IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA

THIS MONDAY, THE 1ST DAY OF MARCH, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/2846/2017

BETWEEN:

1. AYOMANS INVESTMENT LIMITED

2. ANAYO ODO } **..... PLAINTIFFS**

AND

ACCESS BANK PLC ..... DEFENDANT

JUDGMENT

By an Amended Writ of Summons and Statement of Claim dated 30th October, 2020 and filed same date in the Court's Registry, the Plaintiffs claims against the Defendant as follows:

a. **A Declaration that the purported sale, by the Defendant of the 2nd Plaintiff's Shop No. 4, Block A22, Section A, at Wuse Market, as guarantor to the 1st Plaintiff's loan taken from the Defendant, without Notice to the Plaintiffs and/or obtaining an Order of Court to do so, is unlawful and inequitable.**

b. A Declaration that the purported sale, by the Defendant, of the 2nd Plaintiff's Shop No. 4, Block A22, Section A, at Wuse Market, as guarantor to the 1st Plaintiff's loan taken from the Defendant, without Notice to the Plaintiffs and/or obtaining an Order of Court to do so, is null, void and of no effect whatsoever.

c. An Order of the Honourable Court setting aside the purported sale, by the Defendant, of the 2nd Plaintiff's Shop No. 4, Block A22, Section A, at Wuse Market, as guarantor to the 1st Plaintiff's loan taken from the Defendant, without Notice to the Plaintiffs and/or obtaining an Order of Court to do so.

d. An Order of the Honourable Court directing the Defendant to accept Wuse Market Traders Association's Cheque of N1, 300, 000.00 (One Million Three Hundred Thousand Naira) only drawn in favour of the 1st Plaintiff, as full and final repayment of the 1st Plaintiff's credit facility and release forthwith the 2nd Plaintiff's original LETTER OF OFFER and DEED OF SUB-LEASE, respectively, in respect of Shop No. 4, Block A22, Section A, at Wuse Market.

e. Special Damages of N2, 000, 000 (Two Million Naira) only for the embarrassment the Defendant has caused the Plaintiffs.

f. General Damages of N1, 000, 000.00 (One Million Naira) only.

g. 21% interest on the Judgment sum from the date of Judgment till the entire sum is liquidated.

h. An Order on the Defendant to pay the Plaintiff the sum of N1, 000, 000.00 (One Million Naira) only being the cost of this suit.

The Defendant filed an Amended Statement of Defence dated 18th February, 2019 and filed on 19th February, 2019. The Plaintiffs filed an Amended Reply to the Amended Statement of Defence dated 30th October, 2020 and filed same date.

Hearing then commenced. In proof of their case, the plaintiffs called two (2) witnesses. **Mr. Anayo Odo**, the 2nd plaintiff and Managing Director of 1st Claimant testified as **PW1**. He deposed to two (2) witness depositions dated 13th October, 2017 and 11th December, 2017 which he adopted at the hearing. He tendered in evidence the following documents:

1. Letter of Offer of Credit Facility dated 17th December, 2015 to the Managing Director Ayonans Investment in the sum of N1, 300, 000 (One Million Three Hundred Thousand Naira only) was admitted as **Exhibit P1.**

2. Letter by the law firm of R.C. Ojiaku & Co. dated 5th September, 2017 was admitted as **Exhibit P2.**

3. Letter of Offer by Abuja Investment and Property Development Company Ltd dated 11th December, 2006 to Anayo Odo was admitted as **Exhibit P3**.

4. Copy of Deed of sub-lease of shop between Abuja Investment Company Ltd (AICL) and Anayo Odo was admitted as **Exhibit P4.**

5. Letter by the law firm of J.C. Alum and Associates to the Branch Manager Diamond Bank Plc, Wuse Zone 4, Abuja – FCT dated 21st April, 2017 was admitted as **Exhibit P5.**

6. Letter by the law firm Sinai Solicitors dated 2nd August, 2017 to the Branch Manager Diamond Bank Plc Wuse Zone 4, was admitted as **Exhibit P6.**

PW1 was then cross-examined by counsel to the defendant. **Mr. Okorie Ikechukwu Raphael** then testified as **PW2**. He deposed to a witness statement on oath on 13th October, 2017 which he adopted at the hearing. He tendered in evidence the following documents to wit:

1. An orange stick-up paper which has written on it, "Ayonans Investment Ltd = 001921940" was admitted as **Exhibit P7.**

2. Copy of letter by Wuse Market Traders Association (WUMATA) to the Branch Manager, Diamond Bank Plc, Wuse Zone 4 together with a Diamond Bank Cheque dated 23rd August, 2017 were admitted as **Exhibits P8a and P8b.**

3. Letter by Diamond Bank dated 24th August, 2017 to the Chairman Wuse Market Traders Association was admitted as **Exhibit P9**.

PW2 was then cross-examined by counsel to the defendant and in the process his specimen signature which he signed on a white piece of paper was admitted as **Exhibit P10.**

With the evidence of PW2, the plaintiffs closed their case and the matter was adjourned for defence. With the agreement of counsel on both sides of the aisle, the matter was adjourned to 11th October, 2018 for defence and continuation of hearing.

On the Record, learned counsel for the defendant only further appeared once in the proceedings and for unexplained reasons simply abandoned the case despite service of hearing notices all through the course of this proceedings. The defendant similarly never sent a representative to court. It is strange that counsel qua advocate would be instructed to defend an action, he will proceed to settle pleadings and cross-examine plaintiffs witnesses and then for no apparent reason(s) simply abandon the case. The point must be made clear that under the Rules of Court, counsel has no liberty to exercise when it comes to the prosecution or defence of a case filed except of course he exercises his right to discontinue his appearance and he is so allowed. **Order 55 Rule 1 of the Rules** makes this abundantly clear thus:

"Every legal practitioner who is engaged in any cause or matter is bound to conduct it on behalf of the Claimant or Defendant, by or for whom he is engaged until final Judgment, unless allowed for any good reason to withdraw."

The defendant that obviously instructed counsel to defend the action cannot be excused for the indifference exhibited in this case by them. The rather easy and convenient excuse to always blame counsel for want of diligence to prosecute or

defend a matter can no longer be used in our jurisprudence as a cover for unserious litigants. Litigants must show or exhibit heightened levels of interest when they instruct lawyers to file or defend cases on their behalf.

In **Kano Textile Printers V Gloede & Hoff Nig. Ltd (2002) 2 NWLR (pt.751) 420 at 459,** the Court of Appeal per Salami, J.C.A (as he then was) stated thus:

"A litigant has a duty to check on his counsel if necessary steps are being taken in a case; if he failed to do so, he is as guilty or his counsel and is not entitled to any indulgence."

In the case of **Chief Nicholas Banna V Telepower (Nig) Ltd (2006) SC 407/2001** delivered on 7th July, 2006, the Supreme Court held per Oguntade JSC as follows:

"It is needful that it be stressed that a plaintiff who is not ready to pursue his suit with diligence upon which the court must insist has no business bringing such case to court. Counsel and parties alike must bear in mind that the time of the court is valuable and must be apportioned between the different cases requiring attention. It is the duty of the court to proceed with the hearing of the cases before it expeditiously. The courts in the land must exact from parties and counsel as much diligence in the prosecution of their eases as would enable the court consign the incidence of congestion in our courts to history."

In his own contribution, Niki Tobi JSC (of blessed memory) stated thus:

"…A plaintiff has not only a right to file on action in court to redress a wrong done him by a defendant, he also has a duty to prosecute the matter to conclusion within the rules of court. Of course, the duty is not mandatory, compulsory or sacrosanct, as he can decide not to prosecute. A plaintiff who files an action in court and exhibits some indolence and nonchalance has himself to blame. After all, he brought the defendant to court and if he decides not to pursue the case diligently, the court has no option than to either strike out or dismiss the matter, depending on the enabling rules of court."

The bottom line is that diligence in the prosecution or defence of cases is as much on the lawyer or counsel as the party. Parties will not be allowed to use the

judicial process to achieve a purpose that is not salutary by turning the courts to warehouses to file and store cases which they are unwilling to prosecute or defend. As stated earlier, the defendant that gave instructions for the case to be defended never sent a Representative to court all through the proceedings to show some modicum of interest in the case filed. With the failure of the defendant to exercise their right to defend the action despite the ample time given to them, their right to defend was on application by plaintiffs foreclosed.

Now I recognise that fair hearing is a fundamental element of any trial process and it has some key attributes; these include that the court shall hear both sides of the divide on all material issues and also give equal treatment, opportunity and consideration to parties. See **Usani V Duke (2004) 7 N.W.L.R (pt.871) 16; Eshenake V Gbinijie (2006) 1 N.W.L.R (pt.961) 228.** It must however be noted that notwithstanding the primacy of the right of fair hearing in any well conducted proceedings, it is however a right that must be circumscribed within proper limits and not allowed to run wild. No party has till eternity to present or defend any action. See **London Borough of Hounslow V Twickenham Garden Dev. Ltd (1970) 3 All ER 326 at 343.** The Defendant has here been given every opportunity to defend this case but they exercised their right not to defend same.

In the final address of Plaintiffs, only (1) one issue was raised as arising for determination as follows:

"Whether the Plaintiffs have not proved their case against the defendant to be entitled to the Reliefs sought."

I have carefully considered the pleadings and evidence led and it does appear to me that the issue raised by Plaintiff is apt but will be slightly modified by court hereunder. In the court's considered opinion, the single issue which arises for determination is simply **whether the Plaintiff has established its case in the circumstances and therefore entitled to all or any of the Reliefs sought.**

This issue is not raised as an alternative but fully incorporates the issue raised by Plaintiff and has therefore succinctly captured the pith or crux of the contest that remains to be resolved shortly by court and it is on the basis of this issue that I would now proceed to consider the evidence and submissions of counsel.

Now to the merits or substance of the case.

At the beginning of this judgment, I had stated the claims of Plaintiff. The case clearly is founded on the propriety of the foreclosure order and the consequent sale of the property of 2nd plaintiff by defendant, arising or situated on a loan transaction involving parties. I had also indicated that the Defendant filed an Amended statement of defence but no evidence was led whatsoever in support of the Defence. The implication in law is that in the absence of evidence in support of the Amended statement of defence filed on behalf of defendant, the said defence is deemed as lacking probative value and abandoned. In **N.I.M.V. LTD V F.B.N. Plc (2009)16 N.W.L.R (pt.1167)411at 437 D.E**. the Court of Appeal stated thus:

"Pleaded facts on which no evidence was adduced in support are deemed abandoned. Pleadings are the body and soul of any case in a skeleton form and are built and solidified by the evidence in support thereof. They are never regarded as evidence themselves and if not supported by evidence are deemed abandoned."

As a logical corollary and flowing from the above, it is equally accepted principle of general application that the Defendant is in the circumstances assumed to have accepted the evidence of the Plaintiffs and the trial court is at liberty to act on the Plaintiffs unchallenged evidence.

Notwithstanding the above general principle, the court is however still under a duty to examine the established facts of the case and then see whether it entitles the plaintiffs to the relief(s) they seek. I find support for this in the case **of Nnamdi Azikiwe University vs. Nwafor (1999) 1 NWLR (pt. 585) 116 at 140-141** where the Court of Appeal per Salami JCA (as he then was) expounded the point thus:

"The plaintiff in a case is to succeed on the strength of his own case and not on the weaknesses of the case of defendant or failure or default to call or produce evidence … the mere fact that a case is not defended does not entitle the trial court to over look the need to ascertain whether the facts adduced before it establish or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant…"

A logical corollary that follows the above instructive dictum is the attitude of court to the issue of burden of proof where it is not satisfactorily discharged by the party upon which the burden lies. The Supreme Court in **Duru vs. Nwosu (1989) 4 NWLR (pt. 113) 24** stated thus:

"… a trial judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory then he had not made out what is usually referred to as a *prima-facie* case, in which case the trial judge does not have to consider the case of the defendant at all."

From the above, the point appears sufficiently made that the burden of proof lies on the Plaintiffs to establish their case on a preponderance of credible evidence to sustain the claim irrespective of the presence, absence or indeed disposition of the Defendants. See **Agu v. Nnadi (1999)2 N.W.L.R (pt.589)131 at 142; Oyewole V. Oyekola (1999)7 N.W.L.R (pt.612)560 at 564.**

It is equally important to add that the substance of the **Reliefs (1) and (2)** of the claims of plaintiffs on which the other reliefs are predicated are declaratory in nature. In law where such declaratory reliefs are sought, the burden is on the party seeking such Reliefs to creditably establish his entitlement to such relief and not on the weakness of the defence, if any. Indeed such Relief will not be granted, even on admission made by the adversary. See **Nyeson V Peterside (2016) 7 NWLR (pt.1512) 452; Onovo V Mba (2014) 14 NWLR (pt.1427) 391; Akande V Adisa (2012) 15 NWLR (pt.1324) 538.**

Now on the pleadings and evidence, the facts of this case are fairly straightforward. The case simply is that the 1st plaintiff was granted a credit facility in the sum of **N1, 300, 000** which was guaranteed by 2nd claimant. Indeed the 2nd claimant guaranteed the facility with his shop known as **Shop No. 4 Block A22, Section A, Wuse Market**.

The claimants could not liquidate the facility within the tenor or time frame as agreed. The 2nd claimant said he sought for extension of time to settle the indebtedness and ultimately got his market association to pay the debt only to be

informed in circumstances that are not clear that the security had been foreclosed and sold. The alleged faulty actions and conduct of defendant provides the crux of the extant complaint.

As stated earlier, on the other side of the aisle the defendant absolved itself of any blame worthy conduct in their defence but chose or elected not to lead critical evidence to support the case made out in their defence. We need not suffer ourselves to be detained by this defence any longer.

Let us now properly situate the evidence led to see whether a case has been made out by claimant to entitle them to all or any of the Reliefs sought.

On the pleadings and evidence, there is no real difficulty or disagreement that there exists a banker and customer relationship between parties. It is in the context of this precisely streamlined relationship that the crux of this dispute relating to the propriety of defendants action in foreclosing and selling the shop put up as a security for the loan to 1st Claimant by 2nd Claimant, shall be determined.

Within this contextual construct, it bears stating that the relationship that exists between a banker and a customer is one founded on a banker and customer contract. It involves a specie of contract with special usages with particular reference to monetary or commercial transactions. See **Linton Ind. Trading Co. Ltd V. CBN (2015) 4 NWLR (pt.1449) 94.**

Now in this case, from the trajectory of the narrative which is not denied, the claimants were indeed granted a facility dated 17th December, 2015 vide **Exhibit P1**. The letter was titled **"Offer of Credit Facility"** in the sum of N1, 300, 000 and the offer was accepted by the **claimants** on terms as stated in the offer letter and the sums were duly disbursed. Now it is stating the obvious that parties to an agreement such as **Exhibit P1** are bound by the terms of the agreement they entered into freely. See **Artra Industries (Nig.) Ltd V. N.B.C. 1 (1998) 4 NWLR (pt.546) 357 at 376 par E.** Indeed where there is a valid contract, parties must be held bound by the agreement and by all its terms and conditions. There should be no room for departure from what is stated therein. See **Jeric (Nig.) Ltd V Union Bank Nig. Plc (2000) 15 NWLR (pt.691) 447 at 462 – 483 par G-A; 466 par C.**

Where there is any disagreement between parties to a written contract or agreement on any particular point, the authoritative and legal source of information for the purpose of resolving that disagreement or dispute is the written contract executed by the parties. The reason for the stringent position of **Section 128 (1) of the Evidence Act** is to ensure that a party to a contact in writing does not change his position midstream in his underserved advantage and to the detriment of the unsuspecting adverse party. See **Larmie V D.P.M & Services Ltd (2005) 18 NWLR (pt.958) 88 at 496 A-B.**

The point to underscore here is that the **offer letter** constitutes or provides the basis for the mutual reciprocity of legal obligations between parties and they are bound by it.

Now some of the key features of **Exhibit P1** and I will highlight some of the provisions in some detail are as follows:

"**1. Facility type: Working capital (Diamond SME Revolving Overdraft credit)**

2. Facility amount: N1, 300,000.00 (One Million Three Hundred Thousand Naira only)

3. Purpose:To finance stock of household consumable goods

4. Tenor: 360 days (on a 90 Days clean up cycle)

5. Security: i. Transfer of Ownership of Shop No. 4 Block A22, Section A, Wuse Market Abuja Street, with OMV of 15, 000,000.00 and FSV of 10,000,000.00.

Valued by Osas & Osaji on November 26th, 2015.

ii. Irrevocable domiciliation of daily sale proceeds.

6. Default Indemnity:

If the Borrower fails to pay any sum (of principal, interest or otherwise) due or to become due hereunder, the Borrower shall be liable to a penalty fee of 1% flat per month on un-repaid portion on the facility. This fee, which shall be charged on the 1st working day after the sum is due, will be in addition to the prevailing temporary overdraft interest rate on the unpaid sum from the date when such payment fails due up to the date of payment.

7. Events of Default:

The occurrence of any of the following events shall cause all out standings under this Facility to become immediately payable;

(i) if you fail to settle when due any outstanding amount owed to and advised by the Bank; or

(ii) if a winding up petition is presented against you; or

(iii) if a distress or execution is levied upon or issued out against your property and is not discharged within 10 days or;

(iv) if an encumbrancer takes possession or an administrator is appointed over all or any part of your undertaking and assets; or

(v) if you are unable to pay any other party within the meaning of Section 1 of the Bankruptcy Act (Cap 30) Laws of Federation of Nigeria 1990; or

(vi) if a situation arises which in the opinion of the Bank makes it inappropriate for the Bank to continue to extend the Facility to you: or

(vii) if you default in the performance or observance of any other term, condition or covenant applicable to the Facility and such breach shall continue un-remedied for a period of 10 working days after notice thereof has been given to you."

As stated above, parties are clearly bound by the terms of the above offer letter.

Now on the pleadings and unchallenged evidence, the plaintiffs clearly were not able to fully pay back the facility within the time frame as agreed and vide **Exhibits P5** and **P6**, appealed for extension of time to allow them meet up with their commitments, but that there was no response from the defendant.

It is equally common ground on the evidence, that the plaintiffs approached the Wuse Market Traders Association (WUMATA) to help settle their indebtedness and they helped out by issuing a **cheque** in the said amount vide Exhibits P8a and 8b after PW2 had held discussions with the Branch Manager of the Defendants Wuse Zone 4 Branch.

In response, the defendant by letter dated 24th August, 2017 vide **Exhibit P9** then responded and I will quote the letter *in extenso* as follows:

"The Chairman,
Wuse Market Traders Association
Main Administrative Block
Wuse Market, Abuja

Dear Sir,

RE: FULL AND FINAL PAYMENT-AYOMANS INVESTMENT LIMITED-ACCOUNT NUMBER- 0019219940

ACCOUNT CLOSURE-0089526061

The above subject matter refers.

Kindly recall that the discussion referred to held in our branch took place on 23rd of August 2017 and not 23rd of June, 2017.

While we appreciate your kind intervention in this matter, kindly be informed that we have foreclosed on subject customer's collateral. As a result, we will be unable to accept the cheque in the sum of N1, 300, 000 (One Million, Three Hundred Thousand Naira).

Enclosed is the cheque of N1, 300, 000 previously attached. We look forward to working with you in other circumstances for the betterment of the members of your association.

Yours faithfully
For Diamond Bank Plc."

The claimants on the unchallenged evidence, stated that they were never informed or put on notice of the actions taken by the defendant with respect to the collateral or security 2nd claimant gave for the credit facility only for him to note that when he went to check his account balance, that his account was credited with the sum of **N14, 000, 000** on 4th August, 2017 apparently been proceeds of the sale of his shop. The sum of **N1, 300, 000** representing the loan facility was deducted from the said sum leaving a balance of **N12, 715, 471.94** in his account.

The substance of the narrative of the claimants were not really challenged or impugned during cross-examination by the defendant. The narrow issue here is whether the actions of the defendant in the context of the precise situational relationship of parties can be legally countenanced?

The action taken by defendant on the security given by claimants for the unpaid facility can be situated within the letter Exhibit P9 earlier highlighted. Let me perhaps repeat the salient portion of the letter thus:

"… while we appreciate your kind intervention in this matter, kindly be informed that we have <u>foreclosed</u> on subject customers collateral. As a result we will be unable to accept the cheque in the sum of N1, 300, 000 (One Million, Three Hundred Thousand Naira)…" (underlining supplied)

The action(s) of defendant appears to be predicated on a mortgage or security created by contract between parties for a debt already due. In resolving whether there is legal validity for the action(s) taken, we must properly understand the nature and import of a Mortgage and what foreclosure entails. While there may not be consensus in legal circles as to definition of a Mortgage, it however has certain common and accepted features.

The most important feature of a mortgage is that it is a conveyance of a **legal or equitable interest** in property with a provision for redemption, that is upon the repayment of the loan, the conveyance becomes void or the interest is re-conveyed. See B**.O.N Ltd V Akintoye (1999) 12 NWLR (pt.392) 403**. See also **Section 80 of the Stamp Duties Act, Cap 58 LFN 2004** which provides a very comprehensive description of a mortgage. A typical mortgage transaction occurs when the owner of an interest in land, puts forward the land as security to another party in exchange for an advance of a sum of money as loan. The security or collateral remains with the party advancing the sum of money until the money and all interest on it is repaid.

Now **mortgages** may be broadly categorized into **legal mortgages** and **equitable mortgages**. A legal mortgage is a transfer of a legal estate or interest in land or other property for the purpose of securing the repayment of a debt, while an equitable mortgage is one that passes only an equitable estate or interest. See **Fagge V Tukur (2007) All FWLR (pt.387) 876 at 891**. For instance, the deposit of title deeds with a bank as security for a loan creates an equitable mortgage as against a legal mortgage which is created by deed transferring the legal estate to the mortgagee. See **Yaro V Arewa Const. Ltd (2008) All FWLR (pt 400) 603 at 634**. An important feature of mortgages, both legal and equitable is that once a mortgage, always a mortgage and nothing but a mortgage. The essential character of an equitable mortgage is that it is an agreement to enter into a legal mortgage.

In this case on the evidence, it would appear an **equitable mortgage** was created as the agreement here arose out of the deposit of the claimants title deeds with the Bank for loan as security. It is true that in the letter of offer Exhibit P1, the phrase or sentence **"Transfer of ownership or shop No. 4 Block A22, Section Wuse Market"** may have been used in describing the security for the loan but the choice of language here must be understood in the context of the entire agreement. There could obviously not have been a transfer of ownership in **2015** when the offer was just given and before it was disbursed and also even long before the loan was due for repayment. There is in this case absolutely no **Deed of Mortgage** prepared transferring legal estate in the property of 2nd claimant to the bank. As repeatedly stated in this case, the only document situating the relationship of parties is the letter of **"offer of credit facility"**, Exhibit P1. No more. **Exhibit P1** speaks clearly

for itself as a simple offer of credit facility and it cannot be altered or interpolations made to it to suit a particular purpose. See **Section 128 of the Evidence Act**.

Now where a mortgage is created, both the mortgagor and mortgagee have certain rights dependent on whether it is a legal or equitable mortgage. In this case the defendant made it clear vide Exhibit P9 when it stated it **"foreclosed"** on the subject matter to accentuate the position that they knew what they had was an equitable mortgage. What is **foreclosure** and when is the Order made? In **Africa Bank Big. Plc V Alade (2000) 13 NWLR (pt.685) 59**; the Court of Appeal stated instructively as follows:

> ***"The word "foreclosure" is a term of art used in conveyancing practices, particularly in a legal mortgage which means that the estate mortgaged or secured in, as the mortgage property, has become the property of the mortgagee by the Order made in a foreclosure suit. Sometimes, the agreement of foreclosure is contained in the deed. The Order of foreclosure is usually made upon the proved default of the mortgagor to observe the mortgage terms following the institution of a suit. The terms of the mortgage may provide conditions upon which the mortgage property may be sold if the mortgagor defaults in payment of the mortgaged debt."***

It is settled principle of wide application that an **Order of foreclosure** is a common remedy for **equitable mortgagees**, since a legal mortgage would rather exercise the power to sell the property in the event of a default.

The point to underscore is that **foreclosure is an order of court** by which the equity of redemption of the mortgagor and all persons claiming through him including subsequent encumbrances are extinguished so as to vest the mortgaged property absolutely in the mortgagee. The equitable right to redeem is the right granted by equity to the mortgagor to still recover his security by paying the money under the mortgage although the time fixed for the payment of that money has passed and even if this is against the expressed intention of the parties. In foreclosure, equity by equity destroys the equitable right to redeem.

Under **foreclosure**, a **mortgagee applies to transfer the mortgagors' title to him. The court may exercise its powers pursuant to a judgment made by it to**

order for a sale of a property. The court would then issue a certificate of purchase which is a certificate usually issued to purchasers in case of a judicial sale. A certificate of purchase in certain jurisdictions is an instrument that is required to be registered and failure to register it will make it inadmissible in evidence. Such purchaser, where the land is subject to a customary right of occupancy would have to apply for the consent of the Governor to have the legal title of the property vested in him. See **Section 21 (a) of the Land Use Act**.

The court may also grant an order for judicial sale as an alternative to foreclosure in the course of foreclosure-proceedings. Usually foreclosure order is granted in stages – first *nisi* (unless) and then secondly, *absolute*. When an order is made nisi, redemption is still possible for a period of six months and where the mortgagor still fails to redeem, then upon another application by mortgagee, a decree absolute would be granted.

On the authorities and I had earlier alluded to it, the general rule is that foreclosure, and not sale, is the proper remedy of an equitable mortgagee and when an equitable mortgagee by deposit of title deeds and agreement to give a legal mortgage if called upon to do so, takes foreclosure proceedings to enforce his security, the court usually decrees that the deposit operates as a mortgage and that in default of payments, due under the mortgage, the mortgagor is trustee of the legal estate for the mortgagee and that he must convey that estate to him. See **Ogundiani V Araba & Anor (1978) All NLR 165 or (1978) 6-7 SC 42**.

I have deliberately and at length above explained what foreclosure entails and then tried to situate the action(s) of defendant. The point to underscore here again at the risk of prolixity is that there is absolutely nothing on the evidence denoting that the defendant took the necessary and legal steps to initiate **foreclosure proceedings** to enforce the security which the court would have on the facts have decreed. Foreclosure cannot be done behind closed doors or behind the walls of the defendant Bank or in secret.

An equitable mortgagee is not entitled to enter into possession of the land or property unless the right to do so has been expressly reserved or the court makes an order to that effect. The statutory power of sale is only exercisable if the mortgage is made by deed and therefore would only be permissible where the contract to

create a legal mortgage provided for the legal mortgage to be created by deed; or where the deposit of title deeds is evidenced by a memorandum of deed. Alternatively the court may order a sale. See **Gwarzo V Mohammed & Anor (2012) LPELR – 22375 (CA).**

It is clear in this case as demonstrated that absolutely no order of court for foreclosure was applied for and obtained from court. Nothing was streamlined by the defendant on the evidence situating the precise modalities for the forfeiture proceedings and the entire circumstances surrounding the alleged sale of the property of claimant. They only indicated in Exhibit P9, that they had foreclosed but the question is How? Was any application made to transfer the title of Mortgagor to them under the foreclosure? Where and when was the application made? Who then was the property sold to? etc. These and many more questions have been left to speculation or guess work and it is no duty of court to engage in an idle exercise of speculations situating the extinguishing of the claimants right on the property given as security as to vest the mortgaged property absolutely in the mortgagee, particularly here where there is nothing in **Exhibit P1**, the offer letter to situate the actions taken by defendant.

There is equally nothing before the court to situate any sale of the mortgaged property to even allow the court properly inquire and evaluate its propriety. On the pleadings and unchallenged evidence of the 2nd claimant, he alluded or led evidence on a certain clandestine payment of N14, 000, 000 (Fourteen Million Naira) into his account and the deduction of N1, 300, 000 from it, the amount loaned to them and coupled with the evidence that an unknown person appeared on the mortgaged property claiming ownership and the letter they, the defendant, wrote vide **Exhibit P9** foreclosing the secured property gives some clear indication that the defendant must have used the cover of the loan and security to deal with the property in a manner certainly not countenanced by law and proper procedure. It is difficult to understand the foreclosure and the purported sale of the mortgaged property of claimants and why it is shrouded in so much secrecy. It is impossible to understand why the claimants were left in complete darkness over their own property with no notices or information in respect of the foreclosure and sale.

Even in legal mortgages created by deed, which is not the case here, the power of sale becomes exercisable only if any of these three conditions are met:

1. Notice requiring payment of the mortgage money has been served on the mortgagor or on several mortgagors and there is default of payment for three months after such service; or

2. Some interest under the mortgage is in arrears and unpaid for two months after becoming due; or

3. There has been a breach of some provisions contained in the mortgage deed or under the provisions of the Conveyancing Act or the Property and Conveyancing Law.

In **B.O.N V Aliyu (1999) 7 NWLR (pt.612) 622 at 634**, the court interpreted these requirements on the exercise of power of sale and held that compliance with them are mandatory and not advisory and that any sale of any mortgage property without the requisite notice is invalid *ab initio* and cannot convey any title to a subsequent purchaser. It is only apposite to add that by Sections 19 (2) of the CA and 123 (2) PCL any of these requirements may be excluded either altogether or be varied by agreement of the parties. See **B.O.N. V Babatunde (2002) FWLR (pt.119) 1452 at 1473**.

In **Akano V FBN Plc & Anor (2004) 8 NWLR (pt.875) 318**, the Court of Appeal stated as follows:

> **"Where the mortgagor failed to pay the loan within time specified, the mortgagee forwarded notice of demand of the loan from the mortgagor who fails to pay the loan within time specified, the mortgagee is entitled to foreclosure the equity of redemption of the mortgage and sell the mortgage property."**

The above streamlined conditions were observed more in breach by the defendant. Yes, the secured loan may have not been paid within the time frame as stated in Exhibit P1 but it is clear that the defendant did not forward any demand notice for the loan to the claimants. This clearly is even a violation of the terms of the offer letter. Under Clause (vii) of the provisions under **"Events of Default",** the offer letter stated thus:

"The occurrence of any of the following events shall cause all outstanding under the facility to become immediately payable

"… (vii) if you default in the performance or observance of any other term, condition or covenant applicable to the Facility and such breach shall continue un-remedied for a period of 10 working days after notice thereof has been given to you." (underlining supplied).

Indeed on the unchallenged evidence, Appeals were made on behalf of claimants vide **Exhibits P5** and **P6** for extension of time to liquidate the indebtedness of claimants. Meetings were equally held between 2nd claimant and officials of defendant on one hand and officials of Wuse Market Traders Association and officers of defendant on the other hand all towards reaching an agreement on how the loan facility could be paid which finally culminated in the cheque sent by the traders **Association** in the sum of **N1, 300, 000** to the Bank to offset the loan. I find it really curious and even strange that it was only after the defendant received this cheque on 23rd August, 2017 that they now forwarded a letter dated 24th August, 2017 vide Exhibit P9, the following date saying they had **foreclosed** on the security.

In the very **unclear circumstances** of this case, it is difficult to validate the actions of defendant in foreclosing the equity of redemption of the mortgagor without recourse to the agreement, law and the Courts especially here where the agreement or offer letter provides for penalties where there is default by the borrower in meeting up with his commitments. The Default indemnity clause of Exhibit P1 provides this:

> **"If the Borrower fails to pay any sum (of principal, interest or otherwise) due or to become due hereunder, the Borrower shall be liable to a penalty fee of 1% flat per month on un-repaid portion on the facility. This fee, which shall be charged on the 1st working day after the sum is due, will be in addition to the prevailing temporary overdraft interest rate on the unpaid sum from the date when such payment fails due up to the date of payment."**

The above is clear and all provided to adequately protect the interest of the Bank. Forfeiture is no doubt a legal mechanism to further secure the interest of a creditor but it must be carried out in a manner countenanced by law and not subject to the unwieldy whims of officers of the Bank. I say no more. The above now provides broad and legal basis to situate whether the reliefs sought by claimants are availing.

Reliefs (a) and **(b)** are essentially the same. Relief (b) is simply a repetition of Relief (a) even if some of he wordings used are different and will be struck out. Having however found that foreclosure in this case cannot be legally countenanced as demonstrated, it is clear that the purported sale of property of claimants stands compromised. **Relief (a)** is availing but on terms to be streamlined hereunder.

With the success of **Relief (a), Relief (c)** seeking to set aside any purported sale has considerable merit and is granted. Any sale conducted in such opaque manner and in questionable circumstances should not be allowed to stand judicial scrutiny and oversight. Banks and indeed financial institutions are entitled to get back loans given but there actions in recovering the loans or securities for the loan must be guided by strict fidelity to the law.

Relief (d) is for an order of the Honourable Court directing the Defendant to accept Wuse Market Traders Association's Cheque of N1, 300, 000.00 (One Million Three Hundred Thousand Naira) only drawn in favour of the 1st Plaintiff, as full and final repayment of the 1st Plaintiff's credit facility and release forthwith the 2nd Plaintiff's original LETTER OF OFFER and DEED OF SUB-LEASE, respectively, in respect of Shop No. 4, Block A22, Section A, at Wuse Market.

Now at the beginning of this judgment, I had referred to the offer of credit facility vide **Exhibit P1** which regulated the relationship of parties. It is true that the facility was for N1, 300, 000 and the tenor was for 360 days. The letter of offer has terms and conditions regulating the transaction and I had earlier highlighted some of these terms, for example there is a 26% interest element to the loan and also **default indemnity clause** e.t.c which has immediate application where claimants defaulted as in this case. These interest element, penalty clause may have accrued in line with banking practices but there is nothing to situate the amount

due on the loan. It is equally true on the evidence vide Exhibits P5 and P6 that the claimant had made some payments even if the whole facility was not fully liquidated.

If **parties** had agreed as to a particular figure constituting the **final indebtedness**, there is nothing before me to ground this agreement. Exhibit P1 must then remain the pivot or basis for the mutual reciprocity of legal obligations between parties.

One more point which further undermines this relief. On the evidence of 2nd claimant, certain payments to the tune of N14, 000, 000 were made into his account by defendant and the amount loaned to him was said to have been deducted. What the moneys or payment were for and what the deductions meant were not stated or explained by defendant in evidence. The court is therefore in no position to say how these payment and deductions impacted on the volume of the claimants indebtedness as at the time of this judgment.

The bottom line is that in such unclear circumstances with respect to a precise volume or state of the facility granted in 2015, it will appear to me unfair and even unreasonable to make the orders sought in **Relief (d).** The Relief fails.

Relief (e) is for special damages of **N12, 000, 000** (Twelve Million Naira only) for the embarrassment the defendant has caused plaintiff.

Now on the authorities, special damages have been defined as damages of the type as the law will not infer from the nature of the act; they do not flow in the ordinary course; they are exceptional in their character and therefore, they must be claimed specially and strictly proved. See **A.T.E. Co. Ltd V M.L. Gov. Ogun State (2009) 15 N.W.L.R (pt.1163) 26 at 71; Ekennia V Nkpakara & 2 ors (1997) 5 SCNJ 70 at 90.**

The Apex Court in **X.S (Nig.) Ltd. Vs. Tasei (W.A) Ltd**. **(2006)15 N.W.L.R. (pt.1003) 533 at 552 B-E; 552 E-G** Mohammed J.S.C. stated as follows:

> ***"With regard to how to plead and prove special damages, the law is quite clear that special damages must be specifically pleaded and proved strictly…In this respect, a plaintiff claiming special damages has an obligation to plead and particularise any item of damage. The obligation to***

***particularise arises not because the nature of the loss is necessarily unusual, but because the plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible*"**

Also in **Neka BBB Manufacturing Co. Ltd V A.C.B. LTD (2004) 2 NWLR (pt.858) 521** the Apex Court stated thus:

"A damage is special in the sence that it is easily discernable. It should not rest on a puerile conception or notion which would give rise to speculation, approximation or estimate or such like fractions."

Now in paragraphs 22 and 23 of the statement of claim, the plaintiffs averred as follows:

"22. The Plaintiffs state that a mysterious man has been visiting the 2nd Plaintiff's Shop No. 4, Block 22, Section A at Wuse Market claiming to be the new owner and telling the 2nd Plaintiff's tenant that he must henceforth be paying rent and be reporting to him; shouting in the neighbourhood and threatening to evict/eject the 2nd Plaintiff's tenant for daring to say that he (the tenant) does not know him as his Landlord.

23. The Plaintiffs state that the conduct of the mysterious man stated in paragraph 22 above has caused them great embarrassment and unquantifiable damages."

The above averments are clear. What however is strange here is the complete absence of evidence to support the above averments. The above paragraphs alludes to a visit by an **unidentified person** to the **2nd claimants tenant** but this tenant was not produced in court to give evidence of what this unidentified person said or did.

Again, if anybody was shouting in the neighbourhood, nobody was brought from this neighbourhood to give creditability to this assertion with respect to what this unidentified person said or again did. Indeed since the pleadings described him as "mysterious", the question then is what is his link with the defendant? It is really

difficult to legally and factual situate evidence establishing embarrassment occasioned by defendant to ground a claim for special damages. **Relief (e)** fails.

Relief (f) is General damages of **N1, 000, 000 (One Million Naira) only**.

Now in law, general damages flow from the wrong complained of and is usually awarded to assuage loss suffered by the plaintiff from the alleged act of the defendant complained of. Put another way, general damages are the kinds implied by law in every breach of legal rights, its quantification however being a matter for the court. See **Corporative Development Bank Plc V. Joe Golday Co. Ltd (2000)14 N.W.L.R (pt.688)506; UBA V. BTL Ind. Ltd (2001)AII F.W.L.R (pt.352)1615.**

The Supreme Court in **Lar V. Strling Astaldi (Nig) Ltd (1977)11-12 SC 53 at 63** defined general damages as such damages as may be given when the judge cannot point out to any measure by which they may be assessed, except the opinion and judgment of a reasonable man. See also **Elf Petroleum Nig. V. Umah (2006)AII F.W.L.R (pt.343)1761.**

Now in this case, it is clear that it is the failure of the claimants to live up to their commitments under **Exhibit P1** that ultimately led to the actions of defendant in foreclosing the secured property which the court has faulted and set aside. In the peculiar circumstances, I do not consider that damages be awarded. If claimants have paid back the credit facility within the **360 days** tenor, we may perhaps not be here today. When the unexplained payment of N14, 000, 000 into 2nd Claimants account and the deduction of the amount loaned all effected by the defendant bank is added to the mix, if further dilutes the imperative to award General Damages in such unclear circumstances, Relief (f) fails.

With the failure of the monetary claims, **Relief (g)** claiming 21% interest on the judgment sum must fail.

The final **Relief (h)** is for **N1, 000, 000** only being the cost of this suit. It is true that Exhibit P2 was tendered representing legal fees of N1, 000, 000 charged but it is clear that this relief as framed is not a claim for solicitors fees. The Relief speak for itself and it is for cost of the suit which is regulated by the provisions of **Order 56 Rule 1 (3) of the Rules of Court**. Having taking into consideration the facts of

this case, the claimants having partly succeed in their claims are entitled to be indemnified with reasonable cost which I assess in the sum of **N30, 000** payable by defendant.

On the whole and in the final analysis, the claimants action partially succeeds and I accordingly make the following orders:

1. **It is hereby declared that the purported sale by the Defendant of the 2nd Plaintiff's Shop No. 4 Block A22, Section A, at Wuse Market as guarantor to the 1st Plaintiff's loan taken from the Defendant without Notice to the Plaintiffs and/or obtaining an order of court to do so is unlawful, null, void and of no effect whatsoever.**

2. **Relief (b) is struck out.**

3. **An Order of court is granted setting aside the purported sale, by the Defendant of the 2nd Plaintiff's Shop No. 4, Block A22, Section A at Wuse Market.**

4. **Reliefs d, e, f and g fail.**

5. **I award cost assessed in the sum of N30, 000 payable by Defendant to the Claimants.**

……
Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. **Ekpo Philip Ekpo, Esq. with R.C. Ojiaku, Esq. for the Plaintiffs.**

2. **J.E. Udor, Esq. for the Defendant.**