IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

HON. JUDGE HIGH COURT NO. 13

COURT CLERKS: T. P. SALLAH & ORS

DATE: 6/05/2020

FCT/HC/CV/1389/16

BETWEEN

E-BARCS MICROFINANCE BANK LIMITED----------PLAINTIFFS

AND

1. O.J CHUBBY INTERNATIONAL LTD **DEFENDANTS**
2. OJINNAKA CHIDIKE

JUDGMENT

The Plaintiff by a writ of summons accompanied with a statement of claim and other processes dated 1st April, 2016 and filed on 31st March, 2016 commenced this suit against the Defendants. The Plaintiff claims against the Defendants jointly and severally as follows:-

a. N15,506,677.46 or any other sum of money which Court shall deem fit to grant, being the total indebtedness of the 1st Defendant to the Plaintiff as the 31st of October,2015 which arose on account of the loan and overdraft grant to the 1st Defendant by the Plaintiff and guaranteed by the 2nd Defendant;
b. 7% interest per month or in the alternative 5% interest on N15,506,677.46 or any other sum of money granted to the Plaintiff under the preceding relief.
c. A declaration that by the terms and conditions of the overdraft facility granted to the 1st Defendant, Plaintiff has right

and/orpower to sell, the said properties at Plot Nos. A353 and 31D both of which are situate in Cadastral Zone 04-07, GiriAirport Community layout, and the shop known as LP/RVW/176, Dei-Dei International Building materials Market, Abuja in order to realize the Defendant's total indebtedness to the Plaintiff on account of the aforesaid overdraft and/ or loans; and

d. An order granting the Plaintiff leave to sell the said the said properties at plot nos. A353 and 31D both of which are situate in Cadastral Zone 04-07, Giri Airport Community Layout, and his shop known as LP/RVW/176,Dei-Dei International Building materials Market in order to recover the Defendant's indebtedness to it by reason of the said overdraft and/or loan, upon the failure by the Defendants to pay to the Plaintiff, in full the various sum of money the sums of money ordered under the reliefs claimed in paragraphs 28(a) and (b) of the statement of claim.
e. N2,500,000.00 being the legal expense and cost for recovering the Defendant's total indebtedness to the Plaintiff on account of the aforesaid overdrafts and/or loans.

The Defendants filed their statement of defence and counter claim by the order of this Honourable Court granted on 29th November, 2016 out of time. The Plaintiff's reply to the statement of defence and counter claim was deemed as properly filed and served on the same 29th November, 2016. Thus, pleadings having been filed and exchanged between the parties, the case was then adjourned to 14th March, 2017 for hearing.

On the 14th March,2017, Helen Ajayi testified as PW1 on behalf of the Plaintiff. PW1 adopted her witness statements on oath deposed to on 1st April, 2016 and 4th October, 2016 as her evidence in this case. Exhibits 1,2,3,4,4(a),5, 6,6(a),7,7(a)8,9,9(a),9(b) 9(c), 9(d) and 10 respectively were admitted in evidence through PW1 on behalf of the Plaintiff. After PW1 had testified on 14th March,2017, the case was adjourned to 16th May, 2017 for cross examination by the defence. The case was further adjourned to 15th January,2018 for cross examination.The case was adjourned again to 25th February,

2018, 18th April, 2018 and 4th June, 2018 for cross examination of PW1 but the Defendants failed to cross examine PW1.
Then on the 4th June, 2018, PW1 was cross examined by the Defendants Counsel and later discharged on the order of this Honourable Court. The case was then adjourned to 9th July, 2018 for defence and instead of the Defendants opening their defence, the Defendants Counsel filed a motion for amendment of statement of defence. On the 15th October, 2018, the application for amendment of the Defendants statement of defence was granted. The case was further adjourned to 19th November, 2018 for defence and to enable the Defendants' filed clean copies of the amended statement of defence which they failed to do so. Thus, based on reasons on records, the right of the Defendants to call witness(es) in their defence of this case was foreclosed and the case was adjourned to 7th February, 2019 for address. On 20th May, 2019, both Counsel to the respective parties adopted their addresses and the casewas adjourned to 1st July, 2019 for judgment. However judgment could not be delivered within the statutory period due to Court's vacation and official engagement of the trial judge in Trainings in Accra, Ghana.
Be it as it may, the brief facts and evidence of the Plaintiff's case is that it is a registered Limited Liability Company under Companies and Allied Matters Act to carry out business as a microfinance bank and that the 1st Defendant is a customer of the Plaintiff while the 2nd Defendant is its Managing Director.
At paragraphs 3-5 of the statement of claim, the Plaintiff avers that the 1st Defendant applied and was granted a loan facility of N8,500,000.00 by the Plaintiff vide its offer letter dated 9th April, 2014. According to the Plaintiff the loan granted on 17th April, 2014 for the sum of N8,500,000.00 for a term of 180 days with an agreed interest of 3% per- month and 2% interest per quarter as management fee and thus the maturity date for the loan of N8,500,000.00 was 13th October, 2014.
The Plaintiff avers further that while the loan of N8,500,000.00 was running the 1st Defendant applied for and was granted an overdraft facility of N3,000,000.00 on 10th July, 2014 with a maturity date of 8th August, 2014. The offer of loan facility of N8,500,000.00 dated 9th April,2014 and offer of N3,000,000.00

overdraft dated 9th July, 2014 were received in evidence as exhibits 1 and 2 respectively.

At paragraphs 5-8 of the statement of claim, the Plaintiff through PW1 avers to the effect that the 2nd Defendant executed a memorandum of personal guarantee which he accepted personal responsibility for the repayment of the loan facility and overdraft. The personal guarantee dated 14th July, 2014 of the 2nd Defendant was admitted in evidence as exhibit 3. Further, the 2nd Defendant, according to the Plaintiff agreed to use his properties at plot nos A353 and 31D both situate at Cadastral Zone 04-07, Giri Airport Community Layout and his open space/shop known as LP/RVW/176, Deidei International building Materials Market, Abuja as collateral security for the repayment of the facilities. The collateral i.e title documents for the facilities were admitted in evidence as exhibits 6 and 6(a) respectively. PW2 further avers that the 2nd Defendantfurther deposited title documents for the facilities which title documents were admitted in evidence as exhibits 7,7,(a)8,9,9(a),9(b),9(c)and 9(d) respectively.

According to the Plaintiff that the 2nd Defendant, as Managing Director of the 1st Defendant executed exhibits 9 (b) and 9(c), that is powers of attorney in favour of the Plaintiff to sell the properties used as collateral security upon default to re-pay the overdraft and loan facilities granted to the Defendant.

The Plaintiff at paragraphs9-19 of its statement of claim states to the effect that as the overdraft/loan exposure of the 1st Defendant was getting higher, the Plaintiff demanded for further collateral and the power of attorney dated 28th August, 2014 was executed in favour of the Plaintiff by 2nd Defendant for shop No. LP/RVW/176 at Deidei Building Market, Abuja was given by the 2nd Defendant and admitted in evidence as exhibit 9(d).

PW1 avers that upon the maturity date of the loan of N8,500,000.00 granted the 1stDefendant, the loan was debited into the 1st Defendant's account on the 14th October, 2014 thereby throwing the 1st Defendant account into a debit balance of 12,201,783.06 which represents the combined balance of the loan facility of N8,500,000.00 and the overdraft of N3,000,000.00 inclusive of interests and charges. PW1 further states that the loan facility of N8,500,000.00 was restructured on 15th October,

2014 for a term of 60days out of the total indebtedness of the 1st Defendant in the sum of N12,201,783.06 thereby leaving a debit balance of N3,781,783.06 only. Then on the 15th November, 2014 the 1st Defendant deposited the sum of N450, 000.00 toward liquidating its indebtedness to the Plaintiff on account of the facilities. PW1 then states that as the interests and charges continue to run on the facilities granted the 1st Defendant by the Plaintiffand on 15th December, 2014 the restructured loan matured. She then stated that as at 31st October 2015, the debit balance in the Defendant's account was N15,506,677.45. The statement of account and breakdown of the 1st Defendant's withdrawal were admitted in evidence as exhibits 4 and 4(a) respectively. PW1 then avers that when the total credit transaction of N1,870,000.00 is deducted from the total debit transaction of N17,376,677.46 of the total indebtedness of the 1st Defendant, as of 31st October, 2015 the debit balance was N15,506,677.64 only.

At paragraphs 20-27 of the Plaintiff's statement of claim, PW1 states that the 2nd Defendant executed a personal memorandum of Guarantee for the repayment of the loan and overdraft facilities including its interest and charges. PW1 then avers that despite the personal memorandum of Guarantee executed by the 2nd Defendant for the repayment of the facilities, the Defendants failed, neglected or refused to liquidate their indebtedness with the Plaintiff after the expiration of the tenor of the facilities and despite several demands by the Plaintiff. PW1 therefore testified that the Plaintiff reserves the right to sell the plot of land or property used as collateral security as the facilities granted the Defendants accrued or crystallized in order to repay the facilities. PW1 refers to documents at paragraph 28 of her witness statement on oath deposed on 1st April, 2016. Exhibit 5 the bill of charges by one Charles Ndukwe and co. was received in evidence through PW1.

In conclusion PW1 urged me to grant the claims of the Plaintiff jointly and severally as per paragraph 28 of its statement of claim.

As i said earlier, the Defendants filed and in fact amended their statement of defence/counter claim. However, the Defendants did

not call evidence in support of their amended statement of defence/counter claim. Thus, after the case of the Defendants was foreclosed, parties filed final written address and formulated issues for determination.

The Plaintiff Counsel on the 29th March, 2019 filed the Plaintiff final written address and a reply on points of law to the Defendants final written address on 16th May,2019. In the final address of the Plaintiff, learned Counsel formulated the following sole issue for determination.

> *"Having regards to the pleadings and evidence before this Honourable Court, whether the Plaintiff is entitled to be granted all the reliefs as per its writ of summons and statement of claim."*

In proferring arguments on the sole issue, at paragraphs 3.2-3.3.12 of the final address of Plaintiff's Counsel he submitted to the effect that by the evidence of PW1 Miss. Helen Ajayi and the documentary evidence admitted as exhibits1,2,3,4,4,(a)5,6,6(a),7,7(a),8,9,9(a),9(b),9(c),9(d)and 10, PW1's testimony at paragraphs 5,6,7,8,9,10,11,12 and 13 of the further witness statement on oath was neither debunked nor challenged by the defence under cross examination and therefore be accepted by the Court as the truth of her testimony. Counsel relied on the cases of***NJIOKWUEMNI V OCHEI,(2004) 15 NWLR (pt.895)page 196 at 227, FARI V FEDERAL MORTGAGE FINANCE LTD, (2004) ALL FWLR (pt235) page 27 at 44paragraphs E-F.***

Learned Counsel submitted that in the absence of contrary evidence from the Defendants, they have admitted the granting of the said facilities by the Plaintiff. He further posits that the Plaintiff has proved the grant of overdraft of N3,000,000.00 and he urged me to so hold and dismiss the spurious claims of the Defendants that the overdraft was not granted. Then at paragraphs 3.4-3.5.11 of the Plaintiff's address, learned Counsel stated that the Defendants admitted having been granted a loan facility of N8,500,000.00 and the Defendants did not also contest the agreed interest rates. Counsel to the Plaintiff then contented that PW1 by her credible evidence has shown that both facilities granted to the Defendants were disbursed to the 1stDefendant and same has not been liquidated together with interests. He submitted that the Defendants failed to show in their statement

of defence that out of the facilities they have paid any" farthing" or kobo to the Plaintiff to liquidate the facilities.
The Plaintiff's Counsel submitted further that the Defendants contested the authenticity of the powers of attorney and two offer letters by alleging forgery or alteration but that the Defendants failed to prove the allegation beyond reasonable doubt since the averments have criminal context and yet they failed to challenge the interests which apply to the said facilities.
Plaintiff's Counsel submitted that by the evidence of PW1 thatat the maturity of both facilities, the Defendants failed to take serious efforts to liquidate the facilities as the result the facilities which was run from the same account continued to attract agreed interest and charges. Learned Counsel on behalf of the Plaintiff submitted further that the debit balance of the 1st Defendant was restructured on two occasions on 15th October, 2014 and 31st December,2014 for the benefit of the 1st Defendant each time the account of the 1st Defendant is in excess of the initial loan of N8,500,000.00 to avoid the default interest of 7 % per month. He therefore contented that out of the total debit balance of N17,376,677.46 standingagainst the 1st Defendant, the 1st Defendant only paid the sum of N1,870,000.00 leaving a total debit balance as at 31st October, 2015 in the sum of N15,506,677.46 only.
At paragraphs 3.5.13 of the Counsel's final address on behalf of the Plaintiff, he posits to the effect that by exhibits 1 and 2 the offer letters and the evidence of the Plaintiff's witness, the Plaintiffs has proved its case on a minimal of proof and he relied on the case of ***AFRIBANK (NIG) LTD V MOSLAD ENTERPRISES LTD, (2008)11 NWLR (pt1098) page 223 at 243-244 paragraphs F-D.***
At paragraphs 3.6.1-3.6.8 of the address, Plaintiff's Counsel submitted that by paragraph 28 (c) and (d) of the statement of claim it is entitled to sell all the properties used as collateral security for the said facilities given by the 2nd Defendant to repay the loans/overdraft. Counsel relied on exhibits 9 (a), 9 (c) and 9 (d), the irrevocable powers of attorney and submitted that a mortgagee's power of sale arises when any part of the debt is outstanding.He relied on the cases of ***OKKUNEYE V FIRST***

BANK OF (NIG) PLC, (1996)6 NWLR (pt457) pages 749 at 756 paragraphs D-F, YARO V AREWA CONST. LTD & ANOR, (2007) 17 NWLR (pt.1063) page 333 at 368 paragraphs B-D and pages 369-370 paragraphs C-B and ADENEKAN V OWOLEWA, (2004) ALL FWLR (pt216) page 510.

Learned Counsel therefore posits that being an equitable mortgage, leave of Court is required for the Plaintiff to sell the said properties of the 2nd Defendant.

He further contended that two options are open to the Plaintiff:-

(1) *Being an equitablemortage, the mortgagee can sell but with the leave of Court;*

(2) *Exercise its right of sell of the properties pursuant to the irrevocable powers of attorney, exhibits 9 (b), 9 (c) and 9 (d).*

On the liability for the legal expenses as averred at paragraph 28 (e) of the statement of claim forthe sum of N2,500,000.00 for recovery of debt, Counsel submitted that by the offer letters for the loan and overdraft facilities granted to the 1st Defendant and guaranteed by the 2nd Defendant, the Defendants agreed to bear all legal, statutory and out of pocket expenses which may arise on account of the Plaintiff enforcing the terms and conditions of the said facilities. He relied and referred me to exhibit 5 the receipt or bill of legal charges of Charles I. Ndukwe Esq for prosecuting this suit.

On the liability of the 2nd Defendant, learned Counsel to the Plaintiff stated that the 2nd Defendant agreed with the Plaintiff to use his plots of land and open space as collateral security and thus according to Counsel, the 2nd Defendant has guaranteed due repayment of the facilities by depositing the title documents with the Plaintiff as well as a memorandum of personal guarantee, exhibit 3.On the deposition of a guarantee, Counsel referred me to the case of ***NWANKWO & ANOR V ECUMENICAL DEV. COOPERATIVE SOCIETY LTD, (2002)1 NWLR (pt749)page 513 at 535 paragraph B-C.***

In conclusion, he urged me to grant all the reliefs claimed by the Plaintiff in this suit.

The Defendant's Counsel filed his final written address and distilled the following issues for determination:-

(1) Whether this suit is incompetent as the Plaintiff failed to make demand for the repayment of the loan and overdraft facilities from the Defendants before instituting this suit.
(2) Assuming without conceding that this suit is competent before this Honourable Court, whether the 2nd Defendant is a party to the loan contract of N8,500,000.00 executed between the Plaintiff and the 1st Defendant, exhibit 1?
(3) Assuming without conceding that this suit is competently before this Honourable Court, whether the Plaintiff granted the sum of N3,000,000.00 overdraft facilities on 10th July, 2014 (exhibit 2) to the 1st Defendant.

ISSUE ONE

At paragraphs 3.0.1 – 3.0.7 of the address of the Defendants Counsel, he submitted that the condition precedent for the exercise of the Plaintiff's right of action in order to recover the alleged debt from the Defendants have not arisen in that the law requires and imposes a legal duty on the Plaintiff to make a formal demand for the payment of the debt by the Defendants. According to learned Counsel that a formal demand for payment is what activate the right of cause of action through judicial processes of Court.

In the instant case, Counsel posits on behalf of the Defendants that the Plaintiff did not make any demand whatsoever on the Defendants to repay the alleged debt before instituting this action. Learned Counsel to the Defendants referred me to paragraphs 18 and 19 of the amended statement of defence and relying on the evidence of PW1 under cross examination wherein the Plaintiff's witness testified that no evidence was tendered before the Court evidencing a formal demand for repayment of the debts.

Learned counsel contended that PW1's evidence was contradicted during re-examination by the Plaintiff's Counsel. He then relied on the cases of ***OBIEGUE V A.G FEDERATION, (2014) 5 NWLR (PT.1399) page 171 at 207***.

Counsel posits that it is not the duty neither did the Court has power to speculate on the existence or fact not placed before the Court. He relied on the cases of ***UTB(NIG) V OZOEMENA,***

(2007) 3 NWLR (pt1022) page 448 at 487 UWAH V AKPABIO (2014) 17 WRN page 61 at 77.

In the instant case learned Counsel to the Defendants submitted that cross examination is a double edge sword and evidence adduced during cross examination which goes to support the case of the party cross – examining constitute evidence in support of the case of the Defence. He relied on the case of ***OKOROJI V ONWENU, (2016)*****50 WRN 85 at 102.**

Then at paragraphs 3.0.8- 3.1.6 of the Defendants address, learned Counsel submitted to the effect that by exhibits 1 and 2 the offer letters of the credit facilities imposed a duty on the Plaintiff to make demand for repayment of the facilities before instituting this suit and thus failure of the Plaintiff to make such a demand as a condition precedent, the cause of action does not arise. He relied on the cases of ***KOLO V FBN, (2002)LPELR 7106 (CA), ISHOLA V S.G BANK, (1997) 2 SCNJ 1 at 19 and WEMA BANK PLC V ALHAJI ADISATU OWOSHO, (2018) LPELR 43857 (CA).***

Learned Counsel to the Defendants then contended that based on the evidence before the Court and the position of the law, the instant suit as presently constituted is incompetent and by the conditions in exhibits 1 and 2 and the failure of the Plaintiff to make demand forrepayment of the loan facilities, this Court is robbed of the jurisdiction to adjudicate over this instant suit as the condition precedent has not been fulfilled. He relied on the cases of ***MADUKOLO V NKEMDILIM,(1962) 1 ALLNLR page 581 at 589-590, WEMA BANK PLC V ALHAJI ADISATU OWOSHO (Supra)***.

In the instant case, Defendants Counsel posits that the Plaintiff having failed to fulfil the conditions precedent before instituting this action, the suit is incompetent and he urged me to strike out or dismiss this suit for want of jurisdiction.

ISSUE TWO.

At paragraphs 3.1.8- 3.2.6 of the final address of the Defendants Counsel submitted to the effect that there is no evidence before the Court that the 2nd Defendant is a party to the N8,500,000.00 loan agreement, the offer letter, exhibit 1. Counsel stated that the 2nd Defendant is not a party to the loan agreement of

N8,500,000.00 between the Plaintiff as evidenced by exhibit 1 and that JANCILA HOMES LIMITED is not party to the N8,500,000.00 contract aver at paragraphs 8 and 11 of the amended statement of defence. He submitted that parties to exhibit 1 are the Plaintiff and the 1st Defendant and he referred me to the elicited evidence of PW1 under cross examination that Jancilla Homes Limited is not a party to the transaction of the loan in exhibit 1. And that it was an oversight that the Plaintiff did not produce in Court evidence to guarantee.

The Defendant's Counsel therefore submitted that it is elementary principle of law that a company is a distinct legal entity from its members and directors and he relied on the case of ***OYEBANJI V STATE, (2015) 42 WRN 77 at 102.*** He then contended on behalf of the Defendants that it is the law that a contract cannot confer rights or impose obligations arising under it on any person except parties to it. He relied on the cases of***AFRICAN INSURANCE DEV. CORP V NIGERIA LNG.LTD, (2000) 2 SC 57.And THOMAS CHUKWUMA MAKWE V CHIEF OBABUA NWUKOR & ANOR, (2001) 14 NWLR (pt733) page 356.***

Learned Counsel therefore posits that the 1st Defendant who is not a party to the contract between the Plaintiff and Jancilla Homes Limited cannot take the benefit of such contract as contained in exhibit 10. Further, Counsel submitted that the Plaintiff has failed to prove the nexus between the instant case and exhibit 10 and therefore exhibit is not relevant as 1st Defendant is not a party to it.He submitted also that the arguments of the Plaintiff's Counsel at paragraphs 3.3 and 3.4 of his final written address is completely misplaced to the effect that the 2ndDefendant accepted exhibits 1 and 2 as the managing Director of the 1st Defendant and agreed to use his personal properties as collateral security for repayment of the facilities while indeed the Plaintiff failed to prove with credible evidence the loan facility of N8,500,000.00. He submitted that address of Counsel is to assist the Court and cannot be a substitute for evidence. He relied on the case of ***OBIDIKE V STATE, (2016)20 WRN 1 at 14.***

At paragraphs 3.2.9-3.3.4 of the final written address of the Defendants Counsel, he submitted to the effect that intention of

the parties to exhibit 1,the loan facility of N8,500,000.00 is draw down while is a condition precedent. He argued that there is no evidence to support the arguments of the Plaintiffs Counsel at paragraphs 3.3.7 of his final written address and that by exhibits 1 and 2 assuming the documents i.e exhibits 1and 2 are not doctored the N8,500,000.00 facility shall only become available upon receipt of all the documents listed under the clause by the Plaintiff.

Issue three

At paragraphs 3.3.6- 3.6-3.4.9 of the address of the Defendants, learned Counsel submitted to the effect that the overdraft facility of N3,000,000.00 granted by the Plaintiff to the 1st Defendant was not made available to the 1st Defendant. According to the Defendants Counsel as averred at paragraphs 3 and 4 of the amended statement of defence the approved overdraft dated 9th July, 2014 was never granted to the 1st Defendant as the Plaintiff breached its obligation as contained in exhibit 2 and that there is no evidence shown in the 1st Defendant's statement of account on 10th July, 2014 or any later date. Learned Counsel relied on the evidence of PW1 under cross examination and submitted that the Plaintiff's reply to the statement of defence/counter claim is an after thought. Counsel to the Defendants referred me to exhibit 2 and its terms/ conditions and submitted that the alleged overdraft of N3,000,000.00 was granted on 19th June, 2014 but it was conferred to the 1st Defendant on 9th July, 2014 with a tenor of 30days. He then contended on behalf of the Defendant that the condition precedent to exhibit 2 was drawn down and that there is no evidence to support paragraphs 1,2 and 3 of the Plaintiff's reply. Learned Counsel posits that the duty of the Court is to interpret a contract to give effect to the wishes ofthe parties as expressed in the contract. He relied on the cases of ***ADETOUN OLADEJ I. (NIG) LTD V NIGERIAN BREWERIES PLC (2007) LPELR 160 (SC) and KAYDEE VENTURES LTD V HON MINISTER OF FCT, (2010)7 NWLR (PT.1192) page 171.***

At paragraphs 3.4.9-3.5.7 of the address of the Defendants, learned Counsel referred me to exhibit 4 wherein the Plaintiff stated that on the 15th October, 2014 and 31st December, 2014 two loans of N8,500,000.00 each was granted to the 1stDefendant

by the Plaintiff. Then under cross examination, according to the Defendants Counsel, PW1 testified that he is not sure if there were applications from the 1st Defendant for the two loans. Counsel then posits that a Court of law lacks the power to speculate on the existence of document that was not tendered in evidence by the Plaintiff. He relied on the case of ***UTB(NIG) V OZOEMENA (supra).***

In respect of exhibits 9(b), 9(c) and 9(d), Counsel to the Defendants stated that assuming but not conceding that the exhibits are genuine, he posits that the doneerequires to execute a deed on behalf of the donor and therefore the appointment of the donee requires to be by a deed. He relied on the case of ***ABINA V FARHAT, (1938) 14 NLR 17.***

Learned Counsel submitted on behalf of the Defendants that the 2nd Defendant denied donating exhibits 9 (b), a(c) and 9(d), the irrevocable powers of attorney and hence there is the need for the Plaintiff to prove its genuineness Counsel relied and referred me to the evidence of PW1 under cross examination to the effect that the 2nd Defendant is not in custody of any copy of the irrevocable power of attorney and that the irrevocable powers of attorney have been registered or deposited with an independent body apart from the Plaintiff.Learned Counsel further submitted that exhibits 9 (b) 9(C) and 9 (d) be discountenanced as they were drafted by the staff of the Plaintiff contrary to section 83(3) of the Evidence Act 2011 and that exhibits 9(b) and 9(c) are not relevant to the instant suit while exhibit 9 (d) was made after the expiration of the tenor of exhibit 2.

At paragraphs 3.5.8-3.7.8 of the Counsel's address to the defendants he submitted that assuming without conceding that the act of draw down on the sum of N3,000,000.00 by the 1st Defendant on 19th June, 2014 amounted to an overdraft by the Plaintiff and that the Plaintiff formalized the overdraft by an offer of 9th July, 2014, he posits that assuming the facility is governed by offer letter dated 9th July, 2014 and the overdraft was granted on 19th June, 2014, the tenor of 30 days would have elapsed on 18th July, 2014 i.e 9 days after the offer letter. He then contended that the Plaintiff would have demanded the 1st Defendant to

repay the said facility in line with the repayment clause of exhibit 2.

In conclusion, learned Counsel urged me to dismiss the Plaintiff's claims and find in favour of the Defendants counter claim.

The Plaintiff's Counsel in reaction to the final written address of the Defendants Counsel, filed what he titles "Plaintiff's reply on points of law" of 20 pages while his final written address is of 13 pages only. In any event, it appears the reply filed by the Plaintiff's Counsel is more of a second bite at the cherry to re-argue his case. And the law is that where a reply on points of law translate to re-arguing a party's written address or brief of argument, it will be discountenanced by the court. See the cases of ***ECOBANK (NIG) LTD V ANCHORAGE LEISURES LTD & ORS, (2016)LPELR 40220(CA), OKPALA V IBEME, (1989)2 NWLR (pt102) page 208 AND OPENE V NJC, (2011)LPELR 4795 (CA).***

In the instant case, I have gone through the entire 20 pages reply on points of law filed by the Plaintiff's Counsel. I will therefore refer to the reply on points of law where I consider necessary in the course of this judgment in order to arrive at a just decision in this matter.

Having said the above, both parties in this case formulated issue for determination in the instant case. However, it appears the issue distilled or nominated for determination by the Plaintiff's Counsel is apt and all encompassing. I will and I hereby adopt the sole issue as follows:-

> *"Having regard to the pleadings and evidence before this Honourable Court, whether the Plaintiff is entitled to be granted all the reliefs as per its writ of summons and statement of claim."*

In the course of determining the above issue, I will also consider and determine the points of law as to the competency or otherwise of the instant suit raised by the Defendants' Counsel which invariably bothers on jurisdiction of this Honourable Court to entertain the instant suit. In otherwords, at paragraphs 17 and 18 of the amended statement of claim the Defendant's aver that this suit or action is incompetent as the Plaintiff failed to make any demand for the repayment of any of the facilities. The

Plaintiff in response at paragraph 25 of its statement of claim avers that despite several demands after the expiration of the tenor of the said overdraft and loan, the 1st Defendant was unable to liquidate its indebtedness to the Plaintiff.

Thus, by paragraph 25 of the Plaintiff's statement of claim and paragraphs 17 and 18 of the Defendants amended statement of defence, issues are joined on whether the Plaintiff actually served a demand notice for repayment of the facilities in line with the offer letters, exhibits 1,2 and 3. This is to say, the Defendants by their amended statement of defence categorically denied paragraph 25 of the Plaintiff.

In the case of ***UGOCHUKWU NWAFOR V NIGERIA CUSTOM SERVICE & ORS (2018) LPELR 45034,*** *the Court of Appeal held:-*

> *"when issues are joined on any averment it is evidence that should be used to resolve them."*

Also in the case of ***REPTICO S.A GENEVA V AFRIBANK (NIG) PLC, (2013)14 NWLR (pt1373) page 172,*** the Supreme Court of Nigeria Nigeria per Ariwoola JSC held:

> *"There is no doubt and it is a fundamental procedural requirement that when issues are joined by parties in the pleadings, evidence is required to prove them as averred."*

See also ***NKUMA V ODILI & ORS (2006)LPELR 2047 (SC)***

Now before I proceed to resolve the question of competency or otherwise of this suit, at paragraphs 2.2.1 and 2.2.2 of the final written address of the Plaintiff's Counsel, he submitted to the effect that Defendants filed their joint statement of defence but did not defend the case as there was no material evidence from the Defendants to support their pleadings and thus the pleadings amount to nothing, no matter their cogency in the absence of evidence.

I quite agree with the learned Counsel to the Plaintiff that filing of the joint statement of defence by the Defendants without calling witness(es) to support their defence, such statement of defence goes to no issue because it is lacking in evidential backing. In the case of ***THE REGISTERED TRUSTEES SPIRIT OF LIFE BIBLE***

CHURCH V NNIKOL RESOURCES LTD (2013) LPELR 24796, the*Court of appeal held thus:-*

> *"It is trite that where a part fails to support his pleadings with evidence, such pleading is deemed abandoned. Having failed to lead evidence at trial therefore, the Appellant Defendant was deemed to have abandoned its pleadings."*

See also ***OKOLI DIM V ENEMUO, (2009)38 NSCQR 873,RT HON. ROTIMI AMACHI V INEC, (2008) LPELR 446(SC)***

However, it may not always be the case because if the party cross-examining, (in this case) the Defendants Counsel is able to extract or elicit evidence from the Plaintiff's witness(es) that tends to support his Pleading, such relevant averments would not be deemed as abandoned and the elicited evidence from Plaintiff's witness (es) would be regarded as evidence in –chief. In the case of ***EVA ANIKE AKOMOLAFE & ANOR V GUARDIAN PRESS LTD & ORS (2010) LPELR 366,*** the Supreme Court of Nigeria held thus:-

> *"On the issue as to whether both parties called evidence in support of their pleadings as held by the lower Court, it is settled law that evidence elicited from a party or his witness (es) under cross examination which goes to support the case of the party cross-examining constitute evidence in support of the case or defence of that party. If at the end of the day, the party cross examining decides not to call any witness, he can rely on the evidence elicited from cross examination in establishing his case or defence. In such a case, you cannot say that the party called no witness in support of his case or defence, as the evidence elicited from his opponent under cross examination which is in support of his case or defence constitute his evidence in the case. The exception is that the evidence so elicited under cross examination must be on facts pleaded by the party concerned for it to be relevant to the determination of the question or issue in controversy between the parties."*

In the instant case, I will now consider the evidence of the Plaintiff in support of its paragraph 25 of the statement of claim. Firstly, by exhibit 1, and 2, the offer letters of the loan/overdraft facilities amongst other terms and conditions prescribed and agreed by parties on the repayment of the loan/overdraft facilities states:-

> *"This facility is repayable on demand, failure by the borrower to fully liquidate the total amount at the expiration of its tenor any unpaid balance, excess over limit and or expired facility will be calculated at a default interest basis in addition to 1% flat management fee charged on outstanding expired balance per month."*

Further, by exhibit 3 the personal guarantee of the 2nd Defendant in respect of the overdraft of N3,000,000.00 on behalf of the 1st Plaintiff, paragraphs 2 of the guarantee states:-

"I, OjinnakaChidike of CS71 Corner shop Deidei hereby guarantee payment to E-Barc MFB (on account of the N3,000,000.00 being availed to O.J Chubby International Limited on demand of all moneys and liabilities whether certain or contingent now or hereafter owing or incurred to the E-Barcs MFB from or by the principal and unpaid or undischarged on any current or other account……."

Thus, from exhibits 1,2 and 3 tendered in evidence by the Plaintiff, it appears parties had agreed that before the Plaintiff can initiate or take any step for the repayment of the facilities after the expiration of their respective tenors, the Plaintiff, must, as a condition to repayment to recover the loan or overdraft facilities granted by it to the Defendants, is to demand for repayment of the facilities from the Defendants.

The Plaintiff in support of paragraphs 25 of its statement of claim relied on the evidence of PW1 at paragraph 25 of her sworn testimony as follows:-

> *"That both Defendant have failed, neglected and or refused to liquidate the indebtedness of the 1st Defendant on account of the said loan despite the expiration of its tenor as aforestated and several demand by the Plaintiff."*

The Plaintiff did not tender any document served on the 1st Defendant as a demand notice or repayment of the facilities but learned Counsel at paragraphs 1.5.2-1.6.14 of his reply and relied heavily on the evidence of PW1, Helen Ajayi in her sworn testimony adopted as her evidence to establish the fact that there was a demand by the Plaintiff to the Defendants.

On the otherhand, the Defendants at paragraph 17 and 18 of their amended statement of defence states:-

> *"Assuming without conceding that the Plaintiff has any claim against the 1st Defendant in respect of the facilities, the 1st Defendant posits that this action is incompetent as the Plaintiff failed to make any demand for the repayment of any of the said facilities."*

The Defendants did not call any witness to testify in support of their pleading. However, on the 4th June, 2018 PW1, Helen Ajayi testified under cross examination as follows:-

"No evidence was tendered by the Plaintiff as a formal demand for payment of the loan. I am not sure if there was a formal demand for payment from the Plaintiff before coming to Court."

By the above elicited evidence from cross examination of PW1 by the Defendants Counsel, the elicited evidence supports paragraphs 17 and 18 of the amended statement of defence of the Defendants. The elicited evidence during cross examination of PW1 was not reexamined by the Plaintiff's Counsel and thus the evidence becomes the evidence in –chief of the Defendants in support of paragraphs 17 and 18 of the Defendants amended statement of defence.

As I said earlier the Plaintiff's Counsel argued at paragraphs 1.5.2- 1.6.14 of pages 2-4 of his written reply to the effect that the Defendants Counsel misconstrued the position of the law on the issue of demand for repayment as according to learned Counsel to the Plaintiff, demand coming from a bank to recover debts from its customers, any of the following suffices:-

(a) A demand;

(b) A notice given or

(c) On other condition agreed upon by the parties.

Learned Counsel further submitted that by paragraph 29 of the witness statement on oath of PW1, the Plaintiff has satisfied the first condition by making a demand. He further contended in the written reply that none of the exhibits 1,2 and 3 provides that the demand shall be by way of a letter or in writing.

Now I have gone through the arguments of both Counsel as regards the position of the law as it relates to the conditions or duty impose on the Plaintiff in respect of exhibits 1,2 and 3 in the process of recovering the debts owed the Plaintiff.

In the case of ***KOLO V FRN (supra),*** the Court of Appeal held thus:-

> *"It is trite law that in an action for the recovery of a debt the cause of action accrues upon demand for the payment of the debt. If no demand is made, a cause of action does not arise and no action can be commenced."*

Further, the Supreme Court in the case of ***ISHOLA V S.G. BANK, (1997) 2SCNJ page 1 at 19***held as follows:-

"It is an implied term of the relationship between a banker and his customer that there should be no right of action until there has been a demand or notice given."

In the recent case of ***WEMA BANK PLC V ALHAJI ADISATU OWOSHO (2018) LPELR 43857,*** *the Court of Appeal held:-*

> *"…It is the letter of demand from a bank to its customer for the payment of a debt owed in his account that gives rise to the accrual of the right of action for the purpose of the recovery of the debt by means of the judicial process of a Court of law. As stated in the authorities, until such letter of demand was issued no right of action would arise and accrue to the bank to enable it commence a legal action in a Court of law for the recovery of the debt in question."*

The Plaintiff's Counsel in his reply to the final written address of the defendants Counsel appears to have misconstrued the above decisions when he held at paragraph 1.6.3 of page 3 as follows." *"The summary of these decisions shows that any of the following coming from a bank recovery debts from its customers will suffice:-*

(a) A demand,
(b) A notice given or
(c) On other condition agreed upon by the parties."

I completely disagree with the position of the Plaintiff's Counsel. His arguments are shallow and lame in the circumstances.
Firstly, by paragraphs 1 and 2 of the statement of claim, both the Plaintiff and the 1st Defendant are legal entities and the offer letters, exhibits 1 and 2 speaks for themselves. In otherwords, by exhibits 1 and 2, the offer letters, the contract is between two legal entities i.e the Plaintiff and 1stDefendant. This is to say, the Plaintiff and 1st Defendant being corporate bodies by law they are separate and distinct from its subscribers and directors. See ***OYEBANJI V STATE (supra) and TRENCO LTD V AFRICAN REAL ESTATE LTD, (1976)4 SC9.***
In effect, exhibits 1 and 2 which are the contract agreements that govern the relationship of the Plaintiff and the 1st Defendant being corporate bodies, it is implied that any demand for repayment by the Plaintiff to the 1st Defendant ought to be in writing whether the demand is inform of a notice or letter but certainly it cannot be orally as the relationship has been embodied in a document. I cannot subscribe to the position of the Plaintiff's Counsel that by the evidence of PW1 in her witness statement on oath, demand were made by the Plaintiff to the 1stDefendant.
A close look at the Plaintiff's statement of claim at paragraph 21 and pargraph 29 of PW1's witness statement on oath, the Plaintiff did not state the nature of the demand served or communicated to the 1st Defendant. Paragraphs 21 and 29 of the statement of claim and PW1 witness statement on oath respectively states:-
Paragraph 21-

> *"The Plaintiff avers that both Defendants have failed , neglected and or refused to liquidate the indebtedness of the 1st Defendant on account of the said loan despite the expiration of its tenor as aforestated and several demands by the Plaintiff."*

Then paragraph 29 states:-

"*That despite several demands after the expiration of the tenor of the said over draft and or loan, the 1st Defendant was unable to liquidate its indebtedness to the Plaintiff and the 2nd Defendant also has failed to repay the 1stDefendant's indebtedness in compliance with the personal guarantee duly executed by him."*

There is no evidence either in writing or orally to show and establish the method or ways in which the several demand were given by the Plaintiff and served on either the 1st Defendant or its managing Director. In both paragraphs i.e 21 and 29 of the statement of claim and witness statement on oath as I said earlier, a close look at the two paragraphs, the Counsel that drafted same is only being crafty and economical with the truth as to the fact of repayment demand.The witness statement on oath that suppose to flow naturally in explaining and supporting the statement of claim is rather a repetition of what was pleaded. In otherwords, PW1 while testifying in open Court, his oral testimony ought to have supported the way and manner the several demands by the Plaintiff were made to the Defendants.

The Plaintiff's Counsel had submitted at paragraph 1.5.3 of his reply that the Defendants Counsel instead of cross examining the witness, PW1 on the critical issues of demand was trying to be smart by having avoided the issue and limited his question to PW1 whether any document evidencing formal demand was tendered in Court. I think it is the Plaintiff's Counsel that tried to be smart in the way and manner he couched or drafted his pleadings on behalf of the Plaintiff. In fact even at paragraph 1.6.3 of the Plaintiff's Counsel reply wherein he came to the conclusion that by paragraph 29 of the witness statement on oath that PW1 satisfied condition (i) above which is to make a demand. The Plaintiff's Counsel is also smart and economical in his written reply as to how PW1 conveyed the demand to the 1st Defendant, a corporate body and a demand clause has been defined by the blacks law dictionary 8th edition at page 462 as follows:-

"A provision in a note allowing the holder to compel full payment if the maker fails to meet an instalment"

The same black's law dictionary categorizes demand as:-

(i) Demand instrument
(ii) Demand letter.

In the instant case there is a provision in exhibits 1,2 and 3 for a demand clause.
Thus, parties having reduced their intentions and wishes in exhibits 1,2 and 3 any demand by the Plaintiff,to the 1st Defendant, a corporate body, the demand must be preceded by a demand instrument or a demand letter.
In the instant case therefore, I agree with both Counsel to the effect that my duty is to interpret exhibits 1,2 and 3 in line with the intentions and wishes of the parties and that is what I have done in the circumstance. I therefore hold the considered view that the Plaintiff did not and infact failed, neglected and refused to make a demand on the Defendants as required by exhibits 1,2 and 3 and I do hold.
Now having considered the pleadings and evidence of both parties and the arguments of both Counsel to the respective parties on the demand clause and their understanding of the law, I must say that this is a Court of law and equity that dispense justice in accordance with the law. I will now state the law as regards demand for payment.
In law there are categories of demand imbedded in a contract and its resultant legal consequences in commencing a law suit before a Court of competent jurisdiction. It is trite law that, generally in an action for recovery of debt, the cause of action accrues upon demand for the payment of debt. If no demand is made, a cause of action does not arise and no action can be commenced against the debtors. See ***ISHOLA V SGB(NIG) LTD (supra)*** **KOLO V FBN PLC(supra).** However, it appears both Counsel did not read the full judgment of the case of ***ISHOLA V SGB (NIGERIA)LTD (supra). In that case, IGUH JSC*** *(as he then was) at page 405 particularly at page 422 stated thus:-*
" The cause of action does not arise until there has been a demand made or notice given when therefore there is no specific date agreed upon for the repayment of an overdraft, as in the present case, a demand should be made or notice given. In otherwords, a cause of action on an unpaid overdraft is not

deemed to accrue where no specific date for repayment is agreed upon until there has been a demand made or notice given."
(underling mine for emphasis)

By the decision of the Supreme Court above, two issues as regards demand had arisen.

Firstly, where there is no specific date for repayment of debt, a cause of action arises on demand; secondly, where there is specific date for repayment and the date for repayment had elapsed, a cause of action crystallizes . The Court of Appeal in the case of ***DR. LAWRENCE OJEMENE V STERIING BANK PLC. (2014) LPELR 24442*** *relying on the Supreme Court's decision in* **ISHOLA V *SOCIETE GENERAL BANK*(supra**) explained and captured the position of the law thus:-

> "However, albetthe general principle, the determinant date for repayment of a loan or overdraft is dependent upon the agreement between the creditor and the debtor, for instance between the bank and its customer. It has been established that where there is a specific date for payment of the debt, the necessity for notice of demand is dispensed with.In such a situation, payment becomes due as soon as the principal debtor fails to liquidate the debt due on the specific date. The debtor is therefore deemed to have defaulted as soon as he fails to pay on the due date in the agreement between him and his creditor or bank. In otherwords, the right of action crystallizes as soon as the creditor fails to perform his obligations on the specified date on the contract agreement. It will not be mandatory, therefore, for a demand or notice to be served on the creditor before a cause of action accrues"

See also ***OLAOGUN ENT LTD, V S.Y.M, (1992)4 NWLR (pt235) page 361 at 362.***

In the instant case, by exhibit 1, the offer of N8,500,000.00 loan facility dated 9th April, 2014 the tenor is for 180days with effect from the 17th April, 2014 and by the pleading and evidence of PW1, the maturity date for the loan was 13th October, 2014. Further, by exhibit 2 the overdraft facility of N3,000,000.00 dated 9th July, 2014 with effect from 19th June and ending18th July,

2014 was for 30days tenor. The 1st Defendant at paragraphs 1,2,3 and 4 of its amended statement of defence admitted that the loan of N8,500,000.00 maturity date was 13th October, 2014 while the overdraft facility N3,000,000.00 approved by the offer letter dated 9th July, 2014 was supposed to be granted on 10th July 2014 and matured on 8th August, 2014. And by the Plaintiff's claim and the evidence of PW1, the indebtedness of the 1st Defendant as at 31st October 2015 stood at N15,506,677.46.

In otherwords, by the evidence of PW1 and exhibit 1 and 2, the offer letters of the two facilities the tenor or maturity date of 180days and 30days respectively has elapsed or expired and the 1st Defendant is still in default of payment as at the time this suit was commenced and filed.

Thus, therefore, by the evidence before me I hold the view that the 1st Defendant and indeed the Defendants are in default of payment of the facilities granted by the Plaintiff, the tenor or time to liquidate same had expired and I so hold.Consequently therefore, I hold the view that this suit was properly commenced by due process of the law and I so hold. Accordingly, the objection to its incompetence is misconceived and it is hereby dismissed.

Having disposed offthe objection of the Defendants, the 1st claim of the Plaintiff is for the sum of N15,506, 677.46 being the total indebtedness of the 1st Defendant as at 31st October, 2015 which was guaranteed by the 2nd Defendant.

As I said before , there is no dispute by the parties as to the two facilities advanced by the Plaintiff to the 1st Defendant. For the Plaintiff to be entitled to the first relief, there must be evidence that the 1st Defendant enjoyed draw down of the two facilities of N8,500,000.00 and N3,000,000.00 respectively. The fact of draw down has been admitted by the 1st Defendant at paragraph 7 of its amended statement of defence in respect of the loan of N8,500,000. Hence therefore, the 1st Defendant having admitted drawing the sum of N8,500,000.00 loan facility granted by the Plaintiff, the Plaintiff is therefore relieved of adducing evidence to prove same. See the cases of ***AISHA JUMMAI ALHASSAN & ANOR V MR. DARIUS DICKSON ISHAKU & ORS (2016) LPELR 40083 (SC), FEDERAL UNIVERSITY OF TECHNOLOGY***

MINNA & ORS V BUKOLA OLUWASEUN OLUTAYO, (2017)LPELR 43827 (SC) and TAJUDEEN IBIKUNLE & ANOR V AIRFRANCE, (2015)LPELR 25773(CA).

In respect of theN3,000,000.00 overdraft, the 1st Defendant at paragraphs 3 and 4 of their amended statement of defence appears to deny draw down of the sum of N3,000,000.00 overdraft granted to the 1st Defendant and they further asserted that the N3,000,000.00 overdraft was not reflected in the 1st Defendant's statement of account No. 030317024 with the Plaintiff. The assertion of the Defendants that there was no drawdown of the N3,000,000.00 overdraft and that the overdraft amount is not reflected in the account of the 1st Defendant with the Plaintiff is not supported by evidence. The Defendants did not call any witness to testify on their behalf and the extracted evidence elicited by the defendants' Counsel from PW1 during cross examination did not support the case of the Defendants. The pleaded facts are therefore abandoned. See ***MADAKI VIBRAHIM KINGHAN, (2015)LPELR 25696 (CA), OJIOGU V OJIOGU, (2010)9 NWLR (pt1198)page 1.***

In the instant case PW1 testified that there was draw down as averred at paragraph 6 of her further witness statement on oath in support of paragraph 1(a) of the Plaintiff's reply to the statement of defence of the Defendants. The Plaintiff also tendered the account statement of the 1st Defendant admitted in evidence as exhibit 4. I have perused exhibit 4 and its entries and I have seen the withdrawals carried out by the 1st Defendant in respect of the overdraft facility.

Thus, as the Defendants did not call any witness to testify on their behalf, the minimal evidential proof adduced by the Plaintiff suffices.See the cases of ***UNITY BANK PLC V ALIYU ADAMU & ORS (2013) LPELR 22047 (CA), SOSAN VS HFP ENG (NIG) LTD (2004)3 NWLR (pt861) page 546, BALOGUN V LABIRAN, (1988)3 NWLR (pt80) page 66.***

Hence therefore, in this case, I hold the view that by the credible evidence adduced by the Plaintiff there was draw down by the 1st Defendant in account no. 030317024 of the overdraft facility and I so hold.

Now having established by credible evidence the grant of the two facilities of N8,500,000.00 and N3,000,000.00 by the Plaintiff to the 1st Defendant and having also established by credible evidence that the 1st Defendant enjoyed the two facilities by draw down from account no 030317024, the next question to determine is whether the 1st Defendant has liquidated the two facilities advanced to her by the Plaintiff in accordance with the terms/conditions of exhibits 1 and 2.

The Defendants at paragraphs 15 and 16 of their amended statement of defence denied the claims of the Plaintiff and further state that the Plaintiff has no claim against them whatsoever either in law or in equity. Now I have gone through the entire amended statement of defence of the Defendants especially paragraphs 13- 16, the Defendants therein raised a lot of allegations but the averments are not supported with evidence.

Further throughout the length and breadth of the amended statement of defence the Defendants did not also respond to the claim of the Plaintiff narrated at paragraphs 16-20 of her statement of claim and paragraphs 1-4 of the reply to the defence of the Defendants. The averments of the Plaintiff therein are the crux of the claim of the Plaintiff against the 1st Defendant. The Defendants averments at paragraphs 15 and 16 did not in any way join issues with the pleadings of the Plaintiff in the above mentioned paragraphs. In any event the Defendants did not call witness (es) to support the averments at paragraphs 13-16 of their amended statement of defence. They are therefore deemed to have admitted paragraphs 16-20 of the Plaintiff's statement of claim.

Although the Defendants did not call evidence in support of their case, I have considered the evidence adduced by the Plaintiff in support of her claim.At paragraphs 16-20 of the Plaintiff's statement of claim and paragraphs 1-4 of her reply to the statement of defence of the Defendants, the Plaintiff explained and gave a run- down of withdrawals and deposits by the 1st Defendant in account no. 031317024 maintained and operated by the 1st Defendant as well as the interest charges therein. The pleading of the Plaintiff on the aforesaid paragraphs is supported

by the evidence of PW1 at paragraphs 17-23 of her witness statement on oath and her further witness statement on oath.
The statement of account of the 1st Defendant with the Plaintiff further supports the case of the Plaintiff i.e exhibits 4 and 4(a). And a close look at the pleadings of the Plaintiff and the computation of entries as withdrawals, deposits and the interest charges, if the total credit transaction of N1,870,000.00 is deducted from the total debit transaction of N17,376,677.46, the total indebtedness of 1st Defendant as at 31st October, 2015 was N15,506,677.46. The evidence of PW1 tallies with exhibits 4 and 4(a). And it is important to note that exhibit 4, the statement of account of the 1st Defendant with the Plaintiff, the 1st Defendant did not dispute the entries in the said exhibit and indeed relied on same but refused or failed to call evidence.
In otherwords, the evidence of indebtedness adduced by the Plaintiff in support of the 1st claim against the 1st Defendant for the sum of N15,506,677.46 is credible and I believe same. However the claim of the Plaintiff in the instant case is against the 1st and 2nd Defendants jointly and severally for the said sum of N15,506,677.46 being the outstanding indebtedness arising from the loan and overdraft facilities granted to the 1st Defendant and guaranteed by the 2nd Defendant, its Managing Director.
The Plaintiff in its paragraphs 7,8 and 20 of her statement of claim states that the 2nd Defendant guarantees the repayment of the two facilities advanced by the Plaintiff to the 1st Defendant. The evidence of PW1 in her witness statement on oath supports the Plaintiff's pleading.
On the othehand, the Defendants at paragraphs 8, 9,10 and 11 of their amended statement of defence denied the assertion that the 2ndDefendant executed a memorandum of personal guarantee for the re-payment of N8,500,000.00 granted to the 1st Defendant by the Plaintiff. The Defendants did not call any witness to testify on their behalf. However, on the 4th June, 2016, PW1 was cross examined by the Defendants' Counsel. And in answer to a question put forward to PW1 by the Defendants Counsel, she testified thus:-

"It is not correct to say the 2nd Defendant did not guarantee the loan. The 2nd Defendant guaranteed the loan."

On further questioning under cross examination by the Defendants Counsel, PW1 testified as follows:-

"If the evidence of guarantorship of the 2nd Defendant is not tendered in Court it must have been an oversight."

The evidence of PW1 elicited by the Defendants Counsel under cross examination appears to support the Defendants assertion at paragraphs 8-10 of their amended statement of claim.

Hence, parties having joined issues and support same with evidence, the question to ask is whether the 2nd defendant personally guaranteed the loan facility of N8,500,000.00 granted to the 1st Defendant by the Plaintiff? The Plaintiff did not tender in evidence personal guarantee signed by the 2nd defendant for the re- payment of N8,500,000.00. The evidence of PW1 at paragraph 12 of her further witness statement on oath is very categorical on this point to the effect that the personal guarantee signed by the 2nd Defendant was in respect of the overdraft facility of N3,000,000.00 granted to the 1st Defendant by the Plaintiff. The personal guarantee is exhibit 3. Further by exhibit 1, the offer letter, it was part of the term/ condition of exhibit 1 that the 2nd Defendant executed a memorandum of personal guarantee of the loan facility and by the evidence adduced before me, there is no personal guarantee for the loan of N8,500,000.00 by the 2nd Defendant. However by exhibit 3 and the evidence of PW1 it is crystal clear that the 2nd Defendant guaranteed the overdraft facility granted to the 1st Defendant by the Plaintiff. And in the case of ***ECO INTERNATIONAL BANK PLC V NIGERIA UNION OF LOCAL GOVERNMENT EMPLOYEES JALINGO LGC AND ANOR, (2014) LPELR 24171***, the Court of Appeal held.

"The Apex Court in Auto Import and Export v Adebayo (Supra) re-stated the liability of guarantors of loans on pages 923 as follows:-" Itwould in my view amount to a monumental failure of justice to allow the 3rd Respondent who guaranteed the repayment of the credit granted by the Plaintiff to the

Nigerianbuyer to walk –away free from liability while the debt, the repayment of which it guaranteed remained unpaid."
See also ***FIRST BANK OF NIGERIA PLC V MONWADIALU & SONS LTD & ORS, (2015) LPELR 24760(CA) KHALED BARAKAT CHAMI V UBA PLC (2010) 3 SCM page 59 at 78***.

Having established by credible evidence that the 2nd Defendant guaranteed the repayment of the overdraft facility granted to the 1st Defendant by the Plaintiff, the law is that the moment the principal debtor i.e the 1st Defendant fails to repay (as in this case) the facility, the 2nd Defendant as the guarantor under the guarantee his liability thereby crystallizes.

Thus, in view of the facts and evidence before me I hold the view that the Plaintiff is entitled to relief (a) and I so hold.

Having held that the Plaintiff is entitled to relief (a) of paragraph 28 of the statement of claim, relief (b) is for interest of 7% per month or in the alternative 5% interest on N15,506,677.46 or any other sum of money granted to the Plaintiff under the preceding relief.

By exhibits 1 and 2, the offer letters of loan and overdraft facilities granted to the 1st Defendant by the Plaintiff, parties agreed that in the event of default by the 1st Defendant to liquidate the total indebtedness at the expiration of its tenor, any unpaid balance, the Plaintiff will be entitled to default interest rate of 7% per month on the compound interest basis in addition to 1% management fee charge on outstanding expired balance per month.

The Defendants having agreed with the terms and conditions contained in exhibits 1 and 2, the function of this Honourable Court is to give effect to what parties had voluntarily agreed to govern or regulate their relationship except where fraud or illegality is alleged. In the instant case there is no evidence of fraudulent conduct or illegality against the Plaintiff. The Plaintiff and the Defendants are therefore bound by the terms/conditions contained in exhibits 1 and 2. Accordingly, therefore I hold the view that Plaintiff is entitled to 7% interest per month on the sum of N15,506,677.46 and I so hold.

The next relief claimed by the Plaintiff against the Defendants is for a declaration that the terms and conditions of the overdraft

facility granted to the 1st Defendant, the Plaintiff has a right or power to sell the said properties at plot nos. A 353 and 31D both situate in Cadastral Zone 007 Giri Airport Community layout and shop known as LP/RVW/176 Dei Dei International Building materials market, Abuja in order to realize the Defendants total indebtedness to the Plaintiff.

The law is trite that claim for declaration is granted to a party on the strength of that party's evidence before the Court. In otherwords a party seeking the relief must succeed on the strength of his own case and not on the weakness of the defence. Hence, there must be concrete and satisfactory evidence shown that the party is entitled thereto and it cannot even be granted on the admission by the adverse party.

See ***SAIDU SANUSI DONGARI & ORS V SAHEED SA'ANUN, (2013)LPELR 22084(CA), AYARRU V MANDILAS LTD, (2007) 4 SC (pt111) page 58 and DUMAZ (NIG) LTD V NWAKHOBA, (2008) 18 NWLR (pt119) page 361*****.**

In the instant case at paragraphs 6,7 and 8 of the statement of claim, the Plaintiff avers that before the overdraft and loan, the subject matter of the suit, the Plaintiff had granted overdraft and or loans to Jancilla Homes Limited, a company of which the 2nd Defendant is the Managing Director. According to the Plaintiff that the 2ndDefendant executed two powers of attorney in favour of the Plaintiff granting her the right and or powers to sell the properties used as collateral security upon default. PW1's evidence at paragraphs 9, 10 and 11 of her sworn testimony supports the Plaintiffs pleadings. I have also seen exhibits 1, 2,6,6(a), 8,9(b) 9(c) and 9 (d) admitted in evidence through PW1, being the documents executed by the Defendants for the facilities granted by the Plaintiff that confers the right and or power to the Plaintiff to sell the properties in order to liquidate the indebtedness of the Defendants.

Now exhibits 1 and 2 under the heading collateral/support clause 1 and 2 states:-

(1) Properties known as plot Nos A353 and 31D cadastral Zone o4-o7, Giri Airport Community Layout and shop LP/RVW/176,Deidei International Building Materials Market DeideiAbuja. Also deposited all title documents.

(2) The two (2) powers of attorney dated 27th February, 2014 executed by OjinnakaChidike in respect of the facilities granted to Jancilia Homes Limited also apply to this facility."

By clause 2 of exhibits 1 and 2 of the offer letters of the loan and overdraft facilities granted to the 1st Defendant, the 2nd Defendant agreed with the Plaintiff that properties aforementioned in clause 1 earlier used as collateral in respect of facility granted to Jancillia Homes Limited owed by the 2nd Defendant be used as collateral for the loan and overdraft facilities in respect of the claim of the instant suit. The properties referred to in exhibits 1 and 2, that is the collaterals are exhibits 6, 6 (a) and 8 while the powers of attorney executed in favour of the Plaintiff by the 2nd Defendant pursuant to clauses 1 and 2 of exhibits 1 and 2 under collateral are exhibits 9 (b), 9(c) and 9(d).

The above documents, i.e exhibits are crystal clear and they collectively speak for themselves to the effect that the Defendants executed and deposited the title documents to secure the facilities from the Plaintiff and in the event of default in repayment, the Plaintiff can use the collateral to recover its indebtedness by way of sell. The Defendants have alleged at paragraph 9-13 of their amended statement of defence that the collateral given by the Defendants were doctored and forged. Further, in his final written address at paragraphs 3.5.1- 3.5.7, the Defendants Counsel submitted to the effect that the documents i.e exhibits 9 (b), 9(c) and 9(d) were not donated by the 2nd Defendant.

Unfortunately, both the Defendants assertion in their amended statement of claim and address of Counsel is not supported with evidence. The averments at paragraphs 9-13of the Defendants are therefore deemed abandoned. In the same breath, address of Counsel not supported with evidence also goes to no issue. See the cases of ***UNION BANK OF (NIG) PLC V AYODARE & SONS (NIG) LTD, (2007)LPELR 3391(SC), NIPOST V IBRAHIM MUSA, (2013) LPELR 20780 (CA*)**. In otherwords cases are won on credible evidence and not on addresses of Counsel. See ***OGUNSANYA V STATE, (2011)6 SCNJ 190 and SALIZGITTER STAHIGMBH V DOSUNMU, (2010) 20 SCNJ 186.***On the otherhand, I have perused the submissions of

Counsel to the Plaintiff at paragraphs 1.7.3- 1.7.11 of the reply on points of law and I entirely agree with Counsel to the effect that by exhibits 1, 2 9 (b), 9 (c) and 9 9d), the Defendants, as part of the terms and conditions of the loan and overdraft facilities, agreed with the Plaintiff and submitted exhibits 6,6 (a) and 8 as collaterals. Then by clauses A and B under the heading:- "Now this deed witnesseth" of exhibits 9 (b), 9(c) and 9 (d), it provides thus:-

> *"To enter into and take over any building and property situate and known as plot no. D31 Cadastral Zone 04-07 Giri Airport Community layout, Gwagwalada Area Council, Federal Capital Territory, Abuja with appurtenances thereto which was used as collateral security for the overdraft of N8,000,000.00 which the donee granted to Jancilla Homes Limited by reason of the offer of 13th February, 2014 or any other company where the donor has interest, in the event that the company or myself fail to repay the aforesaid overdraft, interests and charges."*
>
> *"(b) To sell, convey, assign or transfer ownership of my said building and property situate and known as plot no. D31 Cadastral Zona 04-07, Giri Airport community layout, Gwagwalada Area Council, Federal Capital Territory Abuja to itself or any other person in the event that Jancilia Homes Limited, that other company or myself fail and or neglects to liquidate in full they said overdraft of N8,000,000. Including the accumulated interests and charges on the said loan."*

The above clauses "A" and "B" of exhibit 9 (b) are similar or same clauses in exhibits 9(c) and 9(d) respectively.

In otherwords, by the combine testimony of PW1 and the documentary evidence adduced by the Plaintiff, the evidence is of credible nature and I have no option than to hold the view that the Plaintiff is entitled to the declaration as per relief (c) of paragraph 28 of the statement of claim and I so hold.

The Plaintiff having established by credible evidence that she is entitled to reliefs (a), (b) and (c) of paragraph 28 of the statement of claim, the next claim or relief of the Plaintiff is for an

order granting leave to the Plaintiff to sell the properties as exhibit 9(b), 9(c) and 9(d).
Bythe irrevocable Powers of Attorney donated by the 2nd Defendant in favour of the Plaintiff, there exist a provision for the donee to exercise a right of sale of the properties, the subject of the collaterals in the instant case.
The order being sought by the Plaintiff is in the realm of judicial discretion. And the exercise of judicial discretion must be done in the interest of justice judicially and judiciously without arbitrariness.
In otherwords, the relief been sought by the Plaintiff against the Defendants is for the purpose or with the sole aim and objective to recover the sum of N15,506,677.46 plus interest at 7% per month being the indebtedness of the Defendants to the Plaintiff. In that wise therefore, consideration must be given or taken into account of the market value of the properties as collateral to be sold either by the Plaintiff or the 2nd Defendant in order to liquidate the indebtedness of the 1st Defendant.
I am therefore of the considered view and in the exercise of my judicial discretion to allow the 2ndDefendant sell the properties, the subject of the collaterals under the strict supervision of the Plaintiff. Accordingly therefore it is hereby ordered that the Defendants to within 30days from today either pay the judgment sum of N15,506, 677.46 plus interest at 7% per month and redeem the properties or within 30days from today, the 2nd Defendant sell the properties, the subject of the collateral and the buyer(s) to pay directly the proceed of sale to account no. 030317024 maintained and operated by the 1st Defendant with the Plaintiff in order to liquidate the judgment sum and any outstanding proceeds after the liquidation of the indebtedness, the Defendants are entitled to same. If however the Defendants failed to exercise the two window of opportunities granted to it in order to liquidate its indebtedness with the Plaintiff, then after the expiration of the 30days, leave is hereby granted to the Plaintiff to sell properties nos A353, 31D situate in Cadastral Zone 04-07, Giri Airport Community layout and shop known as LP/RVW/176, Deidei International Building materials market in order to

liquidate the indebtedness of the 1st Defendant in the sum of N15,506,677.46 plus interest at 7% per month.
The final claim of the Plaintiff is the sum of N2,500,000.00 being legal expenses and cost for recovering the Defendant's total indebtedness to the Plaintiff as a result of the loan and overdraft facilities.
Now I have seen exhibits 1 and 2 and under the heading:- " Other conditions; the Plaintiff is entitled to all legal, statutory and out of pocket expenses that may arise in the course of the enforcing the terms and conditions of this facility and that it would be borne by the borrower. I have also seen exhibit 5, the bill of charges submitted by one Charles Ndukwe& co for the sum of N2,500,000.00. the Plaintiff at paragraphs 26 and 27 of its statement of claim pleaded facts in support of the claim as well as the evidence of PW1 at paragraphs 30 and 31 of her sworn testimony on oath on 1st April, 2016.
There is credible evidence to support this claim which is in the form of a special damage.
The law as firmly stated in the case of ***CHARLES NAUDE & ORS V MONDAY SIMON, (2013) LPELR 20491,***the Court of Appeal held that " costs will therefore be awarded on the ordinary principles of genuine and reasonable out of pocket expenses and normal Counsel cost usually awarded for a leader and one or two juniors"
See also ***LONESTAR DRILLING (NIG) LTD V NEW GENESIS EXECUTIVE SECURITY LTD (2011) LPELR 4437 (CA).***
The Defendants did not challenge the claim of N2,500,000.00 by the Plaintiff. Hence therefore by exhibits 1, 2,5 and the evidence of PW1, I hold the view that the Plaintiff is entitled to the claim and I so hold. Accordingly the sum of N2,500,000.00 is hereby granted against the Defendants being cost of professional fees in prosecuting the instant suit.
In conclusion, the claims of the Plaintiff against the Defendants jointly and severally succeeds and judgment is hereby entered for the Plaintiff as per reliefs (a),(b),(c) and (e) of paragraph 28 of the statement of claim while relief (d) succeeds in the alternative.
That is the judgment of this Court.

HON. JUSTICE D. Z. SENCHI
PRESIDING JUDGE
6/05/2020

Parties Absent.
C.I Ndukwe:For the Plaintiff
I.A Emere:-For the Defendants
Ndukwu:- We are grateful.

Sign
Judge
6/05/2020