

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT MAITAMA – ABUJA**

BEFORE: HIS LORDSHIP HON. JUSTICE S.U. BATURE

COURT CLERKS: JAMILA OMEKE & ORS

COURT NUMBER: HIGH COURT NO. 32

CASE NUMBER: SUIT NO. FCT/HC/CV/643/2018

DATE: 4TH DECEMBER, 2020

1. MR. CHARLES .C. ABANA.....CLAIMANTS
2. WEMA BANK PLC

AND

1. ADENIYI ADEBAYO
2. XIRANT LIMITED.....DEFENDANTS

JUDGMENT

This suit was initiated via Originating Summons dated 19th of December, 2018. Taken out by J. K. Mbanefo Ikewegbue, Esq of Pelican attorneys, solicitors to the Claimants. The claimants prayed this Honourable Court to determine the following questions:

1. Whether under and by virtue of the Deed of tripartite legal mortgage between Xirant Limited and Adeniyi Adebayo and Wema Bank Plc, and Wema Bank Plc's Deed of Appointment of Receiver, Wema Bank Plc validily appointed Mr. Charles C. Abana as Receiver/Manager of the property of Adeniyi Adebayo at Plot No. 2714 Asokoro District, Abuja.
2. Whether under and by virtue of his appointment as Receiver/Manager of the property of Adeniyi Adebayo at Plot. 2714 Asokoro District, Abuja, Mr. Charles C. Abana can exercise all the powers of the receiver and manger set out in the Deed of Tripartite Legal Mortgage between Xirant Limited and Adeniyi Adebayo and Wema Bank Plc, including the power to sell Plot. 2714 Asokoro District, Abuja by public auction or private treaty, let surrender or accept surrenders, grant licenses or otherwise dispose of or deal with any part of the property for such consideration and

on such terms and conditions as he may think fit and apply all money received in the exercise of the debt of N81, 064, 004.40 (as at 19/06/2018) secured by the said Legal Mortgage and the discharge of his remuneration and expenses.

Also Claimants prayed the Court for the following Declaratory Orders:

1. A Declaration that under and by virtue of the Deed of Tripartite Legal Mortgage between Xirant Limited and Adeniyi Adebayo and Wema Bank Plc, and Wema Bank Plc's Deed of Appointment of Receiver, Wema Bank Plc validly appointed Mr. Charles C. Abana as Receiver/Manager of the property of Adeniyi Adebayo at Plot. 2714 Asokoro District, Abuja.
2. A declaration that under and by virtue of his appointment as Receiver/Manager of the property of Adeniyi Adebayo at Plot. 2714 Asokoro District, Abuja, Mr. Charles C. Abana can exercise all the powers of the receiver and manager set out in the Deed of Tripartite Legal Mortgage between Xirant Limited and Adeniyi Adebayo and Wema Bank Plc including the power to sell Plot. 2714 Asokoro District, Abuja by public auction or private treaty, let surrender or accept surrenders, grant licenses or otherwise dispose of or deal with any part of the property for such consideration and on such terms and consideration and as such terms and conditions as he may think fit and apply for all money received in the exercise of the powers conferred by the said Legal Mortgage towards the satisfaction of the debt of the N81, 064, 044.40 (as at 19/06/2018) secured by the said Legal Mortgage and the discharge of his remuneration and expenses.
- (3). AN ORDER that on or before the next ensuing day after the Judgment in this suit, the Defendants shall give the 1st Claimant possession of the land described and comprised in the aforesaid Tripartite Legal Mortgage between Xirant Limited and Adeniyi Adebayo and Wema Bank Plc, being Plot. 2714, Cadastral Zone A04, Asokoro District, Federal Capital Territory, Abuja.
4. AN ORDER that the Defendants paying to the 2nd Claimant the sum of N81, 064, 044.40 (as at 19/06/2018) and all additional interest remaining due to the 2nd Claimant upon the security of the said mortgage, the 1st Claimant (subject and without prejudice to the exercise of any power for the time being vested in him) shall re-deliver to the 2nd Defendant

possession of the property subject of the said mortgage and release to the 1st Defendant the security constituted by him.

5. AN ORDER mandating Adeniyi Adebayo and any person carrying out construction work on Plot. 2714 Asokoro District, Abuja, to immediately render full account to Mr. Charles C. Abana in respect of all ongoing and future construction works on the property and also handover all documents, plans, permits and approvals in respect of the said construction works to Mr. Charles C. Abana.
6. AN ORDER directing Adeniyi Adebayo to forthwith pay all existing and future tenement rates, rent rates, taxes, duties, charges, assessments, impositions and outgoings whatsoever whether imposed by agreement or statute.
7. AN ORDER that all the parties shall be at liberty to apply to the Court as may be advised.

The Originating Summons is supported by a 11 paragraph affidavit deposed to by a Charles Abana, the Claimant/Applicant also attached annexures marked as Exhibit A, A1, B, C, E, F1 respectively.

Also filed in support is a Written Address dated 14th day of December, 2018.

In the said Written Address Counsel for the Claimant/Applicant formulated 2 issues for determination:

1. Whether under and by virtue of Deed of Tripartite Legal Mortgage between Xirant Limited and Adeniyi Adebayo and Wema Bank Plc's Deed of Appointment of Receiver, Wema Bank Plc validly appointed Mr. Charles Abana as Receiver/Manager of the property of Adeniyi Adebayo at Plot No. 2714 Asokoro District, Abuja and whether the said receiver can exercise all the powers of the receiver and manager set out in the Deed of Tripartite Legal Mortgage.
2. Whether your Lordship has the power to make the consequential orders prayed in the Originating Summons.

Counsel to the Claimant/Applicant argued the two issues independently.

In the averments, Counsel stated that the effect of Clauses 1.01,1.02 of Exhibit C is that the Defendants had a positive duty to repay principle with interest on

demand which is found. Also Clauses 1.01, 1.02 and 2.01 of Exhibit B all monies secured under the said mortgage shall become due and payable on the occurrence of any of the events of default in sub-clauses 1.02 a,b,c,d,e,f,g,h,i,j,k, if Exhibit C one of which is any failure by the 2nd Defendant to pay on the due date any money or to discharge any obligation or liability payable by him/her from time to time or to comply with any covenant of the mortgage. By Clause 6.05 of Exhibit (the mortgage instrument) the 2nd Claimant has the power to appoint a receiver over the property of 1st Defendant at Plot No. 2714 Asokoro District, Abuja.

Counsel further averred that the affidavit in support of this Originating Summons clearly shows that the 2nd Claimant has made demands to the Defendants to honour their obligation to repay the sum secured by the mortgage and they failed to do so. The Claimant averred further that it was after the Defendants failed to honour their obligations that the 2nd Claimant appointed the 1st Claimant as receiver over the property of the 1st Defendant in exercise of its power under Clause 6.05 of the mortgage instrument.

On issue two, Counsel submitted that the mortgage instrument (Exhibit C) leaves no doubt as to the powers of the receiver appointed thereunder. Counsel directed the Courts attention to sub-clause (a) –(j) of Clause 6.05 of Exhibit C which gives the receiver various powers including the power to sell Plot No. 2714 Asokoro District, Abuja by public auction or private treaty, let surrender or accept surrenders, grant licenses or otherwise dispose of or deal with any part of the property for such consideration and on such terms and conditions as he may think fit and apply all money received in the exercise of the powers conferred by the said legal Mortgage towards the satisfaction of the debt of N81, 064, 044.40 secured by the said Legal Mortgage and the discharge of his remuneration and expenses.

Counsel concluded by stating that all the declarations and orders which the Claimant prayed for are aimed at giving effect to the terms of the mortgage instrument particularly, sub-clauses (a) - (j) of Clause 6.05 of the mortgage instrument. And also that this Court has the power to make the declarations and orders sought on the face of the Originating Summons. Counsel relied on P.T.F vs W.P.C. LTD (2017) 14 NWLR (Pt. 1055) 478 at 495.

I have carefully gone through the Originating Summons, the affidavit and Written Address in support, in a bid to determine the first issue raised by the Counsel for the Claimant/Applicant, I will begin by stating briefly what a formal contract entails.

A contract is a legally binding agreement between two or more persons in which rights are acquired by one party in return for acts or forbearances of the other party. For there to be an enforceable contract, there must co-exist a precise offer, an unqualified acceptance, a legal consideration and intent to create legal relation. In other words, there must be the mutuality of purpose and intention between the contracting parties. In legal province, that translates to the meeting of the minds of the contracting parties, or consensus ad idem, on the terms of the agreement. In the view of the law, an offer, a definite indication by an offeror to an offeree that he is willing to conclude a contract on his proposed terms if accepted by the other, may be verbal, written or implied from the conduct of the offeror. Where an offeree does not accept an offer, then it mutates to a counter offer- a statement by an offeree that has the legal effect of rejecting an offer and proposing a fresh offer to an offeror.... see JOHN DAVIDS CONSTRUCTION COMPANY LIMITED v RIACUS COMPANY LIMITED & ANOR (2019) LPELR- 47588 (CA).

The legal consequence of the above is that parties will be bound by whatever is written in their contract, so far as to the Contract is duly executed and within the bounds of law. To further buttress this point I will align myself with the submissions of my Lord OLUFUNOLA OYELOLA ADEKEYE, J.S.C. at (P. 39, paras C - G); UBN PLC v AJABULE & ANOR (2011) LPELR – 8239 (SC) held:

“In the law of contract, the law is that a written contract agreement entered into by parties is binding on them. Where there is any disagreement between the parties to such written agreement on any particular point, the only reliable evidence to resolve the claim is the written contract of the parties. The reason being that where the intention of the parties to a contract are clearly expressed in a document the Court cannot go outside the document in search of other document not forming part of the intention of the parties....”

In the instant case, it is evident from the records of Court that a contract has been entered into by means of a Tripartite Legal Mortgage between the Claimant/Applicant and the Defendants which is marked Exhibit C of the Affidavit supporting the Originating Summons, such a contract confers certain obligations for all parties to undertake, failure of which will lead the other party to take necessary steps to right the wrong. In the Claimants/Applicants' Affidavit averments, particularly in paragraph 7 where they mention of the Defendants breach of covenants in the Deed. The Claimant/Applicant also wrote letters to the Defendants requesting the Defendants to honour their obligation as principal obligator and guarantor, copies of said letters were

attached and marked as Exhibit SA1 and E. In addition the Deed executed by the parties particularly 5 and 6 empowers the Claimant/Applicant to appoint a Receiver/Manager in the event of a failure by the Defendants to honour any of their obligations. The appointment of the Receiver/Manager in the circumstance of the instant case and owing to the fact that parties are bound by their written agreements is valid I so hold.

Furthermore, it has been decided in a plethora of cases that the reason or object sought by such appointment of a Receiver/Manager is therefore the safeguarding of property for the benefit of those entitled to it, or to secure funds. See UWAKWE & ORS v. ODOGWU & ORS (1989) LPELR – 3446 (SC).

In the instant case the Receiver/Manager is at liberty to and can exercise all the powers of the receiver and Manager set out in the Deed of Tripartite Legal Mortgage. I so hold.

On the second issue, I will begin by stating that this Court is empowered by the statute creating in the 1999 Constitution of the Federal Republic of Nigeria at Sections 255 and 257 which confers jurisdiction on this Court. Having said that, it is evident from the records of the Court that the Claimant/Applicant has filed a suit against the Defendants who have been duly served with the processes filed. The Defendants have not entered any appearance nor given a response to any of the averments levied against them, or bring any form of defence and the time prescribed by this Court for the Defendants to respond has elapsed, neither is there an application before the Court to suggest their intention to seek an extension. At this juncture it is trite that rules of Court are made to be followed, they regulate matters in Court and help parties to present their case within a procedure made for the purpose of a fair and quick trial. It is the strict compliance with these rules of Court that makes for quicker administration of justice. See INDEPENDENT ELECTORAL COMMISSION V. ASSOCIATION OF SENIOR CIVIL SERVANTS OF NIGERIA & ANOR (2007) LPELR – 8882 (CA).

Even at that, the Court still took steps to enable the Defendant exercise their right to be heard but to no avail. I should emphasise that this Court cannot continue to wait for the Defendants to wake up from their slumber at the detriment of the other party seeking judicial redress, after all justice is a two-way affair. To further buttress this point, I wish to align myself with the dictum of MARY UKAEGO PETER-ODILI, J.C.A (as she then was) at (PP.11-12, paras D - A).

In INDEPENDENT ELECTORAL COMMISSION V. ASSOCIATION OF SENIOR CIVIL SERVANTS OF NIGERIA & ANOR held: (supra)

“A trial Judge can indulge a party in the judicial process for sometime but not for fall times. A trial Judge has the right to withdraw his indulgence at the point the fair hearing principle will be compromised, compounded or will not really be fair as it affects the opposing party who equally yearns for it in the judicial process. At that stage, the party who is not up and doing, to take advantage of the fair hearing principles, put at his door steps by the trial Judge, cannot complain that he was denied fair hearing...”

Similarly, the Supreme Court in Edet Edem Akpan V. The State (1986) 5 SC 186 at 214 – 215; per Oputa, JSC *“the Supreme Court had held that once the Court be it appellate or first instance has discharged its primary function of creating the necessary conducive atmosphere or environment for fair hearing as in this case, a party who out of negligence, indolence and/or share refusal to take advantage of such environment or atmosphere to he heard; he cannot turn round to castigate the Court for his failure....”*

To this end, the Defendants having not contested the Affidavit averments, it is therefore settled law that an averment that is not contradicted is deemed admitted. IBRAHIM SHATA BDLIYA, J.S.A MRS. JULIE MAKAM LEVI V. ADA ADKWU & ORS (2018) LPELR – 44261 (CA) *“The law is trite, where depositions in an affidavit are not denied, challenged nor controverted by the opposing party by further affidavit, same would be deemed admitted, and the Court can properly rely on same in taking a decision on the dispute between the parties....”*

In the interest of justice, I hereby resolve the two issues in favour of the Claimant/Applicant against the Defendants and consequently grant the prayers as contained in the Originating Summons and enter judgment in favour of the Claimant/Applicant as prayed.

Signed

Hon. JUSTICE SAMIRAH UMAR BATURE
4/12/2020