

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA COURT 4, FCT., ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE O. O. GOODLUCK

SUIT NO. FCT/HC/CV/547/2015

B E T W E E N:

AFRO-ARAB INVESTMENT LIMITED } PLAINTIFF

AND

**1. SAFETRUST SAVINGS AND LOANS LTD. }
2. MR. FEMI ALEMEDE } DEFENDANTS
(CARRYING ON BUSINESS UNDER THE
NAME AND STYLE OF FEMI ALEMEDE & CO.
3. JOMED INTERNATIONAL LIMITED }**

J U D G M E N T

The Plaintiff had over the years maintained the 1st Defendant as its property business consultant and in that regard the 1st Defendant has been engaged in the procurement and disposal of properties for the Plaintiff.

One of such properties purchased for the Plaintiff by the 1st Defendant is Plot 2715, Cadastral Zone A06, Maitama District also known as House No. 3 Volta Street, Off Thames Street, Maitama District, Abuja (hereinafter referred to as Plot 2715).

By a letter dated 18th March, 2011, the Defendant offered the Plaintiff a working capital facility in the sum of ~~N~~75,000,000.00 (Seventy-Five Million Naira) which was duly accepted by the Plaintiff. As part of the terms of offer The Plaintiff's Plot 2715 Cadastral Zone A06, Maitama, Abuja was secured as the collateral for the facility. A further sum of ~~N~~90,000,000.00 (Ninety Million Naira) was also advanced to the Plaintiff by the 1st Defendant. The Plaintiff defaulted in the loan repayment of both facilities. By a letter dated 2nd September, 2013 the Plaintiff was informed by the 1st Defendant that the Plaintiff's property at Plot 2715 had been sold to the 3rd Defendant in order to liquidate the Plaintiff's indebtedness in respect of both facilities.

Aggrieved by the sale of Plot 2715 by the 1st Defendant to the 3rd Defendant, the Plaintiff has now instituted this suit against the 1st, 2nd and 3rd Defendants and is claiming jointly and severally against them on diverse reliefs noted in the Statement of Claims and Writ of Summons.

In reaction, the 1st Defendant filed a Statement of Defence and Counter Claim dated 28th January, 2018 wherein it joined issues with the Plaintiff. 1st Defendant contends that it was forced to sell Plot 2715 after repeated demands to the Plaintiff for the repayment of its outstanding indebtedness in the sum of ~~N~~169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and

Six Naira Thirty-Six Kobo). When the Plaintiff refused or neglected to respond to the diverse letters of demands it was constrained to sell. The 1st Defendant denied the Plaintiff's allegation of the sale of Plot 2715 at an undervalue or in collusion and fraud between it and the 3rd Defendant. 1st Defendant maintained the sale was bona fide.

In addition, the 1st Defendant counterclaimed against the Plaintiff contending that the sale of Plot 2715 was pursuant to the invocation of the 1st Defendant right to dispose of the property since the property was the security for the mortgage facility.

By reason of the Plaintiff's default, the Defendant/Counterclaimant is praying for an order of Court inter alia that the sale of Plot 2715 was in accordance with the mortgage agreement, consequently, the sale of Plot 2715 is valid and subsisting, alternatively the 1st Defendant is claiming for a declaration that the Plaintiff is indebted to the 1st Defendant/Counterclaimant in the sum of ₦169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo) as at 31st July, 2010.

Defendant/Counterclaimant is also claiming for an alternative order directing the immediate sale of Plot 2715 by private treaty or public

auction arising from the Plaintiff/Defendant in the counterclaim's default. The 2nd and 3rd Defendants respectively filed their statement of defence.

The 2nd Defendant denied ever having a fiduciary relationship with the Plaintiff. He maintained that Plot 2715 was purchased for the reasonable sum of ~~N~~400,000,000.00 (Four Hundred Million Naira) and the sale was devoid of fraud, collusion or deceit. He maintained that the sale of Plot 2715 was conducted professionally following an advertisement in the open market.

The 3rd Defendant filed a Statement of Defence dated 24th January, 2014, like the 2nd Defendant, the 3rd Defendant also maintained that the sale was conducted after following due process and that it acted bona fide . 3rd Defendant further denied that the property was sold at an under value.

In reply, the Plaintiff filed a "reply to the 1st Defendant's Statement of Defence and Counterclaim dated 29th September, 2014"

Plaintiff denied any indebtedness in the sum of ~~N~~169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo). Plaintiff recounted that the 1st Defendant in advancing the ~~N~~75,000,000.00 (Seventy-Five Million Naira) facility agreed to waive the legal perfection of the mortgage of Plot 2715. He further contended that a separate

agreement was subsequently reached between Plaintiff and 1st Defendant for the sale of two of the Plaintiff's properties at Games Village, Abuja with the objective of applying the proceeds of sale to settle the Plaintiff's indebtedness in the sum of ~~N~~75,000,000.00 (Seventy-Five Million Naira). The Plaintiff insists that Plot 2715 was subsequently sold by the 1st Defendant to the 3rd Defendant with the fraudulent collusion of the 2nd and 3rd Defendants.

At trial, the Plaintiff called two witnesses. The Plaintiff's first witness only gave his evidence in chief by adopting his witness statement on oath. After repeated adjournments on account of the Plaintiff's first witness, P.W.1, Ojonimi S. Akpehe Esq., to attend Court P.W.1 was foreclosed from cross examination hence his testimony is discountenanced.

The Defendant proceeded with the counterclaim. One Fanahanmi Idris testified for the 1st Defendant. He adopted his witness statement and tendered several exhibits. His testimony in brief is that the Plaintiff was advanced facilities in the sum of ~~N~~75,000,000.00 (Seventy-Five Million and subsequently ~~N~~90,000,000.00 (Ninety Million Naira). He tendered Exhibit P.W.1B,¹⁻⁴ a letter of offer for the advancement of a ~~N~~75,000,000.00 (Seventy-Five Million Naira) working capital in favour of the Plaintiff subject to the terms and conditions noted therein. The said

terms were duly accepted by the Plaintiff. Thereafter, the Plaintiff took a further facility in the sum of ₦90,000,000.00 (Ninety Million Naira) based on the same terms and conditions, in Exhibit P.W.1B¹⁻⁴. The subsequent facility noted in the letter of offer dated 19th September, 2011 was admitted as Exhibit P.W.1F¹⁻⁴.

1st Defendant's witness further disclosed that the Plaintiff failed or neglected to refund the loan hence by the 31st July, 2013, the Plaintiff's indebtedness on both loans stood at ₦169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo). He recounted that both Exhibit P.W.1B¹⁻⁴ and P.W.1F¹⁻⁴ reflected that the property located at Plot 2715 Cadastral Zone A06 would be utilized as collateral for both facilities.

The 1st Defendant maintained that it never acceded to the Plaintiff's subsequent proposition vide email, that the 1st Defendant was to dispose of the Plaintiff's property at the Games Village in lieu of the Plot 2715. Besides, he recounts that the Plaintiff failed to deliver the necessary documents for the sale of the Games Village or Utako properties in furtherance of the Plaintiff's proposition that they should be sold in settlement of the Plaintiff's indebtedness. The 1st Defendant's witness also asserted that interest rate of 22% per annum was to be paid on the loan until total liquidation.

Following the default of the Plaintiff to service the loan facility repayment, the 1st Defendant contend, that it repeatedly wrote letters of demand to the Plaintiff to do the needful.

To this end, the 1st Defendant tendered demand Notices addressed to the Plaintiff, they were admitted as Exhibit P.W.1G, P.W.1L, P.W.1M and P.W.1U.

1st Defendant's witness admitted that Plot 2715 was sold to the 3rd Defendant in good faith devoid of fraud, collusion or breach of the agreement. The 1st Defendant witness also disclosed that the sale was in compliance with due process and it was informed by the valuation report of the property by Jide Taiwo & Co. Estate Surveyors and valuers.

He also disclosed that despite the public notice of the sale, the Plaintiff took no step to avert the sale of Plot 2715. 1st Defendant witness maintained that the property was sold to the 3rd Defendant for value without notice of any encumbrance.

Besides, he asserts that other than Plot 2715 there is no agreement between the Plaintiff and 1st Defendant of the sale of any other property.

On the counterclaim of the Defendant hereinafter referred to as the Defendant/Counterclaimant it maintained all its averments in the

substantive suit and insists that the Plaintiff has agreed that the Defendant/Counterclaimant is to retain its rights to the property in the event of default in the repayment of the funds advanced to the Plaintiff.

As at the 31st July, 2013 the Plaintiff according to the 1st Defendant had an outstanding indebtedness of ₦169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo) payable to the 1st Defendant arising from the credit facilities advanced to it. Flowing from the foregoing facts and the Plaintiff's default, the Counterclaimant is praying this Court for a declaration that the sale of Plot 2715 to the 3rd Defendant is valid, subsisting and is in accordance with the agreement reached between parties to Exhibit P.W.1B¹⁻⁴ and P.W.F¹⁻⁴.

Accordingly, Counterclaimant is praying this Court for an order of foreclosure on the property as well as a perpetual injunction to restrain the Plaintiff, their agents from interfering with its title, right and possession of Plot 2715.

Alternatively, the Defendant/Counterclaimant is praying for a declaration that the Plaintiff is indebted to the 1st Defendant/Counterclaimant in the sum of ₦169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One

Thousand, One Hundred and Six Naira Thirty-Six Kobo) as at 31st July, 2013.

Besides, the 1st Defendant/Counterclaimant is also praying for an order to exercise her right and power of sale of Plot 2715 in satisfaction of the outstanding indebtedness of the Plaintiff/1st Defendant in the counterclaim.

The Plaintiff/1st Defendant in the counterclaim thereafter filed a Motion on Notice praying this Court to allow the Plaintiff file a further Statement on Oath. This Court allowed the application, thereafter, the Plaintiff/1st Defendant in the counterclaim called its witness, PP1, Moufatah Baba Ahmed who adopted his Witness Statement on Oath respectively dated 15th December, 2017 and April 2018.

The facts that can be garnered from both sets of written statement of PP1 in summary are that the Plaintiff/1st Defendant in the counterclaim insisted that it is only indebted to the 1st Defendant/Counterclaimant in the sum of the ₦75,000,000.00 facility following the letters of offer dated 18th March, 2011. The Plaintiff/1st Defendant in the counterclaim's witness disclosed that the 1st Defendant/Counterclaimant had agreed to waive some of the conditions precedent to the facility particularly the use of Plot 2715 as collateral for the loan. He asserts that in so far as the Defendant/Counterclaimant is

in possession of the Plaintiff's titled documents in respect of other properties it was agreed that the Defendant/Counterclaimant is to sell two of the Plaintiff/1st Defendant to the Claimant's properties at the Games Village to settle the Plaintiff/1st Defendant to the counterclaim indebtedness of ₦75,000,000.00 (Seventy-Five Million Naira). He disclosed that rather than sell the Games Village properties, the 1st Defendant fraudulently colluded with the 2nd and 3rd Defendants and purportedly sold off Plot 2715 to the 3rd Defendant at a gross under value.

The Plaintiff/1st Defendant's counterclaim's witness further contends that the sale of Plot 2715 was predicated on fraud and collusion as the property at Plot 2715 is valued in excess of a billion. He disclosed that when the property was valued as at the 9th December, 2011 the valuation was for ₦800,000,000.00 (Eight Hundred Million Naira) by Messrs Inyi Victor and Peters, a reputable firm of Estate Surveyors and Valuers.

In effect, Plaintiff/1st Defendant to the counterclaim witness contends that the sale of Plot 2715 is vitiated by fraud and collusion. He went on to assert that investigations conducted at the Corporate Affairs Commission reveals that the 3rd Defendant is wholly owned and controlled by the 2nd Defendant and his family.

In sum, the Plaintiff/1st Defendant in the counterclaim maintains that it is not indebted in the sum of ₦169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo) counterclaimed by the 1st Defendant/Counterclaimant.

On the 26th September, 2018, Casmir Igwe Esq., Counsel for the 2nd and 3rd Defendants informed the Court that the 2nd and 3rd Defendants will not be calling any witness as they intend to rest their case on that of the 1st Defendant. All Counsel in this suit thereafter filed and exchanged final written addresses whilst the Defendant/Counterclaimant filed a reply on points of law. Claimant/1st Defendant to the counterclaim filed a process titled Claimant's Final Written Address dated 28th February, 2019.

F. R. Onoja Esq., Counsel for the Claimant/1st Defendant to the counterclaim hereinafter referred to as the "1st Defendant to the counterclaim" formulated three issues for determination as follows;

1. Whether the 1st Defendant can validly sell property, the subject of an equitable mortgage without first obtaining an order for foreclosure from the Court of law before exercising a right of sale.

2. Whether the 1st Defendant is entitled to the interest claimed on the principal sum even after admitting that interest on the facility was paid up front.
3. Whether in the circumstance of the case the Court can grant the alternative set of reliefs set out in the counterclaim of the 1st Defendant.

Casmir Igwe Esq., Counsel for the Defendant/Counterclaimant in his Final Written Address dated 5th November, 2018 formulated two issues for determination as follows;

1. Whether the Plaintiff made out a case against the Defendant as is sufficient to entitle the Plaintiff to the reliefs sought in her Statement of Claim.
2. Whether the 1st Defendant/Counterclaimant made out a case against the Defendant to Counterclaim as is sufficient to entitle the 1st Defendant/Counterclaimant to the reliefs sought in her counter claim.

The 2nd and 3rd Defendants' Counsel, O. A. Onodu Esq. In his Final Written Address dated 15th day of April, 2019 formulated three issues for determination as follows;

- a) Whether from the totality of the evidence before this Honourable Court the Plaintiff has disclosed a cause of action against the 2nd Defendant in this suit.
- b) Whether the 3rd Defendant in this suit considering the totality of the evidence before this Honourable Court is not an innocent purchaser for value without notice over the property situate at Plot 2715 No. 3 Volta Street, Off Thames Street, Maitama District, Abuja.
- c) Whether this Honourable Court can make an order of perpetual injunction in favour of the Plaintiff in this case against the 3rd Defendant considering the totality of the evidence before the Court.

Having set out the issues for determination respectively canvassed by the Counsel in this matter, I am inclined to consider the 2nd and 3rd Defendant's Counsel's first issue I am so minded in view of the fact that 2nd and 3rd Defendants first issue for determination borders on a threshold point which must be determined one way or the other as it borders on the competence of a party in this suit before proceeding with the other issues.

Learned Counsel for the 2nd and 3rd Defendant, A.O. Onodu Esq., contends that the statement of Claim has not disclosed any reasonable cause of action against the 2nd Defendant.

He then commended this Court to the decision in **ALIU v. A.G. OYO STATE (1988) L.P.E.L.R. page 764 SC** per Muktar JSC when he held thus:

“...A cause of action is constituted by a bundle of aggregate facts which the law will recognise as giving the Plaintiff a substantive right to make the claim must be recognised by the law as giving rise to a substantive right capable of being claimed or enforced against the Defendant. In other words, the factual situation relied upon must constitute the essential ingredient of an enforceable right or claim...”

A. O. Onodu Esq. recounted that the Plaintiff's witness under cross examination admitted that he can remember the name of the 2nd Defendant though he can't remember meeting him. Besides, he says that he cannot recall having any contact with the 2nd Defendant. Onodu Esq., went on to submit that the 2nd Defendant did not occasion fraud or collusion against the Plaintiff's interest nor has it been established that the 2nd Defendant stands in any fiduciary relationship with the Plaintiff. It is further argued that the 2nd Defendant acted professionally and in good

faith in relation to the double allocation noted in the 1st Defendant letter of the 13th day of June, 2011.

Claimant's Counsel has submitted that it was the 2nd Defendant who acted as the consultant to the claimant's properties.

F. R. Onoja Esq. Counsel for the Claimant posits that the 2nd Defendant was placed in an advantage position towards the sale of the property. He went on to contend that the sale of the mortgaged property to 2nd Defendant's company sparks of collusion, inside trading and fraud.

It is settled that in determining whether a suit discloses a reasonable cause of action against the Defendant, the Court is to confine itself to the Statement of Claim and decipher from the facts whether the claim has disclosed facts that are reasonable enough to entitle a person to obtain a remedy from the Court in respect of the injury.

In this case, the Plaintiff/1st Defendant to the counterclaim contends that the property which is the subject in dispute, Plot 2715 was sold to the 2nd Defendant's company and that the sale was not bona fide and it was at an undervalue. Arising out of these allegations and other issues, the Claimant is praying this Court to set aside the sale. My view is that the allegation of fraud, collusion and mala fide sale are strong

allegations which calls for an answer from the 2nd Defendant. Besides, the allegation of collusion by the 2nd Defendant and the 1st Defendant/Counterclaimant in selling off Plot 2715 calls for a defence which if held to be founded by this Court will affect the sale of Plot 2715 and inevitably affect the interest of the 2nd Defendant who is alleged to be a shareholder of the 3rd Defendant.

See the decision in **ALIU v. A.G. OYO STATE (1988) E.P.E.L.R. page 794 SC** where Muktar JSC held thus:

“I think a cause of action is constituted by the bundle or aggregate of facts which the law will recognise as giving the Plaintiff a substantive right to make the claim must be recognised by law to giving rise to a substantive right capable of being claimed or enforced against the Defendant. In other words, the factual situation relied upon must constitute the essential ingredient of an enforceable right or claim”

I am thus not left in doubt that the allegations made by the Claimant in its pleadings together with the relief sought by Plaintiff to set aside the sale on the basis of the alleged collusion between the counterclaimant and 2nd Defendants discloses a reasonable cause of action against the Counterclaimant and 2nd Defendant, this being the case, I am of the view and will so hold that the totality of the Plaintiff's claim before this Court discloses a reasonable cause of action against

the 2nd Defendant, this being the case, 2nd and Defendants' issue one is answered in the affirmative having taken a thorough examination of the Plaintiff's pleadings.

I now turn to the 2nd and 3rd Defendant's second issue for consideration that is, whether the 3rd Defendant in this suit is not an innocent purchaser for value without notice. First and foremost it must be recounted that the 2nd and 3rd Defendants did not call any witness in proof of their assertion even they filed a witness statement on oath in support of their pleadings. The witness, one Ebenezer Babatope Mesele failed to testify at trial. This being the case there is no evidential proof in furtherance of the 2nd and 3rd Defendants pleadings, this being the case the 2nd and 3rd Defendants statement of defence are deemed as abandoned accordingly they will be disregarded by this Court save for the fact that they have rested their case on that of the Defendant/Counterclaimant.

Similarly, one Ojonim F. Apen, gave his evidence in chief but failed to appear for cross examination. This being the case, the testimony of Ojonim F. Apen will be disregarded by this Court.

In sum, only Baba Ahmed, P.W.2 testified as the sole witness for Claimant/1st Defendant to the counterclaim.

It is also recounted that the 1st Defendant/Counterclaimant witness disclosed that Plot 2715 was sold pursuant to the terms in Exhibit P.W.1F¹⁻⁴ and Exhibit P.W.1B¹⁻⁴. It is noted in both documents that the security/collateral for both facilities is Plot 2715, Cadastral Zone A06 Maitama District, Abuja.

I am inclined to endorse the submission of Casmir Igwe Esq., that oral evidence cannot be elicited to contradict, vary or subtract from an agreement expressly entered into by parties, consequently the Claimant/1st Defendant's assertion that the Games Village property was exchanged as collateral for Plot 2715 expressly noted in Exhibit P.W.1B¹⁻⁴ and P.W.1F¹⁻⁴ is inadmissible.

In the case of **F.B.N. PLC v. NDOMA EGBA (2006) ALL F.W.L.R. (PART 307) page 1047 para. A Ratios 22 and 23** it was held that: *"Using documentary exhibits available to the parties and the Court is the best method of resolving a matter in conflict"* at pages 1048 paragraph E, it was held thus:

"It is also a general rule that where parties to an agreement have set out the terms thereof a written document, an extrinsic or oral evidence is not admissible to add to, vary, subtract, or contradict the terms of the written document"

This being the case I cannot but hold that the only property which is subject to sale pursuant to Exhibit P.W.1B¹⁻⁴ and P.W.1F¹⁻⁴ is Plot 2715. For another property to have been the subject matter of the loan facilities both parties to the agreement must have consensually executed an agreement in that regard.

However, I find it needful to point out here that in determining whether the 3rd Defendant was a bona fide purchaser of Plot 2715, it behoves on the 3rd Defendant, to present this Court with documentary evidence of sale of the Plot 2715 in its favour.

The 1st – 3rd Defendants palpably failed to present before this Court evidence of sale of Plot 2715 in favour of the 3rd Defendant that is, the document conferring title of Plot 2715 in favour of the 3rd Defendant. It is now settled that the contents of a document can only be proved by the document itself. This age long principle is resonated in Section 85 of the Evidence Act which provides that: *“The contents of documents may be proved either by primary or by secondary evidence”*

Aside from holding that the sale of Plot 2715 was not validly proved by the Defendant/Counterclaimant, I am also unable to allude to the contention of the Claimant/1st Defendant in the counterclaim that parties have agreed that the Games Village properties should be sold to offset the claimant/1st Defendant to the counterclaimant's indebtedness.

I must state here that the Defendant/Counterclaimant is by this suit urging this Court to declare the sale of Plot 2715 valid and subsisting without presenting this Court with the document evidencing the sale. This Court cannot disregard the fact that the Counterclaimant is seeking for a declaratory relief, Section 5(2) of the Law Reform Act Chapter 517 Laws of the Federation (Abuja) renders its relief incompetent and unenforceable Section 5(2) of the Act provides thus:

“No contract to which this section applies shall be enforceable by action unless the contract or some memorandum or note in respect therefore is in writing and is signed by the party to be charged therewith or by some person lawfully authorised by him.

Section 5(1) specifically states the kind of contract Section 5(2) of the Act envisages, it provides as follows

Section 5(1) “This section” applies:-

- a) To a contract for the sale of land;
- b) To a contract to enter into a disposition that is required by any enactment to be made by deed or instrument or in writing or to be proved in writing
- c) To a contract to enter into a mortgage or charge on land
- d) To a contract by a person to answer to another person for the debt, default or liability of a third party.

(Emphasis is mine). In effect, an order for the validation of the sale of Plot 2715 (which is not conceded) is devoid of the statutory condition precedent for the enforcement or validation of the sale.

The Defendant/Counterclaimant is under an obligation to establish that there was indeed a sale of Plot 2715 and the sale was made bona fide. There is no proof of sale before this Court.

More importantly, the counterclaim is for declaratory reliefs against the Plaintiff/1st Defendant to the counterclaim, there is nothing before the Court in proof of the sale of Plot 2715.

That said, I now turn to the Claimant's first issue for determination, that is, whether the 1st Defendant can validly sell property, the subject of an equitable mortgage without first obtaining an order of foreclosure from a Court of law before exercising a right of sale.

F. R. Onoja, Esq. Learned Counsel for the Claimant has submitted that between parties in this suit there is no dispute that the property, Plot 2715 or House No. 3 Volta Street, Off Thames Street, Maitama District, Abuja is a subject of mortgage which is equitable in nature.

Learned Counsel for the Claimant/1st Defendant to the counterclaim has rightly submitted that where parties intend to enter into

a legal mortgage but are unable to perfect the instruments for a legal mortgage, the law considers such a mortgage as an equitable mortgage.

Claimant/1st Defendant's Counsel rightly commended this Court to the decision in **F.B.N. LTD. V. SANGONUGA (2007) N.W.L.R. (PART 1021) page 230 CA** *“where the Court held that a mere deposit of a title deed which cannot be accounted for in any other way is taken as part performance of a contract to create a legal mortgage. Even when no word about a contract has been said, such deposit creates an equitable mortgage, thus where parties specifically agreed to enter into a contractual transaction, the intensions in favour of a creation of legal undertaking cannot be disputed. In the instant case the act of the Respondent depositing the title deeds with the execution of a memorandum of deposit amounted to a creation of an equitable mortgage”*

I am inclined to endorse the submission of F.R. Onoja Esq. that the right to exercise a power of sale by the equitable mortgagee MUST be predicated on an order of Court.

In effect, it is only the law Court that can order the sale of an equitable property, any sale without an order of Court is unlawful and invalid. Indeed, the Claimant/Defendant to counterclaim's Counsel rightly

referred to the decision in **UBA PLC v. MUSA AND ANOR. (2008) L.P.E.L.R. page 456** where it was held thus:

“...It is settled that though an equitable mortgage gives the equitable mortgagee an immediate power of sale, foreclosure and all other remedies open to a legal mortgage, once the equitable mortgage defaults an equitable mortgage must seek for an order of Court to foreclose the mortgage before he can proceed to exercise the powers of sale... There was no evidence before the lower Court that the Appellant obtained such an order before proceeding to sell the Petrol Station. This omission to obtain the order also rendered the sale wrongful and illegal per Abiru-JCA page 43-41...”

I am not in doubt that the alleged sale of Plot 2715 by the 1st Defendant to the 3rd Defendant is invalid and unlawful. This takes me to the decision in **ADARAH OGUNDIANI v. O.A.L. AROBA & ANOR. (1978) L.P.E.L.R. – SC 470/57 pages 24-25** it was held inter alia thus:

“The right of foreclosure is a very powerful remedy, in the hand of the equitable mortgage and the vendor who takes a legal estate with the notice of an equitable mortgage and therefore...to the class of equitable interest should bear this in mind since, in certain circumstances, he may find in the end that he has bought a worthless legal estate”

Guided by the foregoing pronouncement my answer to the Claimant's first issue for determination is in the negative, I hold that the 1st Defendant cannot validly sell Plot 2715 or any other property which is the subject matter of an equitable mortgage without the prior order of Court.

That said, on the claimant's second issue for determination that is, whether the 1st Defendant is entitled to the interest claimed on the principal sum after admitting that interest was paid up front.

Learned Counsel for the Claimant/1st Defendant in the counterclaim has submitted that the 1st Defendant/Counterclaimant is not entitled to charge interest on the facility after same had been paid up front. He however concedes that the 1st Defendant is entitled to contractual interest, that is, interest agreed by parties. Counsel relied on the 1st Defendant's letter dated 18th March, 2011 and follow up letter dated 19th September, 2011.

Counsel for the Claimant commended this Court to the decision in **MATRIN LTD. V. ATTORNEY GENERAL FEDERATION (1996) (PART 475) page 634 at 664** where the Court held per Baaba JCA held that:

“At common law and general rule interest is not payable on a debt or loan in the absence of expressed agreement or some cause of

dealing or custom to that effect see EWUNIFE v. WAYNE (WA) LTD. (PART 1989) 5 N.W.L.R. (PART 122) page 422 at 44”

Learned Counsel for the Claimant has submitted that the 1st Defendant/Counterclaimant has failed to disclose how it arrived at the sum of ₦169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo) claimed as an alternative relief.

F. R. Onoja Esq. Has urged this Court to decline the Defendant/Counterclaimant’s claim on interest and indeed the entire sum of ₦169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo).

The Claimant’s Counsel has submitted that contrary to the Defendant/Counterclaimant’s Counsel’s submission, Defendant/Counterclaimant is not entitled to charge interest on the credit facility. It will suffice to say that the Claimant has not challenged the 1st Defendant’s right to demand for interest in their pleadings. The allegation that the 1st Defendant is not a bank or a financial institution reared its head in the Claimant’s address.

It has long been settled that the submission of Counsel no matter how brilliant cannot be substituted as evidence. It would amount to

belabouring the point by restating paragraph 2 of the Defendant/Counterclaimant's Statement of Defence wherein its articles includes amongst others activities the acceptance of savings and granting terms loans. I have carefully examined the provisions of the two loan facilities, apart from the fact that both Exhibits P.W.1F¹⁻⁴ and P.W.1A¹⁻⁴ provides for interest rate at 22 percent per annum payable up front. It is noteworthy that both agreements expressed a tenor of ninety days for the life span of the loan.

Learned Counsel for the Defendant/Counterclaimant has submitted that the Defendant/Counterclaimant is entitled to claim and charge interest at the rate of 22% per annum on the outstanding for over eight years in arrears he relied on the decision in **UNITED BANK FOR AFRICA v. LAWAL (2008) ALL F.W.L.R. (PART 434) page 1548 at 1550 Ratio 1**, there, it was held that:

“Interest may be claimed as of right where it is contemplated by the agreement between parties as in the case or under mercantile custom or under a principle of equity, such as a breach of fiduciary relationship, interest may be awarded where there is a power conferred by statute to do so in the exercise of the Court's discretion”

Flowing from the above case and being so guided, I am of the view and will so hold that the Claimant/Defendant to the Counterclaim is

obliged to pay the Defendant/Counterclaimant interest in the manner agreed in the respective credit facility agreements. I have hitherto in this Judgment examined Exhibit P.W.1F¹⁻⁴ and Exhibit P.W.1B¹⁻⁴, both document details the manner of payment. As already noted, provision was made 22% interest per annum (payable up front) the tenor of the loan is 90 days whilst repayment is to be made by Bullet Repayment on the expiration of the facility. My understanding of the facility agreement is that the interest of 22% was deducted up front from the loan advanced whilst a payment enblock of the principal sum is to be paid within 90 days from the date of advancement. I am unable to decipher how the Claimant/1st Defendant to the counterclaim is under an obligation to pay interest on the outstanding after the expiration date of the loan. That much is not reflected in the loan agreement. This observation tallies with the testimony of the Claimant/1st Defendant to the counterclaim witness that the interest on the loan facility was to be up front only at the rate of 22% per annum.

Here, I am inclined to endorse the submission of the Claimant/1st Defendant Counterclaimant's Counsel that the 1st Defendant/Counterclaimant has not demonstrated by his pleadings and evidence how it arrived at the sum of ₦165,000,000.00 (One Hundred and Sixty-Five Million Naira). The Defendant/Counterclaimant's witness

agreed that the upfront interest has been paid, this being the case, I am in agreement with the Claimant/1st Defendant to the Counterclaimant that the interest cannot be paid endlessly as such was not what was mutually agreed by the party.

The case of **ALHAJI HASSAN BELLO AND SONS LTD. AND ANOR. V. ZENITH BANK (2018) L.P.E.L.R. 43 page 792 CA**, per Shuaibu JCA pages 20 – 21 paras. 3B is quite apt and illuminating on the interest payable in a transaction that is, similar to the subject matter of this suit, it was held that:

*“Parties are ad idem as to the tenors of the loan facility as clearly stated in Exhibit P2 to be twelve months. Where there is a fixed expiry date for an overdraft, the agreed interest rate will only be applicable from the date the agreement came into effect up to the date the facility expired as the indebtedness cannot be treated as an overdraft after the expiry date. Thus, what the bank will be entitled to after the debt has become due is damages for breach and it is also not open to Court to award the applicable interest rate per annum to cover from the date overdraft facilities become due up to the day of Judgment of the Court. See **UBA v. LAWAL (2008) 38 W.R.N. 66 at 73 and INTEGRATED DIMENSIONAL SYSTEMS LTD. V. AFRICA INTERNATIONAL BANK LTD. (2002) 4 N.W.L.R. (PART 758) 660 also in SANI ABACHA***

FOUNDAITON FOR PEACE AND UNILAG v. UBA PLC (2010) 17 N.W.L.R. (PART 1221) 192 at 207 – 208. *The Supreme Court has held that interest must not only be pleaded but also strictly proved. Thus, where interest is being claimed as a matter of right, the facts of that entitlement must be pleaded by Claimant followed by evidence to establish same. It is only when the Court is satisfied after receiving the pleadings, and evidence that it may award same”*

Flowing from the foregoing the Defendant/counterclaimant is under an obligation to lead credible, plausible and persuasive evidence of how it arrived at the sum of ~~N~~169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo). Though Claimant’s Counsel has submitted that the Defendant/Counterclaimant’s claim must collapse, I am of the view and will so hold that based on Exhibit P.W.1F¹⁻⁴ and P.W.1B¹⁻⁴ the 1st Defendant/Counterclaimant has established that the sum of ~~N~~75,000,000.00 (Seventy-Five Million Naira) was advanced to Claimant’s 1st Defendant by the letter of offer dated 18th March, 2011 and ~~N~~90,000,000.00 (Ninety Million Naira) was subsequently advanced vide letter dated 19th September, 2011 (Exhibit P.W.1F¹⁻⁴). Both funds, going by the two documents, established payment of the sum of ~~N~~165,000,000.00 (One Hundred and Sixty-Five Million Naira) was

advanced to the Claimant/1st Defendant by the counterclaimant. The fact that the 1st Defendant has proved its counterclaim against the Claimant to the extent of the sum of ₦165,000,000.00 (One Hundred and Sixty-Five Million Naira) in my view, does not fetter 1st Defendant/Counterclaimant's right to enforce its claim against the claimant (less the disputed interest).

My answer to Claimant/1st Defendant's 2nd issue for determination is answered in the negative I hold that the counterclaimant is not entitled to any further interest beyond that paid upfront by the Claimant/Defendant to the Counterclaim.

On whether this Court can grant the alternative reliefs set out in the Defendant's counterclaim, I will proceed to examine the reliefs severally and make my pronouncement however I will consider the claims in the main suit first.

Turning to the Claimant's reliefs I hereby hold as follows;

Leg one succeeds. It is hereby declared that the sale of Plot 2715, No. 3 Volta Street, Off Thames Street, Maitama District, Abuja to the 3rd Defendant/Counterclaimant is null and void and of no effect.

Leg b succeeds. The sale of Plot 2715 by the 1st Defendant to the 3rd Defendant is hereby set aside accordingly an act or step taken pursuant to the void sale is hereby nullified.

Leg c succeeds, partially. The Defendants are perpetually restrained from taking over possession in respect of Plot 2715, House No. 3 Volta Street, Off Thames Street, Maitama District, Cadastral Zone A06, Maitama District Abuja including commencing any proceeding for the purposes of exercising control and possession over Plot 2715, House No. 3, Volta Street, Off Thames Street, Maitama SAVE in the exercise of due process of the law as ordered by a Court of law.

Leg d fails having held that Exhibits P.W.1A¹⁻⁴ and P.W.1F¹⁻⁴, the letters of offers does not provide for the properties at Games Village, Abuja as collateral for the facility, the Games Village properties cannot be appropriated as set off by way of sale.

Leg e succeeds. The 1st Defendant is hereby ordered to render a true and accurate account verified on oath, all the Plaintiff's properties in Lagos and Abuja whose title documents are in the 1st Defendant/Counterclaimant's possession and return same to the Claimant/ 1st Defendant to the counterclaim.

**O.O. Goodluck,
Hon. Judge.
22nd January, 2020.**

JUDGMENT IN THE COUNTERCLAIM

All the evidence, pronouncement and submissions of all Counsel are hereby reiterated by this Court for the purposes of this counterclaim.

I will now proceed to consider the counterclaimant's reliefs.

Leg one of the counterclaimants prayer for a declaration that the sale of Plot 2715 Volta Street, to the 3rd Defendant/Counterclaimant is valid, fails and is hereby dismissed.

Leg 2 which is for an order of foreclosure, the right to redeem also fails having held that the sale to the 3rd Defendant fails.

Prayer for an order of perpetual injunction, the 3rd reliefs also fails.

All the substantive reliefs having failed, I am of the view and will so hold that this Court is empowered to examine the alternative reliefs sought by the counterclaimant and make the appropriate order.

The Counterclaimant is by leg 'a' of the alternative relief claiming the sum of ~~N~~169, 281,106.36 (One Hundred and Sixty-Nine Million, Two Hundred and Eighty-One Thousand, One Hundred and Six Naira Thirty-Six Kobo) as at the 31st July, 2013 being the principal and accrued interest at the rate of 22% per annum of the credit facility granted on the 19th September, 2011.

As already noted the credit facility is in the sum of ~~₦~~90,000,000.00 (Ninety Million Naira) and ~~₦~~75,000,000.00 (Seventy-Five Million Naira). Having paid the interest of 22% per annum, upfront and the Claimant having failed to repay by bullet payment on or before the expiration of the facility, the Claimant/1st Defendant is hereby ordered to pay the sum of ~~₦~~165,000,000.00 (One Hundred and Sixty-Five Million Naira) only being no evidence that parties are agreed that interest will be payable after the expiry date.

Leg 5 succeeds albeit to the extent that the Claimant/1st Defendant is hereby ordered to pay the sum of ~~₦~~165,000,000.00 (One Hundred and Sixty-Five Million Naira) representing the credit facilities granted to Claimant/Applicant.

Leg 6 fails. This leg fails in the absence of credible evidence to the effect that parties are mutually agreed on the payment of 22% interest from August 1st 2013.

Leg 7 also fails for the same reason as in leg 6.

Leg 8 succeeds to the extent that the Claimant has defaulted in the satisfaction of its indebtedness to the 1st Defendant/Counterclaimant accordingly, the Counterclaimant/1st Defendant is hereby ordered to exercise her right and power of sale of property at Plot 2715 (No. 3) Volta Street, Off Thames Street, Maitama District, Abuja.

It is however ordered that in the event the Claimant is unable to satisfy the Judgment sum ordered by this Court within 60 days from the date hereof, Plot 2715, House No. 3, Volta Street, Off Thames Street, Maitama District, Abuja shall be sold and whatever money paid in excess of the Judgment sum shall be paid over to the Claimant/1st Defendant to Counterclaimant.

Leg 9 succeeds. The Defendant/Counterclaimant is hereby ordered to sell by private treaty public auction any of the buildings at Plot 2715, House No. 3, Volta Street, Off Thames Street, Maitama District, Abuja and in the event that the sale of one property is insufficient for the settlement of the Judgment sum, then the second building shall also be sold by private treaty.

O.O. Goodluck,
Hon. Judge.
22nd January, 2020.

APPEARANCES

Parties absent.

F.R. Onoja Esq. With me is S.F. Pele Ms.: For the Claimant.

Ngozi Casmir Igwe Mrs.: For the 1st Defendant/Counterclaimant

Ngozi Orkeki Ms.: For the 2nd and 3rd Defendants.