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

SUIT NO: FCT/HC/CV/957/2011

BETWEEN:

1. MR. HENRY OLUSOLA ADEBONJO)
2. MR. BADEJO O. ADEBONOJO)
3. PROF. FESTUS O. ADEBONOJO)……PLAINTIFFS

(Suing as the Executors of the Estate of Otunba (Dr.) Badejo Oluremilekun Adebonojo)

AND

1. THE HON. MINISTER OF POWER, WORKS & HOUSING)
2. FEDERAL MINISTRY OF POWER, WORKS & HOUSING)
3. ATTORNEY GENERAL OF THE FEDERATION)……DEFENDANTS

JUDGMENT

This Suit was commenced by the Plaintiffs as Executors of the Estate of **late Otunba Badejoh Oluremilekun Adebonojo**. According to the Plaintiffs, sometime in June, 1994 the 2nd Defendant, then known and called Federal Ministry of Works and Housing, offered to sell a 3-Bedroom Flat to **Otunba Badejo** vide a letter of Offer admitted as Exhibit HO8. He accepted the Offer on the 06/10/1994 vide Exhibit HO9. He attached a Manager's cheque (Bank draft) issued by Co-operative Bank Limited in the sum of N600, 000. 00 (Six Hundred

Thousand Naira) only made payable to the 2nd Defendant as full payment for the 3-Bedroom Flat. The 2nd Defendant did not allocate the house to him until sometimes in 1996 when he died.

Sometimes on the 12/02/2010 the Law Firm of M.D. Owolabi & Co. wrote to the 2nd Defendant to know the status of Otunba Badejoh's allocation and to be shown the house allocated to him (Exhibit HO4). There were exchanges of communications between the Law Firm and the Agents of the 2nd Defendant to get the matter sorted out, but this was not to be. At the end of the day, the 2nd Defendant took a position that the receipt (Exhibit HO10) which was forwarded to the 2nd Defendant as receipt issued to acknowledge the payment for the house was not authentic and that no allocation was made in the name of the deceased.

The Plaintiffs have now instituted this case to enforce the allocation or refund of the sum paid. In specific terms, the reliefs sought in the amended statement of claim are:

(a) AN ORDER of specific performance compelling the 1st and 2nd Defendants to complete the allocation of 3-Bedroom Prototype House at Karu, Abuja to the Plaintiffs as contained in the Offer letter dated 7th June, 1994.

(b) AN ORDER directing the 1st and 2nd Defendants to put the Plaintiffs into possession of the said property aforesaid.

(c) COST of this action.

ALTERNATIVELY

The Plaintiffs in the alternative, claims against the Defendants as follows:

(a) The refund of the sum of ₦600, 000. 00 (Six Hundred Thousand Naira) being money paid to the 2nd Defendant on the 10th October, 1994 for the allocation aforesaid.

(b) 10% interest of the said money from the date payment was made till institution of action.

(c) The sum of ₦50,000,000.00 (Fifty Million Naira) being damages for inconveniences, difficulties and hardships caused the Plaintiffs for sixteen years of fruitless search for the said allocation and flagrant breach of contract.

(d) 10% interest on all the money claimed from the date of Judgment till full liquidation of the Judgment sum.

(e) The sum of ₦1,500,000.00 (One Million, Five Hundred Thousand Naira) being cost of this action.

The 1st and 2nd Defendants denied liability to the claims of the Plaintiffs. The 3rd Defendant tried, unsuccessfully to get his name struck out as a party in this case. However, after this application was dismissed, he stopped to participate in this trial.

In their defence, the 1st and 2nd Defendants denied making any Offer and or receiving any payment from late Otunba Badejoh in respect of the sale of houses in Karu. One witness testified either way. One Dr. Muyibi Folarin Adesanya testified for the Plaintiffs. He was cross examined by the counsel to the 1st and 2nd Defendants at the end of his testimony. Similarly, Istefanus John Nash, a Chief Town Planner with the 2nd Defendant testified on behalf of the 1st and 2nd Defendants. He too was fully cross examined by the counsel to the Plaintiffs.

At the close of the trial, parties filed and exchanged final written addresses which were duly adopted in the open Court.

Mr. Paul Eboigbe Esq, of counsel for the 1st and 2nd Defendants in his final address put forward two (2) issues for the determination of this action. The issues are:

(a) Whether or not Exhibits HO1A, H07, H08, H09 and HO10 were wrongly admitted and if so, whether same can be expunged by the Court at this stage.

(b) Whether from the state of pleadings in this suit and evidence led in support of same, the Plaintiffs are entitled to the Judgment of this Court, regard being had to the burden of proof.

In a related development, **Mr. M. D. Owolabi Esq**, of counsel for the Plaintiffs, identified two issues as arising for determination as follows:

(i) Whether the evidence of DW1 is not hearsay that should be expunged from the record of this Honourable Court.

(ii) Whether the Plaintiffs have not discharged themselves of the burden placed upon them by law in this case to entitle them to the reliefs sought on the face of the Writ of Summons?

I have carefully read the final written addresses filed on behalf of the parties, and it appears that issue one raised in the respective addresses are in the form of preliminary objections. It is therefore

proper to address the concerns expressed therein before the determination of the substantive issue.

I have also observed that issue two in the respective address of parties are similar, notwithstanding that they are differently framed. They relate to the burden placed by the law on the Claimant. They are therefore relevant and appropriate for the determination of this case. I have however decided to rephrase it to make it concise and more meaningful. The issue for determination shall be therefore framed as follows:

> **"Whether from the state of pleadings and evidence led by parties, the Plaintiffs have led sufficient evidence to warrant the grant of the claims sought."**

The preliminary issues raised by the parties being what they are must be taken first before I consider the substantive issue.

PRELIMINARY ISSUES

The preliminary issue raised by the Plaintiffs is that the evidence of the DW1 is a hearsay which should not be admitted and be ignored. Section 37 of the Evidence Act, 2011 was referred to, and the case of **OJO Vs CHAGORO (2006) ALL FWLR (PT. 316) 197** was also cited in support.

I have considered the position of the law on hearsay evidence and the peculiar facts of this case, and I have no hesitation in holding that the DW1 being an official witness need not have personal knowledge of the facts contained in his witness statement on Oath. In so far as the information is derived from the records made available to him in the course of his official duties, (especially where as in this case, the evidence is based on facts in the employer's record), he can competently put forward such facts on behalf of his Organization. On this note, I have seen the introductory part of DW1 Statement on Oath, where he stated thus:

> **"I, Nash John Male, Adult, Christian and a Nigerian Citizen of Field Headquarters, Federal Ministry of Power, Works and Housing Abuja do make Oath and states as follows:**
>
> **(1) That I am a Resident Land Officer of the 2nd Defendant in Abuja, FCT, hence I am conversant with the facts of this case.**
>
> **(2) I have the consent and authority of the 1st and 2nd Defendants to depose to this affidavit.**

The learned counsel to the Plaintiffs in my view totally ignored the fact that the DW1 is a civil servant and that his testimony is based on information relating to the activities of his Ministry which are

contained in the record of the Ministry. If that be the case, I form the view that learned counsel was in grave error when he submitted that it was the officers of the 1st and 2nd Defendants who either had direct dealing with the Plaintiffs or executed documents relevant to this dispute that should testify on behalf of the 1st and 2nd Defendants.

On this point of law, I take the liberty to refer to the case of **ISHOLA Vs SOCIETE GENERALE BANK LTD (1997) 2 NWLR (PT. 488) 405** where the legal status of the testimony of an agent of a juristic entity who did not participate in the transaction, subject of litigation was pronounced upon. On this point, Iguh, JSC held thus:

> **"...it cannot be over emphasized that a Company being a legal person or a juristic person can only act through its agents or servants, and any agent or servant of a Company can therefore give evidence to establish any transaction entered into by that Company. Where the official giving the evidence is not the one who actually took part in the transaction on behalf of the Company, such evidence is nonetheless relevant and admissible and will not be discountenanced or rejected as hearsay evidence. The fact that such official did not personally participate in the transaction on which he has given evidence, may in**

appropriate cases, however, affect the weight to be attached to such evidence. See KATE ENTERPRISES LILITED Vs DAEWOOD NIGERIA LIMITED (1985) 2 NWLR (PT. 5) 116; ANYAEBOSI Vs R.T. BRISCOE NIGERIA LIMITED (1987) 3 NWLR (PT. 59) 84; CHIEF OGUNBOR & ORS Vs CHIEF UGBEDE (1976) 9 – 10 SC 179 at 187."

In this case, the DW1 as an employee of the 2nd Defendant is empowered to testify in official capacity, notwithstanding the fact that he was not personally involved in the disputed transaction. All his testimonies are based on the documents in the record of the Ministry. At the end of the day, I hold as I should that the testimony of the DW1 is in order as it does not offend Section 37 of the Evidence Act, 2011. I therefore overrule the learned counsel to the Plaintiffs on this point and affirm the validity of the witness statement on Oath filed and adopted by the DW1.

This now takes me to the objection raised by the learned counsel to the Defendants against the admissibility of Exhibits HO1A, HO7, HO8, HO9 and HO10. His grouse against Exhibit HO1A is that it was not certified in compliance with Section 84(2) of the Evidence Act, 2011. The exhibit is a statement of account which was issued by defunct Cooperative Bank sometimes in 1994. The case of **KUBOR Vs DICKSON (2013) 4 NWLR (PT.1345) 557** was referred to. The

argument of learned counsel is based on the fact that the document is computer generated. Counsel also cited the case of **OMISORE Vs AREGBESOLA (2015) NWLR (PT. 1346) 557**.

In response to the attack on Exhibit HO1A, the learned counsel to the Plaintiffs submitted that the attack was borne out of ignorance. He submitted that as at 1994, when the exhibit was issued the Bank was operating manually and not computer wise. That there is nothing to suggest that the exhibit was computer generated. Learned counsel also cited some authorities to demonstrate the exclusion of Section 84(2) of the Evidence Act from the facts of this case.

Now, I have carefully perused Exhibit HO1A in the light of the mandatory provision of Section 84(2) of the Evidence Act, 2011. The exhibit was pleaded at paragraph 8 of the Amended Statement of Claim as follows:

> **"The Plaintiffs aver that the said payment made is clearly indicated in the Bank's Statement of Account No: 102778 published on the 16th day of November, 1994 whose holder is Dr. Adesanya Moibi Folarin (the deceased long time friend), and having the Federal Ministry of Works and Housing, Lagos as beneficiary. The Plaintiffs have donated a Power of Attorney**

dated 12th June, 2017 appointing Dr. Adesanya Moibi Folari to represent them in this suit. The Plaintiffs hereby plead the said statement of account and the Power of Attorney as same shall be relied on at the trial of this case.

My take on this exhibit is that the attack by the defence counsel is not well founded. I have carefully scrutinized Exhibit HO1A which is the statement of account of the PW1 with the defunct Co-operative Bank Limited, covering the period between 30th September, 1994 and 31st October, 1994. It was clearly stated on the face of the exhibit as follows:

"Date printed: - 16/11/1994:"

This is quite germane to the consideration of the attack on the exhibit in view of the fact that as at the date of issuance of the exhibit, there was no obligation on the Plaintiffs to comply with the provision of Section 84(2) of the Evidence Act which came into force in 2011. A critical look at the exhibit will also reveal that it was manually generated and not produced from any computer. This point is a matter of judicial notice because it is a notorious fact that computed generated documents do not bear the nature and character of manually generated documents. It is also instructive to note, that as at 10/08/2010 when one **Shola Adio-Moses** of Skye

Bank Plc authenticated the disputed exhibit, there was no obligation under Section 84(2) of the Evidence Act to file any certificate of compliance as the law to that effect was not yet enacted. For the records and by way of judicial notice, Co-operative Bank Limited was acquired by Skye Bank Plc which is currently known as Polaris Bank.

It would appeared to me that parties did not advert their mind to the obvious fact that Exhibit HO1A was produced and authenticated long before the enactment into law of Section 84 of the Evidence Act, 2011. This inadvertence has no doubt misled the learned counsel to the Defendants in dissipating so much energy in attacking the admissibility of the said exhibit.

Let me also state for the purpose of argument that even if Section 84(2) of the Evidence Act, 2011 was in force as at 1994 when exhibit HO1A was produced, the law would not place any obligation on the Plaintiffs to produce a certificate of compliance under Section 84(2) of the Evidence Act for obvious reason. The Plaintiffs were not the authority who generated the exhibit and there is no way the law will impose a burden beyond their capacity on them. Even if Section 84 (2) of the Evidence Act, 2011 is to be applied to the disputed exhibit issued by the Co-operative Bank Limited in 1994, the Plaintiffs who simply tendered what the Bank gave them, cannot be put under an

obligation to file a certificate of compliance when they knew next to nothing about the computer (if any) of the Bank which issued the exhibit.

Assuming the Bank was a party to the action, then, the obligation to file a certificate becomes mandatory, where such statement of account is to be tendered by the Bank in support of their case. The reason being that the Bank is the proper authority to file the certificate of compliance contemplated under Section 84(2) of the Evidence Act, 2011. On this account, objection against admissibility of the document is overruled.

The next documents which were attacked in this preliminary exercise are Exhibits H07, H08", H09" and H10". The argument is whether they were properly certified in substantial compliance with the spirit of the Evidence Act, 2011. On this point, parties are agreed that the disputed exhibits are public documents. If that be the case, the only admissible secondary copies of the documents are certified true copies of same. See the case of **ARAKA Vs EGBUE (2003) 17 NWLR (PT. 848) 1** where Niki Tobi, JSC (of blessed memory) stated the Law thus:

> **"It is clear from the provision of Section 97(2)(c) that the only acceptable secondary evidence of a public document is a certified copy of the document. The**

Subsection has put the position precisely, concisely and beyond speculation or conjecture by the words "but no other kind of secondary evidence is admissible."

See also the case of **ABDULLAHI VS FRN (2016) 10 NWLR (PT. 1521) 480** ably cited by the learned counsel to the Defendants.

The question then is whether the certification on the face of the disputed exhibits satisfied the relevant stipulation under the Evidence Act. For ease of understanding, Section 104(1) of the Evidence Act, 2011 is framed as set out below:

"Every public officer having the custody of public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy of such document or part of it as the case may be."

Now Exhibit HO7 is the Certified True Copy of the will of the late **Otunba (Dr) Adebonojo.** It is from this exhibit that the Plaintiffs derived their powers as Executors of the Estate of the deceased/ testator. The primary contention of the learned counsel to the 1st and 2nd Defendants is that the officer who certified Exhibit HO7 being an employee of the Lagos State High Court is not competent to

do so. That under Section 104 of the Evidence Act, 2011 it is only a public officer having custody of a public document that is legally empowered to certify such document. I have considered this argument and I think learned counsel missed the point. If personnel of the Probate Registry of Lagos State High Court is not competent to certify a Will in their custody, I wonder who should certify the Will under reference! I have painstakingly perused the Will (i.e. Exhibit HO7) and I form the view that the certification is in order. The endorsement on the last page of the exhibit indicated that the photocopied exhibit was previously certified by the Probate Registry of the Lagos State High Court which has custody of the said will. The photocopy tendered as Exhibit HO7 was again re-certified in substantial compliance with the Evidence Act. The exhibit is therefore in order and I so hold.

However, the certification done by the Registrar of this Court with respect to Exhibits HO8 (Offer letter), H09 (acceptance letter) and HO10 (treasury receipt) are in a different class, as the ground for the certification is simply that the said exhibits are in custody of this Court. I have considered the submission of learned Counsel to the Plaintiffs on the admissibility of the disputed documents and it is my view that it's lacking in substance and unsustainable. What learned counsel to the Plaintiffs did was to approach the Registrar of this Court with photocopies of documents attached to his amended

statement of claim and requested for certification on the ground that the documents were in the Court's custody. Learned counsel probably forgot that what was in the custody of the Court is not a primary document. The Registrar of this Court was therefore wrong to have produced the purported certification. If indeed the Plaintiffs are truly interested in obtaining a certified true copy of the disputed exhibits, the proper authority to deal with the matter is the 2nd Defendant and not the Registrar of this Court.

I have also considered the argument of the learned counsel to the Plaintiffs that in the face of practical difficulties in obtaining a certified true copy of public document, the Court may admit uncertified secondary version. This submission does not impress me as there is nothing in the pleadings and evidence led by the Plaintiffs to suggest that any application for certification was made to the 1st and 2nd Defendants which was refused. If that is the case, the opinion expressed on that point of law by the learned author **S. T. Hon.** (**SAN)** in his book "**Law of Evidence in Nigeria**" cited by the learned counsel to the Plaintiffs would be unhelpful and I so hold.

At the end of the day, I hold that Exhibits HO8, HO9 and HO10 being secondary copies of public document were wrongly admitted as they were not certified in compliance with the provisions of the Evidence Act, 2011. To put it straight, the purported certification of

these documents is a nullity. The implication of tendering secondary copies of public documents without appropriate certification is grave. On this point, I refer to the case of **ARAKA VS EGBUE (supra)**.

When confronted with this type of scenario, the Court is empowered to expunge documents wrongly admitted as rightly submitted by the learned counsel to the 1st and 2nd Defendants. In **KUBOR AND ANOR VS DICKSON & ORS (2013) 4 NWLR (PT. 1345) 534** ONNOGHEN JSC stated thus:

> **"On the sub issue as to whether the Court has the power to expunge from its record evidence or documents earlier admitted without objection by counsel, it is settled law that the Courts can do that and has been doing that over the years."**

See also **NIPC LTD VS THOMSON ORGANISATION LTD (1966) I NMLR 99 at 104** where Lewis JSC stated the law as follows:

> **"It is of course the duty of counsel to object to inadmissible evidence and the duty of the Court anyway to refuse to admit inadmissible but if notwithstanding this, evidence is still through oversight or otherwise admitted then it is the duty of**

the Court to when it comes to give Judgment treat the inadmissible evidence as if it had never been admitted."

Accordingly, Exhibits HO8, HO9 and H10 are hereby expunged from the records. The conclusion of this preliminary exercise now takes me to the substantive issue.

SUBSTANTIVE ISSUE

As a take off point, I need to remind the Plaintiffs of the well established position of the law that he who alleges must proof. The law is clear that the plaintiff has the burden to lead credible evidence to determine his entitlement to the reliefs sought. On this point of law, see Section 131 to 133 of the Evidence Act, 2011 and the case of **UNION BANK PLC Vs RAVIH ABDUL & CO. LTD (2018) LPELR-46333 (SC)** where Bage, JSC succinctly re-echoed the Law as follows:

"The law is that the burden of proof is on the party who would lose if no evidence is adduced."

In other words, it is now trite law even without citing any authority that the Plaintiffs have the burden to proof their case against the Defendants.

The principal claim before the Court is for an Order of specific performance. To succeed in their case, the Plaintiffs must prove the following:

(a) That the 1st and/or the 2nd Defendants made an offer of sale of the disputed property to the late Otunba (Dr) Adebonojo.

(b) That the offer was accepted in accordance with the terms and condition set out therein.

(c) That the 1st and 2nd Defendants without any legal justification neglected or refused to conclude the transaction.

The pleadings filed by the Plaintiffs and evidence led in support is to the effect that the Defendants made an offer of sale of a 3-Bedroom prototype house at Karu to the late Otunbo Adebonojo sometimes in 1994 for a consideration of ₦600,000.00 (Six Hundred Thousand Naira) only. That the offer was accepted with a Cooperative Bank Limited draft of 10/10/1994 in the sum of ₦600,000.00 to cover the purchase price. Exhibit HO1 is a photocopy of the draft while Exhibit HO1A is the Bank statement showing a debit of ₦600,000.00 against the account. That the 2nd Defendant got value in the sum stated on the Bank draft, but failed to make any allocation to the Plaintiff. That after the transition of Otunba Adebonojo to the great beyond his

estate made several efforts to secure the allocation in dispute but the Defendants refused to allocate the property.

In joining issues with the Plaintiffs, the 1st and 2nd Defendants pleaded at paragraph 4 of their joint amended statement of defence thus:

> **"The 1st and 2nd Defendants denies paragraphs 5, 6, 7 and 8 of the amended statement of claim and puts the Plaintiffs to the strictest proof thereof."**

Having denied making an offer of the disputed property to the Plaintiffs, the law places an obligation on the Plaintiffs to prove the existence of the offer. I have no such evidence before me as Exhibit HO8 (Letter of Offer), Exhibit HO9 (acceptance of the offer) and Exhibit HO10 (photocopy of treasury receipt) which were earlier admitted have all been expunged.

However, from the pleadings and evidence led by the Defendants, it is clear that the Defendants demanded to see evidence of Plaintiffs' allocation and payment. These documents were admittedly supplied to them and according to the Defendants their investigation revealed that they have no record of those documents, and that those documents were not authentic. What that means to me is that the Defendants have admitted seeing photocopies of these documents, notwithstanding that the documents were excluded in

this trial by the Rule of admissibility. What the Defendants have alleged is the authenticity of the documents. In other words, the Defendants are contending that the documents in question are forged. That being the case, the Law is trite that he who asserts must prove. Therefore, the Law places onus on the Defendants to prove that the documents supplied to them by the Plaintiffs were not authentic. This onus has not been discharged by the Defendants.

The Law is settled that an allegation of forgery as in this case implies commission of a crime. Under Section 135(1) of the Evidence Act, 2011 it is provided as follows:

> **"If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt."**

See the case of **EXAMINER-OSIOBE & ORS V. GWEDE & ORS (2019) LPELR-47815 (CA)** where the Court of Appeal held as follows:

> **"The law as settled by the decisions of this Court and the Supreme Court, based on the provisions of the Evidence Act, is that the standard of proof in a civil case or claim is proof on the balance of probabilities based on preponderance of evidence. <u>Where, however, an allegation of crime is made in a civil case, that criminal allegation</u>**

must be proved beyond reasonable doubt. See Section 138 (1) of the Evidence Act, now Section 135 (1) of the Evidence Act, 2011 (as amended) and the cases of MOGAJI VS ODOFIN (1978) 4 SC 91; OMOBORIOWO VS AJASIN (1984) 1 SCNLR 108; BUHARI VS OBASANJO (2003) 17 NWLR (PT. 850) 423." (underlining supplied for emphasis)

To discharge this onus, the Defendants are under obligation to disclose the nature of investigation they did and to lead evidence to show that at the time relevant to this transaction, they had treasury receipts and letter headed papers which are the genuine ones and which are different from the one released to them by the Plaintiffs. It is not enough to merely say that they conducted investigation without explaining the type of investigation they conducted. The Defendants in my view are manifestly dishonest in their dealings with the Plaintiffs.

Part of evidence led by the Plaintiffs was the tendering of Exhibits HO1 (Bank draft) and HO1A (statement of account) obtained from the defunct Cooperative Bank Limited which shows that the Plaintiffs made payment of N600,000.00 (Six Hundred Thousand Naira) only to the 1st and 2nd Defendants. The said statement of account shows that the money was transferred to the 1st and 2nd

Defendant as the account was debited. To effectively deny receipt of this amount, the 1st and 2nd Defendants are under obligation to tender their statement of account covering the period of this payment. They did not do this. Surprising they tried to misled the Court that they conducted investigation and found Plaintiff's documents to be forged when in truth their witness denied the purported investigation! In fact, the DW1 clearly admitted inter alia under cross-examination as follows:

> **"It is possible the document (Exhibit HO10) was forged. If a party forges a document he has committed a crime. <u>The Defendants did not investigate the alleged forgery</u>." (Underlining supplied for emphasis).**

The admission of the defence witness that no investigation was conducted to determine the authenticity of the documents released to them by the Plaintiff, clearly contradicts the position of the Defendants. For avoidance of doubt, the Defendants pleaded at paragraph 16 of their Joint Statement of Defence thus:

> **"The 1st and 2nd Defendants denies paragraph 19 of the Amended Statement of Claim and in response state that their investigation of the purported receipt revealed that it was not authentic and the alleged Letter of Offer dated 7th June, 1994, and Acceptance Letter dated 6th**

October, 1994, payment of N600,000 dated 10th October, 1994 are not in the record of the 1st and 2nd Defendant."

The pleadings of the 1st and 2nd Defendants and the evidence of the DW1 is undoubtedly contradictory. The conduct of the 1st and 2nd Defendants in this case to me smacks of an attempt to deny the Plaintiffs of their entitlement to the house which they paid for. I am not impressed with the way the 1st and 2nd Defendants have gone about this matter, being Government Agencies that must live by credibility and transparency. The defence put forward by the 1st and 2nd Defendant is in my view purely mischievous and unacceptable.

Civil cases are decided on the preponderance of evidence. I have weighed the evidence led on both side and it appears to me that the Plaintiffs have discharged the onus of proof to entitle them to the relief sought in the first leg of their claim. In reaching this conclusion, I am rightly guided by the statement of Oputa J. (as he then was) in the case of **THE STATE Vs THEODORE ONYECHI CHUKWURAH (1966 -1979) Vol. 1** reported in Oputa LR:

> **"In deciding which side to believe, the Court usually has to decide which accounts considered in the light of all the surrounding circumstances bears the impress of probability for the stamp of probability is also generally the stamp of truth."**

The evidence led by the Plaintiffs appears more credible to the account given on behalf of the Defendants. I therefore prefer it to the evidence of the Defendants. The first relief sought is therefore proved.

Be that as it may I reckon with the fact that this transaction took place in 1994 about 26 years ago. There is no doubt that all the houses built by the 2nd Defendant at Karu Federal Housing Estate during the period have been fully allocated and sold out. It would then amount to a fruitless exercise to make an Order of specific performance as the Court does not command the doing of an impossibility. Put in another way, the Court does not make an Order in vain.

In breach of contract cases, the remedies usually available to the Claimant are: (a) to ask for specific performance or (b) avoid the contract and ask for damages.

Having held that the Court cannot Order specific performance in this case, the option available is the consideration of the alternative claim for award of damages.

The principle for the award of damages in contract cases is to put the Plaintiffs to the position he would have been if the breach did not occur, that is to say, *restitutio in integrum*. In this case, the amount paid by the Plaintiffs is ₦600,000.00 (Six Hundred

Thousand Naira) only and that is the amount which is claimed in the alternative relief. If the substantive relief does not succeed, the Law is that the Court can consider the alternative relief. I am satisfied that the claim for the refund of N600,000.00 (Six Hundred Thousand Naira) only by the 1st and 2nd Defendants is in order, and it is hereby granted. The reason is simply that if a party collects money for which he cannot offer the promised consideration, it would be inequitable to keep the money and consideration.

See **UBA PLC VS AWMAR PROPERTIES LTD (2018) 10 NWLR (PT. 1626) 64 at 93 to 94** where the Supreme Court held most admirably thus:

> **"It must be made clear that one cannot make a proper sale of immovable property which he knows is encumbered, but fails to disclose same to the buyer. This kind of behavior is fraudulent and the seller cannot be allowed to keep the money he collected from the sale. I agree with the Court below that the transfer of the property from the seller to the buyer in a document cannot be the end of the sale. The seller must take steps to put the buyer into physical possession, free from all encumbrance. Where the seller fails to put the buyer in physical and peaceable**

possession of the property, the buyer is entitled to sue for damages plus restitution of the money paid to the seller with interest."

The second relief in the alternative claim is for 10% interest from the date payment was made till institution of this action. On this claim, the point must be made that the relationship between the Plaintiffs and the 1st and 2nd Defendants is commercial in nature. Having retained the Plaintiffs' money for over 25 years in the course of business transaction, the Defendants are by custom entitled to pay interest on the sum from the day the money was paid until 2011 when this action was instituted. See also **UBA PLC Vs AWMAR PROPERTIES LTD (Supra).** This relief has merit and it is granted.

The 3rd relief sought is for sum of ₦50,000,000.00 (Fifty Million Naira) being damages for inconveniences, difficulties and hardships caused the Plaintiffs for sixteen years of fruitless search for the said allocation and flagrant breach of contract. The Law is that in breach of contract cases there is nothing like award of general damages beyond those damages that would put the Claimant to restitution. Secondly, there is no pleading and evidence led in respect of difficulties and hardships suffered by the Plaintiffs in respect of this failed transaction. The Law is that parties are bound by their pleadings and that any claim sought that is not backed up by

pleadings does not amount to anything. On this point, see the case of **ISHOLA Vs UBN (2005) ALL FWLR (PT. 258) 1202.**

Finally, granting this relief would amount to double compensation since interest of 10% on the price for the house has been granted. The result is that this head of claim is without merit and it is refused and dismissed.

The next claim is for 10% interest on the Judgment sum of ₦600,000.00 (Six Hundred Thousand Naira) only from the date of Judgment till the same is liquidated. This type of interest is otherwise known as Court interest. Order 39(7) of the Rules this Court empowers me to award this interest in deserving circumstances. No evidence is required to be led in respect of this, as the Court can even award it where it is not claim. I have considered the circumstances of this matter and taking into account the length of time taken for the Plaintiffs to pursue this matter, I find merit in this claim and it is granted.

The Plaintiffs last claim the sum of ₦1,500,000.00 (One Million, Five Hundred Thousand Naira) only being cost of this action. I have carefully scanned the 26–paragraph Amended Statement Claim filed by the Plaintiffs and nowhere was it averred that cost in the sum of ₦1,500,000.00 (One Million, Five Hundred Thousand Naira) Only

was incurred by the Plaintiffs. If that be the case, the claim is not well founded and liable to be and is hereby refused and dismissed.

At the end of the day, the Plaintiffs have emerged victorious in this trial with respect to their alternative reliefs except the claim for general damages and cost. For avoidance of doubt, I make the following Orders:

(a) That the entire claims set out in the main relief of the Plaintiffs are hereby refused and dismissed.

(b) That relief (1) in the alternative claim which is for refund of the sum of ₦600,000.00 (Six Hundred Thousand Naira) only being money paid by the Plaintiffs to the 2nd Defendant for the failed consideration is granted. The 1st and 2nd Defendants are hereby directed to refund this sum to the Plaintiffs forthwith.

(c) That the claim for Pre-Judgment interest of 10% on the Judgment sum is granted and it shall commence from October, 1994 till November, 2011 when this action was commenced.

(d) That the claim for general damages in the sum of ₦50,000,000.00 (Fifty Million Naira) is refused and dismissed.

(e) That I award 10% Post-Judgment interest on the Judgment sum till full liquidation of the entire Judgment sum.

(f) That the claim for cost in the sum of ₦1,500,000.00 (One Million, Five Hundred Thousand Naira) is refused and dismissed.

SIGNED
HON. JUSTICE H. B. YUSUF
(PRESIDING JUDGE)
12/10/2020

Appearance

M.D. Owolabi, Esq……..For the Plaintiffs

B.G. Abbah, Esq……For the Defendants
(with Mohammed Umar, Esq)

SIGNED
HON. JUSTICE H. B. YUSUF
(PRESIDING JUDGE)
12/10/2020