IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDING AT MAITAMA-ABUJA
BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF

SUIT NO: FCT/HC/CV/3273/13

BETWEEN:

1. DOLIZ BROWN GROUP LTD)
2. ENGR. EDDY NDICHIE)……PLAINTIFFS

AND

STERLING BANK PLC……..DEFENDANT

JUDGMENT

The 1st Plaintiff's company in this case was a customer of the Defendant bank. Sometimes in April, 2011 the 1st Plaintiff applied for and was granted a contract finance facility of about N162,000,000.00 (One Hundred and Sixty-Two Million Naira) by the Defendant. To secure the loan the Plaintiffs executed a tripartite deed of legal mortgage with the Defendant in respect of the 2nd Plaintiff's property known as House No. 594B, 411 Crescent, "A" Close, Gwarimpa II Estate, FCT-Abuja.

The 3rd Defendant to the counter claim as the Managing Director and alter ego of the 1st Plaintiff put up himself as the guarantor of the

said loan and personally undertook to repay the loan if the 1st Plaintiff ever defaulted together with interest and all other charges which may accrue from the loan. The loan facility was meant to finance the execution of a contract of road construction awarded to the 1st Plaintiff by the Federal Ministry of Works.

Meanwhile upon the execution of the tripartite deed of legal mortgage by the parties in this case the Defendant as the mortgagee proceeded to the Federal Housing Authority Registry where the mortgage deed was registered.

Along the line the 1st Plaintiff was unable to complete the execution of the road project for which the facility was obtained. The Plaintiffs have alleged that the failure was based on the refusal of the Defendant to release funds meant for the project timeously. They have filed this suit claiming that the Defendants was in breach of the contract finance agreement and claiming damages for the breach. The reliefs sought against the Defendant as per paragraph 61 of the amended statement of claim filed on the 17/11/2014 are as follows:

1. A declaration that the defendant breached both its express and implied obligations/covenants which is embedded in the contract finance agreement and the Tripartite Deed of Legal Mortgage dated 21st April, 2011.

2. A declaration that by the breach of the contract finance agreement by the defendant it is not entitled to the total principal facility and the interest thereof claimed by the defendant.

3. The sum of N500,000,000.00 being special damages resulting from losses caused to the 1st Plaintiff by the acts of the Defendant in breach of the existing contract between the parties in respect of both the rehabilitation of the OBA/Nnewi-Okigwe Road Section 1 Route 429 Contract No. 5983 and the contract for the construction of Wannune Earth Dam Project, Benue State.

4. The sum of N1,000,000,000.00 (One Billion Naira) only as general damages for breach of contract, loss of reputation and goodwill.

5. An Order directing the Defendant to return the title deeds of the House used as a collateral or security for the facility, i.e. Plot No. 594B, along Victoria Ironsi Street, Federal Housing Estate, Gwarinpa 2, Abuja, to the Plaintiffs free from any encumbrance.

6. The sum of Six Million Naira (N6,000,000.00) only as the cost of this action.

The Defendant denied liability to all the claims sought by the Plaintiffs and in its amended statement of defence filed on the 26/11/2015 counter claimed against the Plaintiffs for the enforcement of the payment of the loan sum with the accrued interest. In specific terms the reliefs sought in the counter claim as contained in the amended statement of defence/counter claim by the Defendant are:

a) The sum of One Hundred and Sixty-Two Million Naira (N162,000,000.00) being the principal loan granted to the Plaintiffs, duly accepted and admitted by the defendant from the Plaintiffs but yet unpaid.

b) The sum of Eighty Million, Fifty-Five Thousand, Eight Hundred and Eighty-Eight Naira, Sixty-Two Kobo, (N80,055,888.62) being the interest at 23 percent per annum, handling charges and penalties as beginning (sic) from the 30th day of August 2013 till judgment and after judgment at 10% till liquidation of the judgment sum.

c) A declaration that by virtue of the Tri-partite Deed of Legal Mortgage perfected and registered at the Federal Housing Authority and the default in payment of the loan and the accrued interest, the counterclaimant is entitled to sell the property known as PLOT NO.594B, 411 CRESCENT, 'A' CLOSE

old reference no. FHA/ES/GWA11/P.594B, new ref. No. FHA/ES/GWA/P.594B of 19/10/.0 (sic) situate and lying within Gwarinpa 11 Estate, FCT, ABUJA. In Order recover moneys due to it (sic).

d) A declaration that by virtue of the **PERSONAL GUARANTEE** provided by Chief Omenife A. C. Izuegbu, the Defendant can legally proceed and recover the outstanding indebtedness due from the 1st Plaintiff in her favour against the said Guarantor.

e) A Mandatory Order of this Honourable Court directing Chief Omenife A.C. Izuegbu to settle all outstanding indebtedness due from the 1st defendant which he personally guaranteed to the counterclaimant.

f) A perpetual injunction restraining the Defendants to this counter claim, their agents and privies from interfering with the counterclaimant's right of sale of the said mortgaged property to recover moneys (sic) due to it.

The Plaintiffs filed a reply to the statement of defence and a defence to the counter claim wherein the reliefs sought by the Defendant/Counter claimant were totally denied. At the close of pleadings the matter proceeded to trial. The Plaintiffs called two witnesses to support their case and the Defendant called one

witness and closed its case. At the end of trial parties filed their final written addresses which were adopted in the plenary.

For the Defendant, Mr. A.T. Kehinde SAN, submitted a sole issue for the determination of the case. His argument on this issue was canvassed on the following subheads:

(a) The legal relationship between the Plaintiffs/Defendants to Counter Claimant and the Defendant/Counter Claimant?
(b) The position of the law in respect of an action of this nature?
(c) Whether the Defendant/Counter Claimant was ever guilty of delay in the disbursement of funds?
(d) On the position of the Law in respect of a guarantor of a loan facility?
(e) Whether the reliefs sought by the Plaintiffs/Defendants to Counter Claim is grantable in the instant case.
(f) Conclusion.

On the other hand, Mr. S. I. Ameh SAN, for the Plaintiffs submitted two issues for the determination of the case:

(1) Whether Plaintiffs did not make out a case against the Defendant for breach of contract; and

(2) Whether having regard to the pleadings and evidence in this case, the Defendant's counter claim ought to fail.

I have carefully considered the issues raised on both sides and it is my humble view that subhead (a) to (d) of the sole issue raised by the Defendant relate to whether or not the reliefs sought by the Plaintiffs are sustainable having regard to the evidence led at this trial whilst his argument on subhead (e) relate to whether or not the Defendant/Counter Claimant has proved its claims. A comparison of the issue raised by the learned senior counsel for the Defendant with the two issues raised by the senior counsel for the Plaintiffs would appear to be similar. However for a more practical purpose and straight forwardness I like to identify and rephrase the two issues which are germane to the determination of this case as follows:

(1) Whether having regard to the facts of this case and the evidence led the Plaintiffs are entitled to the reliefs sought; and

(2) Whether the Defendant/Counter Claimant has led evidence to support its counter claims to entitle it to the reliefs sought.

DETERMINATION OF ISSUES

ISSUE ONE

Whether having regard to the facts of this case and the evidence led the Plaintiffs are entitled to the reliefs sought.

In the determination of this issue I need to identify the focal points in the case of the Plaintiffs. The claims of the Plaintiffs are predicated on the *Contract Finance Agreement* executed by the parties on the 08/06/2011 and the *Deed of Tripartite Legal Mortgage and Personal Guarantee* admitted as exhibits DB4 (also SB1) respectively. The contention of the Plaintiff is that the Defendant is in breach of the contract finance agreement hence the claims for damages. Therefore in order to resolve the dispute the proper document to look at is the said agreement. This is the law. The principle was captured by the Supreme Court in the case of **AGBAREH V. MIMRA (2008) 2 NWLR (PT. 1071) 378** when it held:

> **"When parties enter into an agreement, they are bound by its terms and that either of them or the Court cannot legally or properly read into the agreement terms on which the parties have not agreed to. As a matter of fact Section 132 of the Evidence Act states that the only admissible evidence of a contract is the contract itself although the Section recognizes exceptions. Thus if and where there is any**

> **disagreement as to what is or are the terms or terms of an agreement on any particular point the authoritative and legal source of information for the purpose of resolving the disagreement is of course the written agreement executed by the parties"**

The Court of Appeal also held in **ZENITH BANK PLC V. EMIRATES CREDITCORE AND INVESTMENT LTD (2016) LPELR-41586 (CA)** thus:

> **"It is a well settled general principle of law that when parties enter into an agreement and they have reduced same into writing that is what should govern their relationship. If there is any dispute the agreement will be the reference point and non of the parties would be allowed to vary add or subtract or resile from it."**

See **UBA V. OZIGI (1994) 3 NWLR (PT. 333) 385.**

Now the substantive claim of the Plaintiff is for a declaration that the Defendant/Counter Claimant breached both its express and implied obligation and covenants contained in the *Contract Finance Agreement* and the *Tripartite Deed of Legal Mortgage* duly signed by the parties.

It is trite that to sustain this claim the Plaintiff has to prove the alleged breach or breaches. The law places the burden on he who asserts to lead evidence to establish the existence or non existence of what he alleges. See Sections 131(1) and 133 (1) of the Evidence Act and **ORJI V. DORJI TEXTILE MILLE NIG LTD (2010) ALL FWLR (PT. 519) 999.**

In his effort to discharge this obligation the Plaintiffs testified that the sum of N162,000,000.00 (One Hundred and Sixty-Two Million Naira) contract finance facility was granted by the Defendant to the 1st Plaintiff for the asphalting of Oba-Nnewi-Okigwe Road Section 1 awarded to the 1st Plaintiff by the Federal Ministry of Works. That the 2nd Plaintiff offered his property subject of the tripartite deed of legal mortgage as collateral because of the representation made by the Defendant that it would meet its obligations by disbursing funds adequately as at when due to finance the contract. Evidence was also given that the 1st disbursement was made to the 1st Plaintiff on time and the work on the contract commenced promptly and made rapid progress. The PW1 also testified that on 20/07/2011 the 1st Plaintiff wrote for disbursement of the 2nd tranches but the Defendant did not respond, that the 2nd disbursement came many weeks late and because of the delay much precious time during which the 1st Plaintiff's agent could have completed the project

within time frame given was lost and the work down which could not be protected and/or completed was washed away causing huge loss of money and time to the 1st Plaintiff.

In response to the above line of evidence the Defendant testified through the DW1 who was the Accounts Officer to the 1st Plaintiff that it did not breach the contract finance agreement signed by the parties. Evidence was given that after the signing of the loan agreement the first disbursement was made and the 1st and 2nd Plaintiffs began withdrawal soon thereafter. That when the 1st Plaintiff wrote for the 2nd disbursement, the Defendant advised it to provide the breakdown of the fund and the use to which such fund would be put. The Defendant further testified that the breakdown was made and received on the 02/08/2011 and it was approved same day. The Defendant also testified that the Plaintiffs commenced withdrawal of fund on the same day. The statement of account of the 1st Plaintiff's account used as the loan account was relied upon and admitted in this trial as exhibit SB12(a).

The senior counsel representing the Plaintiffs has argued in his final written address that the Defendant did not disbursed the loan sum fully and did not disbursed the fund as at when due.

With the greatest respect to the learned senior counsel the contention that the loan sum was not fully disbursed is not borne

out by evidence. As a matter of fact there is no positive averment in the amended statement of claim that the loan sum was not fully disbursed. The law is clear that submission of counsel no matter how fanciful or alluring cannot take the place of evidence.

In **TAIWO AND ANOTHER V. OSUNLABU (2017) LPELR-43739 (CA)** the Court of Appeal held thus:

> **"The learned trial Court found that the learned counsel to the appellant made frantic effort to make a different case contrary to that which was in the pleadings of the appellant and upon which evidence was adduced. The Apex Court and this Court have held several times that the address of counsel however brilliant cannot take the place of pleaded facts supported by tested evidence. See BUHARI V. OBASANJO (2005) 13 NWLR (PT.941) 1 at pages 286-287 paragraphs A to H."**

As a matter of facts what was pleaded and upon which evidence was given is that the release of the second tranch of loan sum was delayed. See paragraphs 2, 4, 25, and 30 of the amended statement of claim. Furthermore in exhibit SB4 which is a letter written to the Defendant on the 12/12/2011 (a period of six months) after the loan was granted. The 1st Plaintiff wrote as follows:

"**REQUEST FOR EXTENSION OF TIME ON CONTRACT FINANCE FACILITY**

The above subject refers.

We write to request and appeal to you to kindly extend the time frame for the repayment on the contract finance facility granted us which is soon to be due for repayment for a further period of ninety (90) days as we do not wish to be in default.

For: Doliz Brown Group Ltd.

Chief Omenife A. C. Izuegbu

Signed.

Following this letter is the Defendant's letter of 04/05/2013 which was a reply to the 1st Plaintiff's letter for interest waiver. The letter which was for the attention of the 2nd Plaintiff reads:

"RE: REQUEST FOR INTEREST WAIVER ON OUR ACCOUNT

We write to acknowledge the receipt of your letter dated April 19, 2013 addressed to our Chairman with respect to the above subject matter.

We hereby communicate our inability to accede to your request for the waiver of the accrued interest on the One Hundred and Sixty-Two Million Naira (N162,000,000.00)

Contract Finance Facility availed to Doliz Brown Group Ltd in June, 2011.

In the light of the above we are demanding that you immediately repay your loan which balance is Two Hundred and Twenty-Eight Million, Eight Hundred and Fifty-Three Thousand, Fifty-Six Naira, Two Kobo (N228, 853, 056. 02) only inclusive accrued interest to date.

Kindly note that this facility shall be accruing default charge for every day it remain unpaid as it has already expired.

We thank you for your patronage.

Yours faithfully,

For: Sterling Bank.

Signed"

So clearly parties are aware that the loan was fully disbursed all along. To that extent the submission of the senior counsel on this point does not go to any issue as it is ignored. The Law is that what is admitted does not need further prove.

Now what is in contention strictly speaking is that the loan sum was not disbursed timeously. In resolving this point I shall consider the evidence led on this point by either side on the basis of the contract document which in this case is the loan agreement (exhibit DB 4).

Under other conditions precedent to drawdown it was stated in paragraph 2 of exhibit SB1 that disbursement of loan sum shall be made directly to the suppliers vide Managers Cheque in line with the breakdown of fund utilization submitted. Cash withdrawal should be allowed for payment of salaries only.

From the foregoing paragraph in the contract document, it is clear that disbursement of fund to the Plaintiffs is strictly based on breakdown of fund utilization submitted by the Plaintiffs to the Defendant. It was in keeping with that term of agreement that the Plaintiffs wrote exhibit SB3 on the 02/08/2011 which is titled Request for Additional Disbursement. The first paragraph of the letter reads:

> **"Kindly disburse the sum of Fifty Nine Million, Nine Hundred and Ninety-Eight Thousand, Two Hundred Naira only (N59,998,200.00) in favour of our suppliers as indicated below"**

The Plaintiffs gave the names of the suppliers, account numbers as well as the materials to be supplied to Plaintiff by prospective suppliers. The Defendant has led evidence to show that approval was given and the Plaintiffs commenced withdrawal of fund same day. Photocopies of cash withdrawals by cheque were tendered to corroborate this evidence as exhibits SB9 comprising of three

Sterling Bank cheques. The statement of account of the 1st Plaintiff with the Defendant was also tendered and admitted as exhibit SB12 (a). The exhibit shows that apart from the cash withdrawals by the Plaintiffs on the same date the Defendant disbursed the sum of N12,995,000.00 and N15,000,000.00 to the Plaintiffs' suppliers on the 12/08/2011 in response to the request of the 1st Plaintiff in exhibit SB3.

The learned senior counsel to the Plaintiffs has presented an argument that exhibit SB12 (a) was merely dumped by the Defendant as it failed to demonstrate through viva-voce evidence how the entries in the statement of account arose or got to the sheet. That mere production of the statement of account is not proof of indebtedness of the person against whom it is produced. He relied on the following cases for his submission:

WEMA BANK PLC V. OSILARU (2008) 8 CLRN 89 AT 109 lines 5 to 20 (also reported in 2008 10 NWLR 9pt. 1094) 150; and **HABIB NIG LTD V. GIFTS UNIQUE NIG (2004) 15 NWLR (PT. 896) 405.**

In my view the learned counsel is not correct that the statement of account was merely dumped on the Court. First the Plaintiffs throughout their case never contested any entry in the statement of account. As a matter of fact they admitted full disbursement and the interest which accrued. That is why they wrote for interest waiver

on the loan granted which was turned down by the Defendant as conveyed in exhibit SB5 (b) dated 04/05/2013.

Furthermore the Defendant through DW1 gave evidence of full disbursement of the loan to the Plaintiffs with the dates withdrawal and payments made. That being the case it cannot be correct that the statement of account was dumped on the Court.

Learned senior to the Plaintiffs has also argued that after the first disbursement of the loan sum the Defendant failed to make further release promptly for which he relied on exhibit DB6. I have read the said exhibit and it is my considered view that the exhibit did not comply with the contract agreement which required that the loan disbursement would be made directly to the suppliers and in line with breakdown of fund utilization submitted to the Defendant. The terms for disbursement of fund as contained in the contract document was only met when the Plaintiff wrote to the Defendant its letter of 02/08/2011.

In that letter the Plaintiff requested for additional disbursement and in accordance with the loan agreement supplied to the Defendant the names of the suppliers, their account numbers and the specific amount to be credited to their accounts. Exhibit SB12(a) supports the evidence of the Defendant that approval was made same day as sundry payments were made in favour of the suppliers named in

exhibit SB3 and to the Plaintiffs' respectively soon after 02/08/2011. So if there was any delay in the release of fund it was because no valid request for disbursement was made in accordance with the loan agreement (exhibit SB1).

Furthermore it is not true as canvassed by learned senior counsel to the Plaintiffs that exhibit DB14 supports the fact that the Defendant failed to disburse the loan facility fully. In my view the learned senior counsel may have subjected the exhibit to an interpretation that travels beyond its intendment or misconstrued the exhibit altogether. Exhibit DB14 was an appeal for a further grant after the plaintiffs have utilized the total loan sum. The last paragraph of the letter with subheading - "Our appeal to Sterling Bank" puts it beyond doubt that the Plaintiffs by that letter were requesting for a fresh loan facility from the Defendant. It says:

> **"Based on the forgoing, therefore we wish to appeal that you further grant us the requested additional sum of N50, 000, 000 only to enable us work up to the point that qualifies us to receive payment from the Federal Ministry of Works. We also appeal that the facility be further extended for another 90 days.**
>
> **We thank you for your kind consideration of all issues involved in this letter."**

Signed.

In my view no other interpretation could be given to the above quoted letter than that the Plaintiffs were requesting for a fresh loan. To that extent the letter is rather against the Plaintiffs.

Similarly exhibit DB13 which places blame for failure of the Plaintiffs to complete the contract awarded 1st Plaintiff and get payment on the Defendant/Counter Claimant cannot be given any serious consideration. Reason being that in exhibit DB4 which the 1st Plaintiff wrote to the Defendant it put the blame for the failure of contract it had with the Federal Ministry of Works on the Ministry and bad weather.

Furthermore it is my view and it is common knowledge that the months of June, July and August when the Plaintiff started contract work are the months which witness considerable rain. This reasoning is further strengthened by the progress report of work for the period ending July, 2011 authored by the Project Supervisor (Engr. A. N. Animaku) annexed to exhibit D14 by the Plaintiffs. Paragraph 3 of the report states:

> **"3 The contractor (Doliz Brown Group Ltd) is working mainly on drainage and asphalt works because of the rain and is expected to improve on his progress as**

soon the raining season is over and they have stone based and stabilized about 10km."

The above report has negatived the narrative given by the Plaintiffs that it was the delay to release fund that stalled the Plaintiffs' work.

Arising from all that I have said, it is not true that the Defendant was in breach of the loan agreement as such breach has not been established by credible evidence before the Court. I therefore hold as such.

All the other reliefs sought by the Plaintiffs in the amended statement of claim are predicated on the success of relief one which is the substantive relief.

Relief two for example is seeking a declaration that by the breach of the contract finance agreement by the Defendant it is not entitled to the total principal facility and the interest thereof claimed by the Defendant.

The declaration sought herein is dependent on the finding of the Court that the Defendant was in breach of the contract finance agreement between parties. Having found that there was no such breach by the Defendant the basis for this claim is invariably chopped off.

The law is settled that where a party's principal claim fails the accessory claims that are appendages to it will also fail. This cardinal principle of law was espoused by the Supreme Court in the cases of **FAGUNWA V. ADIBI (2004) 17 NWLR (PT. 903) 544 and AKINDURO V. ALAYA (2007) 15 NWLR (PT. 1057) 312.**

The principle traces its paternity to the latin maxim - ***accessorium seguitur principale*** - which means, "an accessory thing goes with the principal to which it is incidental to".

In the case of **NSUGBE V. OKOBI & ANOR (2012) LPELR-2448 (CA)** the Court of Appeal stated the law thus:

> **"The principal claim of the appellant was for a declaration that he is entitled to a statutory right of occupancy over the disputed land. The claim for damages for trespass and injunction are like leaches the success of which was dependent on the principal claim succeeding. Since the principal claim was not granted the Lower Court was right in refusing to grant the reliefs of damages for trespass and injunction against the 1st Respondent. The legal principle is that the principal having fallen through the adjunct would equally be taken away. See**

ADEGOKE MOTORS Vs ADESANYA (1989) 3 NWLR (PT. 109) 250 AT 260."

See **TUKUR V. GOVT OF GONGOLA STATE (1989) 4 NWLR (PT. 117) 517 AT 544-565; AND UNILORIN TEACHING HOSPITAL V. ABEGUNDE (2013) LPELR- 21375 (CA).**

Accordingly the claim fails and it is dismissed.

Similarly reliefs 3 to 6 are all based on a finding that the Defendant is in breach of its agreement with the Plaintiffs. This Court having found otherwise it would amount to a futile exercise to embark on consideration of the reliefs. Just like the 1st and 2nd reliefs they also fail because they are lacking in merit and are accordingly dismissed.

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BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF

SUIT NO: FCT/HC/CV/2911/15

BETWEEN:

STERLING BANK PLC……COUNTER CLAIMANT

1. DOLIZ BROWN GROUP LTD…… 1ST DEFENDANT
2. ENGR. EDDY NDICHIE……2ND DEFENDANT
3. CHIEF OMENIFE A.C. IZUEGBU……3RD DEFENDANT

COUNTER CLAIM

ISSUE 2

Whether the Defendant/Counter Claimant has led evidence to support it counter claims to entitle it to the reliefs sought.

The reliefs sought by the Defendant in the amended counter claim are:

a) The sum of One Hundred and Sixty-Two Million Naira (N162,000,000.00) being the principal loan granted to the Plaintiffs, duly accepted and admitted by the defendant from the Plaintiffs but yet unpaid.

b) The sum of Eighty Million, Fifty-Five Thousand, Eight Hundred and Eighty-Eight Naira, Sixty-Two Kobo, (N80,055,888.62) being the interest at 23 percent per annum, handling charges and penalties as beginning from the 30th day of August 2013 till judgment and after judgment at 10% till liquidation of the judgment sum.

c) A declaration that by virtue of the Tri-partite Deed of Legal Mortgage perfected and registered at the Federal Housing Authority and the default in payment of the loan and the accrued interest, the counterclaimant is entitled to sell the property known as PLOT NO.594B, 411 CRESCENT, 'A' CLOSE old reference no. FHA/ES/GWA11/P.594B, new ref. No. FHA/ES/GWA/P.594B of 19/10/.0 situate and lying within Gwarinpa 11 Estate, FCT, ABUJA. In Order recover moneys due to it (sic).

d) A declaration that by virtue of the PERSONAL GUARANTEE provided by Chief Omenife A. C. Izuegbu, the Defendant can legally proceed and recover the outstanding indebtedness due from the 1st Plaintiff in her favour against the said Guarantor.

e) A Mandatory Order of this Honourable Court directing Chief Omenife A.C. Izuegbu to settle all outstanding indebtedness

due from the 1st defendant which he personally guaranteed to the counterclaimant.

f) A perpetual injunction restraining the Defendants to this counter claim, their agents and privies from interfering with the counterclaimant's right of sale of the said mortgaged property to recover moneys (sic) due to it.

Now the principle on the status of a counter claim within the context of the main claim is so well established by the decisions of superior Courts to deserve a further reinstatement in this Judgment. However it is the law that just like the Plaintiff in the main claim the counter claimant is under a legal burden to establish by credible evidence that it is entitled to the claims sought. It is also the law that the failure of the Plaintiff in the main claim does not entitled the counter claimant to the reliefs sought. The reason is that the two actions are merely put together for convenience as they are separate and distinct.

Their Lordships in the Apex Court in the case of **JERIC NIG LTD V. UNION BANK OF NIG PLC (2000) 15 NWLR (PT. 691) 447 AT 463** clearly held and said:

> **"For all intent and purposes a counter claim is a separate independent and distinct action and the**

counter claimants, like all other Plaintiffs in an action must prove his claim against the person counter claimed before obtaining Judgment on the counter claim."

The evidence in support of the counter claims are largely documentary.

The first head of the claim is for payment of the loan of N162,000,000 (One Hundred and Sixty Two Million Naira) granted the 1st Plaintiff which has not been repaid. In support of this head of claim the counter claimant tendered exhibit SB1 which was the agreement in respect of the contract finance facility granted to the 1st Plaintiff. The document shows on the face of it that the sum granted is N162,000,000 for a tenure of 180 days (i.e. 6 Months). The counter claimant has led evidence in keeping with pleaded facts that the Defendants to the counter claim has failed to repay the loan sum despite repeated demands. Exhibits SB4, SB5, and SB5A were tendered in support.

The Defendants to the counter claim have denied liability to the claim and has asserted that the counter claimant is not entitled to the loan sum because it breached the loan agreement, and secondly that the claim is premature as repayment of the loan was predicated on the payment of the contract sum by the Federal Ministry of

Works. The Defendants to the counter claim has placed reliance on exhibit DB5 which is titled: DOMICIALIATION OF PAYMENT IN FAVOUR OF DOLIZ BROWN GROUP LTD.

The law is clear that parties are bound by their agreement. See **AGBARAH VS MIMRA (Supra)**. If and when there is disagreement as to what are the terms of the agreement on any particular point it is the agreement that would be referred to for the resolution of the dispute.

Now as to the first leg of the defence raised against the counter claim that the counter claimant is in breach of the contract finance agreement, I have dealt extensively when I considered the claims of the Defendants to the counter claimant and resolved that there was no prove before me that any of the terms of the loan agreement (exhibit SB1) was breached by the counter claimant. The loan was disbursed fully as evidenced by exhibits SB4, SB5(a), SB12(a) DB1(c) and DB11 and D12. Exhibit DB12 which was authored by the Defendants to the counter claim is an appeal for interest waiver on the loan of N162,000,000.00. Similarly exhibit SB5(a) was a request for extension of time for the repayment of the loan. Aside from all the above both the PW1 and PW2 who gave evidence for the Defendants to the counter claim admitted that the loan sum was fully disbursed. Like I stated before, the contention of the learned

senior counsel to the Defendants to counter claim is not borne out by the enormous evidence to the contrary. To that extent the contention that the counter claimant was in breach is lame.

The senior counsel has also contended that the claim for payment of the loan sum is premature in that it was agreed that the loan would be repaid from the payment to be made into the Defendants' account domiciled with the counter claimant. This argument with all due respect is misplaced. The document clearly states that the loan will expire within 180 days and not otherwise. The method of repayment of the loan has nothing to do with the life span of the loan. Furthermore the counter claimant as lender does not have any agreement with the Federal Ministry of Works to that effect to enable the counter claimant enforce the payment of the loan sum on the Ministry. The loan agreement tendered variously as exhibits SB1 and DB4 is very clear on this point. For the avoidance of doubt I like to reproduce the opening paragraph of the letter of offer. It states:

> **"We are pleased to inform you that Sterling Bank Plc has approved a N162,000,000.00 Contract Finance Facility for 180 days…"**

Similarly under the terms of the loan it was clearly stated that the tenure is for 180 days. It is therefore clear that the tenure of the loan is certain and fixed for 180 days.

As a matter of fact the defence put forward by the Defendants to counter claim do not avail them as the law is clear that in an action for repayment of loan the defence open to the Defendants are two: (1) that the Defendant has refunded every kobo of the amount he borrowed but his account was not credited with the payments or (2) that he never signed any application for loan with them and never obtained any money and that any purported loan application from him would be a forgery. For this principle I rely on the case of **OKOLI V. MORE CAB FINANCE NIG LTD (2001) FWLR (PT. 60) 15 97 AT 1607** ably cited by the learned senior counsel for the counter claimant.

See also: **GREEN TECH LTD AND ANORTHER V. ACCESS BANK (2015) LPELR-25999; and AZODO V. KAY KAY CONSTRUCTION LTD (2014) LPELR 24150** which were decided on the principle in More Cab (Supra).

In this case what the learned senior Counsel to the Defendants to counter claim has done is to bring into this matter issues that are extraneous to the loan agreement and therefore irrelevant with the sole aim of obscuring the main consideration in this matter.

The law is that where a contract is reduced into writing extraneous matter cannot be permitted to vary or add to the terms validly

agreed to by parties. See **ATIBA IYALAMU SAVINGS AND LOANS V. SUBERU AND ANOR (2018) LPELR 44 069 (SC).**

Before the Court it has been established beyond peradventure that the Defendants took a loan of N162,000,000.00 from the counter claimant. There is also abundant evidence that the loan has not been repaid.

In a very recent case of **FCMB V. ROPHINE NIG LTD AND ANOR (2017) LPELP 42704 (CA)** the Court of Appeal was very emphatic on the obligation of a debtor to pay his loan. The Court held thus:

> **"In the case of AFRIBANK Vs ALADE (2000) 13 NWLR (PT. 685) 591 it was held that a debtor who benefited from a loan or over draft from a bank has both the moral and legal duty and obligation express or implied to repay it as and when due. See also NATIONAL BANK OF NIG VS SHOYOYE (1977) 5 S.C 181. Since the Respondent did not dispute benefiting from the facility granted them by the appellant and did not make or prove that they have fully repaid the facility as and when due they owe both the legal and moral obligation and duty to repay or pay what they owe the appellant as proved by the unchallenged and satisfactory evidence and placed before the High**

Court as demonstrated in the lead Judgment with which I completely agree."

In this case the Defendants to the counter claim haven benefited from the loan facility granted are under obligation to repay their debt. I am therefore satisfied that this claim has merit and I grant it.

The 2nd head of the counter claim is for interest per annum on the loan handling charges and penalties. Exhibit SB1 and SB12(a) were relied upon.

Exhibit SB1 provided for interest at the rate of 23% per annum subject to changes without notice. It also provides for management fee of 1% flat and processing fee of 0.25%. It also provides for payment of all expenses incurred in the arrangement, documentation and enforcement of payment under the facility. Similarly exhibit SB12(a) which is the statement of account for the loan contains all the charges on the account. There was no specific denial of the items of charges as contained in exhibit SB12(a). On that account, couple with series of demand notices as demonstrated in exhibits which were never denied by the Defendant to the counter claim, I am satisfied that the claim of N80,055,888.62 has been made out. It is therefore granted.

Relief C seek for a declaration that by virtue of a tripartite deed of legal mortgage perfected and registered at the Federal Housing Authority and the default in payment of the loan and the accrued interest the counter claimant is entitled to sell the property known as Plot No. 594, B411 Crescent, Gwarimpa, Abuja. As could be denoted, this claim is predicated on the tripartite deed of legal mortgage which was entered and duly signed by the Plaintiffs and the Defendant/Counter Claimant. The document was tendered and admitted without objection by the Defendants to the Counter Claim and admitted as exhibit SB10.

Now the evidence before the Court is that as a result of the loan of N162,000,000.00 granted to the 1st Plaintiff a deed of legal mortgage was created in respect of the 2nd Plaintiff's property which was used to secure the loan. This loan was not repaid by the 1st Plaintiff despite several demands.

On the other hand the Plaintiffs has contended that because of the breach of the loan agreement and the breach of the terms of legal mortgage the mortgage deed has become invalid and the Defendant/Counter Claimant cannot sell the property in mortgage.

The senior counsel further argued that the mortgage deed was not registered nor consent of the Minister of the FCT obtained as required by law. He cited Section 2, 22 and 51 (2) of the Land Use

Act, Section 299 (a) of the 1999 Constitution (as amended) and Section 18 of the Federal Capital Territory Act. Counsel also called in aid the following cases:

ASSOCIATED DISCOUNT HOUSE LTD V. THE MINISTER OF FCT AND ANOR (2013) 8 NWLR (PT. 1357) 493 AT 514-515; and **UBA PLC Vs AYODARE AND SONS NIG LTD (2007) 13 NWLR (PT. 1052) 567 AT 603.**

Counsel also submitted that by the provision of Section 315 (5)(d) of the 1999 Constitution the Land Use Act of 1978 as an existing Law is deemed to be incorporated as part of the Constitution and that the prescription by the Federal Housing Authority requiring a land owner to obtain consent of the Managing Director before alienation of title in inconsistent with the Land Use Act and therefore null and void. He cited the case of **SAVANAH BANK OF NIG. LTD V. AJILO (1989) 1 NWLR (PT. 97) 305.**

I have considered the argument of the learned counsel to the Plaintiffs and my view firstly is that the contention that the mortgage is vitiated as a result of the breach of the contract agreement by the Defendant/Counter Claimant does not have merit. As a matter of fact I dismissed this claim earlier in the course of this Judgment as no such breach was established before me.

However I agree with learned counsel to the Defendants to this Counter Claim that the tripartite deed of legal mortgage created by the parties was not registered and neither was the consent to register same obtained from the Minister of the Federal Capital Territory as prescribed in Section 22 (2) of the Land Use Act. Having not been registered with the relevant land authority exhibit SB10 did not transfer a legal interest to the Counter Claimant. See **CO-OPERATIVE BANK LTD V. LAWAL (2007) 1 NWLR (PT. 1015) 287.**

In **UBA PLC V. AYODARE & SONS NIG LTD (2007) 13 NWLR (1052) 567 AT 603** the Supreme Court held thus:

> **"The appellant ought to know that those consents were not from the respective appropriate authority as directed by the Land Use Act. The appellants should have checked before executing the deeds and parting with their money. I agree with learned counsel to the Respondents that the maxim exturpi causa non oritur actio cannot apply vide Ajilo's case where the Supreme Court per Karibi Wyte JSC stated that the express provision of the Land Use Act makes it undesirable to invoke the maxim and the equitable principle enshrined"**

The result of the foregoing position of the law means that the tripartite deed of legal mortgage which was created by the parties without the consent of the Minister of the FCT was in violation of Section 22 of the Land Use Act and therefore invalid by the provision of Section 26 of the Land Use Act. But this is the end of the matter. Section 22 of the Land Use Act imposes a duty on the mortgagor to obtain consent of the Minister of the FCT as Governor before the deed was created. This important obligation was not carried out by the 1st Defendant to the Counter Claim/Mortgagor. The question then is could such a party who has taken benefit of the loan granted and created a deed rely on his own failure to invalidate the legal mortgage?

The answer is definitely NO. The mortgagor cannot take advantage of his wrongful act for failing to obtain the necessary consent of the Minister of the FCT under Section 22 of the Land Use Act, a requirement placed squarely on it so as to defeat a valid transaction. Therefore for the Defendants to the counter claim as mortgagor to assert that a mortgage deed is null and void for lack of consent of the Minister of the FCT would be fraudulent and unconscionable.

See:

1. **FBN PLC V. SONGONUGU (2007) 3 NWLR (PT.1021) 230;**
2. **AMADI V. NSIRIM (2004) 17 NWLR (PT.901) 111;**

3. **UGOCHUKWU V. CO-OPERATIVE & COMMERCE BANK LTD (1996) 6 NWLR (PT. 456) 524 SC; and**
4. **AGBABIAKA V. OKOJIE (2004) 15 NWLR (PT. 897) 503.**

Following the position of the law which I expressed above with decided authorities against the back drop of the facts of this case it is my view that a valid deed of legal mortgage was created with respect to the mortgaged property. That being the case and having found that the Defendants to the Counter Claim have not paid the sum loaned to the 1st Defendant to the Counter Claim, the Counter Claimant is entitled to sell the mortgaged property and I so hold.

The fourth claim is for a declaration that by virtue of the personal guarantee provided by the 3rd Defendant to Counter Claim, Chief Omenife A. C. Izegbu, the Defendant/Counter Claimant can legally proceed to recover the outstanding indebtedness due from the 1st Plaintiff in her favour against the guarantor. The personal guarantee subject of this claim which was executed by the 3rd Defendant to the counter claim was tendered without objection and admitted as exhibit SB11.

By exhibit SB11 the 3rd Defendant to the counter claim, signed a guarantee in favour of the Counter Claimant the payment of and undertook on demand in writing made on the undersigned by the bank to pay all sums of money which may be due or owing to the

bank by the 1st Defendant to the counter claim including all bank charges or expenses.

However the Defendants to the counter claim has led evidence in line with pleaded facts that the 2nd Defendant to the counter claim agreed to use his property as collateral and the 3rd Defendant to Counter Claim guaranteed the loan on the basis of the representation made by the Counter Claimant that it was going to disburse funds adequately to finance the contract awarded to the 1st Defendant to the counter claim. That the Counter Claimant failed to comply with the agreement leading to colossal loss to the 1st Defendant to the counter claim.

First and foremost the parties are bound by their agreement. From evidence before the Court the agreement in respect of the loan between parties is exhibit SB1. Exhibit SB1 never pretended to disburse fund adequately to finance the contract other than the sum of N162,000,000.00 which was approved. To me the evidence that the Counter Claimant made representation to the Defendants to the counter claim that it was going to disburse adequate fund is extrinsic to exhibit SB1. The evidence constitutes an attempt to add or vary the terms of exhibit SB1.

In **LAMIE V. DATA PROCESSING MAINTENANCE & SERVICES LTD (2005) 18 NWLR (PT. 958) 38** The Supreme Court held:

"When a transaction has been reduced to, or recorded in writing either by requirement of law or agreement of the parties extrinsic evidence is in general inadmissible to contradict from the terms of the document. The grounds of exclusion commonly given are:

(a) That to admit inferior evidence when the law requires superior evidence would be to modify the law,

(b) That when the parties have deliberately put their agreement into writing it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intention and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory."

Finally there is abundant evidence before me as demonstrated in exhibits SB4, DB7 and DB12 that the delay in the execution of contract was due to vain, community claims and the Ministry of Works. Therefore the Defendants to counter claim cannot in another twist put the blame on the Counter Claimant. A litigant should not be

allowed to speak from both sides of the mouth. See **AKANINWO V. NSIRIM (2008) ALL FWLR (PT. 410) 610 AT 663.**

Exhibit SB10 is a contract made by the 2nd Defendant to the counter claim wherein he promised in writing to the Counter Claimant to pay all debts standing to the debit of the 1st Defendant to Counter Claim as a result of the loan granted to the latter.

The law is that a guarantor can only be discharged from his liability under the contract of guarantee if his obligation under the guarantee has been discharged, where the principal debt has been extinguished by an act or acts of the parties, or where a limitation or prescription period has elapsed and where a Court applies a presumption which operates to terminate the contract of guarantee.

On the facts of this case the 3rd Defendant to counter claim is liable for the outstanding indebtedness of the 1st Defendant to the counter claim. I therefore hold and declare as such.

The 2nd Defendant is by implication directed to settle the outstanding debt.

Finally the claim for Order of Perpetual Injunction is bound to succeed since the counter claims have been granted. This is particularly so as I have Ordered that the Counter Claimant is

entitled to sell the mortgaged property to recover the loan sum with accrued interest.

The end result is that issue two is resolved against the Defendants to the counter claim. The claims of the Plaintiffs in the substantive case are all dismissed because they have no merit while the Defendant/Counter Claimant is successful in its counter claims and they are granted.

Signed
Hon. Justice H.B Yusuf
(Presiding Judge)
01/11/2019