

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**  
**HOLDEN AT JABI - ABUJA**

**THIS WEDNESDAY, THE 8<sup>TH</sup> DAY OF MARCH, 2023**

**BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI -- JUDGE**

**SUIT NO. CV/2817/2015**

**BETWEEN:**

**MOHAMMED BABA NDAKUPE ..... CLAIMANT**

**AND**

**1. FATAI K. SALAWU  
2. FATIA ENGINEERS LTD  
3. FIRST CITY MONUMENT BANK PLC** } ..... **DEFENDANTS**

**JUDGMENT**

By a writ of summons and statement of claim dated 23<sup>rd</sup> September, 2015, the plaintiff claims for the following Reliefs:

- (a) A Declaration that the Plaintiff is the bona fide owner of the property situate and known as Block D8A, FCDA Owner Occupier, Kubwa, Abuja covered by Certificate of Occupancy No: 4d5uw-13e7z-11372-14442-cur3 dated 28/3/2008 (File No: NG 30535) registered as No: 38447 at Pg. 38447 at the Land Registry Office, Abuja.**
  
- (b) An Order of the Honourable Court setting aside the loan agreement and legal mortgage between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in which the Plaintiff's property was used as security, his consent not having first been sought and obtained prior to the transaction. The transaction is therefore void *ab initio*.**

- (c) A perpetual injunction restraining the 3<sup>rd</sup> Defendant, his agents and assigns from selling, advertising, auctioning or otherwise disposing off the plaintiff's property used as collateral for the loan, the 1<sup>st</sup> and 2<sup>nd</sup> defendants not having any title, interest, lien in the property capable of being sold to recover or redeem the loan.**
- (d) An Order of the Honourable Court setting aside every document, form, memorandum of understanding, resolutions of being a director in, consent to become a shareholder or member of the 2<sup>nd</sup> Defendant's company, Corporate Affairs Commission forms, Power of Attorney or any other document, purportedly bearing the signature of the Plaintiff such signature having been forged, altered, cloned or super imposed on such documents as the plaintiff never signed any document in relation to becoming or being a director in the 2<sup>nd</sup> Defendant's company or consenting to using his house as collateral for any loan with the 3<sup>rd</sup> Defendant.**
- (e) The sum of N50, 000, 000. 00 (Fifty Million Naira) as general damages for the deception and under hand dealings practiced on the Plaintiff by the Defendants.**
- (f) The cost of this suit.**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of defence dated 4<sup>th</sup> December, 2015. The 3<sup>rd</sup> Defendant on its part filed a 3<sup>rd</sup> defendant statement of defence dated 19<sup>th</sup> April, 2016 and set up a counter-claim against plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants as follows:

- a. A Declaration that the facility granted the 2<sup>nd</sup> Defendant via the letter dated 6<sup>th</sup> May 2013, having remained unpaid despite repeated demand has become due.**
- b. A Declaration that the Counter-claimant is entitled to the sum of N59, 971, 402.52 (Fifty Nine Million, Nine Hundred and Seventy One Thousand, Four Hundred and Two Naira Fifty Two Kobo), being the principal sum and accrued interest on the facility granted the 3<sup>rd</sup> Defendant to the Counter claim, FATAI ENGINEERS LIMITED as at 29<sup>th</sup> February, 2016.**

- c. **Interest at the rate of 22% on the said sum until judgment, and thereafter at the rate of 10% (ten percent) until final liquidation.**
- d. **Post Judgment interest at the rate of 10% at judgment until the liquidation of the judgment debt.**
- e. **A Declaration that the Counter claimant is entitled to exercise the power of sale provided for in Clause 4(k) (ii) and 13 of the registered tripartite Deed of Legal Mortgage registered as No 50 at page 50 in volume 33, MISC in the Federal Capital Territory Land Registry Office, Abuja.**
- f. **An Order of Perpetual Injunction restraining the Defendants to the counter claim whether by themselves, privies, assigns howsoever called from interfering with the counter claimant's exercise of the power of sale under the tripartite Deed of Legal Mortgage registered as No 50 at Page 50 in Volume 33, MISC in the Federal Capital Territory Land Registry Office, Abuja.**
- g. **The sum of N1, 000, 000.00 (One Million Naira) representing the solicitors fee paid by the counter-claimant.**

In Response to the above, the plaintiff filed the following processes:

- i. Plaintiff's Reply to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Statement of Defence dated 11<sup>th</sup> October, 2016.
- ii. Plaintiff's Reply and Defence to 3<sup>rd</sup> Defendants Defence/Counter-claim dated 11<sup>th</sup> October, 2016.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants then filed a 1<sup>st</sup> and 2<sup>nd</sup> Defendants Joint Defence to the 3<sup>rd</sup> Defendant's Counter-claim.

It is perhaps necessary to state that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought for leave to issue and serve a third party notice on one **Alhaji Abdulrahman Tunau Bello**. The application was granted and he was duly served. Indeed on the Record, one Hajara Gbolegbade (Mrs.) appeared once for him and indicated that they have entered conditional appearance but neither counsel or the third party appeared in court all through the course of this proceeding and no process(es) was filed on his behalf. Counsel on the part of 1<sup>st</sup> and 2<sup>nd</sup> defendants never filed any

application for directions as required by the Rules. Indeed on the Record, precisely on 12<sup>th</sup> December, 2017, the court raised the issue and learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants O.M. Ojite indicated that he will soon do so but he never did. The issue of third party effectively therefore never took off; it was also never raised again by anybody and with the settlement of pleadings by parties in the substantive case, hearing then commenced.

In proof of his case, the plaintiff testified as PW1 and the only witness. He deposed to two witness depositions:

1. Witness statement on oath dated 23<sup>rd</sup> September, 2015 and
2. Plaintiff's additional witness statement on oath dated 11<sup>th</sup> October, 2016.

He adopted the above depositions at trial and tendered in evidence the following documents, to wit:

1. Copy of Certificate of Occupancy acknowledging collection of the original copy by 1<sup>st</sup> defendant was admitted as **Exhibit P1**.
2. Letter written by 2<sup>nd</sup> defendant signed by 1<sup>st</sup> defendant dated 30<sup>th</sup> April, 2013 was admitted as **Exhibit P2**.
3. F.C.M.B Offer of Banking facilities dated 6<sup>th</sup> May, 2013 was admitted as **Exhibit P3**.
4. Letter written by the law firm of Anthony Agbonlahor & Associates dated 26<sup>th</sup> August, 2013 was admitted as **Exhibit P4**.
5. Letter written by the 2<sup>nd</sup> defendant to 3<sup>rd</sup> defendant dated 31<sup>st</sup> August, 201 and copied to plaintiff was admitted as **Exhibit P5**.
6. Letter written by 3<sup>rd</sup> defendant to 2<sup>nd</sup> defendant dated 8<sup>th</sup> September, 2015 was admitted as **Exhibit P6**.
7. Letter written by the law firm of Anthony Agbonlahor & Associates dated 10<sup>th</sup> September, 2015 was admitted as **Exhibit P7**.
8. Letter written by 2<sup>nd</sup> defendant to the law firm of Anthony Agbonlahor & Associates was admitted as **Exhibit P8**.

9. Bank payment slip dated 22<sup>nd</sup> January, 2014; 29<sup>th</sup> January, 2014, 30<sup>th</sup> March, 2014, 7<sup>th</sup> August, 2014 and 5<sup>th</sup> September, 2014 were admitted as **Exhibits P9 (1-5)**.

PW1 was cross-examined by counsel to 1<sup>st</sup> and 2<sup>nd</sup> defendants and counsel to the 3<sup>rd</sup> defendant/counter-claimant. With his evidence, the plaintiff closed his case.

On the part of 1<sup>st</sup> and 2<sup>nd</sup> defendants, they equally called only one witness.

The 1<sup>st</sup> defendant Engr. Fatai Kanmi Salawu and Managing Director of 2<sup>nd</sup> defendant testified as DW1. He deposed to two witness statement on oath dated 7<sup>th</sup> December, 2015 and an additional statement which he adopted dated 1<sup>st</sup> December, 2016 which he adopted at the hearing. He tendered in evidence the following documents:

1. 3<sup>rd</sup> Defendant's Offer of Banking Facilities dated 6<sup>th</sup> May, 2013 was admitted as **Exhibit D1**.
2. 3<sup>rd</sup> Defendant's Offer of Banking Facility dated 18<sup>th</sup> June, 2013 was admitted as **Exhibit D2**.
3. Copy of a FCMB cheque dated 31<sup>st</sup> May, 2013 was admitted as **Exhibit D3**.
4. Notice of meeting issued by 2<sup>nd</sup> Defendant dated 23<sup>rd</sup> October, 2013 was admitted as **Exhibit D4**.
5. Minutes of meeting of Directors of 2<sup>nd</sup> Defendant dated 27<sup>th</sup> August, 2013 was admitted as **Exhibit D5**.
6. Minutes of meetings of 2<sup>nd</sup> Defendant dated 23<sup>rd</sup> October, 2013 was admitted as **Exhibit D6**.
7. Certified True Copy (C.T.C) of particulars of Director of 2<sup>nd</sup> Defendant (Form CAC7) was admitted as **Exhibit D7**.
8. 2<sup>nd</sup> Defendant's letter to the 3<sup>rd</sup> Defendant dated 3<sup>rd</sup> June, 2014 was admitted as **Exhibit D8**.

9. 2<sup>nd</sup> Defendant's letter to the 3<sup>rd</sup> Defendant dated 31<sup>st</sup> August, 2015 was admitted as **Exhibit D9**.
10. 3<sup>rd</sup> Defendant's letter dated 15<sup>th</sup> May, 2013 was admitted as **Exhibit D10**.
11. Letter from National Programme for Food Security dated 4<sup>th</sup> June, 2013 was admitted as **Exhibit D11**.
12. Copy of Data page of International Passport of Plaintiff was admitted as **Exhibit D12**.
13. Receipt issued by AGIS dated 14<sup>th</sup> May, 2013 was admitted as **Exhibit D13**.
14. Demand for Ground rent to plaintiff dated 23<sup>rd</sup> April, 2013 was admitted as **Exhibit D14**.
15. Letter titled Authority to Debit Account No. 0634800017 written by 2<sup>nd</sup> defendant was admitted as **Exhibit D15**.
16. 2<sup>nd</sup> Defendant's Board Resolution was admitted as **Exhibit D16**.
17. Letter by 2<sup>nd</sup> Defendant addressed to 3<sup>rd</sup> Defendant titled "Irrevocable and unconditional undertaking to domicile all proceed of contract" was admitted as **Exhibit D17**.
18. Board resolution of 2<sup>nd</sup> Defendant to upstamp was admitted as **Exhibit D18**.
19. Plaintiffs application to the Minister FCT for consent to create Tripartite Deed of Legal Mortgage was admitted as **Exhibit D19**.
20. Plaintiffs Authority to unstamp was admitted as **Exhibit D20**.
21. Letter written by Plaintiff addressed to 3<sup>rd</sup> Defendant titled "Consent and Authority to create Tripartite Deed of Legal Mortgage" was admitted as **Exhibit D21**.

DW1 was then cross-examined by counsel to the 3<sup>rd</sup> defendant and counsel to the plaintiff. In the course of the cross-examination by plaintiff, copy of

affidavit dated 23<sup>rd</sup> May, 2013 sworn to at the High Court of Justice Nasarawa State was admitted as **Exhibit D22**.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants then on record subpoenaed an official of FCMB (First City Monument Bank) to produce the following documents in court to wit:

1. Tripartite Deed of Legal Mortgage between Fatai Engineer and Mohammed Baba Ndakupe and FCMB plc and
2. Account statements of Fatai Engineers ltd.

The documents were produced but the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not tender the above documents in evidence as the witness they intended to use to put in the documents refused to attend court, according to them. The 1<sup>st</sup> and 2<sup>nd</sup> defendants then closed their case.

On the part of the 3<sup>rd</sup> defendant/counter-claimant, they similarly called only one witness, **Lukman Oladapo**, a Relationship officer with 3<sup>rd</sup> defendant testified as **DW2**. He deposed to a witness deposition dated 30<sup>th</sup> October, 2019 which he adopted at the hearing. He tendered in evidence the following documents:

1. Letter by the law firm of Etukwu Ona & Co. dated 23<sup>rd</sup> June, 2014 addressed to the Regional Manager FCMB plc was admitted as **Exhibit D23**.
2. The letter of instructions by FCMN to the law firm of Tairu Adebayo & Co. and the letter by the law firm of Tairu Adebayo & Co dated 30<sup>th</sup> December, 2015 to the company secretary/legal adviser of FCMB plc were admitted as **Exhibits D24a and D24b**.

DW2 was then cross-examined by counsel to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and in the process, the Tripartite Deed of Legal Mortgage between Fatai Engineers Ltd and Mohammed Baba Ndakupe and FCMB was admitted as **Exhibit D25**.

DW2 was then cross-examined by counsel to the plaintiff and with his evidence, the 3<sup>rd</sup> defendant/counter-claimant closed its case.

At the close of the case, parties filed, exchanged and adopted their final written addresses. The final written address of 3<sup>rd</sup> defendant/counter-claimant is dated

22<sup>nd</sup> June, 2022. In the address, three issues were raised as arising for determination:

- 1. Whether in the entire circumstances of this case, the Claimant has proved his case as required by law, to entitle him to the grant of the reliefs sought.**
- 2. Whether the Claimant is entitled to his claim for general damages and an order of perpetual injunction.**
- 3. Whether the 3<sup>rd</sup> Defendant/Counter Claimant has not proved her counter-claim upon the balance of probability as to entitle her to judgment in this case.**

On the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their final address is dated 2<sup>nd</sup> November, 2022 and three issues were equally raised as arising for determination as follows:

- 1. Whether the Claimant has proven his case to be entitled to the reliefs sought in the writ of summons and statement of claim.**
- 2. Whether the 3<sup>rd</sup> Defendant has a competent counter claim before the Honourable Court.**
- 3. Whether the 3<sup>rd</sup> Defendant has proven her Counter-claim to be entitle to judgment.**

On the part of the claimant, his final address is dated 14<sup>th</sup> November, 2022 and two issues were raised as arising for determination:

- 1. Whether the Plaintiff has proven his case as to be entitled on the preponderance of evidence to the grant of his claims/reliefs contained in his writ of summons and statement of claim.**
- 2. Whether the 3<sup>rd</sup> Defendant has proven her counter claim on the balance of probability as to entitle her to judgment in this suit.**

I have given a careful and insightful consideration to all the issues as distilled by parties in relation to the pleadings and evidence adduced at plenary hearing. The issues may have been differently worded, but they seem to me in substance to be in pari materia.



Now there is no doubt that there is a claim and counter-claim by the 3<sup>rd</sup> defendant in this case. It is true that for all intents and purposes, a counter claim is a separate, independent and distinct action and the counter claimant like the plaintiff in an action must prove their case against the person counter claimed before obtaining judgment on the counter-claim. See **Jeric Nig. Ltd V Union Bank (2001) 7 WRN 1 at 18, Prime Merchant Bank V Man-Mountain Co. (2000) 6WRN 130 at 134.**

In view of this settled position of the law, both the claimant and 3<sup>rd</sup> defendant have the burden of proving their claim and counter-claim within established legal threshold. This being so, the two issues raised by the claimant appears to have captured the crux of the grievance between parties and it is on the basis of these issues which the court has slightly modified hereunder that I would proceed to resolve the present dispute. The two issues are as follows:

- 1. Whether the plaintiff has proved his claims on a balance of probability to entitle him to all or any of the Reliefs claimed.**
- 2. Whether the 3<sup>rd</sup> defendant/counter-claimant has on a balance of probabilities proved its counter-claim and entitled to all or any of the Reliefs sought?**

The above issues are not raised as alternatives to the issues raised by parties, but the issues canvassed by parties can and shall be cumulatively considered under the above issues. See **Sanusi V Amoyegan (1992) 4 N.W.L.R (pt.237) 527.** The issues thus raised will be taken together as it has in the courts considered opinion brought out with sufficient clarity and focus, the pith of the contest which has been brought to court for adjudication.

Let me quickly make the point that it is now settled principle of general application that whatever course the pleadings take, an examination of them at the close of pleadings should show precisely what are the issues upon which parties must prepare and present their cases. At the conclusion of trial proper, the real issue(s) which the court would ultimately resolve manifest. Only an issue which is decisive in any case should be what is of concern to parties. Any other issue outside the confines of these critical or fundamental questions affecting the rights of parties will only have peripheral significance, if any. In **Overseas Construction Ltd V. Creek Enterprises Ltd &Anor (1985)3 N.W.L.R (pt13)407 at 418,** the Supreme Court instructively stated as follows:

**“By and Large, every disputed question of fact is an issue. But in every case there is always the crucial and central issue which if decided in favour of the plaintiff will itself give him the right to the relief he claims subject of course to some other considerations arising from other subsidiary issues. If however the main issue is decided in favour of the defendant, then the plaintiff’s case collapses and the defendant wins.”**

It is therefore guided by the above wise exhortation that I would proceed to determine this case based on the issues I have raised and also consider the evidence and submissions of counsel. In furtherance of the foregoing, I have carefully read the final written addresses filed by parties. I will in the course of this judgment and where necessary make references to submissions made by counsel.

Now to the substance. As stated already, I shall take the two issues together. This will then provide firm basis to determine the questions of whether the reliefs sought by plaintiff and the counter-claim of 3<sup>rd</sup> defendant are availing.

I had at the beginning stated the claims and counter-claims of plaintiff and 3<sup>rd</sup> defendant. The facts, at least the primary facts forming the basis of the relationship are largely not in dispute. The dispute lies in situating the precise nature of the agreement parties especially plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> defendants had with respect to the collateral of plaintiff used for the loan or facility 3<sup>rd</sup> defendant granted to 2<sup>nd</sup> defendant. The plaintiff concedes or agrees he gave his Certificate of Occupancy (C/O) to be used as a collateral but on certain defined terms or conditions. That the documents used by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to situate these conditions were all fraudulently obtained which provides the factual and legal basis for the Reliefs sought and to essentially vitiate the giving of the collateral. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants on their part denied any wrong doing contending that all documents to support the loan facility were properly obtained with consent of plaintiff; while the 3<sup>rd</sup> defendant seeks to enforce the mortgage predicated on the failure of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to meet up with the commitments or terms of the loan facility which they granted 1<sup>st</sup> and 2<sup>nd</sup> defendants which used the Certificate of Occupancy of plaintiff as collateral for the loan facility.

It is therefore to the pleadings which has streamlined the issues in dispute and the evidence that we must beam a critical judicial search light in resolving these contested assertions. The pleadings are even more critical here because, I note

sadly, that in the addresses, submissions were made at large that cannot be situated within the confines of the issues joined on the pleadings. The liberty and right to file addresses has been used here as a conduit to expand the remit of the grievance beyond that submitted on the pleadings.

In this case, the plaintiff filed a 24 paragraphs statement of claim which forms part of the Record of Court. He equally filed a 6 paragraphs Reply to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants statement of defence and a 3 paragraphs plaintiff's Reply and defence to 3<sup>rd</sup> defendants defence and counter-claim. The evidence of plaintiff and sole witness largely falls within the structure of the claim and Replies filed.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a 25 paragraphs statement of defence and a 26 paragraphs 1<sup>st</sup> and 2<sup>nd</sup> Defendants Joint Defence to the 3<sup>rd</sup> Defendants counter-claim which all form part of the Record of court and the evidence of their sole witness is similarly largely within the purview of these pleadings.

Finally, the 3<sup>rd</sup> defendant/counter-claimant filed a 35 paragraphs statement of defence and counter-claim which also forms part of the Record of court and the evidence of their sole witness also largely falls within the body of facts averred in these process.

I shall in the course of this judgment refer to specific paragraphs of the pleadings, where necessary to underscore any relevant point. Indeed in this judgment I will deliberately and in extenso refer to the above pleadings of parties as it has clearly streamlined or delineated the issues subject of the extant inquiry. The importance of parties' pleadings need not be over-emphasised because the attention of court as well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings and ultimately the quality and probative value of the evidence led in support.

Before going into the merits, let me state some relevant principles that will guide our evaluation of evidence. It is settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See **Section 131(1) Evidence Act**. By the provision of **Section 132 Evidence Act**, the burden of proof in a suit or proceeding lies on that person

who would fail if no evidence at all were given on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations.

1. The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;
2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act.**

It is also important to state that some of the key substantive Reliefs sought by both claimant and the counter-claimant are declaratory reliefs which are in the nature of special claims or reliefs which the ordinary rules of pleadings particularly on admissions have no application. It is therefore incumbent on the party claiming the declaration to satisfy the court by credible and convincing evidence that he is entitled to the declaration(s). See **Vincent Bello V Magnus Emeka (1981) 1 SC 101 at 1182; Sorungbe V Omotunwase (1988) 3 NSCC (vol. 10) 252 at 262.**

I have situated the above principles in some detail as it provides broad factual and legal template as I shortly commence the inquiry into the contrasting claims of parties.

Now from the pleadings of parties which as earlier stated has streamlined or defined the issues in dispute, there is no real argument that the 1<sup>st</sup> and 2<sup>nd</sup> defendants approached the plaintiff to request that he releases his certificate of occupancy with **File No. NG30535** to enable them secure a credit facility from the 3<sup>rd</sup> defendant. On the evidence the 1<sup>st</sup> defendant acknowledge receipt of the original vide **Exhibit P1**. In **paragraphs 5 and 6** of the claim, the plaintiff pleaded as follows:

**“5. That in March, 2013, the 1<sup>st</sup> Defendant approached the Plaintiff requesting for his permission to use the Certificate of Occupancy of his house situate at Block D8A, FCDA Owner Occupier, Kubwa, as collateral for one year to secure a loan to assist his company execute contracts worth N30 Million with the Federal Ministry of Niger Delta.**

**6. The Plaintiff willingly gave the 1<sup>st</sup> Defendant the original Certificate of Occupancy on 31<sup>st</sup> March, 2013. But it was agreed that, the Plaintiff must be aware of and sign the relevant documents of loan. The 1<sup>st</sup> Defendant acknowledged the collection of the original C of O by signing and writing his name on a copy of the C of O. The Plaintiff pleads a copy of the C of O signed by the 1<sup>st</sup> Defendant.”**

In response to the above, the 1<sup>st</sup> and 2<sup>nd</sup> defendants in paragraphs 5 and 6 of their Defence pleaded thus:

**“5. That 1<sup>st</sup> and 2<sup>nd</sup> Defendants deny the facts contained in paragraph 5 of the claim and states that the 1<sup>st</sup> Defendant approached the Plaintiff on**

**behalf of the 2<sup>nd</sup> Defendant and requested for the Plaintiff's assistance to utilize his (Plaintiff's) Certificate of Occupancy to secure a loan offered by the 3<sup>rd</sup> Defendant to the 2<sup>nd</sup> Defendant for the execution of Federal Government contracts awarded to the 2<sup>nd</sup> Defendant.**

**6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants avers that the Plaintiff agreed to release his Certificate of Occupancy to the 2<sup>nd</sup> Defendant on the condition that the Plaintiff will be granted a loan of N3, 000, 000 (Three Million Naira) from the proceed of the loan offered by the 3<sup>rd</sup> Defendant which the Plaintiff's Certificate of Occupancy was meant to secure."**

While there is no real issue with respect to the release of the Certificate of Occupancy and its receipt, there is however no real clarity with respect to the terms, if any, governing the relationship. In paragraph 5 of the claim, the purpose of the loan was said to assist 1<sup>st</sup> and 2<sup>nd</sup> defendants execute contract worth 30 Million with the Federal Ministry of Niger Delta. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in paragraph 5 stated that the Certificate of Occupancy was obtained to secure a loan offered by the 3<sup>rd</sup> defendant for the execution of Federal Government contracts awarded to it.

In **Exhibit P2**, a letter by the 2<sup>nd</sup> defendant and signed by 1<sup>st</sup> defendant shows that the collateral was sought for one year worth N30, 000, 000 to enable them complete some projects. There is no indication whether it relates to a Federal Ministry of Niger Delta project as stated by claimant or execution of Federal Government contracts as averred by 1<sup>st</sup> and 2<sup>nd</sup> defendants.

In paragraph 6 of the defence, it was stated that the plaintiff agreed to release his certificate on condition that he is granted a loan of N3, 000, 000 from the proceeds of the loan which his Certificate of Occupancy was meant to secure.

On the evidence, there is no single document situating the clear terms of the relationship of parties with respect to the release of the certificate of occupancy beyond the fact that it was to be used to secure a loan. This then presents is obvious limitations and challenges.

An agreement between two or more parties creates reciprocal legal obligations to do or not to do a thing. Where it is encapsulated in a written document, it is easier to decipher the true intentions of parties from such document. The principle is fairly settled that where parties have embodied the terms of their

contract in a written document, no addition or interpolations can be made to such written document. See **Section 128 (1) of the Evidence Act.**

Where there is however no document and the transaction appears long drawn out involving exchange of correspondences as in this case, then they should be interpreted not in isolation but in the context of the totality of the transaction in order to situate their true legal purpose. A restrictive and restricted interpretation which does not take cognizance of the total package of the transaction in which the documents are an integral part cannot meet the justice of the case. See **Royal Exchange Nig. Ltd & ors V Aswani Textile Ind. Ltd (1991) 2 NWLR (pt.176) 639 at 669.**

On the evidence, there is really nothing to support that one of the conditions for the release of the certificate was that the plaintiff will be granted a loan of N3, 000, 000 out of the facility given to 2<sup>nd</sup> defendant.

Indeed in paragraphs 19 of the statement of claim and 4 of the Reply to the defence of 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff averred that the N3, 000, 000 loan was a personal or friendly loan by the 1<sup>st</sup> defendant and has nothing to do with the extant loan facility and that he has since repaid the loan.

As stated earlier, I have deliberately sought to bring out these fluid positions to situate the challenge where parties fail to put what they have agreed to in a document. What however is undisputed by paragraph 6 of the claim is that the claimant willingly give the 1<sup>st</sup> defendant the said Certificate of Occupancy on the condition that he is aware and signs the relevant **documents** of the **loan**. The 1<sup>st</sup> and 2<sup>nd</sup> defendants admitted this in paragraph 7 of their defence and in paragraphs 8 and 9 stated that they wrote a letter to claimant dated 30<sup>th</sup> April, 2013 vide **Exhibit P2** demanding for certain documents to facilitate the loan transaction.

The plaintiff contends that it did not provide these documents while the 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that he did provide the documents. Nonetheless, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were granted the facility in the sum of **N13, 000, 000** (Thirteen Million Naira Only) on 6<sup>th</sup> May, 2013 vide **Exhibit P3** with a tenor of 365 days from the date of first disbursement.

In **paragraphs 8 and 9** of the claim, the plaintiff pleaded as follows:

**“8. The Plaintiff did not provide any of the listed documents requested by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants till date as they did not follow by disclosing the necessary information to the Plaintiff. When the 1<sup>st</sup> Defendant could not get the documents, he informed the Plaintiff of his intention of making the Plaintiff a director in the 2<sup>nd</sup> Defendant’s company. He promised to bring the requisite CAC forms for the Plaintiff’s signature. But till date, the 1<sup>st</sup> Defendant did not bring any CAC forms for change of or inclusion of Directors for the Plaintiff signature.**

**9. But the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were able to secure a loan from the 3<sup>rd</sup> Defendant for a tenor of 365 days (one year) using the Plaintiff’s title documents as the collateral. The Plaintiff pleads the letter of offer of Banking Facility dated 6<sup>th</sup> May, 2013.”**

**In paragraphs 9, 11 and 12 of the defence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded thus:**

**“9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants deny paragraph 8 of the claim and further state that the Plaintiff provided some of the documents listed in the 2<sup>nd</sup> Defendant’s letter dated 30<sup>th</sup> April, 2013 among which are the following:**

- a. An undated application to the Minister of the FCT for consent to create Tripartite Deed of Legal Mortgage in favour of the 3<sup>rd</sup> Defendant.**
- b. An undated authority to upstamp the Deed of Legal Mortgage.**
- c. An undated consent/authority address to the 3<sup>rd</sup> Defendant for the creation of a tripartite Deed of Legal Mortgage in favour of the 3<sup>rd</sup> Defendant.**
- d. An affidavit dated 23<sup>rd</sup> May, 2013 sworn to at the High Court Nasarawa State, Mararaba Gurku.**
- e. A copy of the data page of the Plaintiff’s International Passport No. A00843411.**



**f. Demand for ground rent dated 23<sup>rd</sup> April, 2013 issued to the Plaintiff by the Federal Capital Territory Administration.**

**g. Revenue receipt No. 000150802 dated 14<sup>th</sup> May, 2013 issued by Abuja Geographic Information System for ground rent paid by the plaintiff.**

**11. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants avers that the Plaintiff was appointed a director of the 2<sup>nd</sup> Defendant and consequently signed Form CAC7 (Particulars of Directors or any change therein) and other documents and resolutions passed by the 2<sup>nd</sup> Defendant in furtherance of the credit facility extended to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall rely on a copy of the 2<sup>nd</sup> Defendant's Form CAC7 and the following documents; while, the 3<sup>rd</sup> Defendant is hereby notified to produce the originals of the documents listed in Roman numeral i to iv below at trial.**

**i. 2<sup>nd</sup> Defendant's letter titled "Authority to debit Account No. 0634820017"**

**ii. 2<sup>nd</sup> defendant's Board Resolution Accepting the 3<sup>rd</sup> Defendant's loan offer.**

**iii. 2<sup>nd</sup> Defendant's letter titled Irrevocable and unconditional undertaking to domicile all proceeds of contract financed into First City Monument Bank Plc.**

**iv. 2<sup>nd</sup> Defendant's Board Resolution to Upstamp the Deed of Legal Mortgage.**

**12. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants admits paragraphs 9 and 10 of the claim and states that the Plaintiff had fully knowledge of the terms and conditions of the loan extended to the 2<sup>nd</sup> defendant as he is one of the director of the 2<sup>nd</sup> defendant."**

In his Reply to these averments in the defence, the plaintiff in paragraphs 1 and 2 pleaded thus:

**"1. The Plaintiff joins issue with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and denies paragraphs 9, 10, 11 and 12 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's statement of defence. In reply, the Plaintiff/Counter Defendant states that he never**

provided the documents listed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They are put to the strictest proof of their averments contained therein.

2. The plaintiff states further that he only gave the 1<sup>st</sup> defendant the data page of his Nigerian international passport when the 1<sup>st</sup> defendant told him, he needed it to conduct search on the property in AGIS. The plaintiff/counter defendant never signed any CAC forms seeking to make him a Director in the 2<sup>nd</sup> defendant. His forged signature was affixed.

### PARTICULARS OF FORGERY

- a. The CAC forms were not signed by the Plaintiff and he did not know when the forms were signed.
- b. The signature affixed was not his own.
- c. The affidavit of change of signature dated 23<sup>rd</sup> May, 2013 was never signed by the plaintiff.
- d. The signature on the tripartite which was dated 30<sup>th</sup> May, 2013 couldn't have been different from that of 23<sup>rd</sup> May, 2013 if the plaintiff had actually changed his signature prior to that date.”

Earlier in the substantive claim, the claimant pleaded as follows:

“11. However, when the 1<sup>st</sup> Defendant could not return the original certificate of occupancy to the plaintiff at the expiration of two years, the plaintiff on 26<sup>th</sup> August, 2015 wrote through his solicitors to the 1<sup>st</sup> defendant demanding for the return of his original Certificate of Occupancy. The Plaintiff pleads the letter, a copy of which was received by one Faustina, the 1<sup>st</sup> and 2<sup>nd</sup> defendants Secretary. Notice is given to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to produce the original at the hearing.

12. The 1<sup>st</sup> defendant, on or about the 27<sup>th</sup> day of August, 2015 organised a meeting in his office between himself, the plaintiff and the 3<sup>rd</sup> defendant represented by Mr. Ogazi Oseiza and Mr. Toba Arogundade. This was because the plaintiff heard that his house was about to be sold by the 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant undertook to issue post dated cheques to

cover the interest on the loan and the 3<sup>rd</sup> defendant agreed to extend the tenor of the loan to 31<sup>st</sup> October, 2015.

16. That the plaintiff caused his solicitors to write to the 3<sup>rd</sup> defendant informing the bank that he had no intention of selling his property. The plaintiff pleads the letter dated 10<sup>th</sup> September, 2015 signed by one Onyeka Ikenta, Esq. Notice is given to the Defendant to produce the original at the trial.

17. The 1<sup>st</sup> defendant on 17<sup>th</sup> September, 2015 replied to the Plaintiff's letter of 26<sup>th</sup> August, 2015 alleging therein amongst others that the plaintiff did not timeously repay the personal loan he took from the company and that the contract sites was over ran by the Boko Haram insurgents. The plaintiff pleads the letter signed by the 1<sup>st</sup> defendant.

18. The plaintiff avers that he has never been a director in the 2<sup>nd</sup> defendant's company. The 1<sup>st</sup> defendant had fraudulently procured his name and signature as a Director of the 2<sup>nd</sup> defendant. He also secured the loan fraudulently.

#### **PARTICULARS OF FRAUD**

- a. The Plaintiff did not sign any CAC forms to be a Director in the 2<sup>nd</sup> Defendant's company.
- b. The Plaintiff did not also sign any letter of consent to be a Director in the company.
- c. He did not sign any document purporting to be an MOU between himself and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- d. He did not sign any Power of Attorney or letter of consent for his property to be used to secure a loan from the 3<sup>rd</sup> Defendant.
- e. He did not provide either his passport photographs or the data page of his international passport.
- f. There was no signed Power of Attorney between himself and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relinquishing his title to them.

**g. The 1<sup>st</sup> defendant told the plaintiff that his company was executing a contract with the Federal Ministry of Niger Delta but in the letter of 17<sup>th</sup> September, 2015, the 1<sup>st</sup> Defendant is now claiming to be executing a non existent contract in Bornu and Yobe States wherein the contract sites have been ran and occupied by Boko Haram insurgents.**

**h. The 1<sup>st</sup> Defendant issued non NUBAN and non clearing cheques to the 3<sup>rd</sup> Defendant but told the Plaintiff that he had paid off the loan in clear deception of the Plaintiff and the 3<sup>rd</sup> Defendant.”**

The positions projected by the above convoluted facts are that:

1. The plaintiff willingly agreed to release his certificate of occupancy to 1<sup>st</sup> and 2<sup>nd</sup> defendants to secure a loan. The acquisition of the certificate was by 1<sup>st</sup> and 2<sup>nd</sup> defendants thus a function of free will.
2. The loan was advanced through facility dated 6<sup>th</sup> May, 2013 vide **Exhibit P3**.
3. The loan was secured using the collateral offered by plaintiff.
4. The 3<sup>rd</sup> defendant was not a party or privy to the relationship between plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> defendants.
5. The plaintiff contends that though the loan was given by 3<sup>rd</sup> defendant, it was fraudulently obtained by 1<sup>st</sup> and 2<sup>nd</sup> defendants as he did not give his consent or sign necessary documents to allow for the disbursement of the loan facility.

As stated earlier, it is based on these facts, albeit contested assertions that claimant faults or seeks to undermine the whole transaction he had with 1<sup>st</sup> and 2<sup>nd</sup> defendants. This complaint of **fraud** is a critical pillar that underpins the very basis of the case of claimant. In law fraud must be distinctly alleged with all necessary particulars as done in this case in the relevant pleadings of claimant already highlighted above. These must then be distinctly proved within the required legal threshold. Where a party fails to plead the particulars of fraud or to prove the allegation or to lead credible and cogent evidence in support, the pleading is deemed abandoned. See **Durbar Hotel Ltd V Kasasa**

**United Ltd (2017) 2 NWLR (pt.1549) CA; Yakubu V Jauroyel (2014) 11 NWLR (pt.1418) 203.**

In law, an allegation of fraud as done here by plaintiff is analogous to imputation of crime and ought to be proved beyond reasonable doubt. Fraud requires a higher degree of probability for its proof. See **Durbar Hotel Ltd V Kasaba United Ltd (2017) 2 NWLR (pt.1549) CA; Famuroti V Agbeke (1991) 5 NWLR (pt.189) 1.** See also the provision of **Section 135 (1) of the Evidence Act.**

As stated earlier, it is one thing to aver a material fact in the pleadings but quite a different thing to proffer evidence in proof of these facts. It is to the evidence we must again have recourse to situate the proof of these criminal allegations or imputations.

Now as stated earlier and at the risk of prolixity, the claimant willingly gave the certificate of occupancy to 1<sup>st</sup> defendant vide **Exhibit P1**. The purpose for this transaction was equally well known. On the evidence by paragraphs 7 and 8 of the claim and **Exhibit P2**, the 1<sup>st</sup> and 2<sup>nd</sup> defendants requested for certain documents as contained in the Exhibit which claimant said he did not provide these documents but nevertheless that by paragraph 9, the loan was however still given to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Now the documents sought from claimant vide **Exhibit P2** are:

- “(a) The letter of consent from the property owners/Board resolution**
- (b) Evidence of registration of the Deed at the land registry**
- (c) Signed MOU in respect thereof**
- (d) Tax clearances of Amethyst Options Limited/the Directors of the Company**
- (e) Two passport photographs of each of the Directors and the ID of the holders of the Power of Attorney i.e. Data pages of international passports, if any**
- (f) Payment of tenement rate and other taxes in respect of the property**
- (g) Complete legal search report from AGIS as at date.”**

The claimant said he did not provide these documents but the 1<sup>st</sup> and 2<sup>nd</sup> defendants on their part in paragraph 9 of the defence stated that the claimant released **some** of these documents including:

- a. **An undated application to the Minister of the FCT for consent to create Tripartite Deed of Legal Mortgage in favour of the 3<sup>rd</sup> Defendant.**
- b. **An undated authority to upstamp the Deed of Legal Mortgage.**
- c. **An undated consent/authority address to the 3<sup>rd</sup> Defendant for the creation of a tripartite Deed of Legal Mortgage in favour of the 3<sup>rd</sup> Defendant.**
- d. **An affidavit dated 23<sup>rd</sup> May, 2013 sworn to at the High Court Nasarawa State, Mararaba Gurku.**
- e. **A copy of the data page of the Plaintiff's International Passport No. A00843411.**
- f. **Demand for ground rent dated 23<sup>rd</sup> April, 2013 issued to the Plaintiff by the Federal Capital Territory Administration.**
- g. **Revenue receipt No. 000150802 dated 14<sup>th</sup> May, 2013 issued by Abuja Geographic Information System for ground rent paid by the plaintiff.**

As stated earlier, the contest or issue with respect to these documents was clearly defined on the pleadings – that they were fraudulently obtained.

Two questions arise here: Firstly, was the giving of the offer by 3<sup>rd</sup> defendant predicated on the provision of these documents?

On the evidence, this was not addressed but there were **conditions** precedent to **drawn down** which forms part of the letter of offer **Exhibit P3**. The offer will appear distinct from the issue of the actual drawn down. I shall shortly return to these points.

The second question is if indeed these documents were produced, was it without the consent of claimant as contended or put another way, where these false documents or products of forgery?

In law, the critical elements of forgery that must be established include:

- a. The document is false.
- b. Knowing that the false document or writing is false.
- c. Intention that same be used or acted upon as genuine.
- d. To the prejudice of any person or with intent that any person may, in the belief that it is genuine, be induced to do or refrain from doing any act. See **Oduah V F.R.N (2012) 11 NWLR (pt.1310) 76.**

The phrase “making a false document in writing” includes altering a genuine document or writing in any material part, either by erasure, obliteration, removal or otherwise and making any material addition to the body of a genuine document or writing and adding to a genuine document or writing any false date, attestation, seal or other material matter. See **Oduah V FRN (supra).**

As stated earlier the burden was on the claimant to establish these allegations of forgery and I have situated in law the elements to be established. Now to the specifics of the allegations as itemized in the particulars of fraud pleaded in paragraph 18 of the claim and paragraph 2 of the Reply to the statement of defence of 1<sup>st</sup> and 2<sup>nd</sup> defendants (which I will take seriatim).

A careful evaluation of the evidence projects that the plaintiff did not creditably prove the following:

1. That he did not sign any Corporate Affairs Commission (CAC) Forms to act as a Director of the 2<sup>nd</sup> defendant. No CAC document was tendered to demonstrate this assertion. If he did not sign any CAC form as contended, then he ought to have produced the CAC Form, which could have been readily obtained from the CAC, to show or prove that such a false document was indeed filed using a false signature.
2. If he did not sign a letter of consent to be a Director, was any letter as such signed? If it was signed, why was it not tendered to support the contention that a false signed letter of consent was issued.
3. The above finding also goes for the document purporting to be an MOU between claimant and 1<sup>st</sup> and 2<sup>nd</sup> defendants. No MOU situating this allegation was tendered in evidence.

4. Again, if he did not sign any Power of Attorney, was any power of attorney signed using his name? If there was, no evidence of the existence of his Power of Attorney was tendered.
5. The contention that he did not provide either his passport or the data page of his international passport clearly has no factual resonance to the clear extant that in paragraph 2 of the Reply, the plaintiff now agreed he gave the data page of his Nigerian Passport to 1<sup>st</sup> defendant when he said the 1<sup>st</sup> defendant informed him he wanted to conduct a search.

The bottom line with regards to the signatures on the CAC Forms is clearly that the claimant did not tender any CAC forms to situate or support the allegation of forgery or to be specific that the signature on the CAC Forms do not belong to him. This issue or matter of forgery cannot be left to speculation or guess work or a matter for address of counsel.

It is true that the 1<sup>st</sup> and 2<sup>nd</sup> defendants may have tendered **Exhibit D7**, the particulars of directors of 2<sup>nd</sup> defendant said to contain the signature of claimant but as stated earlier, nothing was demonstrated in open court to situate its falsity.

Again the data page of claimant tendered as **Exhibit D12** and **Exhibit D22**, the affidavit sworn at the High Court said to contain a different signature from that on **Exhibit D12** may have been tendered again by 1<sup>st</sup> and 2<sup>nd</sup> defendants but nothing was demonstrated in open court situating the falsity of the said affidavit and the court cannot speculate.

Even if the Court was to seek to make any comparisons of the signatures in the documents tendered by 1<sup>st</sup> and 2<sup>nd</sup> defendants exercising its powers under **Section 101 of the Evidence Act**, the challenge will be that in the absence of evidence demonstrating or establishing first a genuine document containing a genuine signature of claimant vis-à-vis a false document containing his false signature, any exercise in trying to compare will be an exercise in futility.

What is again interesting on the point that the claimant was never a director in 1<sup>st</sup> defendant is that by **Exhibit D4**, a notice of meeting of directors of 1<sup>st</sup> defendant was issued and served on claimant and he acknowledged receipt and signed on 10<sup>th</sup> October, 2013. Now if he was not a director, why did he receive the notice of meeting? The signature of claimant on **Exhibit D4**, the notice of



meeting of 1<sup>st</sup> defendant is consistent with the signature of claimant on the data page of his passport **Exhibit D12** and the signatures on the 2 witness depositions plaintiff signed.

The question of proof of the allegations of forgery can therefore not be left to speculation or a matter for address arising from documents tendered by defendants but not demonstrated in open court. It was a matter to be established creditably by claimant.

As has been severally stated by our Superior Courts, the type of evidence a court can act on is the evidence which was exposed and canvassed in court. A judge cannot be examining documents outside court and for the court to act on what he considers he has discovered on an issue when that was not supported by evidence or was not brought to the notice of the parties to be agitated in the usual adversarial procedure. The principle is settled that the duty of court is to decide between parties on the basis of what has been demonstrated, canvassed and argued in court. It is not the duty of a court to do clustered justice by making an inquiry in the case outside court, even if such inquiry is limited to examination of documents when the documents had not been examined in court and their examination out of court disclosed matters that had not been brought out and exposed to test in court. See **Alhaji Onibudo & ors V Alhaji Akibu & ors (1982) 7 S.C 60 at 62.**

In any event, the contention that the signature on the affidavit **Exhibit D22** is different from that of the Tripartite Deed of Legal Mortgage vide **Exhibit D25** so that the integrity of Exhibit D25 can be impugned in my opinion loses any traction to the clear extant that the claimant admitted he signed the said Deed of Mortgage – **Exhibit D25**, even though he said only the last page was brought to him and that he was told it was needed to enable 1<sup>st</sup> defendant register the property with AGIS.

Now on the contention that he was only given the last page of the Deed of Tripartite Mortgage, **Exhibit D25** and that he signed for reasons not connected with the transaction with 1<sup>st</sup> and 2<sup>nd</sup> defendants, I am afraid I am not enthused by the reasons proffered by claimant. The claimant on the evidence in court is clearly a very enlightened person and well read with a BSC in Business Administration from the prestigious Ahmadu Bello University, Zaria.

I find the narrative of plaintiff incredible that he signed the last page of **Exhibit D25** without knowing what the document was for as lacking in value and credibility.

The beginning of the last page of **Exhibit D25** reads thus:

**“IN WITNESS WHEREOF the Surety, the Borrower and the Bank have executed this deed the day and year first above written.**

**THE COMMON SEAL OF THE WITHIN NAMED BORROWER  
FATIA ENGINEERS LIMITED  
IS HEREUNTO AFFIXED IN THE PRESENCE OF:**

.....  
**DIRECTOR**

.....  
**DIRECTOR**

**SIGNED, SEALED AND DELIVERED BY THE WITHIN NAMED  
SURETY**

**MOHAMMED BABA NDAKUE .....”**

The column for Directors was duly signed and claimant signed as a surety.

The contents of this page is clear and unambiguous. The claimant cannot in the context of the entire transaction claim ignorance of what a SURETY means? If he was ignorant, why did he not ask for clarification? Why did he not even ask for the entire document to study? Even if admittedly certain aspects of the case appear fluid, the claimant clearly on the evidence refused to ask necessary questions or demand for explanation and proceeded or allowed the 1<sup>st</sup> defendant to unhesitantly lead him on in accepting whatever was presented to him without question. A party cannot append his signature to a document which he did not sign under duress and then after execution claim ignorance of the contents and what it provides.

The contention that he signed because he was informed it was needed to register the property with AGIS must be discountenanced in the absence of evidence to support such assertion.

The bottom line is that despite the lack of clarity in certain aspects of the case, as demonstrated above, the following facts however stand established:

1. The Plaintiff accepted the proposal of 1<sup>st</sup> and 2<sup>nd</sup> Defendants to use the Certificate of Occupancy of his house situate at Block D8A FCDA owner occupier as a collateral for a loan to be obtained from the 3<sup>rd</sup> defendant.
2. The plaintiff willingly gave the 1<sup>st</sup> defendant the certificate of occupancy over his property.
3. The facility was duly granted vide Exhibit P3 with a tenor of 365 days.
4. The claimant was aware of the offer of facility and that his property was used to secure the loan.
5. The plaintiff duly signed or executed a Deed of Tripartite legal Mortgage vide Exhibit D25 over his property to secure the loan advance to 1<sup>st</sup> and 2<sup>nd</sup> defendants.
6. The Plaintiff never raised any complaints since the facility was offered on 6<sup>th</sup> May, 2013 (paragraph 9 of the claim) until nearly two years later on 26<sup>th</sup> August, 2015 when his solicitors wrote demanding for a return of the C/O (paragraph 11 of claim) vide **Exhibit P4**. This letter reads thus:

**“RE: LETTER OF INTENT FOR THIRD PARTY COLLATERAL WORTH N30, 000.00 FOR OUR COMPANY PROJECTS”**

**We act as Solicitors to Alh. Ndakupe Mohammed Baba of Block D8A, FCDA Owner Occupier, Kubwa, Abuja (hereinafter called “our Client”) and on the instructions, we write this letter.**

**Your letter dated 30<sup>th</sup> April, 2013 on the above subject matter refers. It is our Client’s brief that he gave you the original Certificate of Occupancy to his house to enable you secure a loan from an institution to assist you company complete her projects. You were expected to return the C of O back to our Client after one year.**

**However, over two years now, you are yet to return the original Certificate of Occupancy and the delay has caused our Client serious inconvenience.**

**While acknowledging your cordial relationship and benevolence to him in the past, our clients firm instructions is that we ask you to return his original C of O within Seven (7) days from the date of this letter. Our Client shall be constrained to seek redress in court if there is any further default on your part in returning the original C of O as herein demanded.**

**Thanks for your understanding.”**

The above solicitors letter in a simple trajectory captures the true facts of this dispute.

7. The sum covered by **Exhibit P3**, the offer letter and **Exhibit D25**, the Tripartite Deed of legal Mortgage is the sum of **N13, 000, 000** only. The 3<sup>rd</sup> defendant in their defence again captured this situation in paragraphs 4, 5, 6 and 8 as follows:

**“4.The 3<sup>rd</sup> Defendant vehemently denies Paragraphs 6 & 7 of the Plaintiff’s Statement of Claim and further states the Plaintiff and 1<sup>st</sup> Defendant as directors of the 2<sup>nd</sup> Defendant’s company duly executed all the documents required for the perfection of the loan of N13, 000, 000.00 (Thirteen Million Naira) advanced to the 2<sup>nd</sup> Defendant.**

**5. The 3<sup>rd</sup> Defendant further states that the 2<sup>nd</sup> Defendant provided a duly executed Tripartite Deed of Legal Mortgage, Original Certificate of Occupancy with 4d5uw-137z-11372-14442-cur3, a board resolution, a letter of application to the Minister of the Federal Capital Territory for consent to create Tripartite Deed of Legal Mortgage, Consent letter addressed to the 3<sup>rd</sup> Defendant, sworn affidavit of the Plaintiff dated 23<sup>rd</sup> May, 2013, Copy of Demand for ground rent, data page of the Plaintiff’s international passport, Revenue Receipt No. 000150802 in respect of the Plaintiff’s property.**

**6. The 3<sup>rd</sup> Defendant further states that the Tripartite Deed of Legal Mortgage between the Plaintiff, the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant has been registered as No. 50 at page 50 in Volume 33, MISC in the Federal Capital Territory Land registry Office, Abuja.**

**The registered Tripartite Deed of Legal Mortgage is hereby pleaded and same will be relied upon in the trial of this suit.**

- 8. The 3<sup>rd</sup> Defendant admits Paragraph 9 of the Plaintiff's Statement of Claim only to the extent that the 2<sup>nd</sup> Defendant company that has the Plaintiff and the 1<sup>st</sup> Defendant amongst her directors was granted a loan of N13, 000, 000.00 (Thirteen Million Naira) for execution of contracts awarded the 2<sup>nd</sup> Defendant. The offer of banking facility dated 6<sup>th</sup> May, 2013 is hereby pleaded as same will be relied upon in this suit and Notice is hereby given to the 2<sup>nd</sup> Defendant to produce the original."**

Here too the 3<sup>rd</sup> defendant did not tender any of the documents stated in the above paragraphs which should be in their possession. Notwithstanding these absence of necessary details, **the above represents the key fundamental elements of the relationship of parties.**

I am in no doubt that the claimant was fully aware of the consequences of this arrangement and I cannot situate any deceit on the basis of the narrative and evidence before the court. If the claimant provided or stood as surety and the debtor fails to discharge his obligations to the creditor, is there basis to seek to abdicate responsibility of the suretyship at that point? I just wonder. Clause 2 of the Deed provides as follows:

**"2. For the consideration aforesaid, the Surety as BENEFICIAL OWNER with the consent of the appropriate governmental authorities HEREBY CHARGES BY WAY OF LEGAL MORTGAGE ALL that which is comprised in the MORTGAGED PROPERTY with the payment to the Bank of all monies including principal monies, interest and other monies herein covenanted to be paid by the Borrower PROVIDED ALWAYS that if all monies covenanted to be paid shall be paid by Borrowers to the Bank accordingly then and in such a case the Bank will at the request and cost of the Borrower release this Charge."**

The above is clear and unambiguous. The claimant, unfortunately for him is bound by the clear contents of this Deed.

The contention of fraud which I have deliberately addressed at length has no traction in the context of the simple arrangement of parties.

As demonstrated at some length, fraud was not established and the court cannot speculate on the basis of some discrepancies not established at the hearing. It is not enough to plead fraud or that a document was fraudulently obtained when the evidence in support shows no such thing and this is all the more necessary where the forgery at the base of the fraud alleged is a crime which has to be proved on the correct standard or threshold, that being beyond reasonable doubt, which is not going to be sidelined because the suit in dispute is civil. In the absence of evidence to sustain the allegations, pleadings on that score will lack value and cannot translate to evidence. See **Durbar Hotel Ltd. V Kasaba United Ltd (supra); Yakubu V Jauioyel (2014) 11 NWLR (pt.1418) 205 and NNB plc V Denclag Ltd (2005) 4 NWLR (pt.916) 549.**

Secondly if a party is willing to give his certificate of occupancy as a collateral to a friend or anyone for that person to obtain a loan facility, he does so at extreme risk or great peril. If the borrower of the loan facility refuses or fails to meet up with his commitments under the facility he was given, then the surety must be ready to also bear the brunt or consequences. I leave it at that.

On the whole, the case of claimant on fraud with respect to the collateral for the facility granted 1<sup>st</sup> and 2<sup>nd</sup> defendants suffers from serious evidentiary challenges as I have demonstrated at length. On the key elements or fundamentals of the relationship which I identified above, there is no dispute, for me, on those grounds.

The other issues raised by claimant were clearly not established and in my opinion seeks to only becloud the fundamental elements of the case. A court cannot however decide issues on speculation no matter how close what it relies on may seem to be on the facts. Speculations is not an aspect of inference that may be drawn from facts that are laid before the court. Inference is a reasonable deduction from facts whereas speculation is a mere variant of imaginative guess which even when it appears plausible, should not be allowed by a court of law to fill any hiatus or gaps in the evidence before it, as in the extant case. See **Overseas Const. Co. Ltd V Greek Ent. Ltd (1985) 3 NWLR (pt.13) 409; Dennis Iviengbor V Henry Osato Bazuaye & Anor (1999) 6 SCN 2 235 at 243-244.**

The point I must again underscore, in the context of the interplay of fluid facts before me is that a trial judge cannot draw inference in vacuo or in a vacuum but only in relation to facts which justify such inference. And since an

inference is an act of deducing or drawing a conclusion from existing premises by way of acts, the facts upon which the inference is deduced or drawn must be in proximity or intimacy with the inference. Where an inference or inferences as sought by the plaintiff in this case are at large and from an underwhelming collage of evidence, a court of law qua justice cannot perform an inferential function of drawing a conclusion from such premises.

As a logical corollary, if the debt for which the plaintiff's property was used as security (a security freely given I must add) has not been fully discharged, I am afraid the plaintiff cannot now seek to renege from the consequences of that relationship. If on the other hand it has been discharged, then obviously he cannot be held liable. The issues of liability or otherwise will be dealt with more appropriately when I deal with the counter-claim.

The above **findings** provides broad legal and factual template to now proceed to determine whether the Reliefs sought by **claimant are availing**.

However because of the inextricable connection and relation of the substantive case with the counter-claim, I shall prefer to now evaluate the case made in the Counter-Claim and then resolve the questions of whether both the Reliefs in the substantive claim and the Counter-Claim are availing.

I had at the beginning defined the issue arising from the counter-claim. I need not repeat it. As stated in the consideration of the substantive claim, the counter-claim is a distinct and separate course of action which must equally be established by the counter-claimant to entitle it to the Reliefs sought.

Before dealing with the substance of the Counter-Claim, let me quickly address the point raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that having regards to the provisions of **Order 17 Rule 7 of the Rules of Court**, that the counter-claim of 3<sup>rd</sup> defendant having failed to comply with the terms of that provision is incompetent. I am not enthused at all by technical submissions of this nature which has nothing to do with the merits or substance of the counter-claim. What is the relevance of the provision of **Order 17 Rule 7** at this point? I just wonder.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants never challenged or at any time raised any complaint with respect to the Counter-Claim. Indeed all parties including 1<sup>st</sup> and 2<sup>nd</sup>

defendants filed defences to this counter-claim and the trial and counter-claim was conducted on the basis of the processes filed by all parties.

The objection at this time to the counter-claim appears belated and I really cannot situate any injustice to 1<sup>st</sup> and 2<sup>nd</sup> Defendants or that they suffered any confusion or doubt in the case filed against them. The Rules of Court itself under the relevant provisions of **Order 5** has anticipated such procedural challenges and provides the leeway or solution when it provides for effect of non-compliance with the Rules under **Order 5 Rule 1(2)** as follows:

**“Where at any stage in the course of or in connection with any proceedings there has by reason of anything done or left undone been a failure to comply with the requirements as to time, place, manner, or form, such failure may be treated as an irregularity. The court may give any direction as he thinks fit to regularize such steps.”**

The above provision states clearly that any failure to comply with the provisions of the rules in respect of time, place, manner, form or content, the failure may be treated as an irregularity and the court may give any direction as it thinks fit to regularize such steps.

The Supreme Court in **Nipol Ltd V Bioku Inv. & Property Co. Ltd (1992) 3 NWLR (pt.232) 727 at 746 G-H** per Akpata JSC (of blessed memory) stated that Non-compliance should be treated as an irregularity and shall not nullify proceedings. Such proceedings can however be set aside wholly or in part on ground of irregularity and not because the proceedings are a nullity. Whether or not to set aside any proceedings for irregularity as a result of non-compliance depends on the circumstances of the case and the nature of the irregularity.

The provision of **Order 5 Rule 2 (1)** then provides as follows:

**“An application to set aside for irregularity any step taken in the course of any proceedings may be allowed where it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”**

Now, where a party elects to exercise the option above, it has to be done timeously and within a reasonable time and before taking any fresh steps after noticing the irregularity under **Order 5 Rule 2(2)** of the Rules. Where steps are taken, any further challenge shall not be allowed.



In this case, the 1<sup>st</sup> and 2<sup>nd</sup> defendants took active steps in contesting the evidence led on the basis of these processes; the court made pronouncements on the validity of aspects of these processes culminating in the final addresses they filed. It appears too late in the day to raise such an issue now. I find support for this in the Supreme Courts case of **Cooperative & Commerce Bank (Nig) Plc V A-G Anambra (1992) 8 NWLR (pt.261) 528 at 554 C-G** per Karibi-Whyte JSC who stated that where a party alleges non-compliance with the Rule of Court, yet files a counter-affidavit, he is deemed to have taken fresh steps in the proceedings since knowing of the non-compliance complained of. He is therefore prevented from raising the alleged non-compliance.

The Apex Court here talks about filing a counter affidavit as compromising the challenge on the issue of non-compliance with the rules. In this case the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a Defence to the Counter-Claim and fully contested the case against them on the basis of these processes which makes their position worse. I agree that rules of court are meant to be obeyed but the modern and purposive approach of courts is that where strict compliance with the rules will lead to injustice, the rules should be abandoned in favour of doing substantial justice. See **Amadu V Yantunmake (2011) 9 N.W.L.R (pt.1251) 161 at 182 Pac per Peter Odili JCA (as he then was); Jeric (Nig) Ld V UBN Plc (2000) 15 N.W.L.R (pt.691) 447 at 458** per C Kalgo JSC. Indeed a procedural irregularity cannot vitiate a suit once it can be shown that no party suffered a miscarriage of justice as in the present situation. See **Famfa Oil Ltd V A-G Fed (2003) 18 NWLR (pt.852) 453 at 468** per D-H per Belgore JSC (as he then was).

On the whole, the extant objection at this late stage is a resort to technicalities of the extreme type. Rules of court cannot be read in the absolute without recourse to the justice of the case. To do so will simply to make courts slavish to the rules and that certainly cannot be the *raison d'etre* of the Rules of Court. See **Anatogu V Anatogu (1997) N.W.L.R (pt.519) 49 at 67.**

In conclusion, I call in aid the immortal words of Tobi JCA (as he then was and of blessed memory) in **General Oil Ltd V Oduntan (1990) 7 NWLR (pt.163) 423 at 441** paras D-E where he stated as follows:

**“Rules of Court are meant to be obeyed. Obedience to rules should however not be slavish to the point that the justice of the case is destroyed or thrown overboard. The greatest barometer as far as the eagle eyes of**

**the public are concerned, is whether justice has been done to the parties. Therefore, if in the course of doing justice, some harm is done to some procedural rule which eventually hurts that rule, the court should be happy that it took that line of action in pursuance of justice. Litigation should be more than a pound of flesh but rather a game of give and take; not where the party in blunder, however infinitesimal, must pay the highest penalty of being denied hearing on the merits. Counsel should rely less on legal technicalities and more on merits.”**

I leave it at that.

The objection lacks merit and is discountenanced without much ado.

Now to the substance. In the consideration of the substantive claim, there were certain clear common grounds established.

By **Exhibits P3** or **D1** there was an offer of credit facilities to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. By **Exhibit D25**, parties executed a Tripartite Deed of Legal Mortgage wherein the plaintiff used his property as security for the facility advanced to 2<sup>nd</sup> defendant.

Indeed in **Exhibit D25**, in Clause 3 of the Recitals, the Deed of Legal Mortgage was tied to the Offer letter of 6<sup>th</sup> May, 2013, **Exhibit P3** and the sum advanced to the 2<sup>nd</sup> defendant was the sum of N13, 000, 000. I had earlier in the substantive judgment referred to paragraphs 4, 5, 6 and 7 of the 3<sup>rd</sup> defendants defence which captured or situated the facility of N13, 000, 000 advanced to 2<sup>nd</sup> defendant and how it was secured.

Now in the statement of defence of 3<sup>rd</sup> defendant vide paragraph 25, it was averred that the loan advance to 2<sup>nd</sup> defendant remains unpaid despite repeated demands and indeed in paragraph 16 they pleaded the statement of account but this was not tendered in evidence.

Now in paragraphs 29-32 of its Counter-Claim, the 3<sup>rd</sup> defendant pleaded as follows:

**“29. The 3<sup>rd</sup> Defendant states that the sum outstanding in debit in the account of the 2<sup>nd</sup> Defendant that has both the Plaintiff and the 1<sup>st</sup> Defendant as directors is in the sum of N59, 971, 402.52 (Fifty Nine Million, Nine Hundred and Seventy One Thousand, Four Hundred**

**Two Naira Fifty Two Kobo). The 2<sup>nd</sup> Defendant's Statement of account is hereby pleaded and same will be relied upon in this suit.**

**30. The 3<sup>rd</sup> Defendant states that the principal and accrued interest on the loan granted to the 2<sup>nd</sup> Defendant on 6<sup>th</sup> May 2013 has fallen due same having remained unpaid.**

**31. The 3<sup>rd</sup> Defendant further states that the 2<sup>nd</sup> Defendant has acknowledged the right of the 3<sup>rd</sup> Defendant over the property covered with Certificate of Occupancy with No. 4d5uw-13e7z-11371-14442-cur3 wherein she wrote the 3<sup>rd</sup> defendant via a letter dated 23<sup>rd</sup> June, 2014 where she requested that the 3<sup>rd</sup> defendant to call in the facility. The letter dated 23<sup>rd</sup> June 2014 is hereby pleaded and same will be relied upon in this suit.**

**32. The 3<sup>rd</sup> Defendant further stated that she has given the 2<sup>nd</sup> Defendant due notice to pay up and liquidate the Loan granted her alongside the interest, which she has failed to liquidate. The 3<sup>rd</sup> Defendant's letter dated 8<sup>th</sup> September, 2015 is hereby pleaded and same will be relied upon in this suit."**

As stated earlier, the settled position of the law is that averments in pleadings is not evidence. Facts deposed to in pleadings must be substantiated and proved by evidence, in the absence of which the averments are deemed as abandoned. See **Aregbesola V Oyinlola (2011) 9 NWLR (pt.1253) 458 at 594.**

Indeed, pleadings however strong and convincing the averments may be, without evidence in proof thereof, go to no issue. Through pleadings, people know exactly the points which are in dispute with the other. Evidence must be led to prove the facts relied on by the party or to sustain allegations raised in pleadings. See **Union Bank plc V Astra Builders (W/A) (2010) 5 NWLR (pt.1186) 1 at 27 F-G.**

In this case, the 3<sup>rd</sup> defendant did not lead evidence and tender material documents which they have copiously pleaded situating the indebtedness.

It is logical to ask that if as pleaded, the sum of N13, 000, 000 was given as a loan facility to 2<sup>nd</sup> defendant vide paragraphs 4, 5, 6, 8 and 25 of the 3<sup>rd</sup> defendants statement of defence and also as highlighted in the averments in the Counter-Claim above, then there must be evidence before the court

demonstrating the basis of the sum of N59, 971, 402.52 (Fifty Nine Million, Nine Hundred and Seventy One Thousand, Four Hundred and Two Naira, Fifty Two Kobo) said to be **sum outstanding** on the facility in the account of 2<sup>nd</sup> defendant as pleaded in paragraph 29 of the counter-claim.

In paragraph 30 of the counter-claim, the 3<sup>rd</sup> defendant avers that the principal and interest on the loan granted to the 2<sup>nd</sup> defendant on 6<sup>th</sup> May, 2013 has fallen due and remained unpaid but there is nothing in the pleadings or evidence situating the principal element and the interest element.

I find it curious that the 3<sup>rd</sup> defendant did not in their pleadings or evidence demonstrate or establish by clear evidence the outstanding, if any remaining on the facility of N13, 000, 000 given to 2<sup>nd</sup> defendant particularly when it is noted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants in their defence to the counter-claim in paragraph 9 pleaded as follows:

**“The 1<sup>st</sup> and 2<sup>nd</sup> defendants avers that the loan covered by the offer letter dated 6<sup>th</sup> May, 2013 has been fully liquidated and the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not liable to pay any sum whatsoever on the loan covered by the offer dated 6<sup>th</sup> May, 2013.”**

If there was any balance outstanding, the **bank** or **3<sup>rd</sup> defendant** is in a vantage position to provide the materials to support that there is some outstanding on the sums advanced. It is indeed strange that a document as basic as **statement of account** which would have provide a clear and detailed insight into the position of the account of 1<sup>st</sup> and 2<sup>nd</sup> defendants as it relates to the loan facility was not tendered by the Bank to show evidence of transactions on the loan account and if there is any outstanding element.

The point must equally be underscored that a bank statement of account on its own is not sufficient explanation of debit and lodgments in a customer’s account 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 A.C.B (1986) 1-2 S.C 49; Nema Bank plc V Alh. Idowu Fasabi Osilaru (2001) LPELR – 8960.**

The failure to tender the relevant statement of account by the Bank in this case allows for the invocation of the presumption under **Section 167 (d) of the Evidence Act** that if they had produced same, it would be unfavourable to the case of the 3<sup>rd</sup> Defendant.

There is really absolutely nothing before the court to situate the basis of the outstanding sum of N59, 971, 402, 52 claimed by the 3<sup>rd</sup> defendant. **Exhibit D23**, the letter by the solicitors of 1<sup>st</sup> and 2<sup>nd</sup> defendants merely urged the 3<sup>rd</sup> defendant to call-in the facilities to avoid “further accumulation of interest on the facility.” No more. The court cannot make any additions to what is contained in the letter. The letter acknowledges the facts of the relationship of parties. There is however nothing in the letter wherein the ownership of claimants property was acknowledged as belonging to 3<sup>rd</sup> defendant. That can only be a function of whether parties ultimately kept to their sides of the agreement or not.

To further undermine the case of the counter-claimant, the witness they produced appeared to have no knowledge of the details of the loan facility. I will highlight aspects of his evidence. Under cross-examination, DW2 stated that **further loan facilities** were given to the 2<sup>nd</sup> defendant but he does not know the number but that the counter-claim is in respect of the loan facility dated 6<sup>th</sup> May, 2013. Even with respect to this offer facility, DW2 under cross-examination stated that he does not know the exact amount disbursed to 2<sup>nd</sup> defendant.

Again under cross-examination by counsel to 1<sup>st</sup> and 2<sup>nd</sup> Defendants, even though he stated that the counter-claim was in respect of the loan facility of 6<sup>th</sup> May, 2013, he now stated that there was another offer facility to 2<sup>nd</sup> defendant vide **Exhibit D2** dated 18<sup>th</sup> June, 2013 which according to him is a continuation of the offer of 6<sup>th</sup> May, 2013. Even with respect to this enhancement, DW2 stated that he does not even know what was disbursed.

When he was specifically asked whether 2<sup>nd</sup> defendant has fully paid the facility of 6<sup>th</sup> May, 2013, he said he was not aware. When asked whether any amount has been paid towards liquidating the said loan, he said he was also not aware. He gave the same responses for the second enhancement offer vide **Exhibit D2**.

DW2 then stated that as at 2016, the outstanding indebtedness of 2<sup>nd</sup> defendant stood at about N59, 000, 000 but he does not have the breakdown of the principal and the interest.

Interestingly, he added that he does not have in his possession the deed of legal mortgage referred to in **Exhibit D2**, the enhancement of the facility which shows that a property in Gwarinpa was given as a security for the facility granted vide **Exhibit D2**.

When he was asked under cross-examination by plaintiff whether the consent of plaintiff was obtained before his property was used as security for the further facility granted 2<sup>nd</sup> defendant vide **Exhibit D2**, he answered in the negative. On whether the bank wrote informing plaintiff that since the borrower has defaulted, he should pay or his property will be sold, PW2 said he had no information on that.

Again when asked whether any amount has been paid for the loan, he said he does not have any information. He also does not know of the level of indebtedness. It is really a matter of great concern that a bank official has no insight and necessary information over an account they superintend over.

I have at length above evaluated the answers elicited from DW2 at trial and what it does is simply to add further layers of uncertainty and absence of clarity to the case of 3<sup>rd</sup> defendant with respect to whether any sums are still outstanding on the facility as claimed. If there is any outstanding, is it in respect of the initial loan of 6<sup>th</sup> May, 2013 or the enhancement? Did the collateral given by claimant extend or cover the enhanced facility? All these questions and many more were not answered? On the evidence there was a facility granted vide **Exhibit P3** or **Exhibit D1**, which may or may not have been further enhanced vide **Exhibit D2** with a different collateral, but these were not pleaded in the defence of 3<sup>rd</sup> defendant and it was also not made the basis of the counter-claim of 3<sup>rd</sup> defendant. Indeed the Reliefs sought by counter-claimant have no nexus with **Exhibit D2**.

In these unclear circumstances, as demonstrated, the court has not been put in commanding height by credible evidence to ground the claims made by the Counter-Claim. At the risk of sounding prolix, the key Reliefs sought by Counter-Claimant are Declaratory in nature which has to be established by

credible and cogent evidence. No such admissible evidence with probative value was proffered.

As stated earlier, the above extensive pronouncements and findings on the very critical elements of the complaint or grievance of the claimant and counter-claimant provides broad factual and legal template to address whether the Reliefs sought by claimant and counter-claimant are availing. I start with the Reliefs of claimant.

**Relief (a) seeks for a Declaration that the Plaintiff is the bona fide owner of the property situate and known as Block D8A, FCDA Owner Occupier, Kubwa, Abuja covered by Certificate of Occupancy No: 4d5uw-13e7z-11372-14442-cur3 dated 28/3/2008 (File No: NG 30535) registered as No: 38447 at Pg. 38447 at the Land Registry Office, Abuja.**

In the context or light of the findings of this court on critical elements of the case, to wit: that the claimant gave his property willingly as collateral for the loan and he equally executed a Deed of Legal Mortgage duly registered vide **Exhibit D25**, can this Relief as claimed be availing?

The law is well settled that 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 Construction Limited (2007) 17 NWLR (pt.1063) 333, (2008) All FWLR (pt.400) 603 at 634; Usenfowokan V Idowu & Anor (1975) 4 S.C. (Reprint) 136; Pharmatek Industrial Projects Ltd V Trade Bank (Nig) Plc (2009) All FWLR (pt.495) 1678 at 1705 E-F; Mathew V Good Day (1861) 31 L.J. CH. 282**; Where a mortgage is by way of charge and not by conveyance, the mortgagee takes no estate whatsoever in the land or in the property but he generally has only an equitable interest to be enforced by sale upon an order of court". See **Ogundiani V Araba (1978) 6-7 S.C 42.**

In this case, it is not a situation where there is a deposit of original title document of plaintiff as collateral for the loan advanced to 1<sup>st</sup> and 2<sup>nd</sup> defendants. If that was the case, it would have the effect of creating an equitable mortgage in favour of 3<sup>rd</sup> defendant which can enforced by sale upon an Order of the Court. In this case, the claimant created a legal mortgage by a Deed transferring his legal estate to the mortgagee of the 3<sup>rd</sup> defendant.

In the circumstances, **Relief (a)** as couched cannot be availing. Technically, the claimant cannot be said to be the bona fide owner in the light of the existence of the Registered Deed of Legal Mortgage. Whether he ultimately loses his title will now be a function of whether the borrower of the facility has fulfilled his side of the bargain by meeting up and paying up his commitments under the facility granted.

**Clause 2** of the Deed of Legal Mortgage, **Exhibit D25** makes this clear:

**“For the consideration aforesaid the Surety as BENEFICIAL OWNER with the consent of the appropriate governmental authorities HEREBY CHARGES BY WAY OF LEGAL MORTGAGE ALL that which is comprised in the MORTGAGED PROPERTY with the payment to the Bank of all monies including principal monies, interest and other monies herein covenanted to be paid shall be paid by the Borrower PROVIDED ALWAYS that if all monies covenanted to be paid shall be paid by the Borrowers to the Bank accordingly then and in such a case the Bank will at the request and cost of the Borrower release this Charge.”**

There is nothing before me showing that the facility has been paid and that the borrower has made a request for the release of the charge and that it has been released. The implication is that the **Deed of Legal Mortgage** is still extant and alive. Relief (a) as prayed for can't be availing in the circumstances.

**Relief (b)** seek for an Order of the Honourable Court setting aside the loan agreement and legal mortgage between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in which the Plaintiff's property was used as security, his consent not having first been sought and obtained prior to the transaction. The transaction is therefore void *ab initio*.

On the evidence as already demonstrated, I had found that the claimant for reasons that are not clear or apparent willingly give his C/O to be used as a collateral for a loan facility. I found that there was no fraud or deceit in the evidence when he gave out the C/O and executed the Tripartite Deed of Legal Mortgage. I agree that certain aspects of the relationship with 1<sup>st</sup> and 2<sup>nd</sup> defendants were opaque but he elected or chose to relate on that basis with 1<sup>st</sup> and 2<sup>nd</sup> defendants. As is said in popular parlance, as you lay your bed, so you lie on it. He cannot now seek to escape from the consequences of deliberate actions taken by him. The unproven claim that his consent was not sought prior



to the transaction clearly will not fly. The acknowledged exercise of free-will in willingly releasing the C/O and the signing of the Deed of legal mortgage agreement clearly projects a consensual note to critical actions in this case. **Relief (b)** is not availing.

**Relief (c) seeks for a perpetual injunction restraining the 3<sup>rd</sup> Defendant, his agents and assigns from selling, advertising, auctioning or otherwise disposing off the plaintiff's property used as collateral for the loan, the 1<sup>st</sup> and 2<sup>nd</sup> defendants not having any title, interest, lien in the property capable of being sold to recover or redeem the loan.**

This Relief appears to me not properly framed. The exercise of powers of sale for example under the mortgage agreement is not because the 1<sup>st</sup> and 2<sup>nd</sup> defendants have title over the collateral given by claimant but more as a consequence of the failure of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to meet up with their financial commitments or obligations under the loan facility. The issue of 1<sup>st</sup> and 2<sup>nd</sup> defendants having title or interest in the collateral is of no moment. The critical question here is the mortgaged debt and whether it has been liquidated? If it has, that is the end of the matter, and if it has not been paid, then the right to exercise, for example, power of sale, will arise after the mortgage debt must have fallen due. **Relief (c)** is thus struck out.

**Relief (d) seeks for an Order of the Honourable Court setting aside every document, form, memorandum of understanding, resolutions of being a director in, consent to become a shareholder or member of the 2<sup>nd</sup> Defendant's company, Corporate Affairs Commission forms, Power of Attorney or any other document, purportedly bearing the signature of the Plaintiff such signature having been forged, altered, cloned or super imposed on such documents as the plaintiff never signed any document in relation to becoming or being a director in the 2<sup>nd</sup> Defendant's company or consenting to using his house as collateral for any loan with the 3<sup>rd</sup> Defendant.**

As indicated in the judgment, the above were elaborate averments made in the pleadings but without credible evidence to back the assertions made. As stated in the judgment, these are not matters for address of counsel or for speculation. In the absence of evidence, or proof of these contested assertions, these allegations are not proven and thus fail. **Relief (d)** fails.

**Relief (e) is for the sum of N50, 000, 000. 00 (Fifty Million Naira) as general damages for the deception and under hand dealings practiced on the Plaintiff by the Defendants.**

General damages in law 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)All 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)All F.W.L.R (pt.343)1761.**

In this case, again, I cannot situate on the evidence clear elements of deception and under hand dealings as alleged. There are elements of the case which are no doubt unclear and the court cannot speculate but on the fundamentals, there is really no dispute. The claimant freely gave his C/O to be used as collateral or security for a loan to a third party. He equally freely executed the mortgage agreement. I cannot really fathom how a party gives his property as security for a loan he is not receiving or enjoying. A party thus enjoys the benefit of the loan, and if he defaults, I bear the brunt. That is really interesting but how this works out, I don't really know or understand, so I keep my peace.

The bottom line here is that I cannot situate my wrongdoing and in the circumstances, General damages will not be availing.

I now deal with the Reliefs sought in the Counter-Claim.

**Relief (a) seeks for a Declaration that the facility granted the 2<sup>nd</sup> Defendant via the letter dated 6<sup>th</sup> May 2013, having remained unpaid despite repeated demand has become due.**

In the absence of any credible evidence in support or showing that the facility granted on 6<sup>th</sup> May, 2013 remains unpaid, this Relief will not be availing particularly here where 1<sup>st</sup> and 2<sup>nd</sup> defendants have asserted and joined issues

with counter-claimant, that the facility had been fully repaid. As stated earlier, it is really strange that the Counter-Claimant literally refused to furnish documentary and clear oral evidence to support this relief. Relief (a) thus fails.

**Relief (b) seeks for a Declaration that the Counter-claimant is entitled to the sum of N59, 971, 402.52 (Fifty Nine Million, Nine Hundred and Seventy One Thousand, Four Hundred and Two Naira Fifty Two Kobo), being the principal sum and accrued interest on the facility granted the 3<sup>rd</sup> Defendant to the Counter claim, FATAI ENGINEERS LIMITED as at 29<sup>th</sup> February, 2016.**

As demonstrated earlier on, no scintilla of evidence was proffered by the bank situating the above outstanding sum and how it was arrived at. I need not repeat myself. **Relief (b)** equally fails. With the failure of Relief (b), the claims under **Reliefs (c) and (d)** for pre and post judgment interest rates predicated on the success of the sum in Relief (b) must equally fail. The principle is settled that once that principal is taken away, the adjunct is similarly taken away. Relief (b) equally fails.

**Relief (e) seeks a Declaration that the Counter claimant is entitled to exercise the power of sale provided for in Clause 4(k) (ii) and 13 of the registered tripartite Deed of Legal Mortgage registered as No 50 at page 50 in volume 33, MISC in the Federal Capital Territory Land Registry Office, Abuja.**

Now in law, it is trite principle that a **mortgage** is a legal or equitable conveyance of title as a security for the payment of debt or the discharge of some other obligations for which it is given, subject to a condition that the title shall be reconvened if the mortgage debt is liquidated. See **All State Trust Bank V Nsofor (2004) All FWLR (pt.201) 1719.**

It is important to note that a Deed of Legal Mortgage such as **Exhibit D25** unlike an equitable mortgage transfers title in the property to the mortgagee and the term(s) of the mortgage may give a right of sale to the mortgagee without a court order. An equitable mortgage on the other hand by way of deposit of title deed does not transfer title on the property to the mortgagee and the equitable mortgagee can only enforce his right of sale upon a court order. See **Okuneye V F.B.N Plc (1996) 6 NWLR (pt.457) 749.**

It is equally important to add that before the right to exercise the power of sale under a mortgage can arise, the mortgage debt must have fallen due. That is the only way that the mortgagee can properly possess a good title to pass to a purchaser free from the equity of redemption. See **Oguchi V F.M.B (Nig.) Ltd (1990) 6 NWLR (pt.156) 330.**

Now in this case, as I have severally stated, there is absolutely nothing before court to show or establish that the mortgage debt has fallen due. Indeed in respect of the facility granted on 6<sup>th</sup> May, 2013 which is what the counter-claim is dealing with, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have advanced the position that payment has been fully made on that loan facility.

Now if there was any outstanding or a contrary position to that asserted by 1<sup>st</sup> and 2<sup>nd</sup> defendants, then it is for the counter-claimant to creditably prove that defendants are still indebted and that it has fallen due. No such clear evidence was proffered and that is fatal.

One more point. On the evidence, there was nothing to indicate or show that the counter-claimant gave or served notice of demand for payment of the mortgage debt. **Section 20 of the Conveyance Act 1881 or Section 125 of the Property and Conveyance Law** (whichever is applicable) provides for service of three (3) months demand notice for the payment of the mortgaged money or debt. Let me quickly add that the authorities recognize that parties can by their agreement, exclude the operation of the section and that will not constitute a breach of any provisions of the Constitution. See **Kano V Maikaji (2011) 17 NWLR (pt.1275) 139.**

There is here really nothing before me to situate if there was any outstanding from the facility granted on 6<sup>th</sup> May, 2013 and whether any demand has been made. In the circumstances, on the very fluid and unclear facts, I have not been put in a comforting position to hold that the power of sale covered by the Deed of Legal Mortgage has arisen.

I am aware that in law, even if there is a dispute with respect to the amount due, the mortgagees power of sale or foreclosure cannot be effected. See **All State Trust Bank V Nsofor (2004) All FWLR (pt.201) 1719; Omidiji V F.M.B (2001) 13 NWLR (pt.731) 646 at 609.** Indeed it is settled principle that the court will not restrain a mortgagee from selling even if there is dispute as to the actual amount due. See **All State Trust Bank V Nsofor (supra); Nigerian**

**Housing Dev. Society Ltd V Yaya Mumuni (1977) NSCC (vol.11) 65.** But these cases must be distinguished from the present scenario where the lender does not know or refused to furnish court with documents to situate clearly whether the borrower is indebted. At the risk of prolixity, the borrower here has stated that it has fully paid the amount borrowed. It was an issue precisely defined on the pleadings. It was thus a matter which the claimant, here the 3<sup>rd</sup> defendant counter-claimant must then creditably establish. The right to exercise power of sale must be done in a transparent manner free from suspicions of under hand dealings. **Relief (e) fails.**

With the failure of Relief (e), **Relief (f) which seeks for an order of perpetual injunction restraining the Defendants to the counter claim whether by themselves, privies, assigns howsoever called from interfering with the counter claimant's exercise of the power of sale under the tripartite Deed of Legal Mortgage registered as No 50 at Page 50 in Volume 33, MISC in the Federal Capital Territory Land Registry Office, Abuja.** Must equally fail.

The final **Relief (g) for N1, 000, 000 solicitors fees** also must fail since all the substantive Reliefs sought are not availing; this Relief clearly has no leg or foundation to stand on and must thus fail.

Before I round up, I call on parties particularly the 1<sup>st</sup> and 2<sup>nd</sup> defendants to meet with other parties in this case and clearly work out a fair compromise to sort out this rather protracted dispute. All parties in this case clearly have been impacted one or the other by this protracted litigation. I leave it at that.

On the whole and for the avoidance of any doubt, the court hereby accordingly makes the following orders:

**ON PLAINTIFF'S CLAIMS/RELIEFS**

- 1. Reliefs (a), (b), (d) and (e) fail and are dismissed.**
- 2. Relief (c) is struck out.**

**ON 3<sup>RD</sup> DEFENDANT'S COUNTER-CLAIM**

**The 3<sup>rd</sup> defendant's counter claim fails in its entirety and is dismissed.**

.....  
*Hon. Justice. A.I. Kutigi*

*Appearances:*

- 1. Anthony Agbonlahor, Esq. with Lucky Akharamé, Esq. for the Plaintiff.*
- 2. O.M. Ojite, Esq., for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*
- 3. Tairu Adebayo, Esq., for the 3<sup>rd</sup> Defendant/Counter-Claimant.*