows;

4. *That I further state that shortly after I paid the rent the Plaintiff informed me that the property will be put up for sale and that whenever the Landlord authorizes him to do that they would give me first opportunity to buy the property and that the rent of N20,000,000.00 I paid will be put into consideration during negotiation.*

The Defendant who, in his previous statement on oath Exhibit 3, clearly stated that the N20,800,000.00 he paid to the Claimant was for rent and agency fees has now turned around in his evidence-in-chief before this Court to state that said sum was paid as part-payment for the purchase of the Demised Premises. These are clearly inconsistent and directly contradictory facts.The law is that where a witness is shown to have made previous statement inconsistent with the oral evidence given by that witness at the trial, such witness testimony is to be treated as unreliable while the statement (whether sworn or unsworn) is not regarded as evidence upon which the Court can act. – see the cases of ***OLADEJO V. STATE (1987) 3 NWLR (pt. 61) P. 419, ONWUKIRU V. STATE (1995) 2 NWLR (pt. 377) P. 67*** *and****JOSEPH EZIRIM & ORS V. ATTORNEY-GENERAL OF IMO STATE (2009) LPELR-8679(CA)****.*

In the case of **SURGEON CAPTAIN C. T. OLOWO V. THE NIGERIA NAVY (2006) LPELR-11815(CA)** the Court of Appeal held as follows;

> *"The Supreme Court had at great length dealt with the rules of inconsistent statements which purpose is to "impugn the credibility of who has given two inconsistent versions of the story. Consequently neither of the two versions of the story is worthy of any credit and therefore incapable of establishing the truth."See case of* ***ASANYA V. THE STATE*** *(1991) 3 LRCN 720 at 725. Furthermore, and in the case of****IKEMSON V. THE STATE*** *(1998) 1 ACLR 80 at 85, the apex court held the rejection of both statement of the accused made before the trial and the oral testimony at the trial as unreliable on inconsistency. Same principle was also applied in* ***R V.Ukpon*** *(****1961) 1 All NLR 25."***

Consequently the Defendant's testimony/evidencebefore this Court on the transaction between him and the Claimant in respect of the Demised Premises for which the sum of N20 Million was paid must be rejected as being inconsistent with his previous written statement on oath Exhibit 3 and as such, unreliable his previous statement on oath Exhibit 3 cannot be used by this Court to establish any fact contained therein. It follows and i therefore hold the view that the Defendant has failed to establish a defence to the case of the Claimant and I so hold.

Even if the Defendant's evidence can somehow be considered (although I don't see how), his defence of paying the sum of N20,800,000 as deposit for the purchase of the Demised Premises and entering into possession pending an agreement on the actual sale price of the said property does not ring true at all. How does one pay a deposit for a property at a time when the actual purchase price is not known? This does not accord with the usual practice in

agreements for sale of land or even common reasoning. In any case, Exhibit 1 is a written tenancy agreement between parties and executed by parties. Exhibit 1 speaks for itself. It does not however say what the Defendant is trying to tell this Court regarding the nature of the transaction between himself and the Claimant in respect of the Demised Premises. From Exhibit 1, it is clear that the relationship between the Claimant and the Defendant in respect of the Demised Premises is one for tenancy and NOT an agreement for the sale of property. The Defendant's oral evidence and defence of some transaction for the sale of the Demised Premises cannot therefore stand in view of Exhibit 1. This is because the general rule is that where the parties have embodied the terms of their agreement or contract in a written document (as was done by parties in this suit vide Exhibit 1) extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. Parties are bound by the terms of their written contract and it is unfair for the Court (or anyone for that matter) to read into such a contract the terms on which there was no agreement. – see the Supreme Court case of ***LAYADE V. PANALPINA WORLD TRANS. NIG. LTD (1996) 6 NWLR (pt. 456) P. 544***. It also follows therefore that any variation of a written agreement, must itself, be in writing. – see ***C.B.N. V. IGWILLO (2007) 14 NWLR (pt. 1054) P. 393*** *per Ogbuagu JSC.*

Whichever way one looks at it, there is no proper defence to the case of breach of Exhibit 1 which the Claimant has been able to successfully establish against the Defendant in this case. I therefore hold the view that the Claimant is entitled to the first relief sought by him in the Statement of Claim.

The third relief of the statement of claim is for an order ejecting the Defendant from and granting the Claimant possession of the Demised Premises. The Claimant thus seeks recovery of possession of the Demised Premises.

By virtue of **Section 7 of the Recovery of Premises Act Cap 544 Laws of FCT Nigeria 2006,** at the end, or determination by notice to quit, of a tenancy, a tenant is entitled to be served with a 7 day's notice of the landlord's intention to recover possession of the demised premises. It is after the proper service of these notices that a landlord may proceed to institute an action for the recovery of possession of his premises under **Section 10 of the Recovery of Premises Act**. Thus, the service of statutory notices is a condition precedent to the exercise of a landlord's right of action in recovery of possession – see ***IWUAGOLU V. AZYKA (2007) 5 NWLR (pt. 1028) P. 613at P. 630 paragraphs. C-F*** *and* ***AYINKE STORES LTD. V. ADEBOGUN (2008) 10 NWLR PT. 1096 P. 612 at P. 630 paragraphsA-B****. See also* ***IHENACHO V. UZOCHUKWU(1997) 2 NWLR (pt. 487) P. 257****.*
By paragraph 3(c) of Exhibit 1, parties had specifically agreed that the Defendant shall not be entitled to notice to quit upon the expiration of the tenancy term created by Exhibit 1. The law is also in support of this position. The implication of **Section 7 of the Recovery of Premises Act** is that a tenancy could either come to an end or be determined by notice to quit. See also ***IHENACHO V. UZOCHUKWU(supra*****)**. Where a tenancy is for a fixed term, a quit notice is not requiredto determine same (particularly where same has come to an end). – see the case of ***HILDA JOSEF V. CHIEF A. S. ADOLE(2010) LPELR-4367(CA)****.*

The tenancy term created by Exhibit 1 in favour of the Defendant in the Demised Premises is for a fixed term of two years certain. I have already submitted that the said term expired but the Defendant is still holding over possession of the Demised Premises from the Claimant. In the circumstances, the only notice the Defendant is entitled to in law before the Claimant can recover possession is a notice of at least seven days of the Claimant's intention to recover possession of the Demised Premises.

The Claimant's case is that he issued and served a 7-days notice of owner's intention to recover possession through his solicitor, one Anthony BioseEsq. on the Defendant. The Defendant denied service of such notice. The said Anthony Biose however appeared at the trial of this suit and testified as PW2. Exhibit 2 is a copy of the notice of owner's intention which he testified that he personally served by pasting the original copy on the Demised Property rented by the Defendant. He was cross-examined extensively as to the date, time and circumstances in which he pasted the notice in Exhibit 2. PW2 answered the questions put to him under cross-examination accordingly without any inconsistence. He said he pasted the notice at about 3:00pm on 20th January,2018 which was the day he prepared it. He said the Demised Premises where he pasted Exhibit 2 was highly secured and under lock and key. When asked if he had any further proof, PW1 said he had no further proof there with him in the witness box to show that he had served the Defendant.

Counsel to the Defendant has contended that the Claimant had failed to prove service of the notice Exhibit 2 on the Defendant because PW2 had admitted under cross-examination that he had no further proof of such service. I disagree. PW2 who personally served Exhibit 2 was physically before the Court to testify. His evidence of how he served Exhibit 2 by pasting at the Demised Premises occupied by the Defendant, the time, date and circumstances of such pasting, was not discredited in any way under cross-examination. I hold the view that sufficient evidence has been adduced to establish the fact that service of the notice of Exhibit 2 was effected by pasting same on the Demised Premises occupied by the Defendant and I so hold.

By Exhibit 1, parties agreed at paragraph 3(c) as follows;

That all notices required to be given to the Tenant under the terms of this Tenancy shall be sufficiently served if left under the door of the demised Property or pasted at the door of the Tenant or sent to it by registered post or if addressed to the Landlord shall be sufficiently served if sent by registered post of her address given in this tenancy or served on any agent authorized by her to receive same.

The Defendant was therefore properly served with notice of Exhibit 2 by pasting same at the Demised Premises occupied by him. The Claimant was under no obligation to do anything further to bring notice of Exhibit 2 to the Defendant's attention. Consequently, proof that Exhibit 2 actually got to the attention of the Defendant after it was pasted is not necessary.

By Exhibit 2 dated 20th January,2018, the Claimant gave 7 day's notice of his intention to proceed on 2nd February,2018 to recover possession of the Demised Premises from the Defendant. The instant suit for recovery of possession of the Demised Premises was instituted on 12th June, 2018 after the expiration of the notice given in Exhibit 2. I therefore holdview that the Claimant has complied with the requirements of the law for the recovery of possession of the Demised Premises from the Defendant. Thus, the claimant having complied with the statutory process of recovery of premises there is undisputed evidence before this Court that the Defendant is however still in possession of the Demised Premises till date. In the circumstance I hold the view that the Claimant is entitled to the recovery of possession of the Demised Premises from the Defendant and I so hold. The third relief of the claimant is hereby granted.
The second relief of the statement of claim is for the sum of N4,998,000 as arrears of rent for the period from 22nd November,2017 to 22nd May, 2018.

The Claimant's case in both his oral and documentary evidence before this Court is that the Defendant's tenancy was for a term of two years certain commencing from 23rdNovember,2015 and expired on 22ndNovember,2017 without the Defendant renewing same. The pertinent question is this; if the Defendant's tenancy ended on 22nd Novembe,2017, can the Claimant be entitled to rent (in arrears) to cover a period after the tenancy had already been determined?

The position of the law is that rent is operative during the subsistence of a tenancy and differs drastically from *mesne* profit in this regard. – see the decision of the Supreme Court per Oputa JSC (of blessed memory) delivering the lead Judgment in the case of ***DEBS V. CENICO NIGERIA LTD (1986) 3 NWLR (pt. 32) P. 846***.'Arrears of rent' simply means rent which has become due (but is unpaid) for the period covering the subsistence of a tenancy.

The Supreme Court also held per the same erudite jurist in the case of ***MARINE & GENERAL ASSURANCE COMPANY LTD. V. ROSSEK & ANOR (1986) 2 NWLR (pt. 25) P. 750*** as follows;

> *On the termination of the lease agreement by effluxion of time on 6th October 1976, the appellant held over. The respondent cannot claim rents from the appellant. The only claim open to the respondent was mesne profits.*

In view of the position of the law, I hold the view that the claim of rent (in arrears) cannot be available to the Claimant against the Defendant for the period after the Defendant's tenancy had expired by efflux of time and I so hold. The second relief of the statement of claim for arrears of rent is hereby refused and accordingly dismissed.

By the fourth relief of his statement of claim, the Claimant seeks *mesne* profit of N833,000 monthly from the Defendant from June, 2018 until the Defendant delivers possession of the Demised Premises to him. In law '*Mesne* profit' is the sum due to a landlord from the time his tenant ceases to hold the premises as a tenant to the time such tenant gives up possession. – see ***ODUTOLA V. PAPERSACK (NIG.) LTD. (2006) 18 NWLR (pt. 1012) P. 470 at PP. 495-496 paragraphs G-B, IBILE HOLDINGS LTD. V. P.D.S.S. (2002) 16 NWLR (pt. 792) P. 117 AT P. 133 paragraphs A-D****and*** ***AGBAMU V. OFILI (2004) 5 NWLR (pt. 867) P. 540***. I have earlier had the view that the Claimant has been able to establish that the Defendant's tenancy, which he held of the Claimant in respect of the Demised Premises, was for a term of two years certain and expired on 22nd November,2017 without the Defendant renewing same. It is not in dispute that the Defendant is however still in possession of the Demised Premises till date. The Defendant thus started holding over the Demised Premises from 23rd November,2017. The Claimant is therefore entitled to *mesne* profit from this date. The Claimant however claims *mesne* profit to start from June, 2018 which is well after the Defendant started holding over. Thus therefore I hold the view that the Claimant is entitled to *mesne* profit from June, 2018 till he gives up possession of the demised property to the Claimant and I so holds.

The Claimant claims *mesne* profit at the rate of N833,000 per month.Exhibit 1 executed between parties shows that the agreed rent for the Demised Premises was N20,000,000 for two years at N10,000,000 per annum. On a *pro rata* basis, this translates to N833,000 monthly which is the rate of *mesne* profit claimed by the Claimant in this suit. In ***COBRA LTD. V. OMOLE ESTATES & INVESTMENT LTD. (2000) 5 NWLR (pt. 655) P. 1 at PP. 15-16 H-A*** the Court of Appeal held that the previous rent could be used as a guide for the correct measure of *mesne* profit. See alsothe

provisions of**Section 10(2) of the Recovery of Premises Act** which I reproduce hereunder;

> *If mesne profits are claimed and the writ or plaint shows that the rate at which the mesne profits are claimed is the same as the rent of the premises, judgment shall be entered for the ascertained amount as a liquidated claim and if mesne profits are claimed at the rate of the rent up to the time of obtaining possession the judgment shall be extended to include that claim and shall be as in the second alternative in Form J.*

Hence, therefore the Claimant is entitled to the fourth relief of the statement of claim and it is accordingly granted.

In conclusion, the Claimant being the successful party, I hold the view that he is also entitled to his cost of this action which he claims vide the fifth relief of his statement of claim as well as the sixth relief for post judgment interest of 10%. The position of the law is that costs follow the event in litigation and the award of same in favour of a successful party (who is entitled to cost) is entirely at the discretion of the court. – see the cases of ***ADELAKUN V. ORUKU (2006) 11 NWLR (pt. 992) P.625, NIGERIAN NATIONAL PETROLEUM CORPORATION V. CLIFCO NIGERIA LIMITED (2011) LPELR-2022(SC)***.
In the circumstance of this case, a cost of N200, 000.00 is hereby assessed in favour of the Claimant against the Defendant. And finally, the Claimant is also entitled to post judgment interest. 10% interest on the entire judgment sum is hereby awarded to the claimant against the Defendant until final liquidation of the entire judgment sum.
Judgment for the claimant succeeds in part.

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HON. JUSTICE D. Z. SENCHI
(**Presiding Judge)**
26/09/19

Parties:- Absent.

NwabuezeNwankwo:-With me is EbereEzenwaholding the brief of IkechukuwKanu for the Claimant.

Emmanuel N. Ign:-For the Defendant.

Court:- In the course of writing the judgment, I discovered that the Defendant's statement of defence was filed out of time. There was no application for extension of time to file out of time. In the circumstance, what do we do?

Ign:- In the circumstance I humbly apply for the leave of this Court to deem the already filed statement of defence as duly filed and served out of time.

Nwankwo:-I have no objection.

Court:- The oral application to deem the already filed statement of defence of the Defendant as properly filed and served, time having elapsed is hereby granted in the interest of justice.

Signed
Judge
26/09/19