IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON MONDAY THE 1ST DAY OF JULY, 2019.
BEFORE HIS LORDSHIP ; HON. JUSTICE MODUPE OSHO-ADEBIYI
SUIT NO. CV/0767/2018

BETWEEN

PAULO HOMES LIMITED ----------PLAINTIFF

AND

IRENE OTTIH----------DEFENDANT

JUDGMENT

By an Originating Summons filed 30/1/2018 brought pursuant to Order 1 Rule 2(2)(a) of the High Court of the FCT Civil Procedure Rule 2004, the Plaintiff filed this application against the Defendant for the determination of the following questions:

1. Whether the continuous non-payment of the balance of the purchase price of land purchased by the Defendant from the Plaintiff since July 2015 till the institution of this suit is a breach of the agreements entered into on the 15th day of July 2015 by the parties?
2. Whether if question 1 above is answered in the affirmative, the Plaintiff in line with Clause 9 of Section C of the agreements between the parties is entitled to revoke the allocation made to the Defendant and re-allocate same?
3. Whether if question 1 and 2 above are answered in the affirmative the liability of the Plaintiff who is also the developer exceed that which is stipulated in the said agreements particularly

Clause 21 Section C of the agreements between the parties should the Plaintiff thus revoke the allocation granted to the Defendant under those agreement?

4. Whether if the answer to question 1 and 2 above is in the affirmative and 3 in the negative, the Plaintiff is entitled to the following orders:

a. A declaration that the continuous non-payment of the balance of the purchase price as agreed by the parties under the agreements entered into on the 15th day of July, 2015 for sale of land is a breach of the agreement by the Defendant which entitles the Plaintiff to revoke the allocation made to the Defendant.
b. A declaration that the Plaintiff in line with Clause 21 of Section C of the agreements between the parties is only liable to make refunds to the Defendant to the extent agreed to between them.
c. And for such further or other orders as the honourable Court may deem fit to make in the circumstances.

In support of Originating Summons is an affidavit of 18 paragraphs deposed to by Ogechi Ukaogo, the Facilities Manager of the Plaintiff. From the facts deposed therein, it is the case of the plaintiff that the Plaintiff and the Defendant entered into two separate agreements on the 15th day of July 2015 for the sales and purchase of two separate plots of land after the said land had been shown to the Defendant by the Assistant General Manager of the Plaintiff. That the total sum for the two, equal Twenty Two Million Naira only out of which the Defendant paid the sum of Nine Million Naira only; Six Million Naira for the first plot of land located in Cluster 3 and Three Million Naira only for the second plot of land located in Cluster 4 of Plaintiff's Estate.

That according to the agreement in Clause 7, the Defendant was to complete the payment of the purchase price within three months of signing the agreement and by implication 14th October 2015. That the Defendant did not make any further payment despite repeated demands being made on her.

That sometime in March 2017 the Defendant, without any effort to pay the balance, mobilized contractors to the land who carried out some skeletal digging and peg fixing on the land but Plaintiff had to stop Defendant from proceeding with construction until payment of balance of the purchase price.

The Defendant thereafter wrote a letter to the Plaintiff asking for her plot numbers in Cluster 3 and 4 on the 28th day of March 2017, which the Plaintiff responded to the same date.

That when it became clear the Defendant was not willing to pay the balance of the purchase price, the Plaintiff through its Managing Director issued a Zenith Bank Cheque dated 6th of April 2017 to the Defendant to the tune of Nine Million Naira which is a refund of the the sum the Defendant had paid for the two plots of land, which cheque was rejected by the Defendant.

That the Defendant wrote another letter on the 11th day of April, 2017 asking for her Plot numbers again which Plaintiff replied with a letter dated 12th April 2017 and also wrote another on the 14th of July 2017**.**

Attached to the affidavit are exhibits marked as follows:

1. The contracts entered into by the Plaintiff and the Defendant marked as Exhibit Al and A2.
2. The receipts of payments made by the Defendant marked as EXHIBIT B1 and B2

3. A printed screenshot of communication evidencing demand of balance by the plaintiff to the Defendant marked as Exhibit C.
4. The letter by the Defendant requesting for Plot number is marked as Exhibit DI and the reply by the Plaintiff is marked as Exhibit D2.
5. The cheque of refund to the Defendant rejected by the Defendant is marked Exhibit E.
6. The letter written by the Defendant on the 11th day of April asking for her plot is marked Exhibit F1 and the reply the Plaintiff made on the day 12th day of April 2017 is marked Exhibit F2. The letter Plaintiff wrote to the Defendant on the 14th day of July 2017 through Trannex City Express as Exhibit F3.

The Plaintiff Counsel in the written address filed, adopted the questions raised for determination on the face of the summons as follows;

1. Whether the continuous non-payment of the balance of the purchase price for land purchased by the Defendant from the Plaintiff since July 2015 till the institution of this suit is a breach of the agreements entered into on the 15th day of July 2015 by the parties?
2. Whether if question 1 above is answered in the affirmative, the plaintiff in line with Clause 9 of Section C of the agreements between the parties is entitled to revoke the allocation made to the Defendant and re-allocate same?
3. Whether if question 1 and 2 above are answered in the affirmative the liability of the Plaintiff who is also the developer exceed that which is stipulated in the said agreements particularly Clause 21 Section C of the agreements between the parties should the Plaintiff

thus revoke the allocation granted to the Defendant under those agreement?

4. Whether if the answer to question 1 and 2 above is in the affirmative and 3 in the negative, the Plaintiffs are entitled to the orders sought.

On issue number, which is whether the continuous non-payment of the balance of the purchase price for land purchased by the Defendant from the Plaintiff since July 2015 till the institution of this suit is a breach of the agreements entered into on the 15th day of July 2015 by the parties?

Counsel submitted that it is trite that parties are bound by the agreements they enter into and an innocent party is entitled to regard itself as discharged from an agreement/contract which the other party had grossly violated/breached.

Submitted that the provision of the agreements between the Plaintiff and the Defendant particularly Clause 7, 9, 19 and 20 when read together simply is to the effect that, the Defendant had the grace of 90 days to make full payment of the purchase price after provisional allocation was made to the defendant on the 15th July 2015; and failure to effect payment as agreed automatically entitles the developer which is the Plaintiff in this case to revoke the allocation and even re-allocate same without written notice to the Defendant. Relied on the reasoning of Ogbobine J in the case of Johnson Bekederemo V. Colgate-Palmolive (Nig.) Ltd (reproduced from the leamed SAN Itse Sagays book on Nigerian Law of Contracts; second edition).

Submitted that in this case, had the plaintiff the slightest hint, that the payment plan agreed with the Defendant in Clause 7 would not be respected, it would assuredly have not entered into this agreement. Counsel therefore urged the Court to consider the above argument and the obvious facts presented in the affidavit in support of the Originating Summons where Defendant instead of the 90 day grace it had by virtue of Clause 7 had now defaulted in well over Two Years and resolve this question in the affirmative.

On question 2 & 3, which is whether if question 1 above is answered in the affirmative, the plaintiff in line with Clause 9 of Section C of the agreements between the parties, is entitled to revoke the allocation made to the defendant and re-allocate same? And whether if question 1 and 2 above are answered in the affirmative the liability of the Plaintiff who is also the developer exceed that which is stipulated in the said agreements particularly Clause 21 Section C of the agreements between the parties should the plaintiff thus revoke the allocation granted to the defendant under those agreement?

Counsel submitted that the law is that the terms of an agreement between parties are binding on them and not even the Court has the power to change same. Relied on Teju Investment And Property Company Limited V. Alhaja Moji Subair (2016) LPELR-40087(CA) where Per SANKEY, J.C.A. (Pp. 21-22, Paras. C-E) held that "A party cannot ordinarily resile from a contract or agreement just because he later found that the terms of the contract or agreement are not favourable to him. This is the whole doctrine of the sanctity of contract or agreement. The Court is therefore bound to properly construe the terms of the contract or agreement in the event of an action arising therefrom. See Arjay Ltd V

Airline management Support Ltd (2003) LPELR- 555(SC) 1 at 67; & Nneji v Zakhem con. (Nig.) Ltd (2006) LPELR-2059 (SC) 1 at 27.1n conclusion, Tobi, JSC, summarized the principles of law governing contracts succinctly in Nika Fishing Co. Ltd V Lavina Corporation (2008) LPELR-2035(SC) 1 at 30-31, in these words: "Parties are bound by the conditions and terms in a contract they freely enter into... The meaning to be placed on a contract is that which is the plain, clear and obvious result of the terms used... when construing documents in dispute between two parties, the proper course is to discover the intention or contemplation of the parties and not to import into the contract ideas not potent on the face of the document...Where there is a contract regulating any arrangement between the parties, the main duty of the Court is to interpret that contract and to give effect to the wishes of the parties as expressed in the contract document...lt is the law that parties to an agreement retain the commercial freedom to determine their own terms. No other person, not even the Court can determine the terms of contract between parties thereto. The duty of the Court is to strictly interpret the terms of the agreement on its clear wordings... Finally, it is not the function of a Court of law either to make agreements for the parties or to change their agreements as made. "

Counsel on the above principles of law, urged this Court to resolve these questions in favour of the Plaintiff.

On question number 4, which is whether if the answer to question 1 and 2 above is in the affirmative and 3 in the negative, the plaintiffs are entitled to the reliefs sought?

Counsel contended that the Plaintiff is entitled to all the reliefs sought in the event that the questions are resolved in the Plaintiffs favour as the law is clear as it relates to the fact that where there is a wrong there must be a remedy. Submitted that if the questions earlier asked are resolved in favour of the Plaintiff particularly question one, it would seem obvious that a wrong had been occasioned to the Plaintiff by the Defendant which will then entitle the Plaintiff to the reliefs sought and urged the Court to grant same.

The Defendant failed to enter appearance or file a counter affidavit in response to the Plaintiff's Originating Summons despite being served with the originating processes and hearing notice, via substituted means on application of the Plaintiff's Counsel as Defendant could not be served personally.

The law is well settled that, where both parties to a dispute have been duly notified of the hearing date and a party, for no justifiable reason, decides to opt out of the proceedings, the case of the other person, once it is not discredited in any legal way should be the case to be considered on merit. The other party that refused to avail itself with the opportunity cannot complain of lack of fair hearing. See Newswatch Communications Ltd V. Atta (2006) 12 NWLR (pt. 993) 144 at 171-175.

A defendant who fails to enter appearance or file counter affidavit in response to the averments in support of the Originating Summons would be presumed to have demurred and admitted the facts deposed to in the affidavit filed in support of Originating Summons. See OYEYIPO V OYINLOYE (1987) 1 NWLR (PART 50) 350;IGBOKWE V UDUBI (1992) 3

NWLR (PART 228) 214, INAKOJU V ADELEKE 2005 2 M.J.S.C 1 , OMO V J.S.C DELTA STATE (2000) 12 NWLR (PART 628) 444.

The Court in ORISAKWE & SONS LTD. & ANOR V. AFRIBANK PLC.(2012) LPELR-20094(CA) Per OREDOLA, J.C.A. (P. 49-50, paras. D-G) held

> *"It is trite and elementary principle of law that a party who fails to file a counter affidavit, reply or further and better affidavit in order to challenge or controvert the depositions in the adverse party's affidavit is deemed to have accepted the facts deposed in the affidavit in question. It is thus established that unchallenged facts in an affidavit are treated as established before the court."*

Also, in L. O. YEMOS (NIG) LTD & ANOR v. UNITY BANK (2016) LPELR-41211(CA) Per ONYEMENAM, J.C.A. (Pp. 29-31, Paras. F-A) held

> *"Still on non filing of a counter affidavit by the Respondent, I have read the authorities cited by the Appellants and I agree with them on the general principle that as in this case, the failure of the Respondent to file a counter-affidavit, the facts should ordinarily be deemed correct and believed by the Court to exercise its discretionary power in their favour. However, as argued by the Respondent, this general principle is not absolute. The application to extend the*

time allowed by the rules for a procedural step to be taken being an equitable relief whoever that approaches the Court for the exercise of its discretion to grant such a relief must stand before the Court with clean hands, as he who comes to equity must come with clean hands. …. This principle has eroded the absolute nature of the principle that once there is failure to file a counter affidavit, the Court is bound to accept the affidavit evidence since equity cannot stand injustice or unfair play. Affidavit evidence is therefore not sacrosanct. The facts deposed to therein is subject to evaluation by the Court to ascertain its veracity, cogency and authenticity. "

The law is also well settled that evidence or averments not denied or challenged are deemed admitted and the court ought ordinarily to act on them; however, going by the principle in the case of L. O. YEMOS (NIG) LTD & ANOR v. UNITY BANK (supra), this Court is bound to evaluate the facts in this case to determine the veracity of the Plaintiff's case.

From the above, I have formulated the sole issue for determination:-

"Whether with the continuous non-payment of balance of purchase price of the land purchased by the Defendant from the Plaintiff, Plaintiff is entitled to the prayers as stated on the face of the Originating Process"

Defendant in this suit bought two parcels of land from the Plaintifft in July 2015 to wit:- Plot of land in cluster 3, River Park worth ₦12,000,000.00 with Defendant paying the sum of ₦6,000,000.00 as deposit leaving a balance of ₦6,000,000.00 yet unpaid. The due date for the final payment

as written on the invoice of sale was 14th August 2015. A second plot of land in cluster 4, River Park worth ₦10,000,000.00 with Defendant paying the sum of ₦3,000,000.00 leaving a balance of ₦7,000,000.00 yet unpaid. Total balance of money left unpaid on both plots by the Defendant since 15th July 2015 till date remains the sum of ₦13,000,000.00.

Plaintiff attached Exhibit C, Exhibit D2, Exhibit F2 and Exhibit F3 to its Originating application, the said exhibits are Letters from the Plaintiff to the Defendant reminding Defendant that she has a balance to pay on the land purchased and demanding that same be paid to the Plaintiff; also attached as exhibits are copies of telephone chats between both the Plaintiff and Defendant. Plaintiff has been able to prove before this Court that Defendant is indeed owing a balance of ₦13,000,000.00 left unpaid on the said two plots of land purchased from the Plaintiff.

It is trite that parties are bound by their agreements and a Court of law will not sanction an unwarranted departure from the contents of the agreement unless they have been lawfully abrogated or discharged. See JERIC NIG LTD VS. UNION BANK NIG PLC (2000) 15 NWLR (PT.691) PG.447 SC @ PG 462-463 Per Kalgo JSC @ page 466 Para C where the Court held that where there is a valid contract agreement, parties must be held bound by the agreement and by all its terms and conditions. There should be no room for departure from what is stated. Also see IGN Vs. ZEBRA ENERGY LTD (2002) 3 NWLR (PT. 754) PG. 471 @ 491.

Plaintiff in this suit is seeking an order of Court to refund Defendant's balance to the Defendant in line with the agreement freely entered into by parties. It is the duty of the Court to construe the surrounding circumstances, including written and oral statements, so as to effect the

intention of the parties to the contract, hence the Court is to construe any document fairly and broadly in a bid to effect the true intention of parties.

Paragraph 7 of Section C of the agreement between parties states that applicants shall be given the grace of 90days from the day of issuance of provisional allocation to complete payment but Plaintiff exhibited via Exhibit F1, a letter from Defendant where Defendant stated that her land ought not be revoked because Plaintiff was just showing her the location of her land on 6/4/2017 despite paying since August 2015.

It is trite that all exhibits attached to Plaintiff's originating application are exhibits relied upon by Plaintiff and the Court should rely on same in the determination of Plaintiff's case. Hence, this Court will adopt the 6/4/2017 as the commencement date for the letter of provisional allocation. Plaintiff on July 14, 2017 wrote another letter of demand to the Defendant thereby making it a period of 90days from when Defendant was shown her plot in line with the agreement that Applicants have a grace period of 90days to complete payment of land purchased from the Plaintiff.

Paragraph 9 of Section C of the agreement further states that failure of applicants to effect payment within 90 days; the developer (Plaintiff) shall have the option of revoking the allocation and re-allocate of same to another person without written notice. Clause 21 paragraph C further states that the liability of the developer (Plaintiff) to any allocation withdrawn shall be limited to the refund of the deposit paid by the allottee excluding 10% administrative charges and that the developer shall not be liable to pay interest on the said amount, or pay for other loss suffered by the allottee arising from the withdrawal of allocation.

The Apex Court has held in **DALEX NIG. LTD. VS. OIL MINERAL PRODUCING AREAS DEVELOPMENT COMMISSION (OMPADEC)** (2007) 7

NWLR (PT.1033) Pg.441 para A-B Per Ogbuanya JSC held that where the words of a contract or agreement are clear, the operative words in it should be given their simple and ordinary grammatical meaning. If parties enter into an agreement, they are bound by its terms. The Court cannot legally or properly read into the agreement, the terms of which the parties have not agreed, it is not the business of the Court to make a contract for the parties before it or to rewrite one already made by them. Once the parties fulfill the condition precedent to the formation of the contract thereto, they are bound by it. Where parties have embodied the terms of their contract in a written agreement, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. -Per Mohammed JSC in LARMIE VS. DPM & SERVICES LTD. (2005)18 NWLR (Pt. 985)SC.

Hence, where there is a dispute between parties to a written agreement as in this suit, the Courts have a duty to look at the terms of the agreement for the purpose of resolving the dispute. Defendant by her letter stated that Plaintiff could not revoke her land while Plaintiff on the other hand, filed this present suit seeking for a Court Order to revoke Defendant's land. From the Clauses in the agreement highlighted above, parties have agreed that in the event that allottee is unable to offset the balance of the land purchased from the Plaintiff, the agreement stated that Plaintiff as in this case shall have the option of revoking and re-allocating same to another allottee on the condition that the Developer (Plaintiff) shall return the money paid to the allottee (Defendant) less 10% administrative charges and these terms were unconditionally and unequivocally accepted by the Defendant by writing and signing her name in the "Acceptance" Column of all terms and conditions of the agreement. See BEST (NIG) Ltd.

VS. BLACKWOOD HODGE (NIG) LTD (2011) 5 NWLR (PT. 1239) PG. 95 @ 127 Para F Per Adekoye JSC, where the Apex Court held that an offer must be unconditionally and unequivocally accepted. Any addition to or subtraction from the terms and conditions amounts to a total rejection of the offer by the offeree.

Moreover, it is trite law that where a purchaser of land makes part payment of the purchase price but defaults in the balance, there can be no valid sale, even where the purchaser is in possession, such possession is incapable of defeating the vendor's title- Per GALIJE JSC in ACHONU VS. OKUWOBI (2017) LPELR-42102 (SC)P.29 PARA D-E

Hence in law, where a purchaser defaults in the payment of the balance of the purchase price of land, not minding that he has made part-payment, the vendor would be at liberty to re-sell, since legal title remains with the vendor until full price is paid by the purchaser. See ODUSOGA & ANOR VS. RICKETTS (1997) LPELR-2256 (SC) PP 16-17 (para G-C) where Ogundare JSC held that

> "*Where the purchase price is not fully paid there can be no valid sale, notwithstanding that the purchaser is in possession. That possession cannot defeat the title of the vendor. Here however, part payment of the purchase price was made and the balance is tendered within the stipulated time or in the absence of a stipulated time, within a reasonable time, the vendor cannot rescind from the contract of sale and the purchaser in possession shall be entitled to a decree of specific performance".*

From the above authorities, I am of the view and so HOLD that Plaintiff is entitled to the prayers sought on the face of his motion and it is hereby DECLARED AS FOLLOWS:-

1. That the continuous non-payment of the balance of the purchase price as agreed by the parties under the agreements entered into on the 15th day of July, 2015 for sale of land is a breach of the agreement by the Defendant which entitles the Plaintiff to revoke the allocation made to the Defendant.
2. That the Plaintiff in line with Clause 21 of Section C of the agreements between the parties is only liable to make refunds to the Defendant to the extent of the amount agreed between them in line with duly executed agreement between both parties dated 15/7/2015.

PARTIES: Parties absent.

APPEARANCES: O. S. Adebiyi, Esq., for the Plaintiff. Defendant not represented.

HON. JUSTICE M. OSHO-ADEBIYI
JUDGE
1ST JULY, 2019