IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS MONDAY, THE 22ND DAY OF MARCH, 2023

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/1699/18
MOTION NO:M/4082/2020

BETWEEN:

FIRST BANK OF NIGERIA LTD ………………… COMPLAINANT

AND

1. **FEDERAL CAPITAL TERRITORY ADMINISTRATION (FCTA)**
2. **MESSRS AUG GREEN PROJECTS LIMITED**

…… DEFENDANTS

JUDGMENT

By an Originating Summons dated 4th May, 2018 the Claimant has posed the following query:

Whether by reason of the Existing Assignment of the Debt in the Account for the Payment of the proceedings of the L.P.O to the 1st Defendant by 2nd Defendant, the 1st Defendant is not liable to pay the debt and the interest in the Account of 2nd Defendant to the Claimant.

Upon Resolution of the above query, the Claimant seeks the following Reliefs:

1. **The Claimant Claim against the Defendant is for the sum of N21,334,025.43 Dr (Twenty One Million, three Hundred and Thirty Four Thousand, Twenty Five Naira, Forty Three Kobo) as at 13th February, 2018, being the unpaid Debit Balance in the 2nd Defendant's Account with the Claimant arising from the failure of the 1st Defendant's refusal, failure**

or negligent(sic) to domicile the full Proceeds of LPO Contract with the Claimant as agreed by the parties.

2. **The agreed interest rate of 14% per annum of the N21,334,025.43 Dr (Twenty One Million, three Hundred and Thirty Four Thousand, Twenty Five Naira, Forty Three Kobo) from 13th February, 2018, till Judgment is delivered in this suit.**

3. **Post Judgment interest rate of 10% per annum until full Liquidation of the Judgment sum.**

4. **N200,000 being the cost of this suit.**

The application was supported by a 17 paragraphs affidavit with 5 annexures marked as **Exhibits A, B, C1, C2 and D.** A written address was filed in which one issue was raised as arising for determination, to wit:

Whether by reason of the Existing Assignment of the debt in the Account for the payment of the proceedings of the L.P.O to the 1st Defendant by 2nd Defendant, the 1st Defendant is not liable to pay the debt and the interest in the account of 2nd Defendant to the claim.

Submissions were made on the above issue which forms part of the Record of Court. The summary and essence of the submissions is that there was a valid assignment of debt by 2nd Defendant to 1st Defendant so that it is liable to pay the sums claimed having failed to domicile all payment(s) as agreed.

The Claimant also filed a **further and better affidavit in support** of the originating summons together with another written address which sought to essentially accentuate the points earlier made and to additionally underscore the point that the case was properly commenced by the Originating Summons. These processes also form part of the Record of Court.

The **1st Defendant** in response filed the following processes.

1. 1st Defendants counter-affidavit to the originating summons containing 23 paragraphs with 12 annexures marked as **Exhibits A-I.** The address initially filed in support was discountenanced and struck out and with leave of court, a

fresh amended address was filed on 14th January, 2020 in support of the counter-affidavit. The address raised three issues for determination to wit:

(i) **Whether there is a competent affidavit in support of the originating summons before the Honourable Court.**

(ii) **Whether considering the mode of commencement of this suit, can the suit be conveniently disposed off under the originating summons procedure.**

(iii) **Whether considering the facts and circumstances of this case, the Claimant is entitled to the grant of the Reliefs as contained in the originating summons.**

The submissions on the issues equally form part of the Record of Court. On issue one, the case made out is that the affidavit in support of the summons is incompetent having violated the provisions of **Section 115(3) and (4) of the Evidence Act** in that the deponent of the affidavit failed to disclose the source of his information and the reasonable particulars of the informant and the time and place and circumstances of the information and further that the affidavit also contains extraneous matters in violation of the same provision of the Evidence Act.

On **issue 2**, the point made is that the action ought not to be commenced by this procedure in that the facts contained in the affidavit in support are contentious and hostile with serious issues raised which would require the leading of evidence.

Finally on issue 3, it was submitted that the Claimant is not entitled to the Reliefs sought.

2. The 1st Defendant also filed a **Notice of Preliminary objection** on 10th January, 2020 seeking for the following:

    a. **An order striking out and/or dismissing the Originating Summons as it was filed in flagrant disregard of known position of law.**

    b. **An Order that the court has no jurisdiction to entertain the Originating Summons against the 1st Defendant as she is not a proper/necessary party to this suit.**

c. **An order that the originating summons against the 1st Defendant constitutes an abuse of court process.**

The grounds on which application is sought are as follows:

a. **Contrary to the provision of Order 2 Rule 3(1), (2) and (4) of the Rules of this Honourable Court 2018, the Originating Summons herein is without any question for determination by this Honourable Court.**

b. **In the Originating Summons proceedings, grant of reliefs are contingent upon resolution of the questions for determination in favour of the Claimant.**

c. **The originating summons constitutes an abuse of court process, as the 1st Defendant is not a proper/necessary party to this suit.**

d. **The present of the 1st Defendant is not required for the just determination of this suit.**

e. **The 1st Defendant is not privy to the Loan Financing Agreement between the Claimant and the 2nd Defendant.**

The objection is supported by a written address in which 2 issues were raised as arising for determination:

(i) **Whether there is a competent Originating Summons before the Honourable Court.**

(ii) **Whether this Court has jurisdiction to hear and determine this suit against the 2nd (sic) Defendant who is not a proper/necessary party to the suit thereby rendering the suit an abuse of Court processes.**

Submissions were made on the above issues which also forms part of the Record of Court. I will highlight the essence of the submissions. On **issue (i)**, the simple point made is that the originating summons contains no issue or question for determination in contravention of the provision of **Order 2 Rule 3(1) of the Rules of Court** and thus defective and incompetent.

On **issue (ii)**, it was contended that the 1st Defendant is not a proper or necessary party in this case since he is not privy or party to the L.P.O financing loan agreement between the Claimant and the 2nd Defendant and that the joining of 1st Defendant to this action constitutes an abuse of process.

The **2nd Defendant** on its part filed a counter affidavit of 20 paragraphs with 4 annexures marked as **Exhibits DD1-DD3.** A written address was filed in which 3 issues were raised as arising for determination:

1. **Whether the Claimant can legally walk away from an agreement reached with the 2nd Defendant at the office of the EFCC on defrayment of the outstanding balance in the loan account.**

2. **Whether this suit can be effectively determined by using the originating summons.**

3. **Whether it is legally permissive for a party not to make available a document that will assist the other party in the preparation of his case.**

The submissions on the issues equally forms part of the Record of Court. I will here also highlight the essence of the submissions made. On issue 1, the point made is that parties are bound by agreement they freely entered into. That the Claimant after instituting this case also petitioned the EFCC where a settlement agreement was brokered wherein the Claimant was by agreement allowed to access the sum of 5 Million Naira belonging to 2nd Defendant in an account of its sister company to defray the outstanding sum on the loan account leaving only 2,000,000 as due on the loan account. That the Claimant accepted this agreement and cannot resile from it and make the extant claim.

On **issue 2**, it was also contended that the case is contentious and cannot be determined by the originating summons.

Finally on **issue 3**, it was contended that the Claimant refused to produce the account of the sister company from which the ₦5,000,000 was withdrawn and that the Court should invoked the presumption under **Section 167(d) of the Evidence Act** to hold that its production would have been unfavourable to the case of Claimant.

The **Claimant** in response to the above processes filed the following:

1. Reply address to the amended written address of 1st Defendant dated 16th January, 2020.

2. Reply address to the 1st Defendant's preliminary objection dated 14th January, 2020
3. Further and better affidavit in response to the 2nd Defendant's processes dated 11th October, 2021. It was supported by a written address.

It is important to state that all the addresses filed above essentially sought to accentuate submissions or points earlier made. No purpose will be served repeating the submissions.

With the **agreement of all counsel**, the hearing of the preliminary objection and the substantive Originating Summons was consolidated. Counsel on both sides at the hearing relied on the processes filed. In respect of the objection, counsel to the 1st Defendant urged on the court to grant it as it has merit while counsel to the Claimant argued to the contrary. On the substantive summons, counsel to the Claimant urged the court to grant it while counsel to both Defendants urged that it be refused.

I have given an insightful consideration to all the processes filed and the submissions made. A convenient starting point will be to determine the issues raised by the **preliminary objection**. I had earlier situated the prayers and the grounds of objections. The objection does not really present any difficult points of law and or facts as I will soon show. I will deal with them seriatim.

The 1st ground and issue raised is that of the alleged non compliance with the provision of **Order 2 Rule 3(1) and (2)** which posits that the originating summons must situate a **question(s)** for determination.

The objector here has contended that no question was raised in the Originating Summons. In view of the **defined question for determination** on the face of the originating summons, which I have already highlighted, it is really difficult to fathom the factual basis for this ground of objection.

At the risk of prolixity, the summons here has unequivocally and clearly formulated a **question for determination** on the face of the processes, therefore the contention that it is defective clearly will not fly. The Reliefs sought by Claimant flows from a resolution of the defined question framed. It is true that the

formulation of question(s) for determination is central to the validity of an originating summons under extant Rules of Court and it is therefore essential that the particular question of construction be clearly identified in the body of the summons. The extant Originating Summons fulfills all these requirements and is thus not incompetent. There is therefore no feauture here that prevents this court from exercising jurisdiction to entertain this matter.

This now leads me to the second ground of the objection that the **1st Defendant** is not a necessary party to the suit thus rendering the suit an abuse of court process.

I think the principles governing the joining of a party to an action are fairly well settled. In **Re: mogaji (1986)1 N.W.L.R (pt.19)759;** the Supreme Court stated as follows:

"The two main objectives for joining a party to an action are:

a) To put an end to litigation and not to have two parallel proceedings in which the same issue is raised, leading to different and incontinent result.

b) To make the person joined bound by the result of the litigation.

Now the classification of parties under our civil jurisprudence is equally settled as follows:

i. Proper parties
ii. Desirable parties, and
iii. Necessary parties.

Proper parties are those who, though not interested in the plaintiffs claim are made parties for some reasons, and desirable parties are those who have an interest or who may be affected by the result. See **Green V Green (1989) 3 NWLR (pt.61) 480; Dapialong V Lalong (2007) 5 NWLR (pt.1026) 199.** A necessary party to a suit is a party who is not only interested in the subject matter of the proceedings but also a party in whose absence, the proceedings could not be fairly dealt with. In such a situation it becomes almost impossible for the court to effectively and conclusively decide upon and settle all questions arising in the suit in the absence of such a party. See **Biyu V Ibrahim (2006) 8 NWLR (pt.981) 1; BON Ltd V Saleh (1999) 9 NWLR (pt.618) 231**. It follows therefore that a necessary party to

an action is one whose presence is necessary for the effectual and conclusive adjudication of the questions involved in the cause of matter.

As a logical corollary, any of the above mentioned parties may be joined to an action dependent on the facts and justice of the case. A primary motivating factor, which is usually lost sight of is the pressing need to avoid multiplicity of actions and to save litigation time in the process. It is also one way to avoid the abuse of court process. See **Ogolo V Fubura (2003) 11 NWLR (pt.831) 231.**

In this case, the Claimant deposed to the following facts in the supporting affidavit:

7. **That the Claimant, by a Letter of Offer executed 3rd February, 2015, offered the Defendant a contract Financing Facility in the sum of N23 Million which the 2nd Defendant accepted on the last page of the offer Letter. The offer Letter is attached and marked as Exhibit B.**

8. **That by Letter dated 11th February, 2015, the 2nd Defendant authorized the 1st Defendant to domicile the payment into the account of the 2nd Defendant with the Claimant as shown by the Copy of the Letter herewith attached and marked Exhibit C1.**

9. **That by letter dated 11th February, 2015, the 1st Defendant accepted to domicile all the payments into the Account of the 2nd Defendant with the Plaintiff but failed to so domicile all the payments into the Account of the domiciliation of all the payment to the Claimant which is herewith attached and marked Exhibit C2.**

10. **That this failure and refusal of the 1st Defendant to deposit the proceeds for the payment of the L.P.O into the account of the 2nd Defendant with the Claimant is a breach of the contractual assignment of the debt by the 1st Defendant.**

11. **That the failure to deposit the Proceeds of the L.P.O into the Account caused the agreed interest rate being charged into the Account to accrued(sic) and raised the Balance in the Account to the present level.**

12. **That due to the failure of the 1st Defendant to pay all the payment of the L.P.O into the Account of the 2nd Defendant with the Claimant left the Account in Debit Balance which the Defendants have refused to pay off, and the Debit Balance in the Account of the Defendant with the Claimant has risen to the N21,334,025.43 Dr (Twenty One Million, three Hundred and Thirty Four Thousand, Twenty Five Naira, Forty Three Kobo) as per the Statement of Account of the 2nd Defendant with the Claimant herewith attached as Exhibit D, the Statement of the Account.**

The above depositions and the annexures attached particularly **Exhibit C2** by 1st Defendant are clear and unambiguous. The fundamentals of the narrative was not really denied in the counter-affidavits filed by either of the Defendants. The case is therefore absolutely not about whether 1st Defendant is a party to the L.P.O Financing Loan Agreement between Claimant and 2nd Defendant vide **Exhibit A** as erroneously conceived by1st Defendant. The extant case is about whether the 1st Defendant lived up to its commitments which it made vide **Exhibit C2.** In **Exhibit C2,** the 1st Defendant stated thus:

"The Manager
First Bank of Nigeria Plc
Ultra Modern Market Branch,
Garki-Abuja

RE: IRREVOCABLE REQUEST FOR DOMICILIATION OF LPO PAYMENT: M/S AUG GREEN PROJECTS LTD

This is to confirm you that we have awarded a contract for the provision of plastic furniture to FCT Secondary Schools to M/S AUG Green Projects Ltd for the sum of N49,598,144.40 (Forty Nine Million, Five Hundred and Ninety Eight Thousand, One Hundred and Forty Four Naira, Forty Kobo) Only.

Following a formal request to us by the Contractor, we have agreed to pay proceeds of the contract to the Contractor's Account Number 2023061479, Sort Code: 011065399 domiciled with your bank. We further agreed that the domiciliation agreement will subsist until we have been notified by you that the facility granted has been fully liquidated.

Yours faithfully,
Signed
U.Y Sodangi
Head, Procurement Unit
For: Secretary, Education"

The above is clear and unambiguous.

The case of the Claimant is that, 1st Defendant did not meet up with this commitments as they themselves represented and accordingly it has suffered financial losses which it is now claiming.

It is therefore really difficult to situate how the **1st Defendant** can on these established facts, contend that it is not a necessary party in the clear context of the specific allegations made and the reliefs sought which will undoubtedly affect them if the Claimant succeeds ultimately.

The provision of **Order 10 Rule 3(1) of the Rules of Court** provides that **"more than one person may be joined a Defendants against whom the right to any Relief is alleged to exist whether jointly or severally.**

The Claimant has here situated the right to the Reliefs sought against 1st Defendant. Whether the Reliefs sought will ultimately succeed is a different matter altogether. Indeed even on the basis of the provision of **Order 10 Rule 5(1) of the Rules of Court,** where it appears to a court, at or before hearing, that all the persons possibly interested in the suit have not been made parties, the court may adjourn and direct that those persons be made either Plaintiff or Defendant in the suit.

The bottom line is that where facts and reliefs sought are clear and specifically targeted at a defined person or institution as in this case, the question is whether the court can determine fairly and effectively the question posed by extant summons behind the back of such person or institution? I don't think so. The joinder of a party to any cause is not a function of the wishes of the party. The dictates of the facts and justice of each case determines how the court proceeds. If from the facts, the presence of the party is critical to a fair, complete and effective resolution of the question(s) raised, then the party must be joined on the principles as early enunciated whatever the wishes, disposition or indeed inclination of the

party. The complaint of abuse of process on the basis of the joinder of 1st Defendant clearly under the circumstances lacks merit and will not fly.

The concept of abuse of judicial process is said to be imprecise. It involves circumstances and situations of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. See **Saraki V. Kotoye (1992)9 N.W.L.R (pt.264)156 at 188 E-F.**

This situation or scenario clearly does not play out in this case. There is no abuse of process here. It is discountenanced without much ado.

On the whole, the **preliminary objection** wholly lacks merit and is discountenanced.

This then leads to the substance of the originating summons and the issue arising for determination appears to me to be as captured by the Claimant as follows:

" Whether by reason of the Existing Assignment of the Debt in the Account for the payment of the proceedings of the L.P.O to the 1st Defendant by 2nd Defendant, the 1st Defendant is not liable to pay the debt and the interest in the Account of 2nd Defendant to the Claimant?"

The **Defendants** will appear to have in their respective addresses modified this issue when they framed the key issue as arising for determination in simple terms of whether the Claimant is entitled to the grant of the Reliefs as contained in the originating summons. In my opinion, these issues may have been differently worded but they in substance convey or project the same issue raised by the Claimant. It is therefore on the basis of the issue as framed by Claimant that I would now proceed to resolve the question raised.

I note that in the **addresses of both Defendants**, the question was raised on the propriety of initiating this action by Originating Summons. I think it is necessary to resolve this issue and then proceed to the merits of the case.

Now Originating Summons is one of the modes by which a civil action may be commenced in the High Court. It is merely a method of procedure and not one that is meant to enlarge the jurisdiction of the Court. See **Re King Mellor V. South Australian Land Mortgage & Agency Co (1907)1 Ch. 72 at 75-per Neville, J** cited with approval in **National Bank of Nigeria V Alakija & Anor (1978)9-10**

SC 59 at 73- per Eso, JSC. The Rules of this Court provide in **Order 2 Rule 3(2)** for the circumstances in which proceeding may be initiated by originating summons.

It is a principle of general application that Originating Summons is reserved for cases bordering on the determination of short questions of construction but not matters of such controversy that the justice of the case would demand the settling of pleadings, and should only be applicable in such circumstances as where there is no substantial dispute on questions of fact or the likelihood of such dispute. See **National Bank of Nigeria V. Alakija & Anor supra and Anatagu V. Anatagu (1997)9N.W.L.R (pt.519)49.** It would seem that the emphasis is not on the **existence of dispute per se since every case necessarily involves one dispute or the other,** but **whether there is a substantial dispute** of fact relevant to the determination of the issue in controversy. See **Habib Nigeria Bank Limited V. Ochete (2001)F.W.L.R (pt.54)384 at 406-407, Inakoju V. Adeleke (2007)All F.W.L.R (pt.353)3 at 202.**

The point to perhaps underscore at the risk of prolixity is that the law does not envisage a situation of no dispute at all in a proceeding commenced with an originating summons, but that of absence of substantial dispute. In other words, there can be disputed facts in an originating summons proceedings, but the dispute must not be substantial. The substantially of the disputed facts determines, largely whether it is appropriate or not to commence an action vide the originating summons. See **Pan V. Mohammed (2008)16 N.W.L.R (pt.112)1 at 15; Nguroje & Anor V. El-sudi & Ors (2012)LPELR-20865 (CA).**

In **Ezeigwe V. Nwawulu (2010)All F.W.L.R (pt.518)794 at 838-839,** the Supreme Court (per Adekeye, JSC) stated the law succinctly as follows:

> **"…The main advantage is simplicity resulting from the elimination of pleadings. The procedure of originating summons is meant to be invoked in a friendly action between parties who are substantially ad idem on the facts and who, without the need for pleadings, merely want, for example, a directive of the court on the point of law involved. The procedure is not meant to be invoked in a hostile action between parties and in which the parties concerned need know beforehand the issues which they are called upon to contend with from the pleadings. <u>There can be disputed facts which originating summons procedure could resolve, but where the</u>**

disputed facts are substantial, the proper mode of commencing such on action is by writ of summons so that pleadings can be filed. In other words, originating summons procedure is appropriate (only) where there is no substantial dispute of facts between the parties or likelihood of such dispute."

Against the back drop of the foregoing, having carefully and insightfully examined depositions in the supporting and counter-affidavits as well as the exhibits annexed thereto, the relevant enquiry is whether or not there is any substantial dispute on the facts that would necessitate a contest by the filing of pleadings. I shall here take my bearing from the affidavits filed by parties and the attached exhibits to situate the precise parameters of the dispute.

Now what stands out in **bold relief** from the supporting and counter-affidavits is that the 2nd Defendant entered into an L.P.O finance loan agreement vide **Exhibit A** with Claimant and the Claimant by a letter of offer dated 3rd February, 2015 vide **Exhibit B** offered the 2nd Defendant a contract financing facility in the sum of N23,000,000 (Twenty Three Million Naira). The 2nd Defendant by **Exhibit C1** then authorized the 1st Defendant to domicile the payment for the contract into the account of 2nd Defendant with Claimant.

The 1st Defendant by **Exhibit C2** agreed or accepted to domicile all payments into the account of 2nd Defendant with Plaintiff. It may be relevant to again, quote the contents of **Exhibit C2** from the 2nd Defendant as follows:

"The Manager
First Bank of Nigeria Plc
Ultra Modern Market Branch,
Garki-Abuja

RE: IRREVOCABLE REQUEST FOR DOMICILIATION OF LPO PAYMENT: M/S AUG GREEN PROJECTS LTD

This is to confirm you that we have awarded a contract for the provision of plastic furniture to FCT Secondary Schools to M/S AUG Green Projects Ltd for the sum of N49,598,144.40 (Forty Nine Million, Five Hundred and Ninety Eight Thousand, One Hundred and Forty Four Naira, Forty Kobo) Only.

Following a formal request to us by the Contractor, we have agreed to pay proceeds of the contract to the Contractor's Account Number 2023061479, Sort Code: 011065399 domiciled with your bank. We further agreed that the domiciliation agreement will subsist until we have been notified by you that the facility granted has been fully liquidated.

Yours faithfully,
Signed
U.Y Sodangi
Head, Procurement Unit
For: Secretary, Education"

The above letter as stated earlier is clear and self explanatory.

The case of Plaintiff is that the 1st Defendant has failed to deposit proceeds for the payment of the L.P.O into the account of 2nd Defendant with Claimant as agreed vide **Exhibit C2.** That the failure to make the payments has left the account of 2nd Defendant in debit balance now claimed representing both the principal and interest charged on the account.

The **1st Defendant** did not in any manner controvert these material assertions. Indeed, they admitted the fundamental basis of the relationship with Claimant in their counter-affidavit as follows:

8. **That the 1st Defendant awarded a contract to AUG Green Projects Limited on 30th December 2014 for the Provision of Plastic Furniture to FCT Secondary Schools with a contract sum of N49,598,144.40 and a completion period of 4 weeks. A copy of the Award Letter is herewith attached and marked as Exhibit A.**

9. **That the 2nd Defendant wrote the 1st Defendant on 11th February, 2015 officially requesting and instructing the 1st Defendant to domicile all payments in respect of the contract with the First Bank of Nigeria Limited Account No:2023061479, Sort Code 01165399 to enable the 2nd Defendant get a loan facility to execute the job. A similar request was made by the 2nd Defendant to the FCT Treasury. Copies of both letters are herewith attached and marked as Exhibit B1 and B2.**

10.That it was based on the above that the 1st Defendant wrote to the Claimant to confirm the genuineness of the contract award and assure the domiciliation of payment with the Bank as requested and instructed by the 2nd Defendant. A copy of the letter to the Claimant is herewith attached and marked as Exhibit C.

14 That after the 2nd Defendant successfully completed the contract, part payment in the sum of N20,000,000.00 minus vat came to N18,095,238.10 was made by the 1st Defendant to the domiciled Account with the Claimant which the bank confirmed receiving. A copy of the letter from the bank confirming receipt of the part payment and the e-payment schedule are herewith attached and marked as Exhibit E.

15 That the 1st Defendant received a letter from the Claimant dated 21st November 2017, requesting the 1st Defendant to confirm whether additional payments have been made in respect of the contract. A copy of the letter is herewith attached and marked as Exhibit F.

16 The Procurement Unit, Education Secretariat of the 1st Defendant officially wrote to the 2nd Defendant to confirm whether it has received any additional payments from the 1st Defendant. The letters upon service to the Contractor were acknowledged by the 2nd Defendant. No response has been received from the 2nd Defendant to date. Copies of the letters dated 29th November 2017 and 13th December, 2017 are herewith attached and marked as Exhibit G1 and G2.

17 That upon investigation carried out by the 1st Defendant, it was discovered that the Contractor fraudulent (sic) supplied a different account number to staff of the FCT Treasury Department and an additional payment of N25,352,537.26 was made to the 2nd Defendant through an account he supplied at Zenith International Bank Plc Abuja, Account Number 1014619066. A copy of the E-Payment Schedule is herewith attached and marked as Exhibit H.

18 That the 1st Defendant served the 2nd Defendant a Demand and Request for Refund Notice dated 5th October 2018 which was acknowledged by the 2nd Defendant. Till date no refund has been made by the 2nd Defendant. The Letter is herewith and marked as Exhibit I.

The above is essentially **self inculpatory**. The 1st Defendant as stated earlier agreed on the fundamentals of the case. They agreed or concede that they awarded a contract to the 2nd Defendant which obtained a loan from Claimant to finance the contract and which then wrote to 1st Defendant to domicile all payments in respect of the contract with an account in Claimant. The 1st Defendant wrote to Claimant confirming this arrangement vide **Exhibit C2** above.

This **Exhibit C2** and its terms are thus binding on 1st Defendant and constitutes a basis for the mutual reciprocity of legal obligations with Claimant.

It is therefore obvious that there is really no **substantial dispute** as to facts. The narrow issue is whether the 1st Defendant made the required payments as agreed which can be conveniently dealt with by means of originating summons without any necessity to order for the exchange of pleadings. The only real question as I see it in the context of the clear facts of this case is whether the amount claimed by Claimant has been established within established legal threshold. I will shortly deal with this issue.

Now, I had earlier situated the common grounds in the relationship of parties. I need not repeat my myself. As already situated, the 1st Defendant agreed that it was to domicile all payments in respect of the contract to Claimant. The question simply is whether it lived up to its commitments? I prefer here to take my bearing from the counter-affidavit of **1st Defendant** thus:

14 That after the 2nd Defendant successfully completed the contract, part payment in the sum of N20,000,000.00 minus vat came to N18,095,238.10 was made by the 1st Defendant to the domiciled Account with the Claimant which the bank confirmed receiving. A copy of the letter from the bank confirming receipt of the part payment and the e-payment schedule are herewith attached and marked as Exhibit E.

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17 **That upon investigation carried out by the 1st Defendant, it was discovered that the Contractor fraudulent(sic) supplied a different account number to staff of the FCT Treasury Department and an additional payment of N25,352,537.26 was made to the 2nd Defendant through an account he supplied at Zenith International Bank Plc Abuja, Account Number 1014619066. A copy of the E-Payment Schedule is herewith attached and marked as Exhibit H.**

18 **That the 1st Defendant served the 2nd Defendant a Demand and Request for Refund Notice dated 5th October 2018 which was acknowledged by the 2nd Defendant. Till date no refund has been made by the 2nd Defendant. The Letter is herewith and marked as Exhibit I.**

The above is again self explanatory.

The 1st Defendant is **essentially admitting** that it did not keep to the terms of the domiciliation agreement with Claimant under **Exhibit C2.** If the 2nd Defendant as contended by 1st Defendant was fraudulent and supplied the 1st Defendant another account where further payments for the contract was made, the Claimant certainly has nothing to do with it and only confirms or situates that 1st Defendant indeed acted in a manner inconsistent with the commitments it made in **Exhibit C2**. It is a contradiction in the gravest terms for the 1st Defendant to aver in **paragraph 19** that they did not at anytime refuse or fail to make the deposits for the payment of the L.P.O and at the same time agree that they made payments to a different account with a different bank contrary to the agreement they made. Indeed it is

because they did not live up to their commitments which explains why in **paragraph 18,** they indicated that they had served the 2nd Defendant a Demand and Request Notice for refund of the sums they paid out contrary to the commitments they made under **Exhibit C2.** If 2nd Defendant has refused to respond as stated, then it is the duty of 1st Defendant to do the needful in view of there extant commitments to Claimant.

The bottom line is that the obligations of 1st Defendant to Claimant for the domiciliation of the L.P.O payment remains extant. It perhaps may be necessary to reiterate what the 1st Defendant stated in **Exhibit C2** thus:

"…Following a formal request to us by the contractor, we have agreed to pay proceeds of the contract to the contractors Account Number 2023061479, sort code: 011065399 domiciled with your bank. We further agreed that the domiciliation agreement will subsist until we have been notified by you that the facility granted has been fully liquidated."

The above is clear and no additions or interpolations can be made to it to suit a particular purpose. See **Section 128 of the Evidence Act.** There is nothing on the materials supplied by 1st Defendant situating that the facility granted to 2nd Defendant has been fully liquidated, but the 1st Defendant made payments of proceeds of contract contrary to the domiciliation agreement. It is safe and logical to say that if the 1st Defendant had kept strict fidelity to the terms of the domiciliation agreement, this case or dispute may perhaps have not arisen. I think under the circumstances, the 1st Defendant is bound to live up to the commitments of the domiciliation agreement. The only challenge here is whether there are clear and precise parameters for the sums claimed by Plaintiff.

Now in the affidavit of **Claimant**, the 2nd Defendant was offered **₦23 Million Naira**. In **paragraph 10**, the Claimant appear to indicate that no payments from the proceeds of the L.P.O was paid at all but in **paragraph 12**, they now projected the position that some payments may have been made when they stated that **"due to the failure of the 1st Defendant to pay all payments of the L.P.O into the account of 2nd Defendant with Claimant, the debit balance in the Account of 2nd Defendant with Claimant has risen to N23,334,025.43 as per the statement of account attached as Exhibit D."**

Paragraph 12 projects clearly that certain payments were made but not **"all".** How much was paid was not identified. There is however nothing on the materials before me situating the parameters of how this sum claimed was reached or how the figure was arrived at. There is nothing to situate what constitutes the principal or interest element of the claim and how it was computed and the court cannot speculate.

It is true that a statement of account was attached as **Exhibit D** to the affidavit in support but it is not the duty of court to in chambers to begin an analysis of the entries. The statement of account clearly will not on its own amount to sufficient proof of the claim which includes an interest element without a clear explanation of the basis or parameters of the overall balance in the account.

The law is settled that a **Bank Statement of Account**, where one is provided, is not sufficient explanation of debit and lodgments in an account of a customer to charge the customer with liability for the overall debit balance shown in the statement of account. Any Bank claiming a sum of money on the basis of overall debit balance of a statement of account must adduce both documentary and oral evidence to show how the overall debit balance was arrived at. See **Yusuf V. ACB (1986)1 and 2 SC at 49; Wema Bank V. Alh Idowa Fasasi Osilaru (2009)LPELR-8960.** Indeed in order for a claim for debt outstanding in a customer's account with its banker to succeed, the banker has to prove how the debit balance claimed from the customer was arrived at. The Plaintiff bank has to demonstrate through oral evidence given by an official who is familiar with the account, how the debit balance was arrived at. See **Bilante Int'l Ltd V. N.D.I.C (2011)15 N.W.L.R (pt.1270)1; Inter Drill (Nig) Ltd (2007) N.W.L.R (pt.366)736**

On the materials there was no clear demonstration of how the overall debit balance in **Exhibit D** was reached.

To further compound the key question of the amount prayed for, the 1st Defendant in paragraph 14 stated that they have made part payment to the domiciled account with Claimant thus:

14. **That after the 2nd Defendant successfully completed the contract, part payment in the sum of N20,000,000.00 minus vat came to N18,095,238.10 was made by the 1st Defendant to the domiciled Account with the**

Claimant which the bank confirmed receiving. A copy of the letter from the bank confirming receipt of the part payment and the e-payment schedule are herewith attached and marked as Exhibit E.

The Claimant as stated earlier filed a further and better affidavit in response to the above counter-affidavit of 1st Defendant but no where in the entire 24 paragraphs did Claimant counter or deny the above **paragraph 14.** The implication in law is that the said **paragraph is deemed admitted**.

If a certain **amount** has already been paid, this certainly must impact the overall indebtedness of 2nd Defendant to Claimant? What that impact is cannot obviously be a matter for speculation or guess work.

Again, and adding a different complicating dynamic to the case of Claimant and the sums claimed, the 2nd Defendant in its counter-affidavit vide **paragraphs 14-18** stated that the Claimant reported the matter at EFCC where several meetings were held and parties agreed that the sum of **N5Million** be used to defray the loan facility which Claimant agreed to, leaving only the sum of N2Million as outstanding and not the sum claimed by Plaintiff in the summons.

The Claimant in response to this counter-affidavit of 2nd Defendant filed a further and better affidavit and stated as follows:

"5. That only the EFCC, upon complaint of the misdeed of the 2nd Defendant by diverting the balance money for the payment of L.P.O to Zenith Bank and the EFCC recovered N5Million to the Claimant from the 2nd Defendant in 2020. The Claimant did not agreed(sic) on any other fact with the 2nd Defendant whatsoever.

6. That the Claimant abandons the N5Milion from the claims of the Claimant as the EFCC recovered the N5Million during the trial of this dispute."

The above again is clear. The Claimant concedes that **N5Milion** was recovered by the EFCC from 2nd Defendant and has now **abandoned N5Million Naira** from its claims. This too clearly must impact the total amount claimed. There is therefore clearly no clarity with respect to the amount due, if any from the loan facility granted to 2nd Defendant which 1st Defendant agreed to pay the proceeds into a designated account and the court cannot speculate. The amount due on the unpaid

debit balance has clearly not been established and the responsibility or duty to positively established these assertions were on the Claimant.

On the whole, the question with respect to whether the 1st Defendant must keep strict fidelity to the domiciliation agreement must be answered in the **affirmative** but the Reliefs sought clearly on the basis of absence of clear evidence will unfortunately not be availing.

Before determining or defining the final order(s) in this case, let me perhaps explain briefly, again, why the specific reliefs cannot be availing particularly in the context of having answered the question submitted for determination in the affirmative. The **Claimant** in **Relief 1** claims against Defendant the sum of ₦21,334,025.43 Dr (Twenty One Million, three Hundred and Thirty Four Thousand, Twenty Five Naira, Forty Three Kobo) as at 13th February, 2018, being the unpaid Debit Balance in the 2nd Defendant's Account with the Claimant arising from the failure of the 1st Defendant's refusal, failure or negligent to domicile the full Proceeds of LPO Contract with the Claimant as agreed by the parties. In face of the fluidity of the facts or put another way in the absence of clear evidence to support the sums claimed as demonstrated at length, this relief in the circumstances cannot be availing.

In light of the absence of credible evidence to establish **Relief 1** or the substantive amount claimed, there then is no basis to determine the claim for interest predicated on this undetermined principal amount. The principle is once the principal is taken away, the adjunct is also taken away. **Relief 2** is in the circumstances also not availing. **Relief 3** on post judgment interest similarly for reasons advanced under Relief 2 cannot be availing. There is no foundation to support this Relief.

Now what are the final orders to make in this case.

Having answered the single issue submitted for resolution in the Originating Summons in the affirmative, logically this should then provide firm basis, both factual and legal to sustain the Reliefs sought. In this case however, as demonstrated, the Reliefs sought were not satisfactorily proved or established.

I was thus compelled to carefully ponder the order(s) to make that will fairly meet the justice of this case. It does not appear to me fair or right to dismiss this case as a consequence of the failure to satisfactorily prove the entitlement to the Reliefs.

Situations as presented in this case thus allow for the invocation of the provision of **Order 38 of the Rules of Court, 2018** which provides as follows:

"Where satisfactory evidence is not given entitling the Claimant or Defendant to the Judgment of the Court, the Court may suo-motu or an application non suit. The Claimant but the parties legal practitioner shall have the right to make submissions about the propriety or otherwise of making such order."

The word **"or"** which is a disjunctive participle appears above allowing the court to suo-motu exercise the power to make the order of non-suit without the necessity of calling for input by legal practitioners. The making of an order of non suit is discretionary but it is one to be exercised judicially and judiciously and with utmost circumspection, the overriding consideration being that of ensuring that justice is served ultimately. It would be injudicious to dismiss this case in the circumstances and thereby preventing the realization of the commitments freely given by both Defendants in this case.

The justice of the matter demands that the Claimant be given another chance, if they so desire, to ventilate the grievance relating to the outstanding indebtedness. What the order of non suit does is salutary and in the interest of justice leaving the Claimant at liberty to commence the action again. See **Okpala V. Ibeme (1989)2 N.W.L.R (pt.102)208; ACB V. Yesufu (1980)1-2 SC 49.**

On the whole, I accordingly in the final analysis and for the avoidance of doubt make an order **of non-suit**. No order as to cost.

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Hon. Justice A.I. Kutigi

Appearance:

1. ***I.Y. Yamah, Esq., with C.O. Iliyasu Esq., and Salisu Iliyasu, Esq., for the Claimant.***

2. ***Tairu Adebayo, Esq., for the 1st Defendant.***

3. ***Igah Idoko, Esq., for the 2nd Defendant.***