IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS TUESDAY, THE 19TH DAY OF JANUARY, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/1939/18

BETWEEN:

ODUMOSU AKPOBI REGINA .....CLAIMANT

AND

1. **CHRISTY LADI OGWUCHE**
2. **ALH ABUBAKAR ADAMU (A.K.A BARRY)**

.... DEFENDANTS

JUDGMENT

By an Amended Statement of Claim dated 5th October, 2018 and filed same date in the Court's Registry, the Claimant prayed for the following reliefs:

1. **An Order of this Honourable Court declaring that due to the conduct of the Defendants, the purported contract between the Claimant and the 1st Defendant has become impossible to perform and consequently the purported contract for the sale of Philkruz Estate 4, Flat 1, Phase 4, Kubwa Abuja stands rescinded.**

2. **An Order of this Honourable Court directing the 2nd Defendant to return the sum of N1000,000.00 he intentionally withheld from the money paid to him by the 1st Defendant, back to the 1st Defendant.**

3. **An Order of this Honourable Court directing the 1st Defendant to give to the Plaintiff the details of her bank account to enable the Plaintiff refund all the money of the 1st Defendant in her possession.**

4. **Any other order(s) that this Honourable Court may make in the circumstances in the interest of justice.**

The processes were then served on the Defendants. The 1st Defendant filed a statement of defence dated 6th August, 2018 and filed same date in the Court's Registry and set up a Counter-Claim against Claimant as follows:

a. **An order of Specific Performance that the Claimant should unconditionally deliver up possession of the property which is the three bedroom Bungalow situate at Philkruz Estate IV, Block 4, Flat 1, Kubwa, Abuja to the Defendant having sold same to her.**

b. **An order of this Honourable Court compelling the Claimant to collect her balance sum of N700.000.00(Seven Hundred Thousand Naira) only from the Defendant as full and final payment of the purchase price of all that three bedroom Bungalow situate at Philkruz Estate IV, Block 4, Flat 1, Kubwa, Abuja.**

c. **An order of this Honourable Court compelling the Claimant to defray and pay up water and light bills which stood at the total sum of N386,000.00(Three Hundred and Eight Six Thousand Naira) as at March 2018 which the Claimant and her family accumulated in the Three (3) bedrooms bungalow and subsequent bills till when possession is delivered to the Defendant.**

d. **The sum of N20,000,000.00(Twenty Million Naira) only as general damages for breach of contract.**

e. **Cot of this suit.**

AND THE ALTERNATIVE CLAIM ARE AS FOLLOWS:

1. **Whereof the Defendant/Counter-Claimant in the alternative the sum N5,800,000.00(Five Million, Eight Hundred Thousand Naira) paid for the house.**

2. **The Defendant/Counter-Claimant claim the sum of N20,000,000.00 (Twenty Million Naira) as general damages for breach of contract of sale.**

The Claimant filed a reply to the 1st Defendant's Statement of Defence and defence to the counter-claim on 5th October, 2018. The 2nd Defendant never appeared in Court and did not file any process despite service of Court processes and hearing notices all through the proceedings. The Court then with agreement of both counsel to the Plaintiff and 1st Defendant adjourned the matter to 2nd April, 2019 for hearing.

Neither counsel for the Claimant or the Claimant however appeared in court to lead evidence in support of Claimants' case despite service of hearing notices all through the course of the proceedings. It is strange that counsel qua advocate would file a case, settle pleadings 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 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 Claimant herself who obviously instructed counsel to file the case cannot be excused for the indifference exhibited in this case. The rather easy and convenient excuse to always blame counsel for want of diligence to prosecute 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 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 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. The Claimant here who instructed for the case to be filed on her behalf never appeared

in court all through the proceedings to show some modicum of interest in the case filed.

The case of Claimant was on application then struck out for want of diligent prosecution and the 1st Defendant proceeded to lead evidence in support of the counter-claim. The 1st Defendant testified in person as DW1. She adopted her witness deposition and tendered in evidence the following documents:

1. **Sale agreement between Odumoso Akpobi Regina C. and Christy Ladi Ogwuche was admitted as Exhibit D1.**

2. **Irrevocable Power of Attorney donated by Odumosu Akpobi Regina C. to Christy Ladi Ogwuche was admitted as Exhibit D2.**

3. **Deed of Assignment between Odumosu Akpobi Regina C.and Christy Ladi Ogwuche was admitted as Exhibit D3.**

4. **Copy of offer of terms of conveyance of provisional for allocation of a house at Philkruz Estate IV, Kubwa Abuja to Mr. Shokunbi Abiodun Sunny was admitted as Exhibit D4.**

5. **Copies of letters issued by Claimant to 1st Defendant to wit:**

   i) **Authority to Register Deed of Assignment**
   ii) **Application for consent to Assign the Right in Respect of Philkruz Estate IV, Block 4, Flat 1, Kubwa Abuja.**
   iii) **Letter of indemnity; were admitted as Exhibits D5(1-3).**

6. **Copy of Power of Attorney between Abiodun Sunny SHokunbi and Odumosu Akpobi Regina was admitted as Exhibit D6.**

7. **Deed of Sublease between Philkruz WA Ltd and Shokunbi Abiodun Sunny was admitted as Exhibit D7.**

8. **Three(3) copies of cash receipt payments in the name of Shokunbi Abiodun Sunny dated 20th May, 2009, 13th November, 2009 and 8th December, 2009 issued by Philkruz (W.A) Ltd were admitted as Exhibits D8(1-3).**

9. **Document titled "Letter of Agreement" in respect of part payment, received by Cynthia Odumosu Akpobi Regina C. from Christy Ladi Oguche dated 6th October, 2017 was admitted as Exhibit D9.**

In the absence of Claimant and her counsel to cross-examine 1st Defendant, her right to cross-examine was foreclosed and the 1st Defendant then closed her case. Again the right of claimant to defend the Counter-Claim was similarly foreclosed in the light of the failure of both Claimant and her counsel to attend court despite service of hearing notices.

Now I recognize 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 Claimant has here been given every opportunity to present her case and to respond to the case made out by 1st Defendant in her Counter-Claim, but in both situations, the Claimant exercised her right not to prosecute her case and to defend the Counter-Claim. Nobody begrudges this election. I leave it at that.

In the final address of 1st Defendant/Counter-Claimant, two(2) issues were raised as arising for determination, to wit:

1. **Whether the 1st Defendant/Counter-Claimant has established her counter-claim on the preponderance of evidence.**

2. **Whether the 1st Defendant/Counter-claimant is entitled to an order of specific performance.**

I have carefully considered the pleadings and evidence led, and it does appear to me that the two issues raised by claimant while apt can however still be condensed into one single issue formulated by the court hereunder. In the courts considered issue, the single issue which arises for determination is simply **whether the 1st Defendant/counter-claimant has established her counter-claim against claimant in the circumstances and therefore entitled to all or any of the Reliefs sought**. This issue will be predicated on a resolution of the following questions:

i. **Whether or not there was a valid contract between the 1st Defendant and claimant with respect to the sale of Block 4, Flat 1 Philkruz Estate, Phase 4 Kubwa Abuja.**

ii. **Whether or not, considering the evidence on record in this case, the 1st Defendant is entitled to an order of specific performance of the said agreement entered into with respect to the sale of Claimants property in question to 1st Defendant.**

iii. **Whether all or any of the reliefs sought are availing.**

This issue and the sub issues raises which will be taken together fully captures or incorporates the two issues raised by 1st Defendant/Counter-Claimant and has succinctly captured the pith or crux of the contest that remains to be resolved shortly by court and it is therefore on the basis of this issue that I would now proceed to consider the evidence and submissions of counsel.

Now to the merits or the substance of the case.

At the beginning of this Judgment. I had stated the claims of Claimant which was subsequently struck out for want of prosecution. I had also stated the Reliefs sought by 1st Defendant in her Counter-Claim. I also indicated that the Claimant filed a Reply to the Statement of Defence and defence to the 1st Defendant's Counter-claim but she chose or elected not to lead evidence in proof of the Reply

and defence to the Counter-Claim. The implication in law is that in the absence of evidence in proof of this process, the Reply and defence to the counter-calim 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 Claimant and Defendant to 1st Defendant's Counter-claim is in the circumstances assumed to have accepted the evidence of the 1st Defendant counter-claimant and the trial court is at liberty to act on the 1st Defendants 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 1st defendant/counter claimant to the relief(s) she seeks. 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 1st Defendant/Counter-claimant to establish her case on a preponderance of credible evidence to sustain her counter-claim irrespective of the presence, absence or indeed deposition of the Claimant/Defendant to the Counter-claim. 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.**

In the case at hand and from the uncontroverted confluence of oral and documentary evidence before me which I find neither improbable or falling below the accepted standard expected in a particular case, I find the following facts as firmly established in this case namely:

1. The Claimant and Defendant to the Counter-claim offered or put up her property situate at Philkruz Estate IV, Block 4, Flat 1, Kubwa Abuja for sale (hereinafter referred to as the **"property"**).

2. The 1st Defendant/Counter-claimant accepted the offer to buy the property and the amount agreed for the sale is the sum of **N6,500,000(Six Million, Five Hundred Thousand Naira)** which the counter-claimant has fully paid in instalments. I will however address in the judgment the question relating to the refund of N700,000, part of the purchase price made by the Claimant to the Counter-Claimant.

3. The Claimant and Defendant to the Counter-claim executed the following documents to situate the agreement by her to sell the property to the counter-claimant to wit:

    i. **Exhibit D1-** sale Agreement

ii. **Exhibit D2-** Irrevocable Power of power donated in favour of Counter-Claimant.

iii. **Exhibit D3-** Deed of Assignment in favour of Counter-claimant.

iv. **ExhibitsD5(1-3) are: (1)** letter of authority to counter-claimant to register the Deed of Assignment (ii) Application for consent to assign the Right in Respect of the property and (iii)letter of indemnity.

4. The Claimant equally handed over all documents situating her root of title over the property to the Counter-Claimant to wit:

(i) Exhibit D4- the offer of terms of conveyance of the property to the initial or original allocate, one Shokunbi Abiodun Sunny.

(ii) Exhibit D6- Power of Attorney executed by the said Shokunbi Abiodun Sunny to the Claimant.

(iii) Exhibit D7- the deed of sublease over the property prepared by Philkruz WA Ltd in favour of Shokunbi Abiodun Sunny.

(iv) Exhibits D8(1-3)- Receipts payments for the property by Shokunbi Abiodun Sunny.

5. That despite these facts identified above, the Claimant has refused to live up to her commitments to hand over the property to counter-claimant as agreed.

Since the above pieces of evidence and facts have not been challenged by the opposite party who has the opportunity to do so, it is always open to the court seized of the proceedings to act on the unchallenged evidence before it; See **Agagu V Dawodu (supra) 169 at 170.** This is so because in civil cases, the only criterion to arrive at a final decision at all time is by determining on which side of the scale the weight of evidence tilts. Consequently where a defendant chooses not to adduce evidence the suit will be determined on the minimal evidence produced by

the plaintiff. See **A.G. Oyo State V. Fair Lakes Hotels Ltd (No.2) (1989) 5 N.W.L.R (pt 121)255; A.B.U V Molokwu (2003) 9 N.W.L.R (pt 825) 265.**

The above identified and streamlined unchallenged facts or evidence now provide broad factual and legal basis to answer the questions earlier raised which has a direct bearing with the success or otherwise of the case made by the Counter-Claimant.

In treating the question of whether there is a valid contract of sale of the property between counter-claimant and claimant, it is settled principle of general application that in law, five elements must be present in a valid contract: they are offer, acceptance, consideration, intention to create legal relationship and capacity to contract. It is important, however, to note that these five ingredients are autonomous units in the sense that a contract cannot be formed if any of them is absent. In other words, for a contract to exist in law, all the five ingredients must be present. See the cases of **Sobanke V. Sarki (2006) All F.W.L.R (pt.292)131; Orient Bank of Nigeria Plc V. Bilante International Ltd (1997)8 N.W.L.R (pt.515)37; Omega Bank Nigeria Plc V. O.B.C Ltd (2005)All F.W.L.R (pt.249)1964.**

Applying the above legal principle, to the present case, I am abundantly satisfied that by a combined effect of **Exhibits D1-D8 (1-3)** highlighted above, that there was a valid offer by claimant and acceptance of the sale of the property in question by the Counter-Claimant. In law, an offer must be accepted in order to crystallize into a contract. An offer may be accepted by conduct, as well as by the words of the parties or by documents that passed between them as in this case. What is important here is that it must be apparent from the exchange of correspondence that parties have come to an agreement. See **Unitabl Nig Ltd V. Oyelola (2005) AFWLR (Pt.286)824; Nneji V. Zakhem Con (Nig) Ltd (2006)12 N.W.L.R (pt.994)297 at 311H.**

There is no doubt here on the evidence that parties have come to an agreement on the sale of Claimants property. It is also not in doubt that both parties have legal capacity to contract. It is also abundantly clear that the positive steps taken by both parties, as evidenced by the exhibits referred to above are sufficient and indeed

unquestionably show that both Claimant and counter-claimant had the intention to create legal relationship.

On the issue of consideration, the unchallenged evidence of counter-claimant is that the payment for consideration was to be in instalments and that she had fully made the said payment to Claimant. The claimant in paragraphs 5 and 9 of the Reply to the Defendants' Statement of Defence and defence to the Counter-claim which as stated earlier was not backed up with evidence appear to concede to the full payment of the consideration but contends that the final payment of the tranche N700,000 by counter-claimant was done after the agreed date for payment and that she thus returned same back to the counter-claimant. Firstly, apart from the apparent concession by Counter Claimant vide Relief (b) of the payment of this N700, 000 (Seven Hundred Thousand Naira) to her, there is nothing before me providing proof of this refund and when it was paid back as alleged. Secondly, there is equally nothing before me to situate the alleged late payment and when it was made. Thirdly, in all the exhibits tendered before court, only **Exhibit D9** show that the balance of N2,500,000 "**would be paid on 6th February, 2018".** There is however nothing before me situating or supporting the contention that the consideration was not paid on terms as agreed. Finally, there is equally nothing in the **Exhibits** situating that time was of the essence in the relationship. It is trite law that all parties are bound by the contents of these exhibits and no additions or interpolations can be made at this late stage to the contents of the documents to suit a particular purpose. See **Section 128 of the Evidence Act.** Indeed, the law is settled that when there is any disagreement between parties to a written 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 parties. The reason for the stringent position of **Section 132(1) of the Evidence Act** is to ensure that a party to a contract in writing does not change his position midstream in his undeserved advantage and to the detriment of the unsuspecting adverse party. See **Larmie V. D.P.M & Services Ltd (2005)18 N.W.L.R (pt.958)88 at 469 A-B.**

The return of the sum of **N700,000** out of the total consideration of **N6,800,000** received by Claimant on the unproven allegation that it was not paid on time cannot in any way therefore affect, vitiate or detract from the validity of the contract of sale

of the property. It has been held that in a contract for the sale of land and by extension landed property, the agreement to sell is concluded when the parties, the subject matter, the nature of the transaction and the consideration are agreed upon; and that the possibility of a default would not make the contract invalid, incomplete or non-existent. See the cases of **Biyo V. AKU (1996)1 N.W.L.R (pt.422)1; Union Bank of Nigeria Plc V. Erigbuem (2003)F.W.L.R (pt.180)1365; Doherty V. Ighodaro (1997)11 N.W.L.R (pt.530)694.**

From the state of the unchallenged evidence, before me, I am satisfied that the counter-claimant has furnished consideration for the property and consequently, I hold that there was a valid contract between the claimant and the counter-claimant with respect to the sale of the property. Valid contracts voluntarily entered into by parties as in this case are binding on them, and a court of law will not sanction an unwarranted departure from them unless they have been lawfully abrogated or discharged. See **F.G.N. V Zebra Energy Ltd (2002)3 N.W.L.R (pt.754)471 at 491.**

There is nothing in this case to situate any lawful abrogation or discharge. The bottom line is that the claimant and counter claimant are held bound by the terms and conditions of the agreement for the sale of the property and there is no room for departure from what is stated thereon in the Exhibits identified. See **Jeric (Nig) Ltd V. Union Bank Nig Plc (2000)15 N.W.L.R (pt.691)447 at 462-463 G-A.**

Having determined the validity of the contract of sale, there is now firm basis to determine whether all or any of the reliefs sought by the counter-claimant are availing?

Relief (a) seeks for an order of Specific Performance that the Claimant should unconditionally deliver up possession of the property which is the three bedroom Bungalow situate at Philkruz Estate IV, Block 4, Flat 1, Kubwa, Abuja to the Defendant having sold same to her.

Now it is again settled principle that specific performance is a court ordered remedy that requires fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. See **Best (Nig) Ltd V. Blackwood Hodge (Nig) Ltd (2011)5 N.W.L.R (pt.1239)95 at 118-119 H-B; Universal Vulcanizing (Nig)**

Ltd V. Ijesha United Trading and Transport & Ors (1992)5 N.W.L.R (pt.266)388. Specific performance is a discretionary remedy and like all equitable remedies, the exercise of discretion must be exercised judicially and judiciously in accordance with settled Rules and principles.

Flowing from the circumstances of this case and the totally of the unchallenged evidence led by counter-claimant, is this an appropriate situation where specific performance should be ordered?

In answering this question, I take into consideration the uncontested evidence of counter-claimant that she has fulfilled all the terms of the agreement ought to be performed by her. In law, a party who wants the court to order specific performance of a contract must adduce evidence of compliance with its terms. See **Best (Nig) Ltd V. Blackwood Hodge (Nig) Ltd (Supra).**

I also take into account that the suit is predicated on agreement for sale of a landed property. In law, where the contract is for sale of land or landed property, the court is always inclined to grant specific performance as land been sold may have a significance especially where the contract does not suffer from any defect and damages will not constitute adequate remedy as in this case. See **Help (Nig) Ltd V. Silver Anchor (Nig) Ltd (2006)5 N.W.L.R (pt.972)196 at 208-209G-A.**

Also relevant here is the clear provision in the terms and conditions of the sale agreement **Exhibit D1** vide clause 3 where the claimant stated clearly that upon payment of the purchase price **"the seller (Claimant) shall vacate and hand over vacant possession of all that 3 bedroom bungalow subject of this transaction including the entire area covered and known as premises Philkruz Estate 4, Flat 7, Phase 4, Kubwa Abuja <u>immediately</u>"** (underlining supplied). This position was amplified or accentuated in both the Power of Attorney **(Exhibit D2)** and the Deed of Assignment (**Exhibit D3).** As stated earlier, the claimant is bound by the contents of these exhibits and or agreement.

It is no longer in dispute that the Counter-Claimant accepted the offer for the sale of the property and performed all obligations imposed on her by the agreement consequent upon her purchase of the property. She has on the evidence paid the purchase price in full. As stated earlier, the refund of N700,000 by Claimant out of

the total sum of N6,800,000 received has no effect on the validity of the sale. The claimant has also handed over all documents to situate title of the property and also signed or given counter-claimant all necessary letters of authority vide **Exhibits D5(1-3)** to allow for a seamless transfer of title to counter-claimant and registration of her title with relevant bodies.

What is left is for the counter claimant to take vacant possession of the property. The claimant has however refused to handover possession years after the conclusion of the agreement. The claimant and defendant to the counter-claim has clearly by her conduct evinced, and unfairly too, an intention not to perform the obligations under the agreement in some essential respect by the deliberate refusal to hand over the property. The failure to hand over shows a clear refusal to perform her side of the agreement and that she does not intend to be bound by the terms or that if at all she is to be bound, she is determined to do so only in a manner inconsistent with her obligations under the contract. Agreements will be useless where parties fail to adhere to the terms voluntarily agreed on. It is worse where a party having derived benefit from an agreement seeks to unfairly shirk from its obligations. At the risk of prolixity, there are no materials before me showing that the contract suffers from any defect such as informality, mistake or illegality. See **Help (Nig) Ltd V. Silver Anchor (Nig) Ltd (supra).**

For the foregoing reasons, I am satisfied that this is an appropriate situation to order specific performance. I am further persuaded to take this position on the authority of the decision of the Supreme Court in the case of **Gaji V. Paye (2003)F.W.L.R (pt.163)1 at page 19** of that decision, the Supreme Court, per Edozie, JSC, held as follows:

"Although generally, an order of specific performance will not be readily granted where a remedy in damages in adequate, in a case involving land, the law is that damages cannot adequately compensate a party for breach of a contract for the sale of an interest in a particular piece of land or of a particular house in which case the order for specific performance is available at the instance of the vendor or purchaser. Anaeze V. Anyaso (1993)5 N.W.L.R (pt.291)1; Universal Vulcanizing Nig Ltd V. Ijesha United Trading and Transport Co. Ltd (1992)5 N.W.L.R 388." Relief (a) is availing.

Relief (b) Seeks for **an order of this Honourable Court compelling the Claimant to collect her balance sum of N700.000.00(Seven Hundred Thousand Naira) only from the Defendant as full and final payment of the purchase price of all that three bedroom Bungalow situate at Philkruz Estate IV, Block 4, Flat 1, Kubwa, Abuja.**

In our consideration of the issue, relating to the validity of the contract of sale, I had found that though no evidence of any refund was made out but I indicated that this Relief is a concession by Counter-Claimant that the refund was indeed made. I had also found that the refund had no effect on the completed sale or its validity. It is therefore open to the counter-claimant to return this sum to the claimant. The court cannot however grant orders in vain or orders incapable of enforcement. If claimant is not open to receive the sum of N700,000 she refunded, there is no legal basis to compel her to do so. As stated earlier, the counter-claimant should be in a position to make this payment of N700,000 to the claimant through the channels they related all through the course of the transaction. I leave it at that. Relief (b) is not availing and is struck out.

Relief (c) is for an Order of this Honourable Court compelling the Claimant to defray and pay up water and light bills which stood at the total sum of N386,000.00(Three Hundred and Eight Six Thousand Naira) as at March 2018 which the Claimant and her family accumulated in the Three (3) bedrooms bungalow and subsequent bills till when possession is delivered to the Defendant.

Again, it is difficult to situate the evidential basis for this Relief. Claims in the realm of water and light bills are in the nature of special damages which apart from been specially pleaded must be strictly proved. The court must be placed in a commanding position by credible evidence situating (1) the existence of these bills and (2) that they relate or are in respect of the sold property and the period covered and; (3) that they have not been paid.

Now in this case, apart from the general averments in paragraph 16 of the counter-claim stating certain amounts as **"light bill and water bill,"** nothing was put forward in evidence to support these averments. No light or water bill was presented in evidence streamlining the alleged indebtedness showing the period it

covers and indeed whether it is even in respect of the sold property. The court cannot similarly be making orders in relation to **"subsequent bills"** that are futuristic and yet to accrue and which were neither pleaded or streamlined and not backed up by evidence. In the absence of evidence to support the averments relating to water and light bills, the said averment is deemed as abandoned. Relief (c) fails.

Relief (d) is for the sum **of N20,000,000.00(Twenty Million Naira) only as general damages for breach of contract.**

There is no doubt that the claimant has blatantly refused to keep up to the terms of the agreement with the Counter-Claimant as demonstrated, but it is not clear to me whether there is indeed legal basis having granted an order for **specific performance** to simultaneously also award damages in respect of the same breach. It would appear and I say this with circumspection that to award damages in addition to specific performance conflicts with the very underlying philosophical basis for the award of specific performance. The award of damages is a common law remedy and its inadequacies led to the intervention of equity and the evolution of the decree of specific performance. On the authorities of our superior courts, it is very clear that a decree or order of specific performance is a form of relief that is purely equitable in origin and the fundamental Rule is that specific performance will not be decreed or ordered if there is an absolute remedy at law in answer to the Plaintiff's claims, where for instance the Plaintiff would be adequately compensated by the common law remedy of damages. The jurisdiction to grant specific performance is therefore anchored on the inadequacy of the remedy of damages of law. See **Ezenwa V. Oko & Ors (2008) N.W.L.R (pt.1075)610 SC; Afrotech Tech Servo (Nig) Ltd V. MIA & Sons Ltd (2000)15 N.W.L.R (pt.692)730.** To perhaps accentuate the dichotomy that they are two specific and different reliefs, the supreme court in **Ezenwa V. Oko (Supra)** per Onnoghen J.S.C (as he then was) stated thus:

"Since the grant of an order of specific performance is at the discretion of the Court, the party claiming same should call evidence on damages claimed or suffered in the event that the court, for some reasons, is unable to grant specific performance."

In **Universal Insurance Co Ltd V. T.A Hammond Nig Ltd (1998)N.W.L.R (pt.565)340 at 366F-F, 368 E-F,** the Court of Appeal stated unequivocally that the court will not order specific performance and award damages in respect of the same breach as this would amount to double compensation.

On the settled principle of law against double compensation, a party who has been fully compensated under one head cannot be awarded damages in respect of the same injury under another head. See **Artra Ind (Nig) Ltd V. N.B.C 1 (1998)4 N.W.L.R (pt.546)357 at 387B.**

I note that in the final address of Counter-Claimant and to support the contention that damages can be awarded in addition to specific performance, the case of **Universal Vulcanizing (Nig) Ltd V. Ijesha United Trading & Transport Co Ltd (supra) was cited** where the following excerpt was quoted thus:

"It is settled law that where a Plaintiff claims specific performance or an injunction, the Court has the power to award damages either in addition to or in lieu of specific performance or injunction, whether damages have also been specifically claimed or not."

Now I have carefully read the judgment of the Supreme Court and the lead judgment of Omo J.S.C (of blessed memory) in the said decision but the above excerpt did not appear in his judgment. The lead judgment it must be noted is the Judgment of the court in the said case. It is settled law that a dissenting Judgment, however powerful, learned and articulate, is not the Judgment of the Court and therefore not binding. The Judgment of the Court remains the majority Judgment which is the binding Judgment. **See Urugbo V. Una (2002)16 N.W.L.R (pt.792)175, Daggash V. Balama (2004)14 N.W.L.R (pt.892)144, F.G.N V. Zebra Energy Ltd (2002)18 N.W.L.R (pt.798)162.**

I note that the above excerpt appeared in the judgment of Kutigi J.S.C (as he then was and of blessed memory) but this pronouncement was in the context of his disagreement with the lead and majority judgment granting an order of specific performance in the said case. The late revered jurist considered that on the materials proffered, there was insufficient factual information to situate the grant of an order of specific performances and he felt damages was sufficient recompense.

Again reading the decision, the above excerpt appeared to be predicated or based on the decision of the earlier Supreme Court decision of **Ibenwelu V. Lawal (1971)AII N.L.R 24,** but reading this decision and the unanimous judgment of the court delivered by Madarikan J.S.C (of blessed memory), there was no issue raised in the case relating to specific performance and whether damages can be granted in lieu of or in addition to specific performance. The case simply dealt with the discretion of the court in awarding damages either in addition to or in lieu of injunction and possession in land matters. The excerpt again cannot be situated in this case. While this court must necessarily defer to a minority decision emanating from a superior court especially over revered Apex Court, it cannot do so in fluid or unclear situation as presented here. The court must therefore err on the side of caution until there are clear pronouncements on the issue by the Superior Courts. I say no more.

On the whole, the Counter-Claimant here having been fully compensated by the decree of specific performance cannot be awarded general damages in the huge sum claimed in respect of the same injury under another head. I only need to add advisedly that the legal dynamic may change if a claimant perhaps seeks special damages in addition to the decree of specific performance which then has to be strictly pleaded and proved within the usual legal threshold. Since the Counter-Claimant is praying for the huge amount of **N20,000,000(Twenty Million Naira)** as general damages, then perhaps she can make a relief in the realm of special damages which must be clearly pleaded and creditably proved. In such limited circumstances, I incline to the view that there won't be any valid challenge or complaint to seek for both awards of specific performance and special damages. I leave it at that. Relief (d) is not availing.

Relief (e) is for cost of this action which will be streamlined at the end of this judgment in the light of the substantial success of the counter-claim pursuant to the provision of **Order 56 Rule 3 of the Rules of Court.**

Finally, there is then the alternative **Reliefs 1-3** claimed by the counter-claimant. I think the principle is now well settled that once a court has granted the main claim of an action, it cannot proceed to grant an alternative claim. See **Olorun Femi V. Saka (1994)2 N.W.L.R (pt. 324)23 at 39C-D.** Put another way, the law is that where a claim is in the alternative, the trial court will first of all consider whether

the principal or main claim ought to have succeeded. It is only after the Court has found that it could not for any reason grant the principal claim that it would consider the alternative claim. See **Newbreed Organisation Ltd V. Erhomosele (2006)5 N.W.L.R (pt.974)499 at 544 D-C.** Having granted the substantive and main claim in this case, the alternative relief has now been overtaken by events.

On the whole, the Counter-claimant has substantially discharged the burden placed on her within the legal threshold allowed by law. The counter-claim substantially succeeds and I hereby make the following orders:

1. **An order of specific performance is hereby made directing the claimant to give full effect and value to the obligations contained in Exhibits D1-D4 and deliver up possession of the property situate at Philkruz Estate IV, Block 4, Flat 1, Kubwa Abuja to the Counter-claimant, forthwith.**

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

3. **Reliefs (c) and (d) fail.**

4. **I award cost assessed in the sum of N25,000 payable by the Claimant to the 1st Defendant/Counter-Claimant.**

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Hon. Justice A.I. Kutigi

Appearances:

1. **Ejike Opara for the Claimant**

2. **Patrick Ocheja Okolo SAN with A.J. Okolo, Esq., and K.U. Udemba, Esq., for the 1st Defendant/Counter-Claimant.**