

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

DELIVERED THE 7TH DECEMBER, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ASMAU AKANBI- YUSUF

SUIT NO. CV/797/2021

BETWEEN

1. NEP MALL LTD
2. NOVARE PROPERTY DEVELOPMENTS
NIGERIA LTD CLAIMANTS

AND

1. ENERGY KONNECT (NIGERIA) LTD
2. ADOGA IBRAHIM DEFENDANTS

JUDGMENT

By a writ of summons placed under the undefended list procedure dated and filed the 7th December 2021, the Claimants' claim against the Defendant as follows.

- The sum of #9,078,095:90 (Nine Million, and Seventy-Eight Thousand, and Ninety Five Naira, Ninety Kobo), being the outstanding sum owed the 1st Claimant in respect of the Arrears Agreement, being as arrears of Rent, Service Charge, and Utility Bills for the 1st Defendant's lease of the Demised Property as at October 14th, 2019.
- The sum of #5,064,207:70 (Five Million, and Sixty Four Thousand, Two Hundred and Seven Naira, Seventy Kobo), being the outstanding arrears of Rent (inclusive of applicable Withholding Tax) owed the 1st Claimant from October 15th, 2019.
- The sum #2,303,143:56 (Two Million, Three Hundred and Three Thousand, One Hundred and Forty Three Naira, Fifty Six Kobo), being the outstanding arrears of Service Charge owed the 1st Claimant from October 15th, 2019.
- The sum of #2,856,317:64 (Two Million, Eight Hundred and Fifty-Six Thousand, Three Hundred and Seventeen Naira, Sixty-Four Kobo), being

the outstanding arrears for Costs of the Utilities owed the Claimant from October 15th, 2019.

- The sum of #738,180:00 (Seven Hundred and Thirty-Eight Thousand, One Hundred and Eighty Naira), being the outstanding arrears for Signage owed the 1st Claimant.
- Payment of Compound Interest at the rate of 18.5% per annum on the above sums (owed the 1st Claimant from October 15th, 2019), cumulatively the sum of #10,961,848:90 (Ten Million, Nine Hundred and Sixty-One Thousand, Eight Hundred and Forty-Eight Naira, Ninety Kobo), from the concessionary due date of December 1, 2020 till liquidation of the entire sums by the Defendants.
- The sum of #155,875 (One Hundred and Fifty-Five Thousand, Eight Hundred and Seventy-Five Naira), being the costs of the reinstatement of the Demised Premises.
- The sum of #5,000,000 (Five Million Naira), being Costs of this action.

The processes of the claimants were served on the defendant vide substituted service and upon the consideration of the affidavit in support of the claimants' case, the matter was transferred to the general cause list and pleadings were ordered to be exchanged. The claimants' filed their Statement of Claim as well as the accompanying processes on 7/12/2021 and same was served on the Defendant via substituted means (see the affidavit of service deposed to by Mohammed Raji Haruna).

The defendants despite being served with the hearing notices failed and/or neglected to defend this matter.

The claimants called a witness in this case. On the 2/11/2022, the claimants' witness MaryJane Ugwu testified as Pw1. She adopted her witness statement on oath. Her evidence is as follows:

1. I am an Accountant of the 1st Claimant, and by virtue of which I am conversant with the facts of this matter. I have the consent of the Claimants to depose to this Affidavit, and all facts deposed to in this Affidavit are true, and within my personal knowledge except as otherwise stated.
2. The 1st Claimant is a Limited Liability Company, duly registered with the Corporate Affairs Commission ("the CAC"), and with offices at Plot 502, Dalaba Street, off Micheal Okpara Way, Novare Central Office, Wuse Zone 5, Abuja. The 2nd Claimant is a Limited Liability Company, duly registered with the CAC, and with offices at Novare Central Office, Plot 502, Dalaba Street, Off Micheal Okpara Way, Wuse Zone 5, Abuja-FCT.
3. The 1st Defendant is a Limited Liability Company registered in Nigeria, with its stated address at 15 Arsenal Street, Sun City, Abuja-FCT. The 2nd Defendant is an individual with address also stated to be at 15 Arsenal Street, Sun City, Abuja-FCT.

4. The 1st Claimant is the owner of the Retail Mall known as Novare Apo Mall, and the 1st Claimant had executed a Lease Agreement sometime about December 1st, 2018 with the 1st Defendant in respect of Shop No. 1 Novare Apo Mall, Abuja-FCT, which Agreement was to last for a term of 2 (Two) years commencing on December 1st, 2018 ("the Agreement"). The 1st Defendant conducted business at the aforesaid Shop No. 1 Novare Apo Mall, Abuja-FCT under the names and styles; "Hairlines", "Hairlines Salon" and "Hairline Barbing Salon".
5. The 2nd Claimant is the Property Manager and Agent of the 1st Claimant, with authority to lease and undertake the management of Novare Apo Mall (part of which was leased by the 1st Defendant) on behalf of the 1st Claimant. The 2nd Claimant also leased Shop No. 1, Novare Apo Mall, Abuja-FCT to the 1st Defendant for and on behalf of the 1st Claimant.
6. By virtue of the Agreement, the 1st Defendant took possession of Shop No. 1 (measuring approximately 29.44 Square Metres) at Novare Apo Mall, Abuja-FCT (the Demised Premises") for use as a Hair Salon, under the names and styles; the names and styles; "Hairlines", "Hairlines Salon" and "Hairline Barbing Salon" from December 1st, 2018.
7. In line with Clause 3.10 of the Agreement, the monthly rental of the Demised Premises for the first year was the sum of USD2,147.05 (Two Thousand, One Hundred and Forty-Seven United States Dollars, and Five Cents), inclusive of WHT but exclusive of VAT, whilst the monthly rental of the Demised Premises for the second year was the sum of USD2,254.40 (Two Thousand, Two Hundred and Fifty-Four United States Dollars, and Forty Cents), inclusive of WHT but exclusive of VAT.
8. In line with Clause 3.16 of the Agreement, the monthly Service Charge of the Demised Premises from the commencement of the Lease to December 31st, 2018 was the sum of NGN2,028.35 (Two Thousand, and Twenty-Eight Naira, Thirty-Five Kobo) per Square Metre, which translated to the sum of #59,714:62 (Fifty-Nine Thousand, Seven Hundred and Fourteen Naira, Sixty Two Kobo) per Month. In line with the Agreement, this amount was adjustable to the actual operating costs subsequently. The services covered by the Service Charge include Cleaning & Fumigation Expenses; Refuse Removal Charges; Security Expenses; Air-Conditioning Running & Maintenance Costs; Building Amenity Costs; and Any Other Cost Incurred In Servicing Or Maintaining Novare Gateway Mall.
9. In line with Clause 2.3 (Annexure A) of the Agreement, Electricity and Water (" the Utilities") consumed upon the Demised Premises was measured by the sub-metres installed for the Demised Premises, and accordingly the Costs varied depending on the quantity of the Utilities consumed by the 1st Defendant and the 2nd Claimant duly issued the

- 1st Defendant with Monthly invoices, for applicable amounts, in respect of the Utilities when due.
10. The lease of the Demised Premises was characterized by the failure of the 1st Defendant to make the above itemized payments in respect of the lease as was due, which culminated in outstanding debts being owed the 1st Claimant by the 1st Defendant. Following complaints by the 1st Defendant on difficulties being experienced in its business, the Claimants decided to formalize the terms of the repayment schedule for the payment of the outstanding debts owed the 1st Claimant by the 1st Defendant.
 11. The 1st Defendant had also leased other shops at other Malls (different from the Demised Premises) from the Claimants' sister/ affiliate companies; Gray-Bar Alliance Limited and Elysium Diem Nigeria Limited, and the 1st Defendant was also owing these aforesaid sister/affiliate companies other outstanding sums in respect of their respective leases (as separate from the debts owed the 1st Claimant).
 12. The Claimant aver that sometime about October 23rd, 2019, the 1st Claimant, Gray-Bar Alliance Limited and Elysium Diem Nigeria Limited jointly executed an agreement tagged the "Terms of Payment of Arrears" (hereinafter "The Arrears Agreement") with the 1st Defendant regarding the terms of the 1st Defendant's repayment schedule for all the several outstanding debts owed to them.
 13. Pursuant to Clause 1 of the Arrears Agreement, particularly by the figures contained in its Annexures, the 1st Defendant formally and unequivocally ADMITTED that it owed the 1st Claimant the sum of #10,179,911.49 (Ten Million, One Hundred and Seventy-nine Thousand, Nine Hundred and Eleven Naira and forty-nine kobo), as arrears of Rent, Service Charge, and Utility Bills in respect of its lease of the Demised Property as at October 14th, 2019.
 14. In line with the terms of the Arrears of Agreement, the 1st Defendant was obliged to pay the sum of #1,000,000 (One Million Naira) per month, a portion of which money would be used to defray the 1st Defendant's continuing monthly rent obligation, and the balance applied towards the 1st Defendant's outstanding arrears. In line with the terms of the Arrears Agreement, the 1st Defendant was obliged to pay these monies at specified times.
 15. The 1st Defendant did not comply with the terms of the Arrears Agreement as it did not make the envisaged payments line with and as contemplated by the Arrears Agreement. The table below depicts payments made by the 1st Defendant towards its compliance with its obligations pursuant to the Arrears Agreement –
 16. The 1st Defendant only paid the cumulative sum of #1,101,815:59 (One Million, One Hundred and One Thousand, Eight Hundred and Fifteen Naira, Fifty Nine Kobo) as its payments in line with the terms of the

Arrears Agreement rather than the full and agreed sum of #10,179,911.49 (Ten Million, One Hundred and Seventy-nine Thousand Nine hundred and eleven Naira and forty-nine kobo), being as arrears of Rent, Service Charge, and Utility Bills in respect of its lease of the Demised Property as at October 14th, 2019, leaving a balance of the sum of #9,078,095:90 (Nine Million, and Seventy Eight Thousand, and Ninety Five Naira, Ninety Kobo) UNPAID.

17. From the commencement of the lease of the Demised Premises, the understanding and agreement between the parties (in line with clause 3.3, Annexure A of the Agreement) is that ordinarily, the conversion rate is as determined by the 1st Claimant's Banker, Stanbic IBTC Plc (which is normally the interbank exchange rate), however, the exchange rate utilized by the Claimants for the 1st Defendant was a "Group Exchange Rate Concession", which was in fact at a rate lower than the prevailing interbank exchange rate.

17.1. The exchange rate utilized for the 1st Defendant for December 2018 was the sum of N250 (Two Hundred and Fifty Naira) to 1USD (One United States Dollar).

17.2. The exchange rate utilized for the 1st Defendant from January 2019 to June 2019 was the sum of #275 (Two Hundred and Seventy Five Naira) to 1USD.

18. From July 2019 to December 2019, the Claimants as a good faith gesture, gave the 1st Defendant a 6-month concession on the rent such that the monthly rental of the Demised Premises was reduced from the agreed sum of USD72.93 (Seventy Two United States Dollars, and Ninety Three Cents) to the sum of USD50 (Fifty United States Dollars) per Square Metre, inclusive of Withholding Tax (WHT) but exclusive of Value Added Tax (VAT), and accordingly, the 1st Defendant was then obligated to pay the 1st Claimant the sum of USD1,472 (One Thousand, Four Hundred and Seventy Two United States Dollars) per Month as rent.

18.1. The exchange rate utilized for the 1st Defendant from July to December 2019 was the sum of N300 (Three Hundred Naira) to 1USD rent.

19. In the second year of the lease, from January 2020, the rent reverted back to the contract sum with a 5% (Five percent) escalation, in line with the Agreement, which was the sum of USD76.57 (Seventy Six United States Dollars, and Fifty Seven Cents) per Square Metre, inclusive of Withholding Tax (WHT) but exclusive of Value Added Tax (VAT). Accordingly, the 1st Defendant was then obligated to pay the 1st Claimant the sum of USD2,254.22 (Two Thousand, Two Hundred and Fifty Four United States Dollars, and Twenty Two) per Month as rent.

- 19.1. The exchange rate utilized for the 1st Defendant for January 2020 was the sum of #325 (Three Hundred and Twenty Five Naira) to 1USD.
20. From February 2020 to November 2020, when the 1st Defendant gave up possession of the Demised Premises, the Claimants as a good faith gesture, gave the 1st Defendant a concession on the rent such that the monthly rental of the Demised Premises was reduced from the agreed sum of USD76.57 (Seventy Six United States Dollars, and Fifty Seven Cents) to the sum of USD40 (Forty United States Dollars) per Square Metre, inclusive of Withholding Tax(WHT) but exclusive of Value Added Tax (VAT), and accordingly, the 1st Defendant was then obligated to pay the 1st Claimant the sum of USD1,177.60 (One Thousand, One Hundred and Seventy Seven United States Dollars, and Sixty Cents) per Month as rent.
 - 20.1. The exchange rate utilized for the 1st Defendant from February to November 2020 was the sum of N360 (Three Hundred and Sixty Naira) to 1USD.
21. From October 15th, 2019 to November 2020, when the 1st Defendant gave up possession of the Demised Premises, the 1st Defendant only paid the cumulative sum of N4,699,472:00 (Four Million, Six Hundred and Ninety Nine Thousand, Four Hundred and Seventy Two Naira) as its payment towards Rent rather than the full sum of N9,763,679:70 (Nine Million, Seven Hundred and Sixty Three Thousand, Six Hundred and Seventy Nine Naira, Seventy Kobo) as its Rent, leaving a balance of the sum of N5,064,207:70 (Five Million, and Sixty Four Thousand, Two Hundred and Seven Naira, Seventy Kobo) UNPAID.
22. For December 2018, the Service Charge was #2,028:35 (Two Thousand, and Twenty Eight Naira, Thirty Five Kobo) per Square Metre, per month, which translated to #59,714:62 (Fifty Nine Thousand, Seven Hundred and Fourteen Naira, Sixty Two Kobo) per Month. However, from January 2019 to December 2019, the Service Charge amount was adjusted in line with the actual operating costs, and became the sum of #73,600 (Seventy Three Thousand, Six Hundred Naira) per Month. From January 2020 to November 2020, the Service Charge amount was again adjusted in line with the actual operating costs, and became the sum of N82,432 (Eighty Two Thousand, Four Hundred and Thirty Two Naira) per Month.
23. From October 15th, 2019 to November 2020, when the 1st Defendant gave up possession of the Demised Premises, the 1st Defendant only paid the cumulative sum of #550,528:00 (Five Hundred and Fifty Thousand, Five Hundred and Twenty Eight Naira) as its Service Charge rather than the full sum of #2,996,015:09 (Two Million, Nine Hundred and Ninety Six Thousand, and Fifteen Naira, Nine Kobo) as its Service Charge, leaving a balance of

- the sum of #2,445,487:09 (Two Million, Four Hundred and Forty Five Thousand, Four Hundred and Eighty Seven Naira, Ninety Kobo) UNPAID.
24. From October 15th, 2019 to November 2020, when the 1st Defendant gave up possession of the Demised Premises, the 2nd Claimant duly issued the 1st Defendant with monthly invoices, for applicable amounts, in respect of the Utilities consumed on the Demised Premises, which amounted to the cumulative sum of #6,494,760:70 (Six Million, Four Hundred and Ninety Four Thousand, Seven Hundred and Sixty Naira, Seventy Kobo). The 1st Defendant subsequently only paid the cumulative sum of N3,638,443:06 (Three Million, Six Hundred and Thirty Eight Thousand, Four Hundred and Forty Three Naira, Six Kobo) towards Utilities consumed at the Demised Premises, leaving a balance of the sum of #2,856,317:64 (Two Million, Eight Hundred and Fifty Six Thousand, Three Hundred and Seventeen Naira, Sixty Four Kobo) UNPAID.
25. Sometime about December 2015, the Defendant had approached the 1st Claimant that it wanted to advertise its services to the public at the Novare Apo Mall by utilizing 2 (Two) Signage Spaces on the eastern wall of Novare Apo Mall, measuring approximately 2,000mm by 1,000mm. Parties subsequently agreed to the payments rates, and in fact the 1st Defendant had made payment to the 1st Claimant in respect of the utilization of the Signage Space for the 2015- 2016 pursuant to the Annual invoice sent in accordance with the terms of the agreement for the Signage.
26. From the commencement of the lease of the Signage Space, the 1st Defendant only paid the cumulative sum of #188,527:50 (One Hundred and Eighty Eight Thousand, Five Hundred and Twenty Seven Naira, Fifty Kobo) as its fees for the Signage Space rather than the full sum of #926,707:50 (Nine Hundred and Twenty Six Thousand, Seven Hundred and Seven Naira, Fifty Kobo), leaving a balance of the sum of #738,180:00 (Seven Hundred and Thirty Eight Thousand, One Hundred and Eighty Naira) UNPAID.
27. As at the November 2020, when the 1st Defendant gave up possession of the Demised Premises, the cumulative outstanding arrears of Rent, Service Charge, and Utility Bills owed the 1st Claimant by the 1st Defendant, from October 15th, 2019, was the sum #10,223,668:90 (Ten Million, Two Hundred and Twenty Three Thousand, Six hundred and Sixty Eight Naira, Ninety Kobo), broken down into its components as follows –
- 27.1 The outstanding rent (inclusive of applicable Withholding Tax) for the Demised premises, being the sum of #5,064,207:70 (Five Million, and Sixty Four Thousand, Two Hundred and Seven Naira, Seventy Kobo).
- 27.2 The outstanding Service Charge for the Demised Premises, being the sum of #2,445,487:09 (Two Million, Four Hundred and Forty Five Thousand, Four Hundred and Eighty Seven Naira, Ninety

Kobo). However, after deducting the sum of #142,343:53 (One Hundred and Forty two Thousand, Three Hundred and Forty Three Naira, Fifty Three Kobo), being Service Charge Deposit paid by the 1st Defendant, the outstanding Service Charge becomes the sum of #2,303,143:56 (Two Million, Three Hundred and Three Thousand, One Hundred and Forty Three Naira, Fifty Six Kobo).

- 27.3 The outstanding Cost of the Utilities consumed in the Demised Premises, being the sum of #2,856,317:64 (Two Million, Eight Hundred and Fifty-Six Thousand, Three Hundred and Seventeen Naira, Sixty Four Kobo).
28. As at the November 2020, when the 1st Defendant gave up possession of the Demised Premises, the cumulative outstanding arrears for Signage was the sum #738,180:00 (Seven Hundred and Thirty Eight Thousand, One Hundred and Eighty Naira).
29. As at the time the 1st Defendant gave up possession of the Demised Premises, the 1st Defendant owed the 1st Claimant the cumulative sum of N10,961,848:90 (Ten Million, Nine Hundred and Sixty One Thousand, Eight Hundred and Forty Eight Naira, Ninety Kobo).
30. The 1st Defendant had failed/refused to pay the outstanding debts despite the many opportunities afforded it by the Claimants. The Claimants and the 1st Defendant had exchanged several email correspondences in respect of the payment of the monies due by the 1st Defendant, but the 1st Defendant had failed/ refused to make the due payments.
31. In line with Clause 2.15 and 2.16 (Annexure A) of the Agreement, where any rent or other monies payable under the Agreement remains unpaid for more than 7 (Seven) days after the DUE DATE, whether formally demanded or not, the 1st Defendant shall become liable to pay Compound Interest (calculated at commercial overdraft rate charged by the 1st Claimant's Bank, Stanbic IBTC, from time to time plus 5% [Five percent per Anum) on the due and outstanding amount commencing from the DUE DATE until payment.
32. The commercial overdraft rate charged by Stanbic IBTC Bank, being the 1st Claimant's Bank, is 13.5% (Thirteen Point Five percent), which is the Monetary Policy Rate (MPR). Stanbic TBTC's interest rate plus 5% (Five percent) is cumulatively interest at the rate of 18.5% (Eighteen point Five percent). The interest payable by the 1st Defendant in line with the Agreement applies from the various due dates of the respective debts, but for uniformity and ease of reference, the Claimants shall utilize the concessionary Due Date of December 1st, 2020 for the debts.
33. The 2nd Defendant had executed Annexure D to the Agreement, a Deed of Suretyship in which he bound himself as Surety in solidum for and as co-principal debtor with the 1st Defendant in respect of all the debts obligation of the 1st Defendant as arising from the Agreement.

34. The 2nd Defendant by virtue of the aforementioned Deed of Suretyship is jointly and severally liable with the 1st Defendant in respect of all the debts obligation of the 1st Defendant as arising from the Agreement and the Arrears Agreement. The duly executed Deed of Suretyship between the 1st Claimant and the 2nd Defendant is attached to and a part of the Agreement.
35. I was informed by Mr. Emmanuel Edibo of Counsel to the Claimants on December 3rd, 2021 at Novare Central Offices, 14 Floor, Novare Central Mall, Plot 502 Dalaba Crescent, Off Michael Okpara Way, Wuse Zone 5, Abuja-FCT, when we were discussing the filing of this Affidavit, and I verily believe him as stated below:
- 35.1 When he wanted to deliver a Demand Letter to the Defendants at 15 Arsenal Street, Stun City, Lugbe, Abuja-FCT, he was informed by the security guard at the premises that the Premises was vacant and that there was no person in occupation.
- 35.2 The Claimants' Solicitor subsequently delivered Demand Letters to the 1st and 2nd Defendants by email adogaibrahim@gmail.com, which is the email address utilized by the 1st Defendant (through the 2nd Defendant), and which email address is apparently also the 2nd Defendant's private email address.
- 35.3 Despite the Claimants' Solicitor's correspondences demanding for payment in respect of the arrears and unpaid sums, the Defendants had failed/ refused to respond in any way or manner to the correspondence.
36. It is the agreement between the 1st Claimant and the 1st Defendant (in line with clause 12, Annexure A of the Agreement) that upon the 1st Defendant's vacation of the Demised Premises, it shall reinstate the Demised Premises back to the state it was prior to the lease. Upon the 1st Defendant's vacation of the Demised Premises by November 2020, the 1st Defendant failed/ refused to reinstate the Demised Premises as agreed.
37. Due to the 1st Defendant's failure/refusal to carry-out its obligation to reinstate the Demised Premises, the Claimants now have to bear the costs of the reinstatement of the Demised Premises. The Claimants had accordingly requested an independent professional to inspect the Demised Premises after same being vacated by the 1st Defendant, and provide its quote for the reinstatement thereof, and the costs quoted by the professional is the sum of #155,875 (One Hundred and Fifty Five Thousand, Eight Hundred and Seventy Five Naira).
38. The Defendants do not have a defence to this suit, and it would be in the interest of justice for this Honourable Court to grant the reliefs sought by the Claimants.

39. I make this oath in good faith, solemnly and conscientiously believing the contents to be true and correct, and in accordance with the extant Oaths Act.

The following documents were admitted in evidence:

- Email sent Tuesday December 2020 to Adoga lbrahim@gmail.com-Re Demand for Debt owed by Energy Connect marked as Exhibit A
- Document with Tenant Hairlines Barbing Salon-Tenant Statement as at 11th January 2021 marked Exhibit A1
- Novare Apo- Signage Document marked Exhibit A2.
- Email correspondence marked Exhibit A3.
- Document of Thursday February 13th 2020 (Money Market and Bond Yield Curve) marked Exhibit A4.
- Photocopy of quotations to apply and reinstate shop 1 Apo mall dated 27/11/2020 marked Exhibit A5.
- Doc-Tenant- Hairlines Barbing Salon Shop No1-Rent Service Charge and utility marked Exhibit A6.
- Lease Agreement between Nepmall Ltd and Energy Konnect Ltd trading as Hairline Salon marked Exhibit A7.
- Terms of payment of arrears marked Exhibit A8

At the end of the Pw1's evidence in chief, the matter was adjourned for cross examination. On the adjourned date, the Defendants failed to appear in Court, hence, the Claimants' Counsel applied that the Defendants be foreclosed. The matter was adjourned for Defence. Again, on the day slated for defence, the Defendants failed to appear before the court, they were foreclosed from defending the matter and same was adjourned for adoption of final written address.

On 2/11/2023, Learned counsel John Paul Okwoli Esq. argued and adopted the final written address filed on behalf of the claimants, wherein he formulated two issues for determination, to wit;

1. Whether the court ought not to grant the reliefs sought for failure of the defendant to defend the matter.
2. Whether the claimant is entitled to the grant of the reliefs sought.

I have read through the issues formulated by counsel to the claimants' and I am of the view that the issues are similar, hence I adopt issue one. It is not in dispute that the defendant failed or ignored to defend this matter or enter appearance; this however will not mean an automatic victory to the claimants. The claimants by law are required to prove their assertions with cogent and credible evidence. In MTN NIGERIA COMMUNICATIONS LIMITED

v. MUNDRA VENTURES NIGERIA LIMITED (2016) LPELR-40343(CA)"...the law is that evidence that is unchallenged or un-contradicted by the adverse party is good to be acted upon by the Court unless it is either irrelevant or palpably false or worthless by itself. Therefore, the mere fact that evidence is unchallenged is not tantamount to proof as such unchallenged evidence must also be credible and relevant in relation to the facts it seeks to establish. See CAMEROON AIRLINES V. MIKE OTUTUIZU (2005) 9 NWLR (PT. 929) 202. SEE ALSO ISHOLA LAWSON V. AFANI CONTINENTAL CO NIG LTD (2002) 2 NWLR (PT. 752) 585; OMOREGBE V. LAWAN (1981) 3 SC 108; ODUOLA V. COKER (1981) 5 SC 197."

In the case at hand, Counsel cited DIGITAL SECURITY TECHNOLOGY LTD & ANOR V ANDI (2017) LPELR-43446(CA) to reiterate his position that the present suit centers on liquidated money demand. On the issue of whether the matter bothers on liquidated money demand or not, I will refrain from speaking to same as it is trite that, where a decision has been taken on an issue and the party is dissatisfied, it is within the aggrieved party's right to appeal the decision. Thus, upon my decision to transfer the matter to the general cause list, counsel to the claimant was at liberty to appeal same, this he failed to do. Counsel cannot by way of final written address ventilate his dissatisfaction where he has the opportunity to appeal on the particular decision.

Going further, learned Counsel to the defendants argued that the claim of the claimants is based on contract vide exhibit A7. He states that it is in evidence that the 2nd claimant duly issued the 1st defendant with monthly invoices for applicable amount in respect of the utilities when due; that the understanding and agreement between the parties in line with exhibit A7 is that the conversion rate is to be determined by the 1st claimant's Banker, Stanbic IBTC Plc; that however the exchange rate utilized by the claimants for the 1st defendant was a Group Exchange Rate Concession which was at a rate lower than the prevailing interbank exchange rate. He continued that exhibit A8 is a copy of the duly executed Terms for Payment of Arrears between the 1st claimant and other affiliate companies and the 1st defendant in respect of the 1st defendant's payment of its arrears of rent and other outstanding in respect of the subject property. Going further, counsel argued that exhibits A1, A2 & A6 are the applicable statements of accounts of the 1st defendant with the claimants which depicts the claimed sums, that exhibit A4 shows the applicable interest rates charged by Stanbic IBTC Bank. Counsel submits that it is trite law that a creditor who claims a sum of money on the basis of the 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. A statement of account is not therefore sufficient explanation of debts and of lodgments; He cited WEMA BANK V OSILARU (2007) LPELR - 8960 (CA AND SOBE & SONS (NIG) LTD & ANOR V FCMB PLC (NIG) LTD & ANOR. VS. FCMB PLC (2013) LPELR-23375(CA). He urged the court

to hold that claimants have not just made bare assertions or provided an account statement, but have equally gone further to substantiate their evidence by cogent and compellable evidence of an accountant on how the sum was arrived at; that the time honoured principle and Latin maxim ingrained in the Law of contract that “pacta convent quae neque contract leges neque dolo malo initia sunt, omni modo observanda sunt” which is that contractual agreements not fraudulently or illegally entered into by parties, must in all respect be observed and enforced. He referred the court to DRAGETANOS CONST (NIG) LTD VS. F.M.V LTD (2011) NWLR PT 1273 PG 308 AT 353.

He argued that the wordings of exhibits A7 & A8 are simple and straightforward, hence same should be given their literal and ordinary meaning. Arguing further, counsel urged the court to hold the 2nd defendant jointly and severally liable with the 1st defendant to the claimants as he executed annexure D of the exhibit A7, a Deed of suretyship wherein he bound himself as surety in solidum for and as co-principal debtor with the 1st defendant. He gave the definition of the term surety and further cited IMOKA & ANOR V UBA PLC. (2012) LPELR – 19837 (CA)

He continued that exhibits A8 & A3 are by their nature admissions by the 1st defendant of the indebtedness and thus no need for further proof. He referred the court to REPTICO SA GENEVA V AFRIBANK NIG. PLC (2013) LPELR-20662 (SC). He submits further that it was a result of the failure of the defendant to settle their indebtedness to the claimants, that resulted in the claimant's filing this action; that claimants had to pay their solicitors the cost thereof. He urged the court to grant the reliefs of the claimants.

It is elementary law that he who alleges must prove. The law enjoins a party who makes an assertion to prove the truth of same, in order to succeed in the action. See DANGOTE CEMENT V. ANYAFU (2021) LPELR-52601 (CA)

Sections 131-133 Evidence Act 2011 states thus;

131. (1) 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.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

132(1) 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.

133(1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

Guided by the above, I shall now proceed to determine the sole issue.

The case of the claimants is simple and straightforward. By the evidence before the court, the claimants are limited liability companies duly registered with the Corporate Affairs Commission. The Pw1 testified to the fact, that the 1st claimant being the owner of the Retail Mall known as Novare Apo Mall, executed a lease agreement i.e exhibit A7 with the 1st defendant in respect of shop no. 1 Novare Apo Mall Abuja – FCT; that the defendant trades under the name and style; Hairline, Hairlines Salon and Hairline Barbing Salon. The Pw1 equally testified that the 2nd claimant being the property manager and agent of the 1st claimant has the authority to lease and undertake the management of Novare Apo Mall which was leased by the 1st defendant on behalf of the 1st claimant; that the 2nd claimant also leased shop no. 1 Novare Apo Mall, Abuja – FCT to the 1st defendant for and on behalf of the 1st claimant; that by virtue of exhibit A7, the 1st defendant took possession of shop no. 1 at Novare Apo Mall, Abuja for use as a Hair Salon under the name and styles Hairlines Salon, Hairlines Salon and Hairline Barbing Salon from December 1, 2018. The Pw1 continued that due to the failure of the defendant to comply with the terms and conditions stated in exhibit A7, the claimants' decided to draw up a terms of repayment schedule for the payment of the outstanding debt owed the 1st claimant by the 1st defendant; that the 1st defendant had also leased other shops at other Malls from the claimants' sister/affiliate companies different from the one stated in exhibit A7 and the 1st defendant was also owing the aforesaid companies, hence, exhibit A8 was jointly executed by the 1st claimant, Gray- Bar Alliance Limited and Elysium Diem Nigeria and the 1st defendant.

It is the law that where parties enter into an agreement in writing, they are bound by the terms thereof and the Court is not allowed to read into such agreement terms which the parties did not agree on. In other words, a Court cannot re-write an agreement already made. JIGNA FARMS LTD V. UBN PLC (2016) LPELR-40231 (CA). Exhibit A7 is the document presented by the Pw1 to prove that shop no. 1 Novare Apo Mall, Abuja – FCT was leased by the 1st claimant to the 1st defendant. See also paragraphs 4 of the witness statement on oath. A careful examination of exhibit A7 which is the lease agreement between NEP MALL LIMITED and ENERGY KONNECT LIMITED trading as Hairlines Salon, particularly clause 3.3 reads thus; The LEASED PREMISES shall be: Shop No. 1 measuring approximately 29.4. ... Plot 232, Cadastral Zone B14, Dutse, Abuja

By the above, it is crystal clear that the property pleaded by the the claimants is different from the property stated in exhibit A7. As rightly argued by counsel to the claimants, exhibit A7 is simple and unambiguous, thus same will be given its literal and ordinary meaning. The claimants failed to plead the

property described in exhibit A7; rather the Pw1 chose to plead Novare Apo Mall which is not contained in exhibit A7. It is trite law that courts are not allowed to read different meanings to documents presented to it by parties. I am not allowed to substitute, vary, review what was agreed by parties, same is also applicable to the claimants. Once terms of a contract are embodied in documents, the parties are presumed to intend what they have written down. The words used are given their ordinary and plain meaning. Neither the Court nor the parties can rewrite the contract or import words to vary the intentions of the parties as written. See SOUTH TRUST BANK & ORS V. PHERANZY GAS LTD & ORS (2014) LPELR-22340(CA).

The established fact here is that exhibit A7 cannot be relied on to determine the existence of the lease agreement between the 1st claimant and the defendants. And I so hold.

Going further, the Pw1 in her oral testimony before the court stated that the defendant also leased other shops at other Malls from the claimants' sister/affiliate companies and was also owing those companies; that sometime about October 23, 2019 the 1st claimant, Gray- Bar Alliance Limited and Elysium Diem Nigeria and the 1st defendant jointly executed an agreement tagged the Terms of Payment of Arrears admitted as exhibit A8

Exhibit A8, reads in part;

TERMS FOR PAYMENT OF ARREARS

*THESE TERMS OF SETTLEMENT is made this October 23, 2109, BETWEEN NEP MALL LIMITED, GRAY- BAR ALLIANCE LIMITED AND ELYSIUM DIEM NIGERIA LIMITED ("NOVARE GROUP"), Private Limited Companies incorporated under the Companies and Allied Matters Act, Cap C20. Laws of the Federation of Nigeria with its representative office at Plot 502. Dalaba Street, Off Micheal Okpara Way. Wuse Zone 5, Abuja which expression shall wherever the context so admits include its successors-in-title and assign of the one part:
AND*

ENERGY KONNECT NIGERIA LIMITED ("Tenant"), having its principal offices at 15, Arsenal Street. Suncity. Abuja, which expression shall wherever the context so admits include his successors- in-title and assign of the other part:

A cursory look at the terms of payment of arrears above shows the names of some companies that are not parties to this suit. The companies are Gray Bar Alliance Ltd and Elysium Diem Nigeria Ltd. I am not by law allowed to take decisions whether for or against Gray Bar Alliance Ltd and Elysium Diem Nigeria Ltd as they are not parties to this suit.

Again, in exhibit A8 it is stated that by virtue of the signed lease agreements, the tenant became a tenant of shop nos. 1 &2 at Novare Apo Mall, shop no 56 at the Novare Gateway Mall and shop no 9 at the Novare Central Mall. I have combed the entire pleadings, it is my finding, that the claimant failed to plead these facts or led evidence to the effect that the defendant is in occupation of shop 2 at Novare Central Mall, Novare Apo Mall, shop no 56 at the Novare Gateway Mall and shop no 9 at the Novare Central Mall. Thus, no weight can be attached to exhibit A8. And I so hold.

Furthermore, learned counsel to the claimants argued that the applicable Statements of Accounts of the Defendant with the Claimants are in evidence and same depict the claimed sums; that the Claimants have not just made a bare assertion against the Defendant, as they have provided an account statement to that effect, and also gone further to depict by cogent and compellable oral and documentary evidence of an accountant, how the claimed sums was arrived at; that the entirety of the monies claimed by the Claimant against the Defendant is covered by written contract in evidence. He argued that contractual agreements not found to have been entered fraudulently or illegally must be observed and enforced. He urged the court to hold that the defendant having consented to an agreement is bound to pay as agreed; he submits that the Arrears Agreement is by its nature admissions by the 1st Defendant of the indebtedness, and thus needs no further proof. He states that it is trite law that whatever fact is admitted needs no further proof. It is deemed established; that the clear intention of the parties as per their agreement and utterances was that the 1st Defendant was obligated to pay the 1st Claimant for the stated items in the manner agreed. He argued that the transaction between the 1st Claimant and the 1st Defendant are first and foremost a commercial lease transaction, and which means that there are bottom-line implications for the Claimant/Landlord and its investments in the Subject Property. Counsel relied on REPTICO SA GENEVA VS. AFRIBANK NIGERIA PLC (2013) LPELR- 20662(SC)

Exhibits A1, A2 & A6 were tendered as the applicable statements of account of the 1st defendant with the claimants. The question I ask here- is the 1st claimant a Bank or financial institution and were the statements of account sent and received by the defendants, particularly the 1st defendant?

The Black's Law Dictionary (9th Edition) defines a Statement of Account at its page 1539 as: "a report issued periodically (usually monthly) by a bank to a customer's account, including the checks drawn and cleared, deposits made charges debited and the account balance. See MAINSTREET BANK LTD V. UBA PLC (2014) LPELR-24118(CA) (Pp. 20 paras. A)

Stemming from the above, it would appear to me that the claimants lacks the capacity to issue a statement of account to the defendants. To the

second question, the claimants failed to present the acknowledged copy of exhibits A1, A2 & A6 to the court. I am not unmindful of exhibit A3 these are email correspondences between Adoga Ibrahim and representatives of Novare Property Developers Nigeria. I have read through the mails and I state that no probative value can be ascribed to same. I had earlier stated my position on exhibits A7&A8, which I do not intend to repeat here. It is rudimentary law that a Court is only to act upon and ascribe probative value to legally admissible credible evidence. See *OLADELE V. STATE (2021) LPELR-54413(CA)* (P. 36, paras. B-C). I find and hold that exhibits A1, A2, A3 & A6 lacks any probative value and same cannot be relied on.

In civil cases, the burden of proof is placed on the claimant; a party is to rely on the strength of his own case and not to depend on the weakness of the defendant's case. The onus is on the claimant to plead and prove every material fact that is necessary by credible evidence for the success of his case. It is the duty of the court to weigh the evidence by placing it on an imaginary scale of justice before arriving at a decision. From the evidence adduced by Pw1, she failed to discharge the initial burden placed on her. I am not unmindful of the fact that the defendant did not put up a defence, however, the failure to do so, does not prevent the claimant from substantiating their claims with cogent evidence; the claimants must succeed on their own strength. See *s.134 Evidence Act*. Having placed the testimony of the Pw1 on the scale of evidence, I find that it lacks evidential value, thus the matter is resolved against the claimants.

Accordingly, the claims of the claimants are refused and the case is dismissed.

ASMAU AKANBI – YUSUF

(HON. JUDGE)

APPEARANCES;

Parties absent and not represented

