IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 19TH DAY OF MARCH, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 10
SUIT NO: CV/5215/2011

BETWEEN:

1. NICHIM GROUP OF COMPANIES (NIG.) LTD.
2. HON. IDEMETO NTATUBOH JOHNSON ---- CLAIMANTS

AND

1. CRYSTAL MULTI-PURPOSE COOPERATIVE SOCIETY LTD. ----
2. FOLAKE ITOHAN SALAMI (MRS) ---- DEFENDANTS
3. PASTOR (DR) CHIDOZIE NWACHUKWU ----

JUDGMENT

The 2nd Plaintiff applied for a loan facility of N30,000,000.00 (Thirty Million Naira) only from the 1st Defendant on the 25th March, 2010. The facility was approved and the sum of N25,000,000.00 (Twenty Five Million Naira) was disbursed to the 2nd Plaintiff.

The Plaintiffs contended that they requested for the documents containing the terms and conditions of the loan facility as well as their statement of account with the 1st and 2nd Defendants in order to understand the terms of the agreement, but no favourable response was received from the 1st and 2nd Defendants.

A letter dated 24th January, 2011 was then written, requesting the 1st and 2nd Defendants to furnish a detailed breakdown of the loan transaction. According to the Plaintiffs, the 1st and 2nd Defendants replied for the first time where the Plaintiff was shocked to realise that he was charged interest rate of 15% on the loan every 90 days and was further asked to pay an accumulated sum of N118,831,973.00 (One Hundred and Eighteen Million, Eight Hundred and Thirty One Thousand, Nine Hundred and Seventy Three Naira) only on the 30th of January, 2011. Another letter was then written requesting the 1st and 2nd

Defendants to be reasonable in charging interest to enable the plaintiffs settle the loan and the interest.

However, the 1st and 2nd Defendants reported the matter to the Economic and Financial Crimes Commission (E.F.C.C.) threatening to arrest the 2nd plaintiff if he refused to pay the amount demanded by the 1st and 2nd defendants. Hence, this suit was filed whereof the plaintiffs sought for the following reliefs:

"1. A declaration that the interest rate outlined in the letter of the 1st Defendants dated 26th January, 2011 on the loan obtained by the 2nd Plaintiff from the 1st Defendant is unlawful, fraudulent, illegal and against mercantile principles and government policy.

2. A declaration that the kind of unusual and unconventional rate of interest being charged by the 1st and 2nd Defendants on the N25,200,000.00 loan advanced to the 2nd Plaintiff would be illegal and

unenforceable without a clear intention that both the creditor and the debtor agreed to such terms.

3. *A declaration that the transactions between the Plaintiffs and the 1st and 2nd Defendant therein are purely civil and business transactions without any element of crime in it.*

4. *An order setting aside the unlawful and the arbitrary claim of interest on the principal sum loaned to the plaintiffs by the 1st and 2nd Defendants.*

5. *An order restraining the Defendants, their agents, privies, servants, workers or any other person however described from harassing, threatening, intimidating and/or arresting the 2nd Plaintiff or any staff of the 1st Plaintiff over the instant transaction.*

6. *An order that the interest rate due to the 1st Defendant on the sum of N25,200,000.00 be calculated at the maximum approved banking rate at the period the loan*

was granted and that such sum be liquidated by the Plaintiff within 365 days after Judgment delivered in this case.

7. *The sum of N2,000,000.00 (Two Million Naira) only being general damages for the continued harassment, threat of arrest and molestation of the Plaintiffs by the Defendants with law enforcement agents."*

Mr. Idemeto Ntatuboh Johnson testified as PW1 and through him eight (8) documents were tendered and admitted as Exhibits A – A7. The documents are:

"1. Irrevocable Power of Attorney between Pastor (Dr.) Chidozie Nwachukwu and Hon. Idemeto Ntatuboh Johnson as exhibit A.

2. Irrevocable Power of Attorney between Hon. Idemeto Ntatuboh Johnson and Crystal Multi-Purpose Co-operative society Ltd. as exhibit A1.

3. *Irrevocable Power of Attorney between Pastor (Dr.) Chidozie Nwachukwu and Hon. Idemeto Ntatuboh Johnson as exhibit A2.*
4. *A copy of the letter from Nichim Construction (Nig) Ltd. dated 24th January, 2011 as exhibit A3.*
5. *A copy of the letter from Crystal Multi-Purpose Co-operative Society Ltd. dated 26th January, 2011 as exhibit A4.*
6. *A copy of letter from Nichim Construction (Nig) Ltd. dated 21st February, 2011 as exhibit A5.*
7. *A letter from Nichim Group of Companies (Nig) Ltd. dated 26th May, 2011 as exhibit A6.*
8. *A letter from Crystal Multi-Purpose Co-operative Society dated 27th May, 2011 as exhibit A7."*

PW1 was duly cross-examined and subsequently discharged.

The 1st and 2nd Defendants filed an Amended Statement of Defence and Counter-Claim dated 15/5/2014.

DW1 testified that on the 24th March, 2010 the 2nd Plaintiff a registered member of the 1st defendant applied for a loan of N30,000,000.00 (Thirty Million Naira) which was approved and disbursed to him on the 1st April, 2010 at the interest rate of 15% for 90 days. The sum of N4,800,000.00 (Four Million, Eight Hundred Thousand) was deducted from source representing the upfront payment of the first interest being N4,500,000.00 (Four Million, Five Hundred Thousand) and processing fee of N300,000.00 (Three Hundred Thousand Naira). The 1st and 2nd Defendants further contended that after satisfying all the conditions for the drawdown of the facility by the Plaintiffs i.e. presenting two guarantors, (Dr. Chidozie Nwachukwu and Arch. Israel Rene Erieniokhale) and depositing three landed properties as collateral, the sum of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) only was finally disbursed to the 2nd Plaintiff on the 1st April, 2010.

The 1st and 2nd Defendant further stated that apart from the sum of N5,100,000.00 (Five Million, One Hundred Thousand Naira), nothing has been paid by the Plaintiff to settle the principal sum and accrued interest as agreed by the parties. Premised on this the 1st and 2nd Defendants Counter-Claimed against the Plaintiffs seeking for the following:

"1. A declaration that the interest on the loan which the 2nd Plaintiff borrowed from the 1st Defendant be calculated at the rate of 15% (on roll-over basis).

2. Judgment that all the properties mentioned and/or deposited as security in this loan transaction be used by the 1st Defendant as a lien or set-off for the loan and the accrued interest as enshrined in a document to the loan transaction particularly at paragraph 7 of the loan Guarantee form (which is part of this loan transaction document) which empowers the 1st Defendant to have a lien or right of set-off on all

money or assets lodged with or under the control of the cooperative.

3. *The sum of N5,000,000.00 (Five Million Naira) as general damages."*

Mr. Idris Saka testified for the 1st and 2nd defendants and tendered a total of thirteen (13) documents as Exhibits B, B1 – B12 as follows:

- Membership Application Form marked as Exhibit B
- Receipt dated 26/3/10 marked as Exhibit B1
- Credit Request Form marked as Exhibit B2
- Receipt dated 1/4/10 marked as Exhibit B3
- Letter dated 26/10/10 marked as Exhibit B4
- Letter dated 26/1/11 marked as Exhibit B5
- Application for credit facility marked as Exhibit B6
- Guarantors Form marked as Exhibit B7
- Loan Guarantee Form marked as Exhibit B8
- 3 Copies of cheque marked as Exhibit B9
- Copy of cheque dated 24/3/10 marked as Exhibit B10

- Letter dated 2/3/11 marked as Exhibit B11
- Letter dated 30/1/12 marked as Exhibit B12

DW1 was duly cross-examined and later discharged.

By the order of Court made on the 11th March, 2014, Pastor (Dr. Chidozie Nwachukwu was joined as 3rd Defendant in this suit. The witness denied being the guarantor of the 2nd plaintiff. He testified that as at the 31/3/2011 when the 2nd plaintiff failed to liquidate his indebtedness, he (3rd defendant) had ceased to be a guarantor for the loan facility.

The 3rd Defendant further contended that the title documents which are in possession of the 1st Defendant were not given for the purpose of securing the loan as the 3rd Defendant did not transfer ownership of the landed properties in question and no legal or equitable mortgage was created over the plots of land with respect to the loan facility granted to the 2nd plaintiff.

That the 2nd Plaintiff is ready and willing to offset his outstanding liability with respect to the loan granted to him by the 1st Defendant. Upon failure by the 1st and 2nd defendants to release his title documents, the 3rd Defendant Counter-Claimed against the Plaintiffs and the 1st and 2nd Defendants as follows:

"1. An order of this Honourable Court declaring that the 3rd Defendant/Counter-Claimant ceased to be a Complementary Guarantor to the 2nd Plaintiff on the 31st March, 2011, in respect of the loan facility granted to the 2nd Plaintiff by the 1st Defendant.

2. An order of this Honourable Court declaring that it is only the 2nd Plaintiff who is indebted to the 1st Defendant in respect of the loan granted to him.

3. An order of this Honourable Court directing the 1st and 2nd Defendants to release to the 3rd Defendant/Counter-Claimant all his title documents in respect of the plots of land which are in their custody."

Three documents were tendered through the 3rd defendant and admitted in evidence as exhibits C,C1 and C2 respectively. The documents are:

1. Letter dated 2/3/11 marked as Exhibit C
2. Irrevocable Power of Attorney marked as Exhibit C1
3. A Deed of Assignment dated 19/10/2009 marked as Exhibit C2.

At the close of evidence, parties were directed to file their final written addresses. Emeka E. Ohanebo on behalf of the 1st and 2nd Defendants filed the final written address dated the 5th April, 2019. Learned Counsel raised three issues for determination as follows:

"1. Whether the Plaintiffs establish their case by credible evidence thus entitling them to Judgment as claimed.

2. Whether by the evidence of the 3rd Defendant, the 3rd defendant proved that he is entitled to the reliefs as contained in his Counter-Claim.

3. Whether by the evidence in this matter, the 1st and 2nd Defendants are not entitled to the prayer in their Counter-Claim."

On his part, B. J. Akomolafe Esq. filed the Plaintiff's final written address on the 17th June, 2019 wherein Learned Counsel formulated six issues for determination as follows:

"1. Whether or not the sum of N30,000,000.00 (Thirty Million Naira) only alleged Principal loan claimed by the 1st and 2nd Defendants was not more than the sum N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) only actually advanced to the claimants on the 1st day of April, 2010 from the impeccable documentary evidence before the Honourable Court.

2. Whether or not if issue one is answered in the affirmative the claimants are not bound to pay interest on the sum of N25,200,000.00 (Twenty Five

Million, Two Hundred Thousand Naira) only loan advanced by the 1st and 2nd Defendants on the 1st day of April, 2010 only at such rate for such period as may be just by way of compensation pursuant to the monetary guidelines of the Central Bank of Nigeria and the Moneylenders Act Cap 525, Laws of FCT Nigeria.

3. *Whether or not repayment of the sum of N118,831,973.00 (One Hundred and Eighteen Million, Eight Hundred and Thirty One Thousand, Nine Hundred and Seventy Three Naira) only demand made by the 1st and 2nd Defendants on the claimants as at the 30th January, 2011 from the sum of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) loan advanced on the 1st of April, 2010 was not outrageous, unrealistic, unlawful and against all statutes relevant to the subject of loan*

transactions in Nigeria in the circumstances of this case.

4. *Whether or not it would be just and equitable to permit the 1st and 2nd Defendants to enforce the loan agreement purportedly signed by the 2nd claimant in the circumstances.*
5. *Whether or not the liability of the 3rd Defendant's Counter-Claim has arisen when the liability of the claimants is still a subject of controversy and litigation yet to be determined.*
6. *Whether or not the threat and attempted arrest and detention of the 2nd Claimant by the officers of the Economic And Financial Crimes Commission (EFCC) at the instigation of the 2nd Defendant over the subject of this suit was not in breach of the Fundamental Human Rights of the 2nd Claimant."*

Then, Canice I. Nkpe Esq. filed the written address dated 8th October, 2019 on behalf of the 3rd defendant.

Learned Counsel raised four issues for determination as follows:

"1. Can the 1st Defendant grant loan and charge interest on the loan when it is not a registered Financial Institution or a registered moneylender?

2. Whether the loan granted to the 2nd Claimant by the 1st Defendant was secured by the 3rd Defendants landed properties?

3. Having regards to exhibit B11 and exhibit C respectively, whether the 3rd Defendant/Counter-Claimant ceased to be a Guarantor to the 2nd claimant on the 31st day of March, 2011.

4. Whether the 3rd Defendant/Counter-Claimant has proved his Counter Claim to entitle him to his reliefs?"

Mr. Ohanebo for the 1st and 2nd defendants filed a reply to Plaintiff's final written address and a Reply on

points of law to the final written address of the 3rd Defendant on the 4th November, 2019.

Having gone through the evidence adduced by the parties, and submissions of Learned Counsel canvassed in their final written addresses, I am of the humble opinion that three issues are germane for the just determination of this suit. The issues are as follows:

1. Whether the plaintiffs proved their case by credible evidence adduced to be entitled to all the reliefs claimed.
2. Whether the 1st and 2nd Defendants/Counter-Claimants adduced sufficient evidence to be entitled to the prayers in their Counter-Claim.
3. Whether the 3rd Defendant/Counter-Claimant has proved his Counter-Claim to entitle him to his reliefs.

ISSUES ONE AND TWO:

"(1) Whether the Plaintiffs proved their case by credible evidence adduced to be entitled to all the reliefs claimed.

(2) Whether the 1st and 2nd Defendants/Counter-Claimants adduced sufficient evidence to be entitled the prayers in their Counter-Claim".

For convenience, I will take the first two issues together. This is because the claims of the plaintiffs are intertwined with the 1st and 2nd Defendants Counter-Claim. Further, it should be noted that a Counter-Claim is a claim by the defendant against the plaintiff in the same proceedings. It is regarded as an independent action in which the Defendant/Counter-Claimant is in the position of the Plaintiff and therefore has the burden of proving the Counter-Claim to be entitled to Judgment thereon. A Counter-Claim can properly be raised by a Defendant when the Counter-Claim is directly related to the principal claim. See: Kwajaffa vs. B.O.N (1999)1 NWLR (Part 587) at 423.

Generally, the burden of proof in civil proceedings is imposed by law on the party who would fail if no evidence at all were given on either side. The onus of proof does not, however remain static, but shift from side to side in civil suits. The Evidence Act, 2011 says it all in Sections 131 – 134. For the purpose of burden of proof in civil suit, the Act states thus:

Section 131

"(1). Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

Section 132

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Also, see: Union Bank Plc. vs. Ravih Abdul & Co. Ltd. (2018) LPELR – 46333 (SC).

Now, from the available evidence before this Court, parties are *ad idem* that there existed a loan transaction between the 2nd Plaintiff and 1st Defendant which was created vide exhibits B2 and B6. By exhibit B2, "Credit Request Form," the 2nd Defendant applied for a loan facility of N30, Million Naira which was approved by the 1st Defendant through exhibit B6. Exhibit B6 was duly executed by the 2nd Plaintiff on one side and 1st Defendant on the other side. It also specified the rights and obligations of the parties, the amount borrowed, tenure of the loan and the interest rate to be charged.

The Plaintiffs alleged that the amount approved by the 1st and 2nd Defendants was different from the amount eventually disbursed which is the sum of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira). And interest rate ought to have been charged on this amount as against the N30,000,000.00, (Thirty Million Naira) claimed by the 1st and 2nd Defendant's.

At paragraphs 4.02 – 4.07 of his final written address, Learned Counsel to the plaintiff's B.J. Akomolafe Esq submitted to the effect that there is overwhelming evidence before this Court that the sum of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira only) was actually advanced to the claimants instead of the sum of N30,000,000.00 (Thirty Million Naira). However unlawfully, the claimants were charged interest based on the sum of N30,000,000.00 (Thirty Million Naira).

Learned Counsel submitted that even the Managing Director of the 1st Defendant who testified as DW1 admitted

that the claimants were charged interest on the sum of N30,000,000.00 (Thirty Million Naira) though the amount disbursed was less. Counsel went on to submit on the trite position of the law that evidence which has not been challenged or rebutted invariably amounts to admission of the evidence. Counsel cited and referred to the cases of Esene vs. State (2017)8 NWLR (Part 1568)337, Atanda vs. Iliasu (2013)6 NWLR (Part 1351) 527 at 559.

Further, at paragraphs 5.02 to 5.10 Counsel submitted that the claimants are bound to pay interest on the sum of N25, Million Naira only advanced to them by the 1st and 2nd Defendants and nothing more. He went on to submit that the interest demand of N93,000,000.00 (Ninety Three Million Naira) within 10 months from the loan of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) was not only outrageous and unrealistic, but also unlawful.

Learned Counsel cited and referred this Court to the Provisions of Sections 15(1)(a) and (b), 16(1) and 18(2) of the Money Lenders Act to the effect that the compound and punitive interest rate charged was outrageous and more than the prescribed rate per annum as regulated by the Money Lenders Act. Counsel urged this Court to hold that the interest charged by the 1st and 2nd Defendants was outrageous, punitive and exorbitant and therefore cannot be enforced. That the 1st and 2nd Defendants are only entitled to 17.5% interest per annum on the N25,200,000.00.

On his part, Learned Counsel for the 1st and 2nd Defendants submitted in his unpaged written address that the loan transaction, the subject matter of this suit was a contract/agreement which was covered by documents specifying rights and obligations of each party. Counsel further submitted that the interest rate on the loan was clearly specified to be 15% for a tenure of 90 days. That in

exhibit A6, the 2nd Plaintiff made an appeal to the 1st Defendant to reduce the known interest rate to enable him liquidate the loan and interest thereto within 45 days from the date of the reduction. He further submitted that the 1st Defendant in response to the request of the 2nd Plaintiff reduced the interest rate to 12%, converted the loan to a back end transaction and dropped the 2% late payment penalty. Counsel finally submitted that parties are bound by their agreement and it is not the duty of the Court to re-write the agreement between the parties, but to interpret and enforce the agreed terms of the parties as contained in any document. Counsel cited and made reference to the following cases.

1. Ignobis Hotel Ltd. vs. Bentec Elect. Ltd. (2015)1 NWLR (Part 1441) at page 504,
2. Ibrahim vs. Garki (2017)9 NWLR (Part 1517) at 377,
3. Sifax (Nig.) Ltd. vs. Migfo (Nig.) Ltd. (2018)8 NWLR (Part 1623) page 138.

4. Linton Ind. Trading Co. Ltd. vs. C.B.N. (2015)4 NWLR (Part 1448) page 94 at page 112.

In BFI Group Corp. vs. BPE (2012)18 NWLR (Part 1392)209 SC, the Supreme Court held as follows:

"The Court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms so long as same is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitute the contract are invariably the guide to its interpretation. When parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the Court to re-write a contract for the parties."

Upon a proper perusal of Exhibits B3, B9 and B10 the 1st defendant issued three Skye Bank post dated cheques all amounting to the sum of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) only. Receipt for the sum of N4,000,000.00 (Four Million Naira) was also issued to the 2nd plaintiff being upfront payment for processing fee and interest charged on the N30,000,000.00 (Thirty Million Naira) credit facility.

It might be proper at this point to reproduce the evidence of PW1 elicited during cross-examination by the 1st and 2nd Defendant's counsel. He said inter alia:

> *"It is true that there was a receipt of N4.5 Million Naira which I signed. This was deducted from the loan facility. I was told that interest will be deducted at source and N4.5 Million Naira was for April interest and N300,000.00 was processing fee for the loan. About N25.2 Million Naira was advanced to me after the deductions."*

Deducing from all the available evidence before this Court, it is clear that the plaintiff actually applied for N30,000,000.00 (Thirty Million Naira) and after all the deductions the sum of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) was disbursed by the 1st and 2nd Defendants.

Further correspondences between the 2nd plaintiff and the 1st and 2nd defendants revealed that the 2nd plaintiff showed willingness to repay the loan and the accrued interest, while appealing that the interest rate be reduced. He also undertook to repay the loan in not more than 45 days from when the interest is reduced. The defendants in their reply to the plaintiff's request wrote Exhibit A7 accepting the proposal, and in paragraph 2 stated thus:

> *"That the 15% rate be reduced to 12%, on your loan be converted to a backend transaction, so the principal given is taken as N25,200,000 and at the same time 2% late payment penalty has also been*

dropped, meaning the co-operative is writing off above N80,000,000 for you."

The plaintiffs are yet to liquidate the loan. Learned counsel for the plaintiff's urged this Court to declare that the interest charged on the loan is unlawful, fraudulent and against mercantile principles and government policy. Counsel made reference to the Moneylenders Act, 1939 and Central Bank of Nigeria Communiqué on the Monetary Policy but he failed to tender same in evidence. In the case of Union Bank of Nig. Ltd vs. Nwoye (1996) LPELR SC 51/1993 the Apex Court held that whoever alleges banking customs must prove it. Any Central Bank guidelines relied upon, must therefore be proved in evidence by producing same in Court. See UBN Plc & anor vs. Ifeoluwa Nig. Enterprises Ltd (2007) 7 NWLR (part 1032), H.N.B. Ltd vs. Gifts Unique (Nig) Ltd (2004) 15 NWLR (part 896) page at 428.

I hold therefore that the 1st and 2nd defendants were entitled to charge interest on the loan facility as agreed upon by the parties. And in this instance, it shall be the sum of N25,200,000.00 (Twenty Five Million Two Hundred Thousand Naira) at the reduced interest of 12%. Reliefs 1 and 2 are therefore resolved against the plaintiffs

By relief No. 3, the plaintiffs are seeking declaration that the transaction with the 1st and 2nd defendants is purely civil with no element of crime in it. The facts of this case are obvious on this point and I have no difficulty granting this relief.

Reliefs 4 and 6 are granted to the effect that the principal sum given to the plaintiff shall be N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) with interest rate of 12% to be calculated from the date of disbursement. There is no evidence that the plaintiffs are being harassed, intimidated or threatened with arrest by the defendants. Relief 5 is therefore refused.

Relief 7 is refused as there is no evidence led as regards threat of arrest, harassment or molestation of the plaintiffs by the defendants using law enforcement agents.

Now to the counter claim of the 1st and 2nd defendants. It is trite that a counter claim is a separate, independent and distinct action by itself and does not lean on the statement of defence for support or sustenance even though it is filed along with the statement of defence. It is equal to and not subservient to the main suit and as such, must comply fully with the law with regard to pleadings. The implication of this is that material facts which by law are expected to be pleaded in a statement of claim or statement of defence as the case may be, or relevant particulars which ought by law to be supplied in a normal pleading...must of necessity be pleaded in a counter-claim before evidence can be led on those facts. See Ali vs. Salihu & ors (2010) LPELR – CA/A/242/2008.

The 1st and 2nd defendants/counter claimants have prayed for a declaration that the interest on the loan which the 2nd plaintiff borrowed from the 1st defendant be calculated at the rate of 15% (on roll – over basis). It is noted that the agreement between the parties was for interest to be charged at the rate of 15% flat. However as earlier held in this judgment, by mutual consent and agreement of parties vide correspondences i.e. Exhibits A6 and A7, the interest rate on the loan facility advanced to the 2nd plaintiff was adjusted to 12% on the amount due to the 1st and 2nd defendants. In granting this relief, I hold that the interest on the loan facility shall be calculated at the rate of 12% flat.

By relief 2, the 1st and 2nd defendants/counter claimants prayed the Court to enter judgment that all the properties mentioned and/or deposited as security for the loan facility listed in Exhibit B7 as;

1. AN 11223 in Gwarimpa 1, Cadastral Zone C02 Plot No. 54
2. AD 40145 in Jikwoyi Village Integration layout.
3. AN 53726 Action Area layout;

be used by the 1st defendant as a lien or set-off for the loan and accrued interest. The counter claimants have averred that they are empowered by paragraph 7 of the Loan Guarantee Form to have a lien or right of set-off on all money or assets lodged with or under the control of the Cooperative.

It is apposite to understand what a guarantee is. The term has been defined as a written undertaking made by one person to another to be responsible to that other if a third person fails to perform a certain duty e.g. payment of debt. Thus where a borrower fails to pay an outstanding debt, the guarantor (or surety as he is sometimes called) becomes liable for the said debt. See Khaled Barakat Chami vs. UBA Plc (2010) 3 SCM 59 at 78. Failure of the principal

debtor to repay the credit facility the liability of the guarantor under the guarantee thereby crystallized. The right of the creditor is therefore not conditional as he is entitled to proceed against the guarantor without or independent of the incident of the default of the principal debtor. See FBN vs. M.O. Nwadialu & Sons Ltd & ors (2015) LPELR – 24760(CA), F.I.B. Plc vs. Pergasus Trade Officer (2004) 4 NWLR (part 863) 369 at 388 – 389.

In this instance, there is a guarantee form Exhibit B8 filled by the guarantors and as rightly stated by the 1st and 2nd defendants/counter claimants, clause/paragraph 7 therein is very explicit and it states:

> *"The Cooperative shall so long as money or liabilities due or incurred by or from the principal to the Cooperative (the repayment of which is secured by this guarantee) remain unpaid or undercharged have a lien or a right of set –off therefore on all money now or hereafter standing*

to the credit of or assets now or hereafter lodged with or under control of the cooperative and every guarantor with the Cooperative whether on any current or other account."

The guarantors deposited the properties listed in Exhibit B7 to secure the loan for the 2nd plaintiff. Having failed to repay the loan, I hold that the guarantors have become liable and the 1st and 2nd defendants are entitled to use the properties deposited as lien or right of set off on the assets. Relief 2 is thus granted as prayed.

Relief 3 is for the sum of N5 Million as general damages. It is trite that general damages are such as the law itself implies or presumes to have accrued from the wrong complained of. Items of general damages need not and should not be specifically pleaded, but some evidence of such damage is required. See <u>Air France vs. Akpan (2015) LPELR – 24648 (CA).</u> The counter claimant has averred that as a result of the plaintiffs commission and or

omission they suffered substantial loss. The plaintiff/defendant to counter claim did not controvert this piece of evidence. Thus this relief will be granted.

ISSUE NO. THREE

> *"Whether the 3rd Defendant/Counter Claimant has proved his Counter-Claim to entitle him to his reliefs."*

As stated earlier in this Judgment that a Counter-Claim is a claim by the Defendant against the Plaintiff in the same proceedings. It is regarded as an independent action in which the Defendant/Counter-Claimant is in the position of the Plaintiff and therefore has the burden of proving the Counter-Claim to be entitled to judgment thereon.

The case of the 3rd Defendant briefly is that the title documents which are with the 1st and 2nd Defendants do not belong to the plaintiffs, and therefore should be

returned to the 3rd Defendant as they are not collateral for the loan.

Under cross-examination by Counsel to the 1st and 2nd Defendants, the 3rd Defendant who testified for himself as DW2 stated that being the Pastor of the 2nd plaintiff, he was approached to stand as his surety before he is given a loan by 1st and 2nd defendants. He gave the 2nd plaintiff some title documents, eventhough he was not informed that they will be used as collateral. The witness said he is not a party to the agreement between the 2nd plaintiff and 1st and 2nd defendants. 3rd Defendant also contended that he ceased to be the 2nd Plaintiff's guarantor on the 31st March, 2011 vide exhibits B11 and C which are clear and unambiguous. It is based on this that the 3rd Defendant/Counter-Claimant claimed against the Plaintiffs and 1st and 2nd Defendants for three reliefs.

It is important at this point to state that the 3rd Defendant's Counsel has raised a point of law at

paragraphs 4.1 – 4.10 of his final written address to the effect that the 1st Defendant as a Co-operative Society has not shown that it is a registered financial institution, with the capacity to accept the various types of deposits from individuals. That the 1st Defendant has not shown that it has the capacity to provide or grant credit facility or loan to its customers or members.

Learned Counsel cited and referred this Court to the Provisions of Section 58 of the Banks and other Financial Institutions Act, (BOFIA) Cap B3 LFN, 2004, Sections 5,7, and 68(1) of the Co-operative Societies Act, Cap 488 Laws of the FCT, to the effect that the 1st Defendant has not presented anything before this Court to show that it is licensed and authorised under the BOFIA. He finally submitted that the 1st Defendant is not a money lender, neither is it duly registered with the Registrar of Co-operative Societies with the capacity to grant loans and charge interest therefrom. He urged this Court to hold that

the transaction between the 2nd Plaintiff and 1st Defendant is illegal.

In response, learned counsel for the 1st and 2nd Defendants at paragraph 1.1 of his Reply on point of law to the final written address of the 3rd Defendant, submitted that the parties to this suit did not raise the issue of legality or otherwise of this loan transaction in their claims and counter-claims. Thus, the 3rd Defendant cannot raise the issue of legality in the final written address. He cited and referred this Court to the cases of: Iyeke vs. P.T.I. (2019)2 NWLR (Part 1656) page 217, Ozomgbachi vs. Amadi (2018)17 NWLR (Part 1647) page 171.

Counsel finally urged this Court to discountenance the prayer of the 3rd defendant's Counsel.

It is settled principle of law that whoever seeks to claim illegality as a defence must not only plead the illegality as a defence, he is also required to set out the particulars of the

illegality in his pleadings. See: West Construction Co. Ltd. vs. Santos M. Batalha (2006) LPELR – 3478 (SC). In this instance, the 3rd Defendant did not in the statement of defence and counter-claim plead that the loan transaction, subject matter of this suit is illegal. Furthermore, the 2nd plaintiff never denied benefitting from the loan transaction. The Courts of law in plethora of judicial decisions have frowned on a party who has benefitted from a contract to turn around and claim that the transaction was illegal. See: Oguntuwase vs. Jegede (2015) LPELR – 24826 (CS), Adedeji vs. National Bank of Nigeria Ltd. (1989)1 NWLR (Part 96) 212.

Thus, I hold that the prayer of the 3rd defendant to declare the transaction illegal is misconceived and same is hereby discountenanced.

Now, to the claims of the 3rd defendant as per his counter-claim. Firstly, the 3rd Defendant prayed this Court to declare that the 3rd Defendant/Counter-Claimant ceased

to be a Complimentary Guarantor to the 2nd Plaintiff on the 31st March, 2011, in respect of the loan facility granted to the 2nd Plaintiff by the 1st Defendant.

From the evidence, the 3rd Defendant by exhibit B7 "Guarantors Form" submitted himself as the guarantor to the 2nd Plaintiff in the loan transaction between the 2nd Plaintiff and the 1st Defendant.

It is settled law that where a person personally guarantees the liability of a third party by entering into a contract of guarantee or surety ship, a distinct and separate contract from the principal debtor is thereby created between the guarantor and the creditor. The contract of guaranty so created can be enforced against the guarantor directly or independently without the necessity of joining the principal debtor in the proceeding to enforce same. See: Chami vs. U.B.A. Plc. (2010) LPELR – 841 (SC).

In the instant case, by exhibit B7, the 3rd defendant through his solicitor wrote a letter to the President/CEO of the 1st defendant confirming that the 3rd defendant guaranteed Hon. Idemeto with respect to the loan facility. And that failure by Hon. Idemeto to comply with the terms as agreed, the 3rd defendant shall be compelled to withdraw his guarantorship. See Exhibits B11 and C.

Now, the crucial question is under what circumstances can a guarantor discharge himself from liability under the contract of guarantee?

The position of law is that a guarantor of a loan or overdraft cannot just walk out of his obligation under the agreement without first discharging his liability in the contract. Further, a guarantor cannot determine his liability under a guarantee by mere writing of a letter without more. See: FBN Plc. vs. Songonuga (2005) LPELR – 7495 (CA).

The Court in the case of FBN Plc. vs. Songonuga (Supra) highlighted conditions under which a guarantor can be discharged of his liability as follows:

a. Where his obligation under the guarantee contract has been satisfied;
b. Where the principal debt had been extinguished by acts of the parties;
c. Where a limitation or prescriptive period had elapsed;
d. Where a Court applied a presumption which operates to determine the contract of guarantee.

I hold that the 3rd Defendant cannot just walk out of his obligation by merely writing the letter Exhibit B11. Thus, as guarantor, the 3rd defendant remains answerable for the principal sum granted as loan plus accrued interest at the rate agreed upon until the plaintiff repays the loan. Thus, this claim is refused and accordingly dismissed.

The 2nd relief for the 3rd Defendant/Counter-Claimant is for an order declaring that it is only the 2nd Plaintiff who is indebted to the 1st Defendant in respect of the loan granted to him.

I have earlier resolved in this Judgment that the loan transaction, subject matter of this suit is between the 2nd Plaintiff and 1st Defendant. In fact, the 2nd Plaintiff never denied being liable to the 1st and 2nd Defendants. However, the 3rd Defendant having presented himself to stand as guarantor to the 2nd Plaintiff, a distinct and separate contract from the principal debtor is thereby created between the guarantor and creditor (1st Defendant). Also, a creditor is entitled to proceed against a guarantor immediately the debtor or borrower becomes unable to pay his outstanding debt. See: Gajimi vs. FBN Plc. (2018) LPELR – 43996 (CA).

Thus, this relief is granted to the extent that it is only the 2nd Plaintiff who is indebted to the 1st Defendant in respect of the initial loan granted to him.

Finally, the 3rd Defendant/Counter-Claimant is praying this Court for an order directing the 1st and 2nd Defendants to release all his title documents in respect of his plots which are in their custody. The 3rd Defendant/Counter-Claimant testified that his title documents were not deposited as collateral for the loan granted to the 2nd Plaintiff.

I have earlier held in this judgment while finding for the 1st and 2nd defendants that they have the right of lien and set -off pursuant to paragraph 7 of the Loan Guarantee Form. In the guarantors form filled by the 3rd defendant, he declared his net worth, listed some properties and handed the title documents to the 1st and 2nd defendants.

The 3rd defendant who is a Pastor and a person of full age was not forced or put under any pressure to stand as guarantor or to release his title documents to guarantee the loan. He did all this on his own volition and therefore should take responsibility for his action by discharging his liability.

Having already found for the 1st and 2nd defendants, this relief is accordingly refused.

On the whole judgment is entered as follows:

1. It is declared that the transaction between the plaintiffs and the 1st and 2nd defendants is purely civil without any element of crime.
2. It is further declared that the principal sum on the facility given to the plaintiffs shall be the sum of N25,200,000.00 (Twenty Five Million, Two Hundred Thousand Naira) with interest to be calculated at the rate of 12% from the date the amount was disbursed.

3. Failure by the plaintiffs to offset their obligations, the 1st and 2nd defendants shall be at liberty to exercise the right of lien or set off on the properties deposited as security for the loan and the accrued interest.
4. General damages of N2,000,000.00 (Two Million Naira) awarded in favour of the 1st and 2nd defendants against the plaintiffs.

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Hon. Justice M.A. Nasir

<u>Appearances</u>:

B.J. Akomolafe Esq with him E. Jatto Esq – for the plaintiff

Emeka Ohanebo Esq – for the 1st and 2nd defendants

C.I. Nkpe Esq – for the 3rd defendant