

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT GWAGWALADA**

THIS TUESDAY, THE 25TH DAY OF FEBRUARY, 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/1338/14

BETWEEN:

DR. JEFFREY IDOGHOPLAINTIFF

AND

**1. MR. CLINTON AMADI }
2. MRS. AMINA SALISU }DEFENDANTS**

JUDGEMENT

The claims of Plaintiff against Defendants as contained in the further Amended statement of claim dated 7th November, 2017 is as follows:

- 1. A Declaration that the Plaintiff is entitled to exclusive enjoyment and possession of Duplex Shop, No.009, Mabushi Ultra-Modern Market, Abuja having paid for the said property and pursuant to the Deed of Assignment between Plaintiff and the 1st Defendant.**
- 2. An order granting Plaintiff the exclusive possession of the said property.**
- 3. An order mandating the Defendants to totally surrender and vacate the Duplex Shop, No 009, Mabushi Ultra-Modern Market, Abuja to the Plaintiff in entirety.**

- 4. An order directing the Defendants to forthwith, deliver up possession in the afore described property.**
- 5. An order of perpetual injunction restraining the Defendant's acting either by themselves or through their servants, agents, privies or successors in title from asserting any form of right of interest or whatsoever in the afore described property, be it statutory or other form of right of occupancy and from collecting the rents from tenants therein or parading themselves as being owners or alleged caretakers of the property over or in the said property or Duplex Shop.**
- 6. An order granting the Plaintiff the sum of N5,000,000(Five Million Naira Only), against the Defendants jointly and severally, being damages for inconveniences, trauma, frustration and expenses incurred in the course of litigating this suit coupled with the deliberate instinct of the Defendants to deprive the Plaintiff of the benefits to exclusive possession and enjoyment of the said Duplex Shop.**
- 7. An order granting an indemnity cost of the sum of N2,000,000(Two Million Naira Only) against the 1st Defendant which is the cost of instituting this action and his failure to give possession of the said property to the Plaintiff after sale.**
- 8. An order for specific damages in the sum of One Hundred and Thirty-Seven Thousand, Five Hundred Naira Only per month, from the date of finalizing the purchase i.e. 29th day of July, 2013, until the full determination of this suit against the Defendant.**

PARTICULARS OF DAMAGES

- a. Mense profit for "Tenancy at will/Trespasser" at the sum of N137,500.00K being current monthly rent value of the subject matter in this suit. (To be paid by the Defendants from the period being in wrongful possession or Trespass in the case of 2nd Defendants until the final disposal of this suit).**

- b. Exemplary Damages of the sum of N1,200,000(One Million and Two Hundred Thousand Naira Only) against the 2nd Defendant as a result of 2nd Defendant's failure to vacate the said premises till date.**

IN THE ALTERNATIVE TO THE ABOVE

An order directing the 1st Defendant to refund the sum of twenty-eight Million Naira (N28,000,000.000) to the Plaintiff being the sum paid to the 1st Defendant as full an final payment for the sale of the subject matter; shop No.009 Duplex Ultra Modern Market Mabushi Abuja, with 5% interest on each month from the day of payment of the said sum to the 1st Defendant till judgment is executed.

The 1st Defendant filed a Consequential Amended Statement of Defence on 8th December, 2017. On the part of 2nd Defendant, she filed a statement of defence and set up counter against both 1st Defendant and Plaintiff dated 12th January, 2016 as follows:

- a. A Declaration that the purported power of attorney, Deed of Assignment is null and void same being a product of fraud.**
- b. A Declaration that the purported sale between the 1st Defendant and the Plaintiff is void ab initio as the 1st Defendant does not have the requisite right to transfer title.**
- c. An Order of specific performance of the loan agreement between the Defendant/Counter-Claimant and the 1st Defendant.**
- d. An Order mandating the 1st Defendant, the plaintiff, their agents, privies and officials to revert all title documents belonging to the Defendant/Counter-claimant as the original allottee and owner of Duplex shop 009, Mabushi Ultra-modern Market, Abuja.**

- e. An order of Perpetual injunction restraining the 1st Defendant and the plaintiff, their agents and privies or howsoever described from further trespassing on the Defendant's shop.**

The Plaintiff filed a reply to the 1st Defendant's statement of defence on 23rd June, 2015 and similarly filed a reply and defence to the 2nd Defendant's defence and counter-claim dated 21st April, 2017.

In proof of his case, the Plaintiff testified as PW1 and the only witness. He adopted his 28 paragraphs witness deposition dated 16th November, 2015 and tendered in evidence the following documents:

1. Purchase Receipt between Plaintiff and 1st Defendant dated 29th July, 2013 was admitted as **Exhibit P1.**
2. Deed of Assignment between the Plaintiff and 1st Defendant was admitted as **Exhibit P2.**
3. Deed of Assignment between 2nd Defendant and 1st Defendant dated 18th February, 2013 was admitted as **Exhibit P3.**
4. Power of Attorney between 2nd Defendant and 1st Defendant dated 18th February, 2013 was admitted as **Exhibit P4.**
5. Letter titled Re: Application for consent to assign Shop 009, Mabushi Ultra Modern Market Abuja by 2nd Defendant was admitted as **Exhibit P5.**
6. Provisional letter of allocation of Shop at Mabushi Modern Market to 2nd Defendant dated 16th December, 2008 was admitted as **Exhibit P6.**
7. Letter titled final letter of allocation of a shop at Mabushi Modern Market, Abuja was admitted as **Exhibit P7.**
8. Receipt issued to 2nd Defendant by Metshade Ltd dated 26th May, 2009 was admitted as **Exhibit P8.**

9. Three (3) numbered receipts issued by Mabushi Ultra Modern Market to 2nd Defendant dated 16th December, 2008, 4th March, 2009 and 26th May, 2009 were admitted as **Exhibits P9(1-3)**.

10. Letter by 1st Defendant titled: Notification of sale of my shop No 009 Mabushi Ultra Modern Market to Plaintiff dated 29th July, 2013 was admitted as **Exhibit P10**.

11. Certified True Copies of certificate of service and notice to tenant of owners intention to apply to recover possession was admitted in evidence as **Exhibit P11(1&2)**.

The Plaintiff was then cross examined by both counsel to the 1st and 2nd Defendants and with his evidence, the Plaintiff closed his case.

The 1st Defendant equally testified in person as DW1 and the only witness. He adopted his sixteen (16) paragraphs witness deposition dated 8th December, 2017. He did not tender any documentary evidence. The 1st Defendant was equally cross-examined by both counsel to the 2nd Defendant and the Plaintiff. He then closed his case.

On the part of the 2nd Defendant, one Mr. Dennis Edimoh, a businessman testified on behalf of 2nd Defendant as DW2. He deposed to a witness statement on oath of twenty-one (21) paragraphs dated 14th January, 2019 which he adopted at the hearing in respect of both the defence and the counter-claim. The 2nd Defendant did also not tender any documentary evidence. With the evidence of DW2, the 2nd Defendant closed her case.

At the close of evidence, parties filed and exchanged final written addresses in compliance with the Rules of Court. In the written address of the 2nd Defendant/counter-claimant, only one issue was raised as arising for determination to wit:

“Whether in view of the circumstances and the evidence before the court, the 2nd Defendant is not entitled to the reliefs sought in her counter-claim?”

In the final address of 1st Defendant, two(2) issues were raised as arising for determination as follows:

- 1. Whether the Plaintiff has by preponderance of evidence substantiated his claims against the 1st Defendant.**
- 2. Whether the 2nd Defendant/counter-claimant has substantiated her counter-claim against the 1st Defendant.**

On the part of the Plaintiff, two (2) issues were equally raised as arising for determination as follows:

- a. Whether the Plaintiff is the rightful owner of Duplex Shop No.009 Mabushi Ultra-Modern Market in view of the evidence before this Honourable Court, hence making the 2nd Defendant unsuccessful in her counter-claim.**
- b. Whether the 1st Defendant is in breach of Exhibit P1 and P2.**

The 1st Defendant filed a reply address to the final written address of the 2nd Defendant/counter-claimant dated 17th June, 2019.

I have duly considered the pleadings, evidence led and the final written addresses on both sides of the aisle; it is not in dispute that there is a claim and a counter-claim. It is trite principle of general application that a counter claim is a separate and distinct course of action and the counter-claimant like the plaintiff, must prove his case before obtaining judgment on the counter-claim. See the cases of **Oyebola V. Esso W.A (1966)1 All NLR 170; Shettimari V. Nwokoye (1991)9 NWLR (pt.216)66 at 71.**

In view of this settled principle of law, both the plaintiff and 2nd defendant have the burden of proving their claim and counter-claim respectively. This being so, the critical issue for determination is really who as between the Plaintiff and 2nd Defendant has established a better right to possession and ownership of Shop 009 at Mabushi Ultra Modern Market such that it is entitled to the reliefs sought.

This broad single issue raised by court is not raised or framed as an alternative to the issues as distilled by parties which even if couched differently are in substance all the same. The issue thus framed by court conveniently accommodates all the issues raised by parties and has brought out with sufficient clarity, the pith of the contest which has been brought to court for judicial ventilation and which remains to be resolved by court shortly with the pleadings of parties providing the sole fulcrum or pivot for streamlining of the issues in dispute.

The point to perhaps underscore at the outset is that it is now settled principle of general application that whatever course the pleadings take, an examination of them at the close of pleadings and trial should show precisely what are the issues between the parties upon which they must prepare and present their cases and which remain to be resolved by court. Any issue outside the template of the pleadings can only but have peripheral significance if any. In **Oversees Construction Ltd V. Greek Enterprises Ltd & Anor (1985) 3 N.W.L.R (pt.13) 407 at 418**, the Supreme Court instructively stated as follows:

“By and large, every disputed question of fact is an issue. But in every case there is always the crucial and central issue which if decided in favour of the plaintiff will itself give the right to the relief he claims subject of course to some other considerations arising from other subsidiary issues. If however the main issue is decided in favour of the defendant, then the plaintiff’s case collapses and the defendant wins.”

It is therefore guided by the above wise exhortation that I would proceed to determine this case based on the issue I have raised and also consider the evidence and submissions of counsel. In furtherance of the foregoing, I have carefully read the final written addresses filed by parties. I will in the course of this judgment and where necessary make references to submissions made by counsel.

ISSUE ONE

Which of the Plaintiff and 2nd Defendant has established a better right of possession and ownership of Shop 009 at Mabushi Ultra Modern Market.

Now from the pleadings and evidence, the substance of Plaintiff's claims revolves around his claim of ownership of the disputed Shop 009 at Mubushi Ultra Modern Market and that he derives his **title** from 1st Defendant. What is interesting here is that the 1st Defendant who sold to him never denied the sale and indeed did not at all join issues with Plaintiff with respect to the sale of the shop. The problem and that appears to be the crux of this dispute is that the 2nd Defendant and original allottee of the shop who 1st Defendant on the processes claims he bought from has denied that she sold the said shop. Indeed her claim is that she still owns the shop and predicates the entire counter-claim on this ownership. It is clear that a resolution of the claim of ownership by 2nd Defendant, one way or the other, would have a marked bearing on the claims of Plaintiff.

It may perhaps be necessary to streamline the standpoint of parties and there is no better template to do this than the pleadings of parties. The relevant paragraphs of the Amended statement of claim of plaintiff are as follows:

- “4. The Plaintiff avers that he is the lawful and bonafide owner of the Duplex Shop Numbered 009, at the Ultra-Modern Market, Abuja. Sometime before August 2013, he showed his interest in the purchase of the said Duplex Shop Numbered 009, Ultra-Modern Market, Mabushi, Abuja.**
- 5. After making the necessary search as to ascertain the lawful owner of the said property, the Plaintiff's findings showed that the property belonged to the 1st Defendant herein. The Plaintiff thereof approached the 1st Defendant to convey to him his intention of purchasing the property.**
- 6. The plaintiff further avers that he met with the 1st defendant's legal representative who contacted the 1st defendant (his client) and he later showed a corresponding interest in selling the said property to the Plaintiff.**
- 7. The Plaintiff avers that following the agreement between him and the 1st Defendant's legal representative, they both went to Metshade Limited (the Company in charge of buying and selling of all Mabushi Ultra-Modern Market Shop, Mabushi, Abuja-FCT) to ascertain the legal status of the property.**

8. Following the research conducted at Metshade Limited, the Plaintiff confirmed from Mrs. Maureen (a staff of Metshade Limited) who informed him and the 1st Defendant's legal representative that the 1st Defendant purchased the property from the 2nd Defendant on the 18th of February, 2013.

The search showed the 1st Defendant's root of title is as follows:

a. On the 28th day of May, 2009 the 2nd defendant (Mrs. Amina Salisu) purchased the property from Metshade Limited.

b. On the 18th of February, 2013 the 1st Defendant (Mr. Clinton Amadi) purchased the property from the 2nd Defendant.

9. Following the search report showing that the Plaintiff was dealing with the extant owner of the property, the Plaintiff agreed to purchase the property from the 1st Defendant.

10. The Plaintiff further avers that during the pre-sale inspection of the property with the 1st Defendant's legal representative, the 2nd Defendant was still in possession of the said property. Upon necessary inquiry, the 1st and 2nd Defendants told the Plaintiff that the 2nd Defendant was only in possession pending the completion of the sale contract between the 1st Defendant and the plaintiff.

11. The Plaintiff further avers that on the 29th of July, 2013 he concluded the sale agreement with the 1st Defendant and he paid the agreed consideration of Twenty Eight Million Naira only as the purchase of the said property. A purchase Receipt was thereafter issued by the 1st Defendant to the Plaintiff. The Plaintiff hereby plead the Purchase Receipt dated 29th of July, 2013 and shall, at the hearing of this suit, rely on it.

12. The Plaintiff avers that following the payment of the purchase price, and in completion of the sale agreement, the 1st Defendant's legal representative took the necessary documents to the 1st Defendant at Owerri, Imo State for signature/perfection and subsequently handed over to him the necessary

title documents to the said property. The Plaintiff hereby pleads the Deed of Assignment between him and the 1st Defendant, and other title documents in respect of the property, and shall, at the hearing of this suit, rely on all the documents.

13. The Plaintiff further avers that on the 29th of July, 2013, the 1st Defendant notified Metshade Limited via a letter of same date, of the transfer of the property to the Plaintiff. The Plaintiff hereby pleads the letter dated 29th July, 2013, and shall at the hearing of this suit, rely on same.

14. The Plaintiff further avers that following the notification given to Metshade Limited by the 1st Defendant of the Plaintiff's acquisition/ownership of the property, the 1st Defendant thereafter notified the 2nd Defendant of the Plaintiff's intention to take possession of the property and that the 2nd Defendant should vacate the property.

15. The Plaintiff shall contend at the trial that, ever since the 2nd Defendant received the notification from the 1st Defendant, she changed her attitude, and thus refused and neglected to vacate the property.

16. The Plaintiff thereafter informed the 1st Defendant of the attitude of the 2nd Defendant and her insistence to remain in the possession of the property but the 1st Defendant has made little or no effort to ensure the ejection of the 2nd Defendant from the property.

17. That the Plaintiff will at the hearing of this suit further contend that, at the point of sale, the 1st Defendant and his legal representative never stated that the said Duplex Shop will be encumbered and that the Plaintiff will not readily have access to enjoy exclusive possession of the said property.

18. The Plaintiff avers that on the 16th of September, 2013 through his solicitors informed the 2nd Defendant of his acquisition of the said Duplex Shop and further gave the 2nd Defendant a notice to quit and the said Duplex Shop. The Plaintiff hereby pleads the Notice to Quit and shall rely on same at the trial of this suit.

19. That despite paragraphs 18 above, the 2nd Defendant has maintained a carefree and dubious attitude in her conduct by insisting to remain in the property and unwillingness to vacate same, thereby depriving the Plaintiff of taking possession of his property.

20. At the hearing of this suit the Plaintiff intend to led evidence to show that since he became the bona fide owner of the said property, he has not been able to take exclusive and peaceful possession of the property.”

The evidence of Plaintiff was essentially a rehash of the above averments and it is based on these that he predicates his claim of ownership of the disputed shop.

As stated already, the **1st Defendant** did not at all join issues with respect to his sale of the property to the Plaintiff. The relevant paragraphs of his Amended statement of defence are as follows:

- “1. The 1st Defendant admits paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23 of the Plaintiff’s statement of claim.**
- 2. In specific response to paragraph 16 of the Plaintiff’s statement of claim, the 1st Defendant avers that he had written to the Managers of Mabushi Ultra Modern Market informing them of the interest of the Plaintiff in the said shop and the 1st Defendant has also written to the 2nd Defendant instructing her to vacate the said shop for the Plaintiff.**
- 3. The 1st Defendant further avers that having irrevocably transferred his interest in the said shop to the Plaintiff he does not posses any power over the shop again as all rights over the shop is now vested on the Plaintiff.**
- 4. In response to paragraph 21 of the Plaintiff’s statement of claim, the 1st defendant denies ever refusing to answer the calls of the Plaintiff as he has maintained a cordial relationship with the Plaintiff at all times even now that the Plaintiff has taken to Court.**

6. **The 1st Defendant avers that he has done all he can within the law to make the 2nd Defendant vacate the shop without success and has advised the Plaintiff to use the process of law to recover the shop from the Plaintiff but instead of following that advice the Plaintiff has now sued the 1st Defendant making outlandish claims against the 1st Defendant without jurisdiction.**
7. **The 1st Defendant avers that at the time Plaintiff was buying the shop he saw the 2nd Defendant in occupation and the 2nd Defendant consented to vacating the shop anytime the Plaintiff concludes the transaction and is willing to take possession.**
8. **The 1st Defendant avers that he is not in occupation of the said shop and cannot deliver any possession to the Plaintiff as he cannot give what he does not have.**
9. **The 1st Defendant avers that the Plaintiff is not entitled to be indemnified by the 1st Defendant to the tune of Two Million Naira (N2, 000, 000.00) or any amount at all as the 1st Defendant has not done anything wrong to the Plaintiff and has always supported the Plaintiff in his effort to recover the said shop from the 2nd Defendant.**
10. **The 1st Defendant avers that he transferred to the Plaintiff a valid title to the said shop which was made manifest to the Plaintiff when he conducted his legal search with the operators of the market and that at no time did the 1st Defendant hide the fact of the occupation of the said shop by the 2nd Defendant from the Plaintiff. ”**

The evidence of 1st Defendant is similarly in line with the above averments.

Again as stated earlier, if the dispute was one simply between the **Plaintiff and 1st Defendant**, the ambit of the dispute would have been very narrow. The 2nd Defendant who 1st Defendant predicates his root of title over the shop has however denied that she at anytime sold her shop and infact by the counter-claim still affirms her ownership of the shop. The relevant paragraphs of her defence and counter-claim are as follows:

- “3. The Defendant denies paragraphs 4, 5, 6, 7, 8 and 9 of the further amended statement of claim and states that at all time material to this suit, she is the bonafide and lawful owner of the Duplex Shop No. 009, Mabushi Ultra-Modern Market, Abuja having not at any time alienated her interest in the shop to the 1st Defendant or the Plaintiff or any other person whatsoever.**
- 4. In response to paragraph 4 of the further amended Statement of Claim, the Defendant avers that she is the owner and original allottee of the Duplex Shop No. 009, Mabushi Ultra-Modern Market, Abuja and had never at anytime alienated or transferred her interest to the plaintiff, the 1st Defendant or at all. The defendant does not know the plaintiff whatsoever.**
- 5. The Defendant in further response to paragraphs 5, 6 and 7 of the statement of claim avers that, she was never at anytime aware or privy to whatever transactions that ever took place between the plaintiff and the 1st defendant. The Defendant shall at trial contend that the purported transaction was and is illegal, null and void and bereft of any form of legality, same having elements of fraud.**
- 6. The Defendant avers in response to paragraph 8 that she never sold or transferred any title of her shop no. 009 Mabushi Ultra-Modern Market, Abuja. The defendant states in further response that there has never been a time she sold the property to Mr. Clinton Amadi as claimed or at all.**
- 7. The Defendant avers that sometime in January, 2013 she was in financial straights and called on her lawyer, Barrister Abubakar Isa and informed the said Barrister Abubakar Isa that she needs to raise some money urgently to take care of some personal issues.**
- 8. Sequel to the above, the said Barrister Abubakar Isa introduced one Mr. Dennis to her as a person who could arrange for the Defendant to obtain a loan from a money lender.**

9. **The defendant avers that the duo of Barrister Abubakar Isa and Mr. Dennis then introduced the 1st Defendant as a money lender from whom the Defendant could obtain the loan she desperately required at the time.**
10. **The defendant states that in the presence and active involvement of the said Barrister Abubakar Isa and Mr. Dennis a loan agreement was brokered between the Defendant and the 1st Defendant for a loan of N10, 000, 000.00 (Ten Million Naira) only.**
11. **It was the agreement of the parties to the loan agreement that the loan is repayable in six months and will attract a flat interest rate of 30% whenever the repayment was to be made, hence the agreement was prepared as a loan of N13, 000, 000.00 (Thirteen Million Naira) only for which the Defendant handed over the original title documents in respect of Duplex Shop No. 009, Mabushi Ultra-Modern Market to the 1st Defendant as security for the loan.**
12. **Further to the above, a power of attorney was executed between the Defendant and the 1st Defendant in respect of the Duplex Shop No. 009, Mabushi Ultra-Modern Market, Abuja on the terms among others that whenever the 1st Defendant required his money, he shall give the Defendant notice to that effect of not less than one month, and that at the expiration of the said period, if the defendant is in default of repaying all or any part of the sum advanced to her as loan, the 1st Defendant shall act pursuant to the powers donated to him in the said power of attorney.**
13. **The Defendant avers that few days later, the 1st Defendant came and requested for the only copy of the agreement with her and claimed that, he wanted to make photocopy of it as he had misplaced his own copy while on his way back to Owerri, at that point, the defendant had not even made any copy of the document and this fact was disclosed to the 1st Defendant. The defendant hereby put the 1st Defendant on Notice to produce the Original loan agreement as entered by the Defendant and the 1st Defendant.**

14. The Defendant avers that, all efforts made by her to get her copy of the agreement proved abortive as at every occasion the 1st Defendant kept giving excuses. The Defendant honestly believed him particularly that the 1st Defendant advanced her a loan of N10, 000, 000.00 (Ten Million Naira) only just few months back.
15. The Defendant avers that about six months after the loan agreement, when the loan became due, she was ready, willing and desirous of repaying the agreed sum but all efforts made by the defendant to reach the 1st defendant became fruitless.
20. The Defendant avers that when she was confronted with documents as attached in the statement of claim of the plaintiff, she was utterly shocked, given that all the documents attached to the writ, particularly the power of Attorney and Deed of Assignment were never executed by her nor did she authorise any one in that regard.
22. The Defendant avers that she is baffled over the conduct of the 1st Defendant, having handed over her title documents as collateral and mischievously retrieving the only document that was in her possession with regards to the loan agreement.
23. The Defendant avers that she consider it laughable that a property purchased in 2009 for the sum of N18, 000, 000.00 (Eighteen Million Naira) will be sold 4 years later at N13, 000, 000.00 without her knowing and the same property to be sold only for about 4 months later (sic) for the whopping sum of N28, 000, 000.00 (Twenty Eight Million Naira).

COUNTER CLAIM AGAINST THE 1ST DEFENDANT AND THE PLAINTIFF

1. The Defendant/Counter claimant repeats paragraphs 1-25 as contained in the statement of defence.

- 2. The Defendant/Counter claimant avers that she is the bonafide owner of Duplex Shop 009, Mabushi Ultra-Modern Market Abuja. The Defendant/Counter claimant pleads all her receipt of payment and documents of title and shall be founded upon at trial. The 1st Defendant and the plaintiff are hereby put on notice to produce same.**
- 3. The Defendant/Counter claimant avers that on 17th January, 2013, a loan was advanced to her by the 1st defendant and that her title document of the said duplex shop was used as collateral hence, it was handed over to the 1st Defendant as agreed.**
- 4. The Defendant/Counter claimant avers that she never sold her shop to any one not even the 1st defendant.**
- 5. The Defendant/Counter claimant avers that ever since the loan became due, efforts made by her to reach the 1st Defendant and repay back the loan have proved abortive. The defendant is ready and willing to pay back the loan and get her documents back.**
- 6. The Defendant/Counter claimant shall contend at the trial that the power of attorney and deed of assignment relied on by the plaintiff are null and void, same being a product of fraud.”**

Here too, the evidence of the witness who testified on behalf of the 2nd Defendant is similarly situated within the structure of the above averments.

I have above carefully and in-extenso provided the relevant averments in pleadings of parties. The importance of parties' pleadings need not be over-emphasised because the attention of court as well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings and the reliefs contained therein.

Having therefore provided the platform of the pleadings and the issues precisely streamlined, it is to the evidence we will now have recourse to resolve the

contentious issues of the ownership of the disputed property. In doing so, it is critical to situate or state some settled and elementary principles. The position of the law is that generally the burden of proof by virtue of **Section 131 (1) of the Evidence Act** is clear to the effect that 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 those facts to exist. Similarly by **Section 132 of the Evidence Act**, 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.

I should also state that in law, it is one thing to aver a material fact in issue in ones pleading and quite a different thing to establish such a fact by evidence. Thus, where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish the same by evidence. This is because it is an elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing Co Ltd V B.O.N Ltd (2002) II N.W.L.R. (pt. 777)163 at 198A; Ajuwon V Akanni (1993)9 N.W.L.R (pt. 316)182 at 200.**

Now from the pleadings and evidence, particularly that of Plaintiff and 1st Defendant, there is no dispute at all and indeed no issue was joined that the 1st Defendant sold the disputed shop to the Plaintiff. The unchallenged oral evidence backed with a **surfeit** of documents of title handed over to the Plaintiff vide **Exhibits P1 to P10** all cumulatively accentuate the fact that the 1st Defendant indeed transferred his interest in the shop to the Plaintiff. Indeed even in the final address of learned counsel to the 1st Defendant, they are not opposed to the grant of **Reliefs (i-v)** as claimed by Plaintiff. His only grouse and where he joined issues with Plaintiff is only with respect to whether the 1st Defendant is culpable in the delay in the Plaintiff taking over physical possession of the property. These are issues I will consider subsequently in this Judgment. **Reliefs (vi-vii)** and the Alternative Relief sought by Plaintiff falls within the ambit or purview of this complaint of culpability of 1st Defendant in the failure of Plaintiff to take possession.

It is perhaps apposite to add at this point in reference to the position of 1st Defendant that the usual function of a statement of defence is to state the grounds and the material facts on which the Defendant relies for his defence to the action. The primary object of a defence is to inform the Plaintiff precisely how much of the statement of claim the Defendant admits and what grounds he relies on to defeat the claim of the Plaintiff. Where therefore as a result of exchange of pleadings by parties as in this case, a material fact of sale is affirmed expressly by one of the parties, the 1st Defendant in this case, the consequence is that there is no issue of fact raised in such a situation and indeed no dispute is raised in such a situation for resolution by court. See **Lewis and Peat (NIR) Ltd V. Akhinmien (1976) All N.L.R 365 at 467.**

This however as stated earlier is not the **end of the matter**. The sale of the disputed property by 1st Defendant to Plaintiff is only an aspect of the dispute which on its own does not legally resolve the entire dispute. The trajectory of the narrative is that the 1st Defendant traced his source of title to 2nd Defendant. His case is that he bought the property from her. The 2nd Defendant has however averred that she did not dispose of her interest and predicates her counter-claim on this contention.

As a logical corollary, if the 2nd Defendant did not sell to 1st Defendant, then he had no property to sell to Plaintiff and therefore any claim of ownership by the Plaintiff to the disputed property will be undermined or compromised *abinitio*; this is so, because a party cannot give what he does not have. The principle is *nemo dat quod non habet*. See **Adeagho V. Williams (1998) 2 N.W.L.R (pt.536) 120**. Furthermore, the law is settled that once a party as in this case pleads and traces his root of title to a particular person, and that averment is challenged, he must establish how that person from whom his claims his root of title came to have title invested on him. That means, he must not only establish his own title, but he must also satisfy the court as to the title of the source from whom he claims to derive his title to the land and property. See **Adesanya V. Aderonmu (2000) 6 SC (pt.11) 18**

Let us now therefore carefully scrutinize the evidence, both oral and documentary to situate the sale by 2nd Defendant to 1st Defendant. I had earlier on and at length produced the pleadings of all parties on this case.

In situating the sale by 2nd defendant to 1st defendant, we must have recourse to the pleadings and evidence and in particular the documents of title of the shop 1st defendant obtained from 2nd defendant and which he gave to plaintiff when he sold the shop to him. At the risk of prolixity, in paragraph 1 of his Consequential Amended Statement of Defence, 1st defendant admitted completely the narrative of Plaintiff relating to how he acquired the property from him; the investigations Plaintiff carried out showing or confirming that there was a transfer or sale of the disputed property by the 2nd Defendant to the 1st Defendant. Some of the documents in evidence tendered to support this sale include (1) The Power of Attorney and Deed of Assignment between the 1st and 2nd Defendants admitted as **Exhibits P3 and P4**. (2) The application by 2nd Defendant for consent to assign the disputed shop to 1st Defendant was admitted as **Exhibit P5**. (3) The provisional letter of allocation of the shop to the 2nd Defendant by Metshade Ltd was admitted as **Exhibit P6**. (4) The final letter of allocation of the disputed shop issued by Metshade Ltd to 2nd Defendant was admitted as **Exhibit P7**. (5) Four(4) Receipts of payment issued to 2nd Defendant by Metshade Ltd and Mabushi Ultra Modern Market were admitted as **Exhibits P8 and P9(1-3)**.

All the above documents handed over by the 2nd Defendant to the 1st Defendant and which 1st defendant similarly handed over to the plaintiff disclosed a sale of property transaction between 1st Defendant and 2nd Defendant with respect to the shop in question.

Now it is not the case of the 2nd Defendant on the pleadings and evidence that she had no relationship whatsoever with 1st defendant in relation to the disputed shop and or that she did not hand over all these documents to 1st defendant. Her case as earlier streamlined is that she did not sell the shop or the property to 1st defendant or anybody at any time but that she only collected a loan from the 1st defendant and gave documents of title earlier streamlined to 1st defendant as security for the loan. She also contended that the purported sale transaction is illegal and tainted by fraud.

Let me again at the risk of cluttering the judgment situate the case as made out by the 2nd defendant in her defence and counter claim as follows:

- “5. The Defendant in further response to paragraphs 5, 6 and 7 of the statement of claim avers that, she was never at anytime aware or privy to whatever transactions that ever took place between the plaintiff and the 1st defendant. The Defendant shall at trial contend that the purported transaction was and is illegal, null and void and bereft of any form of legality, same having elements of fraud.**
- 6. The Defendant avers in response to paragraph 8 that she never sold or transferred any title of her shop no. 009 Mabushi Ultra-Modern Market, Abuja. The defendant states in further response that there has never been a time she sold the property to Mr. Clinton Amadi as claimed or at all.**
- 7. The Defendant avers that sometime in January, 2013 she was in financial straights and called on her lawyer, Barrister Abubakar Isa and informed the said Barrister Abubakar Isa that she needs to raise some money urgently to take care of some personal issues.**
- 8. Sequel to the above, the said Barrister Abubakar Isa introduced one Mr. Dennis to her as a person who could arrange for the Defendant to obtain a loan from a money lender.**
- 9. The defendant avers that the duo of Barrister Abubakar Isa and Mr. Dennis then introduced the 1st Defendant as a money lender from whom the Defendant could obtain the loan she desperately required at the time.**
- 10. The defendant states that in the presence and active involvement of the said Barrister Abubakar Isa and Mr. Dennis a loan agreement was brokered between the Defendant and the 1st Defendant for a loan of N10, 000, 000.00 (Ten Million Naira) only.**
- 11. It was the agreement of the parties to the loan agreement that the loan is repayable in six months and will attract a flat interest rate of 30% whenever the repayment was to be made, hence the agreement was prepared as a loan of N13, 000, 000.00 (Thirteen Million Naira) only for which the Defendant handed over the original title documents in respect of**

Duplex Shop No. 009, Mabushi Ultra-Modern Market to the 1st Defendant as security for the loan.

- 12. Further to the above, a power of attorney was executed between the Defendant and the 1st Defendant in respect of the Duplex Shop No. 009, Mabushi Ultra-Modern Market, Abuja on the terms among others that whenever the 1st Defendant required his money, he shall give the Defendant notice to that effect of not less than one month, and that at the expiration of the said period, if the defendant is in default of repaying all or any part of the sum advanced to her as loan, the 1st Defendant shall act pursuant to the powers donated to him in the said power of attorney.**
- 13. The Defendant avers that few days later, the 1st Defendant came and requested for the only copy of the agreement with her and claimed that, he wanted to make photocopy of it as he had misplaced his own copy while on his way back to Owerri, at that point, the defendant had not even made any copy of the document and this fact was disclosed to the 1st Defendant. The defendant hereby put the 1st Defendant on Notice to produce the Original loan agreement as entered by the Defendant and the 1st Defendant.**
- 14. The Defendant avers that, all efforts made by her to get her copy of the agreement proved abortive as at every occasion the 1st Defendant kept giving excuses. The Defendant honestly believed him particularly that the 1st Defendant advanced her a loan of N10, 000, 000.00 (Ten Million Naira) only just few months back.**
- 15. The Defendant avers that about six months after the loan agreement, when the loan became due, she was ready, willing and desirous of repaying the agreed sum but all efforts made by the defendant to reach the 1st defendant became fruitless.**
- 20. The Defendant avers that when she was confronted with documents as attached in the statement of claim of the plaintiff, she was utterly shocked, given that all the documents attached to the writ, particularly the power of**

Attorney and Deed of Assignment were never executed by her nor did she authorise any one in that regard.

22. The Defendant avers that she is baffled over the conduct of the 1st Defendant, having handed over her title documents as collateral and mischievously retrieving the only document that was in her possession with regards to the loan agreement.

23. The Defendant avers that she consider it laughable that a property purchased in 2009 for the sum of N18, 000, 000.00 (Eighteen Million Naira) will be sold 4 years later at N13, 000, 000.00 without her knowing and the same property to be sold only for about 4 months later (sic) for the whopping sum of N28, 000, 000.00 (Twenty Eight Million Naira).

COUNTER CLAIM AGAINST THE 1ST DEFENDANT AND THE PLAINTIFF

- 1. The Defendant/Counter claimant repeats paragraphs 1-25 as contained in the statement of defence.**
- 2. The Defendant/Counter claimant avers that she is the bonafide owner of Duplex Shop 009, Mabushi Ultra-Modern Market Abuja. The Defendant/Counter claimant pleads all her receipt of payment and documents of title and shall be founded upon at trial. The 1st Defendant and the plaintiff are hereby put on notice to produce same.**
- 3. The Defendant/Counter claimant avers that on 17th January, 2013, a loan was advanced to her by the 1st defendant and that her title document of the said duplex shop was used as collateral hence, it was handed over to the 1st Defendant as agreed.**
- 4. The Defendant/Counter claimant avers that she never sold her shop to any one not even the 1st defendant.**

5. **The Defendant/Counter claimant avers that ever since the loan became due, efforts made by her to reach the 1st Defendant and repay back the loan have proved abortive. The defendant is ready and willing to pay back the loan and get her documents back.**
6. **The Defendant/Counter claimant shall contend at the trial that the power of attorney and deed of assignment relied on by the plaintiff are null and void, same being a product of fraud. ”**

Again it is important to underscore the point that it is one thing to make averments in a pleading but it is a different thing to lead credible evidence in support of the pleaded facts. In law to assess a party's case, both the pleadings and evidence must be examined. If the evidence is at variance with the pleadings, such evidence will have no value. Therefore a party who alleges a fact in his pleadings must prove such fact by adducing enough and credible evidence. In the absence of convincing and cogent evidence, such pleading shall be deemed as abandoned. See **Ehidimhen V. Musa (2000)4 S.C. (pt.11)166; Eze V. Atasie (2000)6 SC (pt.1)214.**

It is equally opposite to state that the allegation of fraud is obviously criminal in nature and by virtue of **Section 135(1) of the Evidence Act**, the standard of proof is beyond reasonable doubt.

Now before evaluating the evidence of the sole witness for the 2nd Defendant, let me quickly address an interesting legal point raised by the 2nd Defendant. The 2nd Defendant contends that the 1st Defendant did not file a defence to the 2nd Defendants counter-claim, as such that the counter-claim is deemed admitted and that the 2nd Defendant is thus entitled to Judgment on the counter-claim. I think this submission is with respect misconceived.

As stated earlier, a counter-claim is to all intents and purposes a separate and independent action in its own right, although a Defendant for convenience and speed usually joins it with the defence. See **Ogbonna V. A.G. Imo State & 3 Ors (1992)1 N.W.L.R (220)647 at 658 and 675.** A counter-claim is essentially therefore a cross action against the Plaintiff and not merely a defence to Plaintiff's

claim and procedurally, it was for most purposes except execution, treated as if it was a cross action to be tried together with the original action. A Defendant cannot in law therefore maintain a counter-action against a co-defendant, alone; that is a legal incongruity. Any counter-claim properly conceived in law must involve the Plaintiff and where the counter-claimant as in this case wants to also make claims against a co-defendant, then she can only do so against both the plaintiff and the co-defendant. A pleading or counter claim which asks no cross relief against a plaintiff either alone or with some other person is not a counter claim. Therefore, if the plaintiff cannot be a proper opposing party, that is defendant to the claim in the counter-claim, the proper thing is to strike out the counter-claim. See **Obala V Adesina (1999) 2 SCNJ 1 at 18; Ogbonna V A.G Imo State (supra)** and the cerebral work, **Civil Procedure in Nigeria, (2nd ed.) by Fidelis Nwadiolo S.A.N (of blessed memory) at page 394.** This is what the 2nd Defendant did in this case. She counter claimed against both plaintiff and 1st defendant. The heading of the counter-claim in this case is clearly against the “**1st Defendant and Plaintiff.**” The Reliefs sought by the 2nd Defendant/counter-claimant is equally against “**1st Defendant and Plaintiff.**” There is no confusion or ambiguity about this self evident fact.

The 1st Defendant may have not filed a defence but the **Plaintiff filed a reply and statement of defence** to the 2nd Defendant’s defence and counter-claim joining issues with the averments contained therein. The contested assertions therefore was now a matter for proof. There is no room therefore for **Judgment on admission** in the circumstances. If the counter-claim was against **1st Defendant, alone**, it would have been incompetent.

Most importantly, the substantive **Reliefs (a) and (b)** of the counter-claim of 2nd defendant on which some of the other reliefs particularly reliefs (d) and (e) are predicated are **Declaratory Reliefs**. Declaratory reliefs in law are special reliefs to which the ordinary rules of pleadings particularly on admissions have no application. Indeed it would be futile when Declaratory reliefs are sought to seek refuge on the proposition that there were admissions by the adversary on the pleadings or that the adversary did not join issues. The authorities on this principle are legion. I will refer to a few.

In **Vincent Bello V. Magnus Eweka (1981)1 SC 101 at 182**, the Supreme Court stated aptly thus:

“It is true as was contended before us by the appellants’ counsel that the rules of court and evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence not by admission in the pleading of the defendant that he is entitled to the declaration.”

The law is thus established that to obtain a declaratory relief as to a right, there has to be credible evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon the state of the pleadings or by admissions therein.

In **Helzgar V. Department of Health and Social Welfare (1977)3 AII ER 444 at 451; Megarry V.C** eloquently stated as follows:

“The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what, it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument. That is quite plain.”

I may also refer to the observations of Nnamani J.S.C of blessed memory in **Sorongbe V. Omotunwase (1988)3 N.S.C.C (vol.10)252 at 262 (1988)5 N.W.L.R (pt.92)90** as follows:

“The court of Appeal relied on the decision of this court in Lewis & Peat (N.R.I.) Ltd V. Akhimien (1976)7 SC 157 to the effect that an averment which is not expressly traversed is deemed to be admitted. Admittedly, one does not need to prove that which is admitted by the other side, but in a case such as one for declaration of title where the onus is clearly on the plaintiff to lead such strong and positive evidence to establish his case for such a declaration, an evasive averment...does not remove the burden on Plaintiff. See also Eke V. Okwaranyia (2001)12 N.W.L.R (pt.726)181; Akaniwo V. Nsirim (2008)9 N.W.L.R (pt.1093) 439; Maja V. Samouris (2002)7 N.W.L.R (pt.765)78 at 100-101.”

The point from the above authorities is simply that declarations are not made because of the stance or position of parties in their pleadings or indeed failure to file pleadings but on proof by credible and convincing evidence at the hearing.

Furthermore it is to be noted that the case of parties and the facts in dispute are inextricably intertwined, all relating substantially to the issue of ownership of the disputed shop. The statement of defence of 2nd Defendant has a comprehensive twenty four (24) paragraphs. The entire Counter-Claim however has only 7 paragraphs and paragraph 1 of the counter-claim of 2nd Defendant incorporates the totality of the 24 paragraphs statement of defence to demonstrate the connectivity of the cases presented on both sides of the aisle. It is certainly a difficult if not impossible task to take the issues raised in the substantive action and the counter-claim separately; each would impact the other. In the circumstances the failure to file a defence by 1st defendant to the Counter-Claim of 2nd Defendant is not necessary fatal.

Finally on this point, even if the substantive reliefs in the counter-claim of 2nd defendant were not Declaratory in nature and in this case they are; averments in pleadings are not evidence. See **Inwelegbu V Ezeani (1999) 12 NWLR (pt.360) 266 at 270**. Even where a case is undefended, the burden still is on the plaintiff or the counter claimant in this case to prove her case on the preponderance of evidence.

In **Oyewole V Oyekola (1999) 7 NWLR (pt.612) 560 at 561**, it was stated thus:

“The mere fact that a case is not defendant does not entitle the trial court to overlook the need to ascertain whether the facts adduced before it establish or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant. The better view is that the plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure of defence to call or produce evidence. (Nnamdi Azikiwe University V. Nwafor (1999) 1 N.W.L.R (pt.585) 116 referred to.”

Having resolved this point on the effect of the failure of the 1st defendant to file a defence to the Counter Claim of 2nd defendant, we now come to the issue of proof of the contested assertions. Now the only witness the 2nd Defendant presented is one Dennis Edimoh. (The 2nd defendant did not herself give evidence). His evidence is that he together with one Barrister Abubakar Isa brokered a loan transaction between 2nd Defendant and 1st Defendant when 2nd Defendant was in financial difficulties for which she handed over the original title documents in respect of the disputed shop as security for the loan. That she never sold the shop. He stated that after he brokered the loan, he lost touch with the 2nd Defendant.

Now under Cross-examination, the evidence and credibility of this witness was completely destroyed particularly with respect to his alleged brokerage of a loan agreement between 1st and 2nd defendant.

When he was asked who even loaned the money in question for which 2nd defendant allegedly handed the title documents of her shop as security for the loan, he said thus:

“From my relationship with parties, I felt it was Barrister Steve that owned the money that was lent to Amina”

The witness then added:

“The loan agreement was between Barrister Steve and Amina” and also that “I introduced Barrister Abubakar Isa, lawyer of 2nd Defendant to Barrister Steve. I know Steve. I tried calling him (Steve) but could not reach him on his line.”

Still under cross-examination, DW2 stated further that:

“I saw the loan agreement. I don’t have the loan agreement I actually signed. The loan agreement shown to me by 2nd Defendant’s brother is not the actual loan agreement I signed.”

The above evidence cast serious doubt with respect to the truth of his evidence that he brokered a loan agreement between **1st** and **2nd Defendants**. This witness clearly had no business with **1st Defendant** as the person he dealt with in respect of the loan is one **Barrister Steve**. He knows him very well; has his phone number and even called him. The said Barrister Steve who DW2 believes lent the money subject of the alleged loan agreement is obviously not the 1st Defendant. DW2 was categorical that the loan agreement he claimed he signed is between **“Barrister Steve and 2nd Defendant.”** Interestingly this same witness had stated still under cross-examination that **“I did not act as a witness to any of the parties to the loan agreement”** and then he again added as earlier alluded to that **“the loan agreement shown to me by 2nd Defendant’s brother is not the actual agreement I signed.”**

The inconsistent and contradictory evidence of DW2 detracts completely from his credibility as a witness of truth. His unreliable evidence shows clearly that there is more than one loan agreement involving the 2nd Defendant but none, absolutely none is linked to 1st Defendant and the extant case.

It is really difficult to situate the relevance and value of this witness for the 2nd Defendant when his evidence does not at all support the case of 2nd defendant that loan was obtained from 1st defendant when she was in financial distress and she gave him the title documents of the shop as security for the loan. His completely discredited evidence no way helps the case of 2nd defendant.

Now in the pleadings of 2nd Defendant, this unknown and unproven **loan agreement** was said to have been prepared between parties incorporating the terms of the loan agreement. This agreement and all the other disparate loan agreements referred to by DW2 were unfortunately not tendered by the 2nd Defendant or her sole witness and it is therefore difficult if not impossible to situate any loan agreement in the circumstances as projected by 2nd defendant.

The 2nd Defendant may have pleaded in paragraphs 13 and 14 of the defence that the 1st Defendant collected her only copy of the loan agreement but these averments as stated earlier remain bare averments. The 2nd Defendant who made these averments did not herself give evidence. Her sole witness clearly knows

nothing about the collection of the loan agreement. If any loan was collected he himself said it is from one **Barrister Steve** and not 1st defendant. In the absence of any evidence in support of these averments, the allegation that the 1st Defendant collected her only copy of the loan agreement is deemed as abandoned. What is strange is that the only witness for the 2nd Defendant, Mr. Dennis who said he brokered the loan together with Barrister Abubakar Isa does not equally have a copy of this loan agreement or evidence of same. He clearly could not have a copy because as earlier demonstrated, he does not even know 1st Defendant as the person who gave the loan but one Barrister Steve.

Similarly, the said Barrister Abubakar Isa who DW2 claimed brokered the loan for 2nd defendant along with him was not presented in court to give evidence and give added credibility to this narrative of a loan arrangement. This is more so when under cross-examination by counsel to the 2nd Defendant, the 1st Defendant categorically stated that he does not know either of Mr. Dennis (DW2) or Barrister Abubakar Isa. The **bottom line** here is that there is absolutely no evidence before the court that the title documents 2nd Defendant gave to 1st Defendant over the disputed shop was a security for any loan transaction. There is equally absolutely nothing before the court to show or establish that the 2nd Defendants witness brokered any loan transaction between 1st and 2nd Defendants in respect of the shop as alleged.

To add to the lack of clarity in 2nd Defendants case, in paragraph 12 of her defence, it was averred therein that she executed a **power of attorney** in respect of the said shop and that the contents of the power relates to the loan transaction. Again this paragraph has no oral evidence to sustain it. Now with respect to the power of attorney, the 2nd Defendant did not say, unlike the loan agreement, that anybody collected the copy. So the question is where is the Power of Attorney she claimed she executed? Why was it not tendered? The failure to tender this power of attorney allows for the invocation of the presumption under **Section 167(d)** that the power of attorney was evidence which if produced would be unfavourable to the 2nd Defendant. It is really difficult to situate a power of attorney on terms as situated in paragraph 12 of the defence which as stated earlier is not even backed by any forensic evidence and is deemed as abandoned.

Again, with respect to the Power of Attorney and Deed of Assignment tendered as **Exhibits P6 and P7**, showing a transaction over the shop between 1st Defendant and 2nd Defendant, the 2nd defendant in paragraph 20 of her defence averred that she never executed or authorized those documents. Again there is no oral evidence by the 2nd Defendant to creditably establish this averment and the paragraph is equally deemed as abandoned. The averment in paragraph 6 of the counter-claim alluding to fraud as stated earlier must be creditably established and the threshold of proof is proof beyond reasonable doubt being a criminal allegation. See **Section 135 of the Evidence Act**.

In this case, there is absolutely no scintilla of evidence to situate the criminal allegation of fraud made by the 2nd Defendant. If the Power of Attorney and Deed of Assignment is a product of fraud, as contended by the 2nd Defendant, where is the evidence to support such allegation? None. In paragraph 23 of the defence, the 2nd Defendant avers that she considers it laughable that a property purchased in 2009 for the sum of N18,000,000 (Eighteen Million Naira) will be sold 4 years later at N13,000,000 without her knowing and the same property is to be sold 4 months later for the whopping sum of N28,000,000 (Twenty Million Naira). Again this paragraph 23 is only a bare averment in pleading without any evidence to sustain it. This paragraph is equally deemed as abandoned.

The whole trial process, whatever its imperfections, is entirely evidence driven. In the absence of evidence to support the challenged assertions made by 2nd Defendant, it is difficult to see how the court is put in a commanding height to be favourably disposed to grant her reliefs however much it may seek to be persuaded. Learned counsel to the 2nd Defendant with respect has tried so much and so hard to construct a scenario of a case not based on the structure of the pleadings presented and evidence led in this case. The point to underscore is that cases are decided on the pleadings and evidence led in support and not by address of counsel. It is trite principle of general application that address of counsel is no more than a handmaid in adjudication and cannot take the place of the hard facts required to constitute credible evidence. No amount of brilliance in a final address can make up for the lack of evidence to prove and establish or disprove and demolish critical points in issue. See **Iroegbu V. My Calabar Carrier (2008)5 N.W.L.R (pt.1019)147 at 167; Michika Local Government V. National**

Populaiton Commission (1998)11 N.W.L.R (pt.573)201 and Tapshang V. Lekret (2000)13 N.W.L.R (pt.684)381.

The bottom line is that 2nd Defendant has woefully failed to prove by any relevant, credible and admissible evidence the elaborate allegations as made out in her defence and counter-claim. Facts may have been **pleaded**, but she herself did not appear to give flesh to the allegations exclusively within her knowledge and no credible witness(es) were made available to establish those facts. Let me here paraphrase and adopt the words of Udo Udoma J.S.C (of blessed memory) to the defence and counter-claim of 2nd Defendant in **Elias V. Omobare (1992)N.S.C.C 92** by saying that if there was ever a defence and counter-claim completely starved of evidence, this is certainly one. The case of 2nd Defendant cries to high heavens in vain to be fed with relevant and admissible evidence. The 2nd Defendant clearly failed to realize that judges do not act like oracles. Judges cannot perform miracles in the handling of matters before them; neither can they manufacture evidence for the purpose of assisting a party to win his case. Cases are determined on the strength of the evidence adduced before the court. The case of 2nd Defendant is therefore as a logical consequence completely undermined. The 2nd Defendant clearly entered into a transaction with 1st Defendant with respect to her property for consideration and executed both the Deed of Assignment (**Exhibit P3**) and the Power of Attorney (**Exhibit P4**) in favour of the 1st Defendant. These unchallenged documents and the contents leaves one in no doubt that the 2nd Defendant intended and did enter into a transaction to transfer her interest in the disputed property to 1st Defendant.

Exhibit P5 (her application for consent to assign the property) **Exhibits P6 and P7** (the original letters of allocation to the property) and **Exhibits P8 and P9(1-3) (Receipts of payment)** which 2nd Defendant handed over to the 1st Defendant show again clearly that she indeed evinced an intention to sell the property. The critical elements to situate a contract or agreement of sale are present here from the documentary evidence earlier streamlined. Perhaps it is elementary to state that in law, five ingredients must be present in a valid contract. They are offer, acceptance, consideration, intention to create legal relationship and capacity to contract. For a contract to exist in law, each of these five elements must be

present. See **Solanke V. Sarki (2006)All F.W.L.R (pt292)131; Orient Bank of Nig Plc V. Bilante Int' Ltd (1997)8 N.W.L.R (pt.515)37.**

I am satisfied that by a combined effects of **Exhibits P3, P4, P5, P6, P7, P8 and P9(1-3)** that there was a valid offer and acceptance of the sale of the property in question and the consideration also furnished. Both 1st and 2nd Defendants no doubt have the legal capacity to contract and also the positive steps taken by parties as evidenced by the exchange or transfer of exhibits to which I earlier referred are sufficient to indicate that both parties had the intention to create legal relationship.

There is really nothing on the evidence beyond empty speculations bereft of evidence to vitiate the agreement by 2nd Defendant to sell the shop to 1st Defendant. The only point to even add is that it has been held that in a contract for the sale of land and by extension landed property, the agreement to sell is concluded when the parties, the subject matter, the nature of the transaction and the consideration are agreed upon; and the possibility of default would not made the contract invalid, incomplete or non-existence. See the cases of **Biyo V. Aku (1996)1 N.W.L.R (pt.422)1; Union Bank of Nigeria Plc V. Erigbuem (2003)F.W.L.R (pt.180)1365; Doherty V. Ighodaro (1997)11 N.W.L.R (pt.530)694.**

The bottom line here is that with the concluded sale of the disputed shop, the 1st Defendant had the capacity and authority under the powers conferred in the Deed of Assignment (**Exhibit P3**) and particularly the Power of Attorney (**Exhibit P4**) vide classes 8 and 9 to assign the said shop.

On the whole, the Plaintiff has on a preponderance of credible and admissible evidence established that he has a better claim of right to the disputed shop 009 than 2nd defendant. This then logically leads us to whether the Reliefs as sought in the substantive claim and the counter-claim are availing. Having found for the plaintiff in relation to the shop and as a logical corollary, **Reliefs 1 and 4** succeed. **Reliefs 2 and 3** are simply a repetition of **Reliefs 1 and 4** and will be struck out. **Relief (5)** succeeds only to the extent that the 2nd defendant and her privies or agents are restrained from acts capable of affecting the lawful and subsisting

interest of the plaintiff over the said shop as guaranteed under the **Land Use Act and the 1999 Constitution of the Federal Republic of Nigeria.**

Relief (6) seeks for the sum of N5, 000, 000 against the Defendants jointly and severally, being damages for inconveniences, trauma, frustration and expenses incurred in the course of litigating this suit coupled with the deliberate instinct of the Defendants to deprive the Plaintiff of the benefits to exclusive possession and enjoyment of the said Duplex Shop.

This **Relief (6)** and indeed **Reliefs (6) – (8)** are reliefs in the realm of General and Special Damages. It is important to therefore understand and properly situate the legal import of General and Special damages as this will provide a platform to consider the remaining **Reliefs 6-8** sought by plaintiff.

General damages are damages which the law implies or presumes to have accrued from the wrong complained of. General damages are presumed to flow from the immediate direct and proximate result of the wrong complained of. The court obviously in exercising its undoubted discretion in awarding general damages has the responsibility to calculate what sum of money will be reasonable in the circumstances of the case. See **Osuji V Isiocha (1989) 3 NWLR (pt.111) 623**. General damages is therefore not granted at large. General damages cannot be properly substituted for special damages which a plaintiff fails to prove or claim, even where evidence is led on it. See **Badmusi V Abegunde (2001) 3 WRN 40 SC**.

Special damages on the other hand are damages which the law does not infer from the nature of an act, but which are exceptional in character. Special damages denote those pecuniary losses, which have crystallized in terms of cash and value before trial and they must not only be specifically pleaded but strictly proved with credible evidence. See **Ijebu-Ode Local Govt. V Adedeji Balogun & Co. (1991) 1 NWLR (pt.166) 136 SC; Osuji V Isiocha (1989) 3 NWLR (pt.111) 623 SC**.

Now with respect to **Relief 6**, it is clear that the sale agreement plaintiff had over the shop was with 1st defendant. There is absolutely no established relationship of any kind with 2nd defendant to situate any breach of contract, and in such circumstances, damages cannot inure against 2nd defendant in favour of plaintiff.

In **A.G Rivers State V. Akwa Ibom State (2011)8 N.W.L.R (pt.1248) 3 at 49**, the Apex Court instructively stated as follows:

“There can be no breach of a non-existent contract. Once it has been determined that no enforceable contract exists between the parties or that what took place between the parties did not translate to a contract between them, the foundation of the relief claimed collapse with the absence of a cause of action, that is, breach of contract. There can be no consequence of a breach of contract when no contract exists. In the instant case, the appellant did not prove any enforceable contract which was binding on the respondent. Therefore, there was no plausible reason for an award of general damages for breach of contract in the circumstance. (Best Nig. Ltd V. Blackwood Hodge (Nig) Ltd. (2011)5 N.W.L.R (pt.1239)95 Referred to) (pp.427, para F-H; 429, para E-G).”

Now with respect to the 1st defendant, it is correct that the 1st defendant in the Deed of Assignment exhibit P2 may have covenanted in Clause 2 (1) that the Assignee is to take vacant possession free of occupation on the execution of the deed and learned counsel for the plaintiff has placed so much emphasis on this clause in supporting the case for award of damages against 1st defendant.

Now on the flip side as borne out from the evidence, it is clear that the original allottee, the 2nd defendant had remained in possession even after she transferred her interest in the shop to 1st defendant. The reality of her existence in the shop was known to the plaintiff at all material times. In his evidence during his negotiations for the shop, he saw the 2nd defendant in the shop and when he conducted his search, he was informed by the authority in charge of the shop that while she may be in possession but that she had indeed sold or transferred her interest to 1st defendant. There was really no confusion or doubt about this reality. This case is therefore not one in the strict sense of oral evidence seeking to alter or vary the contents of a written contract. It is one of a contract or agreement not reflecting the reality of what was on ground and parties on both sides including the plaintiff confirmed unequivocally this reality in evidence. What happened here and which is not unusual is parties simply adopting the standard terms of a contractual document without understanding or appreciating its true import and most importantly the document failing to capture the reality of what was on the ground.

To underscore the point that the plaintiff knew at all times that 2nd defendant was in the shop, the following facts need be re-emphasized: Under cross-examination by counsel to the 1st defendant he unequivocally conceded that at the time he bought the shop, he knew that 2nd defendant was in possession. He agreed also under cross-examination that the 1st defendant handed him all the documents of title over the shop and that since 29th May, 2013 when he paid for the shop, he became the owner and that the 1st defendant could not call himself the owner. Indeed he agreed again under cross-examination that since he bought the shop, he has never seen 1st defendant in it and that 1st defendant has not done anything to prevent him from taking possession of the shop. If the plaintiff accepts these established facts, it is difficult to situate any wrongdoing on the part of 1st defendant as to provide a basis for the award of damages in the circumstances.

The bottom line is that the plaintiff bought the shop from 1st defendant knowing 2nd defendant was in it. There is here no contractual relation with 2nd defendant as earlier stated and when 2nd defendant refused to give up possession, plaintiff took the proper legal steps to get possession but for reasons that are not clear or discernable, the plaintiff discontinued or withdrew the action and it would appear that by the withdrawal of the said action for possession unwittingly contributed to the delay in getting possession. In such very fluid and unclear circumstances, it is difficult to situate the basis of the claim for N5, 000, 000 jointly against the defendants. **Relief 6** is refused.

Relief 7 seeks for an indemnity of the sum of N2,000,000 (Two Million Naira Only) against the 1st Defendant which is the cost of instituting this action and his failure to give possession of the said property to the Plaintiff after sale.

This is clearly a relief in the realm of special damages which has not only to be specially pleaded but strictly proved with credible evidence. There is absolutely no evidence denoting the cost of instituting this action in the sum of N2, 000, 000 or indeed the ascertained cost, if any, incurred in the course of prosecuting this action. In addition, I had under Relief (6) held that there was no wrong doing on the part of the 1st defendant with respect to the failure of plaintiff to get immediate possession of the shop. **Relief (7)** in the circumstances cannot be availing.

Relief 8 seeks for Specific damages in the sum of **One Hundred and Thirty-Seven Thousand, Five Hundred Naira Only per month**, from the date of finalizing the purchase i.e. 29th day of July, 2013, until the full determination of this suit against the Defendant.

PARTICULARS OF DAMAGES

- a. Mesne profit for “Tenancy at will/Trespasser” at the sum of N137, 500.00K being current monthly rent value of the subject matter in this suit. (To be paid by the Defendants from the period being in wrongful possession or Trespass in the case of 2nd Defendants until the final disposal of this suit).**
- b. Exemplary Damages of the sum of N1,200,000 (One Million and Two Hundred Thousand Naira Only) against the 2nd Defendant as a result of 2nd Defendant’s failure to vacate the said premises till date.**

The Reliefs sought above are for mesne profit and exemplary damages. There appears to be some misconception as to the real essence of what these reliefs entail by the way and manner the reliefs were framed or claimed.

Here again, let us explain the import of these reliefs: let us start with Mesne Profit.

Now in law, **“mesne profit”** simply means intermediate profit, that is profit accruing between two points of time, that is the date when the defendant ceased to hold premises as a tenant and the date he gives up possession. See **Agbamu Vs Ofili (2004)5 N.W.L.R (pt.867) 540 at 571; Sabalemotu Vs Muniru Lawal (1994)7 N.W.L.R (pt.356) 263 at 213; Udih Vs Izedonmwen (1990) 2 N.W.L.R (p.t132)357.**

Put in more simple language **“mesne profit”** are rents and profits which a tenant who holds over landlords premises after the lawful termination or expiration of his tenancy or a trespasser, has or might have received during his occupation of the land or premises in issue and which he is liable to pay as compensation to the person entitled to possession of such land or premises. On the authorities, it appears settled that a claim for mesne profit can only be made when the tenancy of the tenant has been duly determined. See **African Petroleum Ltd Vs Owodunni**

(1991)8 N.W.L.R (pt. 210)391; Metal Construction (W.A.) V Aboderin (1998)8 N.W.L.R (pt.563) 568 S.C.

Now on the evidence, there is no dispute or argument that the plaintiff did not have any precisely streamlined tenancy relationship with either defendants. There is also no rent paid by any of the defendants to the plaintiff at anytime. There is equally no defined duration of any tenancy. In the circumstances, it is difficult to situate the basis of a claim for mesne profit. If there is no defined tenancy with rent payable and therefore no way to situate when the tenancy expired or was otherwise duly determined and the tenant held over, mesne profit cannot be availing. See **Sabalemotu V Muniru Lawal (supra)**.

With respect to Exemplary damages, the Apex Court in **Williams V Daily Times of Nig. Ltd (1996) 1 NSCC 15** held that Exemplary damages is awarded in order to punish a defendant whose conduct has been outrageous or scandalous and (2) It is awarded where statutes prescribe them also for oppressive, arbitrary and unconstitutional actions by servants of Government.

Here again, I cannot situate from the evidence the basis for the claim of N1, 200, 000 exemplary damages from 2nd defendant. As stated earlier in this judgment, the plaintiff who bought knowing 2nd defendant was in possession had the plenitude of legal options to take to recover possession from her. Indeed on the evidence and records, the plaintiff commenced the process to recover possession but discontinued same for reasons that are not clear. If that process had panned out or was fully actualized to the end, the plaintiff would perhaps have long gotten possession, and whatever damages or expenses he claims he may have incurred all these years would certainly have been avoided or at worst reduced to the barest minimum. Having on his own accord deliberately refused to see through the process, I don't think Exemplary damages should enure. As stated earlier, it is not unusual to buy a property with tenants living in such property; it is a common occurrence in our clime. A Landlord who buys such property does not become less of an owner because tenants are in it. What is expected is for the Landlord to take steps under the law to get the tenants to give up possession. No more. This Relief is equally not availing.

The final relief is the **alternative relief** for an order directing the 1st Defendant to refund the sum of twenty-eight Million Naira (N28,000,000.000) to the Plaintiff being the sum paid to the 1st Defendant as full and final payment for the sale of the subject matter; shop No.009 Duplex Ultra Modern Market Mabushi Abuja, with 5% interest on each month from the day of payment of the said sum to the 1st Defendant till judgment is executed.

The law is settled that a claim in the alternative is an award which can be made instead of another. It is not an additional or further award. Where a party as in this case sets up or claims reliefs in the alternative, he will only be granted such relief as the set of facts he established would entitle him, so only one of two or more of the alternative reliefs will be granted. See **M.V. Caroline Maersk V. Nokoy Inv. Ltd (2002) 12 NWLR (pt.782) 472 at 508; U.B.A. Plc V Mustapha (2004) 1 NWLR (pt.855) 443, 485.**

In this case, I have granted the substantive relief of ownership of the disputed shop to the plaintiff; it follows that the alternative relief for the refund of the money paid for the shop has been logically overtaken by events. The alternative relief is accordingly struck out.

This then leads us to the Counter-Claim of the 2nd defendant and the reliefs sought. As stated in the consideration of the substantive claim, the counter-claim is a distinct and separate cause of action which must equally be established by the 2nd defendant to entitle her to the reliefs sought. On the basis of our consideration of the substantive claim and the issues raised by the counter claim and my findings which I adopt, it is clear that the plaintiff had creditably established his entitlement to the disputed shop 009. The 2nd defendant who claimed she did not sell the shop to the 1st defendant but that she obtained a loan from him and gave her title document as security for the loan did not establish by evidence any loan transaction or evidence to support her contention that she gave out her title documents as security for any loan. There is equally absolutely no scintilla of evidence to support the case of fraud made with respect to the Power of Attorney and Deed of Assignment issued by her. As stated earlier, the 2nd defendant who has the specifics of the knowledge of the transaction subject of her claim did not give evidence at all. If her failure to give evidence was a gamble, it was a colossal error of Judgment that has now backfired spectacularly. It is difficult to situate

how a court of justice can decide in favour of 2nd defendant in the light of her failure to give evidence on critical elements of the case for which only she could have given evidence of probative value.

On the whole, as earlier demonstrated, the entirety of the case made out on the Counter Claim by 2nd defendant must fail for complete want of evidence. The Counter Claim and the reliefs sought accordingly must fail.

In the final analysis, the sole issue raised is answered substantially in favour of the plaintiff, and for the avoidance of doubt, I hereby make the following orders:

ON PLAINTIFFS CLAIMS/RELIEFS:

- 1. It is hereby declared that the plaintiff is entitled to possession and enjoyment of Duplex Shop, No. 009, Mabushi Ultra Modern Market Abuja having paid for the said property and pursuant to the Deed of Assignment between plaintiff and 1st defendant.**
- 2. The 2nd Defendant is ordered to deliver up possession of the said Duplex Shop No. 009 to the plaintiff.**
- 3. The 2nd Defendant either herself or through her servants, agents, privies, assigns or successor in title are hereby restrained from acts capable of affecting the lawful and subsisting interest of the plaintiff over the said Duplex shop no. 009 as guaranteed under the Land Use Act and the 1999 Constitution of the Federal Republic of Nigeria.**
- 4. Reliefs 2, 3 and the alternative relief are struck out.**
- 5. Reliefs 6, 7 and 8 fail and are dismissed.**
- 6. I award cost assessed in the sum of N30, 000 payable by 2nd Defendant to the plaintiff.**

ON 2ND DEFENDANT'S COUNTER CLAIM

The 2nd defendant's counter claim fails in its entirety and it is accordingly dismissed.

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Hon. Justice A. I. Kutigi

Appearances:

- 1. S.A. Omole (Miss) for the Plaintiff.**
- 2. Tony Ogbulafor, Esq., for the 1st Defendant.**
- 3. B.W. Sekpe Esq., for the 2nd Defendant/Counter-Claimant.**