**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**
**HOLDEN AT COURT NO. 13 ABUJA**
**BEFORE HIS LORDSHIP HON. JUSTICE A. S. ADEPOJU**
**ON THE 30TH DAY OF JUNE, 2022**

**FCT/HC/CV/1397/20**

**BETWEEN:**
**OBIKPO UNOMA AGAEZI ----------CLAIMANT**

**AND**

**1. PROPERTY MART REAL ESTATE INVESTMENT LTD**
**2. ALPHA GLOBAL AIR SERVICES LIMITED** }**---------DEFENDANTS**
**3. OMEGA PRIME SUMMIT HOMES LTD**

***O. I. ARASI*** *appears with* ***H. A. SALAMI*** *for the Defendant.*
*Plaintiff not in Court and not represented by Counsel.*

**JUDGEMENT**

In the writ of summons dated the 11th day of March 2020, the Claimant claims jointly and severally against the defendants as follows;

1. An order of this Honourable Court directing the defendants to make available to the Claimant, the house which is the 3 bedroom terrace duplex on the line of 3 bedroom terrace duplexes but which specific unit was converted to a 4 bedroom terrace duplex at Grenadines Estate, Lokogoma, Abuja; back to the Claimant.
2. An order directing that the agreed cost of survey in the sum of **₦80,000 (Eighty Thousand Naira only)** per unit and infrastructures at

**₦750,000 (Seven Hundred and Fifty Thousand Naira)** per unit being the agreed cost of Block D Grounds floor Units 2 and Block D 1st floor Unit 2 the 2 No. Units of 3 bedroom luxury flats at Grenadines Estate, Lokogoma, Abuja the same being the representations agreed at the time of entering into the Contract and when receiving payments from the Claimant are binding on the defendants.

3. An order directing the defendants having received the payment of the agreed sum of **₦80,000 (Eighty Thousand Naira only)** per unit and infrastructures at **₦750,000 (Seven Hundred and Fifty Thousand Naira)** per unit the sum of money already paid by the Claimant, the Claimant shall immediately become entitled to all rights of ownership and possession of Block D Grounds floor Units 2 and Block D 1st floor Unit 2 being the 2 No. Units of 3 bedroom luxury flats at Grenadines Estate, Lokogoma, Abuja as well as the title documents thereto.
4. In the alternative, an order directing that the Claimant is entitled to hire and/or engage its professionals (whether they be lawyers, surveyors or howsoever) and are not and cannot be bound to pay for professional services engaged by the Defendant.
5. An order directing that it is illegal to impose the terms and conditions of payment for professional services engaged by the Defendants as the condition precedent to be into ownership/possession of Block D

Grounds floor Units 2 and Block D 1st floor Unit 2 being the 2 No. Units of 3 bedroom luxury flats at Grenadines Estate, Lokogoma, Abuja.

6. An order directing the Defendants whether jointly or severally to make the payment of the sum of **₦20,000,000 (Twenty Million Naira)** only as loss of earnings and the sum of **₦30,000,000 (Thirty Million Naira**) as damages for breach of contract.
7. The cost of this action being **₦2,500,000 (Two Million Five Hundred Thousand Naira)** only.

The Claimant claimed that sometimes in 2013, the 1st defendant approached her with a proposal to buy two units of 3 bedroom luxury flat for a price of **₦35,000,000 (Thirty Five Million Naira)** and one unit of four bedroom terrace duplex at a cost of **₦26,000,000 (Twenty Six Million Naira)** subject to terms and conditions at Grenadines Estate, Lokogoma. And upon receipt of the letter of offer dated 15th February 2013, the claimant renegotiated the terms of the said letter of offer by way of counter-offer at an agreed price of **₦30,000,000 (Thirty Million Naira)** for the 3 bedroom luxury flat and **₦26,000,000 (Twenty Six Million Naira)** four bedroom terrace duplex subject to terms and conditions. The Claimant made a deposit of **₦10,000,000 (Ten Million Naira)** for the two units of 3 bedroom luxury flat which said payment was acknowledged by 1st defendant vide a letter dated 6th March 2013.

The 1st defendant later reached out to the Claimant stating that the promised 1 No. unit of four bedroom terrace duplex was no longer available and persuaded the Claimant to accept a 1 No. unit of 3 bedroom terrace duplex, with a promise to convert the court yard space to create an additional room with an extra cost of **₦500,000 (Five Hundred Thousand Naira)** to be borne by the Claimant bringing the total cost for the corrected four bedroom terrace duplex to **₦26,500,000 (Twenty Six Million Five Hundred Thousand Naira)** only. And upon the receipt of the Contract of Sale agreement, the parties negotiated the terms and conditions for the 1 No. unit of the 4 bedroom terrace, which are the same as with the 2 No. units of 3 bedroom luxury flats save for the difference in price.

The Claimant claimed that she was shown the specific unit of the1 No. unit of 3 bedroom terrace duplex in the line/section of the 3 bedroom terrace duplex to be converted to 4 bedroom terrace duplex. She further stated that for several months and years, the defendants stopped construction work at the Estate without any form of notice thereby forcing upon her a state of anxiety, trauma and inability to make further payments especially given the fact that payment earlier made to the defendants through the 1st defendant were not receipted. That all the defendants remained incommunicado.

Furthermore the Claimant said she concluded full payment for the 2 No. units of the 3 bedroom luxury flats before 18 months notwithstanding that

set millstones were not reached by the defendants in accordance with the agreement. And upon repeated visitations and demand by the Claimant, the 1st defendant issued their letter of allocation dated 5th June 2014 in respect of the 2 No. units of 3 bedroom luxury flats. The Claimant also claimed that she was prevented from taking possession of the said 2 No. units of 3 bedroom luxury flats by the defendants on the ground that there remained other sundry fees to be settled before the key to the property could be formally handed over to her. The additional sundry payments required as stated by the defendants are:

a) Survey **₦80,000 (Eighty Thousand Naira)** per unit.
b) Documentation **₦1,500,000 (One Million Five Hundred Thousand Naira)** only
c) Infrastructure **₦750,000 (Seven Hundred and Fifty Thousand Naira)** only.

The Claimant also said that she made payments for item (C) but her request for handover of item (b) was rejected, she was eventually able to pay for item (b) but the defendant informed her that the item has been increased by 100% to **₦3,000,000 (Three Million Naira)** an increase the Claimant find to be unacceptable in view of the contractual relationship between parties.

She said that despite payment of the sundry fees, the defendants have not handed over to her the 2 No. units of 3 bedroom luxury flats. That this

resulted in loss of earnings and income to her to the tune of **₦25,000,000 (Twenty Five Million Naira)**. That it was only recently less than a couple of months ago, that she took possession of the 2 No. units of 3 bedroom luxury flats, although she is yet to be given any title document to the said properties.

The Claimant said that she made several payments to the defendants in respect of the 1 No. unit of 4 bedroom terrace duplex to be converted by the 1st defendant totalling **₦12,000,000 (Twelve Million Naira)**. That whereas the payments for the properties were predicated upon milestones achieved by the defendants, the defendants severally abandoned the project for several long periods and it became difficult to be paying for the 1 No. unit of 4 bedroom terrace duplex when the defendants were nowhere to be found. That the 1st defendant was also not available on site at their office from March 2014 to the last quarter of 2015 and the known phone number of the Principal Officers of the 1st defendant were equally not available.

The Claimant eqaully complained that upon subsequent visit to site, she discovered that the defendants has assigned her 3 bedroom terrace duplex converted to a 4 bedroom terrace duplex to a 3rd party. And that upon repeated visitation to the 1st defendant in Abuja and Lagos office, the 1st defendant reported to the Claimant from hiding via email to say that

another property will be allocated to claimant only upon making a full payment of **₦12, 500,000 (Twelve Million Five Hundred Thousand Naira)**. And according to the 1st defendant, the Claimant would require to complete the proposed to be allocated property to her taste thereby introducing strange element to the transaction. And following the failure of the defendants to render to the Claimant the property specified, the Claimant was compelled to hire legal services in the sum of **₦2,500,000 (Two Million Five Hundred Thousand Naira)**.

The documents tendered and admitted as exhibits by the Court on behalf of the Claimant are:

i. Copy of Letter of Order dated 15th February, 2013.
ii. Emails that exchanged between the Claimant and the Defendants.
iii. Copy of Contract of Sale Agreement.
iv. Copy of the Letter of 6th March 2013.
v. Copy of the Letter of 5th June 2014.
vi. Copies of bank transfer records.
vii. Copy of Fee Note.
viii. Copy of Claimant's Solicitors letters dated 6th May 2018.

In defence of the Claimant's claim, the 1st -3rd defendants in their joint statement of defence denied some of the claim of the Claimant when they averred that the title to the land upon which Grenadines Estate (hereinafter

referred to as 'The Estate') is situate was issued by the Honourable Minister of the Federal Capital Territory to Leadils International Limited and was subsequently transferred to the 2nd defendant. That the 1st defendant is not a subsidiary of the 2nd and 3rd defendants, neither do they own a stake in the affairs of the 1st defendant, and that the 2nd and 3rd defendants are not parties to the contract between the Claimant and the 1st defendant. The defendants admitted that with regard to the transaction between the Claimant and the 1st defendant, the Claimant applied to purchase properties within the Estate by filing the subscription forms and further to the application she was offered the available types of houses in the Estate to wit: 2 Units of 3 bedroom luxury flats for the discounted price of **₦30,000,000 (Thirty Million Naira)**, 1 Unit of 3 bedroom Exquisite Terrace Duplex at the discounted price of **₦26,000,000 (Twenty Six Million Naira)**. And in furtherance the Claimant accepted the conditions as stated in the 1st defendant's offer of subscription and subsequently paid the sum of **₦10,000,000 (Ten Million Naira)** as deposit for the 2 Units of 3 bedroom luxury flats and 10% cost of the property i.e. **₦2,600,000 (Two Million Six Hundred Thousand Naira)** as deposit for 1 Unit of 3 bedroom Exquisite Terrace Duplex in line with the conditions of the offer.

The 1st defendant denied that any marketer/promoter informed the Claimant of any 1 unit of 4 bedroom Terrace Duplex as there was no 1 unit of 4 bedroom Terrace Duplex available at the time the Claimant submitted

her subscription form for the properties. The 1st defendant denied that there was a meeting between the Claimant and the executives of the 1st defendant and neither was there a newly fresh terms and conditions as averred by the Claimant. That upon receipt of the offer for subscription the Claimant requested for a discount on the respective properties only due to her decision to purchase 2 Units of 3 bedroom luxury flats as well as 1 unit of 4 bedroom Terrace Duplex and the request was granted.

The 1st defendant also averred that the executed offer of subscription and acceptance dated 15th February 2013 remained the only terms and conditions guiding the relationship between the Claimant and the 1st defendant. The defendants further maintained that the offer for subscription and contract for sale the 1st defendant forwarded to the Claimant was in respect of 1 unit of 3 bedroom Exquisite Terrace Duplex in the Estate, that there was never any negotiation in respect of a 4 bedroom Terrace Duplex as same was not offered to the Claimant and that it was out of its benevolence and in a bid to maintain a good relationship with the Claimant who had already purchased 2 other properties within the Estate that it agreed to convert a 3 bedroom Exquisite Terrace Duplex offered to the Claimant to a 4 bedroom Terrace Duplex at an extremely discounted renovation fee of **₦500,000 (Five Hundred Thousand Naira)**. That the Claimant not only failed/refused to complete payment for the said 3 bedroom Exquisite Terrace Duplex offered to her, she also failed/refused to

pay the approved renovation fee of **₦500,000 (Five Hundred Thousand Naira)** despite her acknowledgement of same in her email dated 18th February 2015 and several reminders made by the defendants in this regard.

The defendants further denied stopping construction works on the project as claimed by the Claimant. That the defendant in an email dated 5th March 2015 informed the Claimant of her eligibility to continue payment as her allocated Terrace unit was excluded from the defendant's list of blocked account. The defendants denied being incommunicado at any time, that they regularly maintained communication with the Claimant through her email address unomaa@yahoo.com.

In addition the defendants stated that her offer of subscription for the Claimant's 2 units of 3 bedroom containing terrace duplexes does not include any set milestones for the defendants and neither were the Claimant's payment for the said property predicated on same, that the 2 units of 3 bedroom luxury flats purchased by the Claimant were well finished before the Claimant completed payment for same. And the allocation letter were issued to her as at when due in compliance with terms contained in her duly executed offer of subscription dated 15th February 2013.

Furthermore the defendants also claimed that the ancillary fees mentioned by the Claimant were contained in the executed offer of subscription and

not unilaterally manufactured by the defendants. The defendants alleged that the Claimant wilfully neglected/omitted to pay the requisite fees since 2013 despite several reminders from the 1st defendant. The development was reviewed upward and communicated to the Claimant via a letter dated 14th August 2016 and that the Claimant never at any time paid the increased development fees to the defendants contrary to her claim. And that the Claimant took possession of her duly purchased 2 units of 3 bedroom luxury flats in 2019 and has remained in possession, and relevant transfer documents forwarded to her. The defendant however admitted that owing to the failure of the Claimant to satisfy the discounted renovation sum of **₦500,000 (Five Hundred Thousand Naira)** and remittance of her balance for the 3 bedroom Exquisite Terrace Duplex renovated into 4 bedroom Exquisite Terrace Duplex prepared for the Claimant was assigned to a third party purchaser and such reassignment was claimed to be in accordance with the terms and conditions contained in the duly executed offer of subscription and acceptance dated 15th February 2013 particularly paragraph 7 thereof.

The defendants contended that the Claimant has constantly refused to accept a refund of her initial deposit of **₦12,000,000 (Twelve Million Naira)** and in a bid to maintain a cordial relationship with the Claimant, the 1st defendant after a series of meeting with the Claimant offered her an alternative 3 bedroom Terrace Duplex to be delivered to her within six (6) months on the contingency that she completes payment of the purchase

price, sundry fees as well as the outstanding discounted renovation fee of **₦500,000 (Five Hundred Thousand Naira)** on or before May 2018. However the defendants claimed that the offer lapsed as the said sum still remain unsatisfied till date.

The defendants also stated that the Claimant rejected the proposal via her email dated 16th May 2018 and provided counter-terms for accepting the alternative property offered to her. The Claimant was said to have proposed that the defendants waive all sundry fees contemplated in the executed offer of subscription and accepted, as well as accept immediate payment of 50% of the outstanding purchase price; while the balance will be paid upon completion of the property at the end of six (6) months period proposed by the defendants. To this the defendants described the claimant's offer as unacceptable and a clear demonstration of her ingratitude and lack of appreciation for the defendants who were willing to accommodate the claimant and make great concessions to her demands. That despite the Claimant's continued refusal and failure to remit her balance of the purchase price for the aforementioned property she has constantly harassed the defendant for transfer of title to her and possession of the said property.

Finally the defendants contended that the Claimant's action does not disclose any reasonable cause of action, vexatious and unmeritorious. They urge the court to dismiss the Claim in its entirety.

After exchange of pleadings by the parties, the matter went into full trial with the Claimant adopting her witness statement on oath on the 22nd day of February 2021. The adopted statement on oath is in pari-material with the facts contained in the statement of claim. She was duly cross-examined by the Defendants' Counsel **O. I. Arasi** and was re-examined by her counsel. On this note the Claimant's case was closed.

Conversely the defendants' sole witness **Hakeem Bakare** adopted his witness statement on oath on the 13th March 2021, and sixteen (16) documents marked as Exh. HB1-HB16 were tendered through him and admitted by the court. He was also cross-examined by the Claimant's Counsel **Mr. Fola Adekoya**. There was no re-examination. The defendants also closed their case. And with the leave of court parties filed and exchanged their written addresses out of time consequent upon which a deeming order was granted.

The 1st -3rd defendants in their written address dated 15th June 2021, submitted two preliminary issues for determination by this honourable court to wit:

*(a) Whether the 2nd and 3rd defendants ought to be parties to the suit.*

(b) *Whether the evidence of CW1 as well as the exhibits tendered by CW1 ought to be expunged from the record of the court.*

With respect to issue (a), the Learned Counsel to the defendants **Mr. Olayinka Arasi** dwelt on the doctrine of privity to contract, which postulates that a contract cannot confer or impose obligations arising under it on persons other than those who were parties to the contract. The Learned Counsel contended that there is no shred of evidence before the court from which it can be inferred much less deduced that the 2nd and 3rd defendants were parties to the contractual relationship between the Claimant and the 1st defendant and there are also no documents to that effect. He referred to the case of **B. B. APUGO LTD V O. H. M. B. (2016) 13 NWLR (PT. 1529) 206 @ PG 237 PAR G.** He also commended to the Court the case of **FEBSON FITNESS CENTER V CAPPA H. LTD (2015) 6 NWLR (PT. 1453) 263 @ PG 280 PAR B-C.**

He observed that the Claimant in her testimony under cross-examination admitted to having never had any form of interaction with the 2nd and 3rd defendants, but admitted point blank that her contractual relationship was solely with the 1st defendant. He referred to paragraph 5 of their statement of defence where the defendants averred that the 1st defendant is not a subsidiary of the 2nd and 3rd defendants, and that the latter defendants do not have any stake in the affairs of the 1st defendant. He argued that the Claimant failed to file a reply pleading or provided any evidence to the contrary. He submitted that the law is trite that when a claimant fails to file a reply pleading to a defendant's statement of defence such failure is

recognised as an admission of facts contained in the said statement of defence. He further commended to the court the case of **ANSA V NTUK (2009) 9 NWLR (PT. 1147) 557 @ PG 590 PAR D-E.** He therefore urged the court to strike out the names of the 2nd and 3rd defendants as parties to this suit and declare any relief sought by the Claimant against the 2nd and 3rd defendants null and void.

On issue (b), the defendants counsel quoted the excerpt from the testimony of the Claimant under cross-examination wherein she admitted that she signed her witness statement on oath in Lagos and in her lawyer's office. The learned counsel argued that the law is clear that failure of a deponent to be physically present before a commissioner for oath when signing a statement on oath amount to a fundamental and incurable effect. He relied on the case of **ASHIRU V INEC (2020) 16 NWLR (PT. 1751) 416 @ PP 441-442 PARAS C-D where the Supreme Court Per Eko JSC** held:

***"The law is that the deposition on oath must be signed by the deponent in the presence of the person authorised to administer oaths, failing which the deposition on oath shall be, and must be, discountenanced. The Court of Appeal had consistently followed, correctly in my view, this principle as can be seen from BUHARI V INEC (2008) 4 NWLR (PT. 1078) 546 @ 608-609; CHIDUBEM V EKENNA (2008) LPELR – 3913 (CA). Depositions on oath, like a sworn affidavit, must be sworn to before the person authorized to***

***administer on the dependent himself appearing before the said person authorised to administer oath… In CHEVRON (NIG) LTD V ENIOYE (2005) AFWLR (PT. 265) 1168 @ 1174 B-C, FABIYI JCA (as he then was) reached the same conclusion when he held that affidavit not signed and sworn to by the deponent before the person authorised to administer oath is incompetent. Such defect is fundamental. It is not a defect as to form but a defect in substance: BUHARI V INEC (Supra) @ 609."***

He submitted that it is trite law that a statement on oath must comply strictly with Section 13 of the Oath Act, Laws of the Federation 2004 for it to be valid. That in the instant suit, the concluding paragraphs of the statement of oath filed by the Claimant reads as follows; *"That I make this affidavit in good faith believing its content to be true and in accordance with the oath law."* He further submitted that the Claimant (CW1) is not a witness of truth as the statement on oath was not deposed in accordance with the oath Act. That Section 13 of the oath Act is mandatory and failure to comply with same is not mere irregularity that can be waived. He therefore urged the court to hold that the statement on oath is a bare declaration without effect.

In addition the counsel referred to the decision of the Court of Appeal in the case of **ALIYU V BULAKI (2019) LPELR 46513**, he argued that the case bears similar facts to the instant suit in that the PW1 and PW2 in that case also

admitted during cross-examination that they signed their respective witness statement on oath at their lawyers' office. That the Court of Appeal in a detailed judgement held that such defect was one of substance and exhibits tendered through the witness ought to be expunged. The learned counsel quoted the excerpt from the court's decision Per **Wambai JCA** at PG 17-19 thus:

***"From the foregoing submission of both Counsel, it is clear that what is in issue is the correctness of the decision of the lower court in refusing to expunge from the record, the written statements on oath of PW1 and PW2 despite the submission of the learned Appellant's counsel in his final written address urging the court to do so. There is no contention that the depositions of both PW1 and PW2 were sworn in the office of their counsel. As recorded at page 47 lines 10-13 PW1 said:***

***'It is correct that I signed my witness statement on oath at my lawyer's office. I went together with the plaintiff to my lawyer's office where I signed my witness statement n oath. The plaintiff also signed his witness statement on oath in his lawyer's office in my presence…'***

***…Section112 of the Evidence Act provides, "An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner. By this provision, an affidavit will***

***not be admitted or acceptable for use in any of the four mentioned instances namely, where it is sworn before: (a) a person on whose behalf the same is offered; (b) his legal practitioner; (c) a partner (d) a clerk of his legal practitioner." Further to the requirement of swearing to the affidavit by a deponent and the exclusion of any affidavit or deposition shown to have been sworn before any of the four classes of persons mentioned in Section 112, a further requirement to authenticate an affidavit sworn before a person duly authorized to take oaths is provided in Section 117 (4) as follows:***

***"An affidavit when sworn shall be signed by the deponent or if he cannot write or is blind, mark by him personally with his mark in the presence of the person before whom it is taken."***

***The combined effect of Section 112 and 117 (4) is that for an affidavit to be admitted in evidence or allowed to be used as evidence, it must not only be sworn before a person so authorized to administer the oath such as the commissioner for oaths or a Notary Public, it must also be signed in the presence of such an officer. In the case of a Notary Public to which legal practitioner belongs, Section 19 of the Notaries Public Act Cap. N 141 LFN 2004 comes into play, it provides:***

***"No notary public shall exercise any of his powers as a notary in any proceedings or matter in which he is interested."***

***Reading the above provisions of the Evidence Act together with Section 19 of the Notaries Public Act, the clear message is that an affidavit sworn in the chambers of a legal practitioner appearing for a party in any proceeding or before a clerk in his chambers is inadmissible in evidence. This includes a witness written deposition on oath."***

He submitted that based on these provisions of the Evidence Act and opinion of the Court, the Claimant witness statement on oath is fundamentally defective due to the Claimant's failure to sign same before a commissioner for oath at the registry of this court, and therefore urged the court to expunge it from the record of the court.

With respect to substantive issues for determination, the counsel, **Learned Counsel to the defendant** submitted four issues for consideration by this court. They are:

1. *Whether considering the totality of facts and evidence in this case, the Claimant is entitled to the 3 bedroom terrace duplex at Grenadines Estate, Lokogoma, Abuja.*
2. *Whether the Claimant is entitled to the relief sought in respect of the two unit of 3 bedroom luxury flats at Grenadines Estate, Lokogoma, Abuja*
3. *Whether the Claimant is entitled to loss of earnings and damages for breach of contract.*

4. *Whether the Claimant is entitled to cost of this action sought in her relief.*

With respect to Issue 1, **Mr. Olayinka Arasi** counsel for the defendant argued that the basis of the contractual relationship between the claimant and the 1st defendant are the subscription form pleaded by the defendant filled by the Claimant as an indication of interest in purchasing of property within its Grenadines Estate, Lokogoma, Abuja. One of such subscription forms he stated was in respect of a 4 bedroom terrace duplex. That by the Claimant's pleadings, it is her contention that based on the subscription form she was by default entitled to a 4 bedroom terrace duplex and same was binding on the 1st defendant to provide. The learned counsel submitted that the subscription is an indication of an application for type of properties that she wanted, and therefore carries a legal status of a mere invitation to treat; which simply opened the door way for an offer to be presented. He cited the case of **OLOJA V GOV BENUE STATE (2016) 3 NWLR (PT. 14499) 217 @ PP 243-244 PAR F-B** to support his contention.

The learned Counsel further submitted that by Exhibit HB2, the offer for subscription of a 3 bedroom exquisite terrace duplex there was a valid and subsisting contract between the Claimant and the 1st defendant which was expected to guide the future actions of the parties vis-à-vis the properties under question, the Claimant having accepted the terms and conditions of

the contract by executing same with her name, address and signature. The Claimant, he submitted only made part payment of **₦12,000,000 (Twelve Million Naira)** out of a total discounted sum of **₦26,000,000 (Twenty Six Million Naira)**. That the said property was agreed to be converted to a 4 bedroom terrace duplex at an extra cost of **₦500,000 (Five Hundred Thousand Naira)**. He referred to the testimony of the Claimant under cross-examination where she admitted not making a payment for the renovation fee. And submitted that the Claimant is in clear breach of the terms and conditions of the offer of subscription. The said property, the learned counsel argued has been reallocated to a third party upon failure of the Claimant to pay the outstanding balance agreed. That it would amount to an exercise in futility granting a relief compelling the 1st defendant to make available the 3 bedroom terrace duplex to the Claimant, without venturing into the interest of a third party (a purchaser for value without notice) who is not a party to this suit. He placed reliance on the case of **APGA V OYE (2019) 2 NWLR (PT. 1657) 472 @ PG 494 PAR G, OKWU V UMEH (2016) 4 NWLR (PT. 1501) 120 @ PP 143-144 H-C Per Okoro JSC.** He urged the court to dismiss the Claimant's relief seeking entitlement to the one unit of three (3) bedroom exquisite terrace duplex having failed to demonstrate that she made full and final payment for the said property.

On issue 2, the Claimant's claim to all rights of ownership and possession, **Mr. Olayinka Arasi** posited that by the terms of offer for subscription and

the provisional letter of allocation, (Exhibit A1), the delivery of the keys and property shall be made three (3) months after full and final payment and that the delivery of the property was contingent upon the payment of the discounted offer of **₦30,000,000 (Thirty Million Naira)** and all other necessary sundry fees/levies which ought to be paid. That under cross-examination, the Claimant admitted that she did not complete final payment over the said properties until November 2014. Counsel submitted that parties are bound by the terms of their contract. See **BFI GROUP CORP V B. P. E. Supra.** That the admission made by the Claimant corroborates paragraph 20 of the 1st defendant's statement of defence. He submitted that facts admitted need no further proof. He relied on the authorities of **ERESIA-EKE V ORIKOHA (2010) 8 NWLR (PT. 1192) 421, AJIBADE V STATE (2013) 6 NWLR (PT. 1349), ANIKE V SHELL PETROLEUM DEVELOPMENT COMPANY NIG LTD (2011) 7 NWLR (PT. 1246) 227.**

The learned Counsel argued that the Claimant was not given final allocation of the flats earlier because she was yet to make full payment, and that the word provisional on the allocation paper connote that allocation is temporary, upon fulfilment of all the conditions and terms stated therein, the completion of full and final payment.

Let me quickly observe that from the testimonies of the Claimant it is clear to me that the Claimant is in possession of the 2 units of 3 bedroom luxury

flat, and in fact have tenants put there by the 1st defendant, a fact she admitted under cross-examination. She has however not taken possession of the 3 bedroom duplex meant to be converted to a 4 bedroom terrace duplex. I agree with the defendants' counsel that since the Claimant is in possession of the 2 units of the 3 bedroom property, the claim by the claimant that the cost of the survey and infrastructure is to be made binding on the 1st defendant is academic. I am also in agreement with the Learned Counsel that since all these terms are contained in the offer for subscription, the claimant's relief seeking for an order of the court directing that it is illegal to impose the terms and conditions of the payment of the sundry fees as a condition precedent to be in possession of the 2 unit three (3) bedroom luxury flat is an illusion. I also endorse his argument that the Claimant cannot pick which part of the terms and conditions of the agreement she intends to comply with while abandoning the rest.

On Counsel's submission in respect of the claimant's claim for loss of earnings and damages for breach of contract the Learned Counsel posited that the Claimant has failed to discharge the burden of proof required to validate a claim for loss of earnings. Placing reliance on the case of **HAWAY V MEDIOWA (NIG) LTD (2000) 13 NWLR (PT. 683) 77 @ PG 86 PAR A**, Per **Muhammed JCA** when the court held as follows:

***"A Plaintiff claiming special damages for loss of earnings or loss of profit must not only specifically plead it with sufficient particulars but must also lead real and credible evidence in strict proof thereof which will readily lend itself to quantification or assessment."***

That the Claimant request for compensation for loss of earnings is predicated on the fact that having made all necessary payments (allegedly) the 1st defendant did not hand over the two units of 3 bedroom luxurious flats to her. The Counsel reiterated that whatever delay suffered by the Claimant was due to her wilful failure in complying with terms of the contract as it pertains to payment. That the Claimant, not only did she fail to adduce any particulars in her pleadings, no evidence was led during trial in strict proof of how she lost the amount of ₦25**,000,000 (Twenty Five Million Naira)** which she claims. That there is nothing before this court that can lend itself to quantification or assessment. He referred to the authority of **S. B. N V CBN (2009) 6 NWLR (PT. 1137) 237 @ PP 307-308 PAR H-A** and submitted that there is nothing before this court that satisfied strict proof as it pertains to the claim for loss of earnings.

In addition **Mr. Arasi** also argued that the claim for damage in respect of breach of contract is contingent on the proof of a breach ab-initio; that where there is no breach of contract, there can be no valid claim for damages in respect of same. He relied on the case of **UDEAGU V BENUE**

**CEMENT CO. PLC (2006) 2 NWLR (PT. 965) 600 @ PP 619-620 Par H-A** where the Court of Appeal Per Sanusi JCA held as follows:

***"The Rule governing the award of damages for breach of contract is that where the parties have made a contract and one of them breached same, the damages which the other party ought to receive in respect of the breach should be as may fairly and reasonable be considered."***

He argued that there was no delay whatsoever in completing the building offered to the Claimant and neither was there a time construction was stopped. He argued that the Claimant has not been able to demonstrate how the 1st defendant breached the terms of contract binding both parties. That the claimant's payments was never contingent on the 1st defendant completing any milestone, as such was not provided for in any of the contracts executed between the parties and the claimant filed no reply in this regard.

Furthermore he stated that there was never a time the 1st defendant became incommunicado considering the frequent email communication between both parties, and that the claimant know the office of the 1st defendant and their employees. The facts he said were alluded to in paragraph 18 of the statement of defence, to which the Claimant failed to file a reply and same is deemed admitted. He therefore urged the court to dismiss the claimant's claim for damages. He referred to the case of **OGBIRI**

**V N. A. O. C. (2010) 14 NWLR (PT. 1213) 208 @ 225** where the Court held that:

***"The law is settled that where there is no evidence to support the claim for damages, the claim ought to be dismissed. Damages are not awarded on sentimental grounds. The award of damages is discretionary, and it has to be exercised judiciously and judicially. Damages are only awarded against those who actually caused them. That is the law."***

Furthermore, the Learned Counsel posited that the law is that damages are not awarded frivolously but must follow the reasonable contemplation of parties and restore the injured party to his/her pre-contractual position. He also commended to the court the case of S**. B. N. PLC V OPANUBI (2004) 15 NWLR (PT. 896) 437 @ PG 460-461 Par H-A.** He stated that assuming the 1st defendant breached the contractual agreement between the parties, the only actionable complaint the Claimant may have is in respect of the one unit of 3 bedroom terrace duplex since she is already in possession of two units 3 bedroom luxury flats. That with respect to the remaining one unit of 3 bedroom terrace duplex, parties are clear in their offer for subscription (Exhibit HB3) on what the Claimant is entitled to in the event of breach in delivering the property at the appointed time. That in the offer for subscription in the event that a default by the vendor to deliver the property at the appointed time, the purchaser at its option may treat the offer as

terminated and be entitled to the refund of all sums paid and the purchasing interest rate applicable at the point of refund. He contended that based on the foregoing, the Claimant is only entitled to a refund of the sum paid even if she was the one who breached a contractual relationship. That the Claimant was offered her initial deposit which she rejected. That it is ludicrous for the Claimant who breached her contractual duties on the one hand to seek damages in a manner contrary to the terms agreed by the parties on the other hand. He urged the court to dismiss this leg of the relief as being speculative and unsupported by any evidence whatsoever.

Furthermore on the claim for cost as prayed by the claimant, the learned counsel argued that such relief cannot be granted being unconnected to the cause of action sought to be ventilated by the Claimant Counsel relied on the cases of **MICHAEL V ACCESS BANK (2017) LPELR 41981 CA. GUINESS NIG PLC V NWOKE (2000) 15 NWLR (PT 689) 135 @ 150 PAR D-E, NWAJI V COASTAL SERVICES (NIG) LTD (2004) 11 NWLR (PT. 885) 552 @ 568-570 PAR H-A.** The defendant's Counsel argued that assuming without conceding that the 1st defendant breached the Contract between it and the Claimant, that the law is clear that cost of litigation is not a loss that can arise from a breach of contract. The case of **UBA Plc V VERTEA AGRO LTD (2020) 17 NWLR (PT. 1754) 467 @ PG 153 PAR D-G** was also commended to the court. He urged the court to hold that the Claimant's cost of litigation of **₦2,500,000 (Two Million Five Hundred Thousand Naira)** cannot stand in a

claim based upon a breach of contract and consequently dismiss this leg of relief for being at variance with the laid down judicial authorities.

Contrariwise the Claimant's counsel **Mr. Fola Adekoya** in the written address distilled four (4) issues for determination to wit:

1. *Whether the Claimant having paid to the developer for the 2 No. Units of 3 bedroom luxury flats at Grenadines Estate, Lokogoma, Abuja timeously and having not taken delivery of same is entitled to damages.*
2. *Whether giving the circumstances of the matter, the 1st defendant frustrated the Claimant from performance with particular respect to payments for the 1 No. unit of 4 bedroom terrace duplex at Grenadines Estate, Lokogoma, Abuja.*
3. *Whether 2nd and 3rd defendants are proper and necessary parties to this action.*
4. *Whether the processes filed before this honourable court are proper and competent.*

One issue one, the learned counsel argued that the defendants have not contested the fact that the claimant paid out the agreed consideration for the 2 No. units of 3 bedroom luxury flats at the estate and upon completion of payment in year 2014, the defendant failed to deliver the 2 No unit of 3 bedroom luxury flats to the Claimant. He submitted that the defendants are

in breach of the contract entered into. He argued that from the terms of contract spelt out none of the terms described as survey, documentation and infrastructure were indicated as conditions precedent to be met before the claimant would take ownership of the 2 No. units of 3 bedroom luxury flats. That an attempt to impose those conditionalities after the defendants have received full payments amounted to a breach of contract and urged the court to so hold.

On whether the Claimant is entitled to damages for breach of contract, the counsel relied on the case of **DR. OLADIPO MAJA V MR. COSTA SAMOURIS (2002) 3 SC 37 PG 8, NNPC V CLIFCO NIG LTD (2011) LPELR 2022 SC.** He submitted that this is a case where the court ought to exercise its discretion in considering damages in favour of the Claimant who ordinarily ought to have been entitled to incomes from the 2 No. units of 3 bedroom luxury flats from the 6th of March 2013 but was robbed of the income by the several fraudulent schemes designed by the defendants in that regard. By extension on issue two the Claimant's counsel urged the court to hold that the defendants frustrated the contract and as such the claimant would not be expected to continue paying for the 1 No. unit of the 4 bedroom terrace duplex. He cited many authorities which included **OYEYEMI V COMMISSIONER FOR LOCAL GOVERNMENT KWARA STATE & 3 ORS (1991-1992) 1 ALNLR 479 @ 489-490 PAR J-A, SANNI V LAYOKUN (1990) 3 NWLR (PT. 141) PG 753 @ 757 PARA B-C.**

On whether the 2nd and 3rd defendants were proper and necessary parties, the Claimant's counsel urged the court to hold in the affirmative. He cited the case of **GREEN V GREEN (1987) 3 NWLR (PT. 61) 480, PROF AKIN MABOGUNJE & ORS V MR. ADEMOLA ADEWUMI ODUTOLA & ORS (2002) LPELR 6051 CA, COL HASSAN YAKUBU RTD. GOV OF KOGI STATE & 3 ORS V HIS ROYAL HIGHNESS ALHAJI AHMADU YAKUBU (THE EJEH OF ANKPA) (1995) 8 NWLR (PT 414) 386 @ 402.** He opined that the only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled. The counsel referred to the facts pleaded in paragraph 3-5 of the statement of claim, and Exhibit A2 which is the contract of sale in particular the introductory part wherein the interest of the 2nd and 3rd defendants in respect of the Estate was put to word; that based on this there is a distinct cause of action against the 2nd and 3rd defendants.

On whether the processes filed before this court are proper and competent, the learned counsel relied on the Court of Appeal case in **HONOURABLE MINISTER FOR WORKS & HOUSING V TOMAS NIG LTD 48 WRN (2001) 119 @ 151** Per **Hon. Justice Zainab Bulkachuwa JCA** and submitted that there is a rebuttable presumption on the regularity of Judicial/Court processes and procedures. He also argued that the regularity of the processes filed in this matter does not constitute a fact in issue for the determination of this matter. That the burden is on the defendants to prove to the contrary the

regularity of the process filed by the Claimant. He relied on the case of **UZOKWE V DANSY INDUSTRIES NIG LTD & ANOR (2002) 7 ALNLR 457 @ 459.** He restated that the statement on oath of the Claimant showed that it was oathed before the commissioner for oaths, that this without more confirms the regularity of the said statement of oath. He also referred to the testimony of the Claimant wherein she stated when asked under cross-examination thus; *"You remember you signed a witness statement on oath before this Honourable Court?"* to which she answered in the affirmative. That their attempt to twist the claimant by asking; *"Where did you sign?"* to which she answered; *"In Lagos at my lawyer's office."* That the question here is what is the "it" that was signed in Lagos and at the lawyer's office after it has been established that (and to use the exact words) you remember you signed a witness statement on oath before this honourable court. He urged the court to find that the Claimant clearly indicated under cross-examination that she presented herself to the said commissioner for oath.

He further relied on the provision of Section 133(1) of the Evidence Act which provides that in civil cases the burden of first proving the existence of a fact lie on the party proving against which the judgement of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise in the pleading. He submitted that the defendants in their statement of defence, statement on oath and

exhibits presented to the court did not place any facts or evidence to establish that the Claimant did not depose to her statement on oath before a commissioner for oath. That evidence giving on facts not pleaded goes to no issue.

It is also on record that the 1st – 3rd defendants filed a reply to the Claimant's final written address. I have painstakingly perused the issues formulated by the counsel to the respective parties and their copious arguments in support of the issues distilled for determination. I will start by addressing the preliminary issues formulated by the counsel to the defendants with respect to the competency of the claimant's witness statement on oath and whether the 2nd and 3rd defendants are necessary parties to this suit.

With respect to the competence of the Claimant's witness statement on oath, the claimant under cross examination answered in the affirmative when the defendant's counsel asked her this; "*You remember you have signed a witness statement on oath before this court?"* and she answered *"yes"* although this sentence or supposed question may appear an affirmation that she signed the oath before this court, rather than a question, as argued by the claimant's counsel, however the follow-up question to where she signed it is to further test her veracity if she would still maintain that she signed it before the court. As rightly argued by the learned counsel to the defendant in his reply address, the whole essence of

cross-examination is to test the accuracy or veracity of the testimony of a witness before the court. See Section 223 (a) of the Evidence Act which provides thus:

"When a witness is cross-examined he may in addition to the question referred proceeding sections of this part, be asked any question which tend to:

(a) Test his accuracy, veracity or credibility or,
(b) Discover who he is and what is his position in life or
(c) Shake his credit, by injuring his character."

The whole essence of cross-examination is to shake the witness to see whether he would be consistent in his testimonies in proof of material facts. In my view the question put to the claimant by the defendant's counsel was proper and the truth of where she signed the witness statement on oath was elicited from her by the learned counsel. I therefore do not agree with the claimant's counsel that question was twisted. Now it is apparent that the witness statement on oath was signed in the claimant's counsel office by the witness in Lagos. The claimant's counsel urged the court to presume that the said witness statement on oath on the face of it was regular because it has the stamp of the commissioner for oath, that such presumption that it was signed before a commissioner for oath ought to be rebutted by the defendant's counsel, and talking about the burden of proof

he relied on the provision of Section 131-133 of the evidence Act, and the case of **HONOURABLE MINISTER FOR WORKS & HOUSING V TOMAS NIG LTD Supra.** This authority cited by the Claimant's counsel is irrelevant as it does not have any bearing to the case at hand. The issue raised in the authority cited by the claimant's counsel centres on whether or not the ruling of the trial court was rendered a nullity because it was delivered in chambers. The Court of Appeal held in the case that since there is nothing in the record of the proceeding to show that the ruling was delivered in chambers, it was presumed that it was delivered in an open court as required by the constitutional provision. In the instant case there is a clear irregularity on the part of the Claimant's witness; there is therefore nothing to rebut by the contending party.

As to whether the irregularity of the process constitutes a fact in issue, facts in issue are facts thrown up for determination by the court; they are disputed facts by the parties and are determined by the state of pleadings. The competency of a suit is anchored on the due initiation of the processes according to the rules of court or statute and where such facts are exfacie, they need not be pleaded. There is therefore rebuttable presumption that they met the requirement of the law. However where facts are elicited during cross-examination which suggests that the due process was not complied with in the initiation of the process, and it supports the case of the party cross-examining, the party cross-examining can use it notwithstanding

that the facts were not pleaded. Furthermore in the instant case the issues as to the competency of the process have been adequately argued by counsel to the parties in their written addresses. Counsels are allowed to raise preliminary issues of law in their written addresses, and have not translate to springing of surprise on each other.

Having said that, what is the position of the courts, with regards to written statement of oath of witness signed on the chambers of their counsel? In the different authorities that I went through, the appellant courts tried to draw a distinction between an affidavit and a witness statement on oath. In the case of **OKPA V IREK & ANOR (2012) LPELR CA (NAEA) 289/2011,** the court held:

***"That a witness statement on oath is different from affidavit evidence. An affidavit evidence is a statement of fact which the maker or deponent swears to be true to the best of his knowledge. It is a court process in writing deposing to facts within the knowledge of the deponent. It is documentary evidence which the court can admit in the absence of any unchallenged evidence. AKPOKENURE V AGAS (2004) 10 NWLR (PT. 881) @ PG 394. On the contrary a witness statement is not evidence. It only becomes a piece of evidence after the witness is sworn in court and adopts his witness statement. At this stage, at best it becomes evidence in Chief it is therefore subjected to cross-examination, after which it becomes a piece***

***of evidence to be used by the court if the opponent fails to cross-examine the witness, it is taken as the true statement of facts contained therein."*** - Per **Ndukwe Anyanwu JCA.**

See also the case of **TAR & ORS V MINISTRY OF COMMERCE & INDUSTRIES & ORS (2018) LPELR CA/MK/29/2013. See further the case of KAAN INTERNATIONAL DEVELOPMENT LTD V LITTLE ACORUS TURNKEY PROJECTS LTD & ANOR (2018) LPELR 452 (CA)** where the Court of Appeal held:

*"It is very important also not to lose sight of the clear distinction between an affidavit and a witness statement on oath because it is not necessary that all sworn documents or oath must comply stricto sensu with the provision of Section 117 and 118 of the Evidence Act. See* ***LAMBERT V OKUJAGU (2015) AFWLR (PT. 808) PG 65.****"*

The earlier position of the Court of Appeal in aforementioned cases was that a witness statement on oath needed not conform with provision of Section 117-120 of the Evidence Act because it is different from an affidavit evidence. Affidavit evidence strictly speaking is only used in a suit commenced by originating summons; while in the general civil suit, the witness needs to depose to a statement on oath, which does not necessarily need to comply with the provision of Section 117-120 of the Evidence Act. The witness statement on oath is said not to be evidence until it is adopted in the court after the taking of oath before a court by a witness. The defect

of not being signed before a commissioner for oath therefore is cured by the oath taken in the presence of the Judge.

However this position seems to have been overtaken by the current position of the same Court of Appeal in the recent case of **ALIYU V BULAKI (2019) LPELR 46513 CA.** In the case the Court of Appeal dealt extensively and lucidly with the issue of competence of the witness statement on oath, while placing reliance on the case of **BUHARI V INEC (2008) 12 SCNJ @ 91 and ASHIRU V INEC (2020) 16 NWLR (PT. 751) @ 416 PP 441 -442** to the effect that a witness statement on oath signed in a lawyer's chambers in contravention of Section 119 of the Evidence Act and Section 19 of the Notery Public Act is not a mere irregularity that can be cured but one that calls for the striking out of the witness statements. The authority of **ALIYU V BULAKI (Supra)** is the law as at today, and by doctrine of stire decisis, lower court are bound to follow the decision of the appellate courts. Furthermore, where there are conflicting decisions of the appellate courts, the lower courts are bound to follow the latter decision in time.

On the competency of the written deposition of the witness statement on oath, the Learned Counsel to the defendants have correctly stated the position of the Court of Appeal at page 16-19 of the written address.

The claimant's witness having by her own showing and admitted that the written witness statement was signed in her lawyer's chambers in Lagos, I

found and declare that the witness statement on oath is incompetent and hereby struck out. In addition, all exhibits admitted in support thereto are hereby expunged from the record of the court.

Another preliminary issue raised by the defendants is on the necessity of joining the 2nd and 3rd defendants as parties to the suit. I endorse the submission of the defendant's counsel that from the oral evidence of the claimant under cross-examination and all the documents tendered, there is no privity of contract between the claimant and the 2nd and 3rd defendants. And in fact the documents Exhibit A2, the Contract for Sale Agreement in respect of the 1 unit of 3 bedroom terrace duplex was not signed by any of the parties, the 2nd defendant inclusive. The implication is that the terms and conditions therein cannot be relied on by the court in enforcing any contractual obligations on the 2nd defendant.

On the effect of an unsigned document, the Court in the case of **LAWRENCE V OLUGBEMI & ORS (2018) LPELR 45966 CA** held:

***"It is settled that unsigned document commands no judicial value, It is a worthless piece of paper which cannot benefit anybody that seeks to rely on such a document."***

I hold therefore that the Exhibit A2 is irrelevant and it is hereby expunged from the record of the court.

On the meaning of privity of contract, the Courts held in a myriad of cases that the doctrine of privity of contract portrays that it is only parties to a contract that can sue or be sued in a contract and a stranger to a contract can neither sue or be sued on the contract even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. See **BASINCO MOTORS V WOORMANN-LENE & ANOR (2019) 39 NS QR 284 PG 319** – Per **O. O. Adekeye JSC.** Both the 2nd and 3rd defendants were strangers to the contract between the Claimant and the 1st Defendant, although it appears that the contract was made for their benefit. See further **REBOLD INDUSTRIES LTD V MAGREOLA & ORS (2013) LPELR 24612 SC** – Per **Fabiyi JSC, CHUWA V CHAD BASIN AUTHORITY (1991) 7 NWLR (PT. 205) @ PG 250.** The 2nd and the 3rd defendants not being parties to the contract between the Claimant and the 1st defendant are not necessary parties. I hold that the joinder of the 2nd and 3rd defendants as parties are improper and their names are hereby struck out as parties to this suit.

Having dispensed with the preliminary issues in favour of the defendant, in the event that the court is wrong to have upheld the preliminary issues raised by the defendants, I shall consider the substance of the Claimant's case. It is trite that civil actions are resolved based on preponderance of evidence and balance of probabilities. See Section 131 of the Evidence Act. The question that is pertinent to ask there is; has the Claimant been able to prove her claim against the defendant based on the evidence both oral and

documentary before this court? The claim of the Claimant in a nutshell is centred on breach of contract of sale of a; (1) a two unit of 3 bedroom luxury flats and (2) one unit 3 bedroom terrace duplex meant to be converted a 4 bedroom terrace duplex. She had adduced documentary evidence, and it is obvious that her complaint flow from alleged breach of terms and conditions contained in the:

(1) The Subscription forms - Exhibit A1.
(2) Contract of Sale Agreement – Exhibit A2.
(3) Provisional Allocation of Two Units 3 (Three) bedroom apartment – Exhibit A13.
(4) Acknowledgement of Subscription – Exhibit 15.
(5) Offer for Subscription.

Other exhibits are receipts for various payments made by the Claimant to the 1st defendant and correspondences between the Claimant and the 1st defendant, Claimant's lawyer and the 1st defendant.

It goes without saying that parties are bound by the agreements which they have willingly and freely entered into. Therefore a valid contract is that which consists of offer, acceptance, consideration and the intention by the parties to create legal relationship. See the case of **ORIENT (NIG) PLC V BILANTE INTERNATIONAL LTD (1997) 8 NWLR (PT. 513) 37 RATIO 1 @ PG 76 PAR B-C, UBN LTD V SAX NIG LTD (1994) 18 NWLR (PT. 361) 150.**

Furthermore on bindingness of contracts, the court opined in the case of **ARIRA INDUSTRIES LTD V NIGERIAN BANK FOR COMMERCE AND INDUSTRIES (1997) 1 NWLR (PT. 483) PG 574 RATIO 10 @ PG 593 PARA F-G:**

***"Parties are bound by the agreement they willingly enter into. A party who signs an agreement is bound by it. The only function of the court is to interpret the agreement in enforcement terms without more. If the provision of an agreement are clear there is nothing to enable the court to put upon them a construction that is different from that which the words of the provisions import the words will prevent. In the instant case therefore if the learned trial Judge had adverted his mind to the provisions of exhibit "C" particularly clause 11(iii) he would not have held that the respondent should bear the difference between the original exchange rate and the new one caused by inflation."***

See further **NATIONAL SALT CO OF NIGERIA V INNIS PALMER (1992) 1 NWLR (PT. 218) 422 @ 426, UBA LTD V PENNY MART LTD (1992) 5 NWLR (PT. 240) 228 @ 234.**

The foundation of the agreement between the Claimant and the 1st defendant is the filled subscription form (Exhibit A1) and upon which an offer for subscription for one (1) unit of a 3 bedroom exquisite terrace duplex was found. See Exhibit B3. I endorse the submission of Learned Counsel to the defendants that the subscription form (Exhibit A1) constitute

an invitation to treat. I also adopt the authority cited by learned defendant's counsel in written address. What the Claimant subscribed for were *"Luxury Flats (two (2) units) 3 bedroom and 4 bedroom terrace duplex plus BQ (Boys Quarters)."* In one of the mails sent to the 1st defendant by the Clamant, she alleged that the 1st defendant forgot to reserve a 4 bedroom duplex for her. However from my findings, parties were consensual that the alleged property (4 bedroom terrace duplex) be replaced or substituted with a 3 bedroom exquisite terrace duplex to be converted to a 4 bedroom terrace duplex, hence the subscription as contained in Exhibit HB3 dated 15th February 2013.

According to the Claimant, the offers were renegotiated, and she eventually made a counter-offer of **₦26,000,000 (Twenty Six Million Naira)** for the 1 unit 3 bedroom terrace duplex, with additional **₦500,000 (Five Hundred Thousand Naira)** as renovation fees. She made an initial payment of **₦2,600,000 (Two Million Six Hundred Thousand Naira).** On the 27th March 2013, and a subsequent instalment and culminating into a total sum of **₦12,600,000 (Twelve Million Six Hundred Thousand Naira)**. The contractual relationship between the Clamant and the 1st defendant is therefore governed by Exhibit HB3. From the evidence of the Claimant under cross-examination, it is obvious that she has not fulfilled the payment of balance on the property hence there was no final allocation to her. I rely on excerpt

from her testimonies as contained on page 25 of the of the defendant's written address.

The claimant have equally not paid the agreed renovation fee of **₦500,000 (Five Hundred Thousand Naira).** Although the excuse of the claimant was that the defendant failed to deliver on their promise after full payment in respect of the 2 units of 3 bedroom luxury flats, hence her delay in making payment for the 1 unit of 3 bedroom terrace duplex. There is obviously a breach of the terms and conditions contained in Exhibit HB3, with respect to duration of payment which is *"18 months from the full payment of the commitment fee."* It appeared the defendant have exercised its right as contained in the offer by reallocating the property to third party, and entreats to offer the Claimant another 3 bedroom terrace duplex which will be converted to a 4 bedroom terrace duplex has been rebuffed by the claimant. The learned counsel to the claimant argued that the defendant by their action frustrated the performance of the contract.

On whether frustration can be said to occur in a contract, the court held that the law recognises without default of either party, a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it radically different from what was undertaken by the contract, then a frustration is said to occur. The events which has been listed by the court to constitute frustration are:

1. Subsequent legal changes or statutory impossibility.
2. Outbreak of war.
3. Destruction of the subject matter.
4. Government acquisition of the subject matter of the contract.
5. Cancellation by an unexpected event like where the other party to a contract for personal service dies or where either party is permanently incapacitated by ill health, imprisonment etc from rendering service he has undertaken to.

See the case of **NWAOWAH V NWABUFOR (2011) 46 (PT.2) NSCQR 1124 @ PG 1152** – Per **Adekeye JSC**. A contract is frustrated by the occurrence of events through no fault of either party to the agreement. In essence none of the parties can be blamed if the unexpected happened in the course of the performance of the contract. Frustrations are therefore unexpected natural occurrences not foreseen by either of the parties. In essence, both parties are discharged from the obligations of the contract if the unexpected happened. In the case at hand, there is no evidence before the court from which I could infer that there was a frustration of the contract. the perceived frustration of the contract by the defendant as opined by the claimant's counsel is not applicable in this case. The learned counsel to the Claimant is obviously misapplying the principle of frustration of contract to the acts occasioned by the parties thereto.

Be that as it may, the court rather than making an order which will be in vein, since it is obvious that the subject matter of the contract is no longer available, it will be more expedient to order that the 1st defendant refund the deposit of the sum of **₦12,600,000 (Twelve Million Six Hundred Thousand Naira)** paid by the Claimant. The said payment shall include the interest rate as at the time the payment was made, and I so order.

With respect to relief 2 and 3 sought as it pertains to the 2 units of 3 bedroom luxury flats, I accept the submission of learned counsel to the defendant that the Claimant having admitted that she paid all the ancillary fees when she had earlier controverted and keys handed over to her, it is an academic exercise granting relief 2 as claimed. However her rights of ownership and possession of the Claimant over the 2 units of 3 bedroom luxury flats is not negotiable having made full payment in respect thereof. I refer to Exhibit HB5 and HB13 dated 6th November 2019 and 15th November 2015 respectively titled; ***'Final Allocation of One Completed Unit of 3 Bedroom Finished Apartment at Micheville Estate, Lokogoma, Abuja.'*** The Claimant is entitled to all the title documents including the Deed of Assignment as contained in Paragraph 2 of the Provisional Allocation Letter dated 5th June 2014. The defendant is hereby directed to release and handover same to the Claimant immediately and in consonance with the condition agreed by the parties in the said offer of 5th June 2014 (Exhibit A13).

On claim/relief 4 and 5, the claimant contends the engagement of lawyers/professional and surveyors by the defendant and the imposition of the fees on her. I say quickly and for umpteenth time that parties are bound by their agreement. It is not for the court to re-write a contract with its terms for parties. Furthermore where the terms of contract are contained in different documents or memorandum, the court shall consider such documents or memorandum as one and to their extent of relevance be deemed as affecting the relationship between the parties to the contract. In my view the only ancillary fee that is not contained in the provisional allocation, exhibit A13 and HB1 is the legal fee. There is no cost placed on the legal fee as could be gleaned from the document Exhibit A13 and HB1. Having issued the Claimant with final allocation, it is assumed that she has paid all the fees, the ancillary fees included. The Claimant is bound to pay all the ancillary fees as contained in the offer letter and provisional allocation letter as rightly pointed out by the defendants' counsel, she cannot pick and choose which of the fees to pay and which ones refuse payment. However on legal fee, I believe that the legal fee can be negotiated since the Claimant is to pick a deed of assignment from the defendants, the Claimant is entitled to pay for it if she has not done that at a reasonable negotiated fee.

On whether the Claimant is entitled to his claim for loss of earnings and damages for breach of contract; The Claimant's claim for loss of earnings is similar to claim of special damages in tort. Before the Claimant can succeed

in this claim for loss of earnings, she must particularize the claim and lead cogent and convincing evidence in proof of the items of claim pleaded. In the case of **OCEANIC BANK INTERNATIONAL LTD V CHITEA INDUSTRIES LTD (2000) FWLR (PT. 4) 678 RATIO 8, PHOTO PRODUCTIONS LTD V SECURICER TRANSPORT LTD (1980) (PT. 827)**, the Court held:

***"There is no such thing as a claim for special and general damages in contract as in tort. That it is erroneous to make such dichotomy in a claim for breach of contract at it is the position of tort. In contract what is claimed is damages simpliciter and this is for loss arising from breach. Such loss must be in contemplation of the parties or one reasonably contemplated. The loss must be real, not speculative or imagined. In contract authorities galore talk of damages simpliciter without distinction or dichotomy."*** See **BARAU V CUBIT NIG LTD (1990) 5 NWLR (PT. 152) 630 @ 646.**

I accept the submission of the defendants' counsel that the claim of **₦20,000,000 (Twenty Million Naira)** by the Claimant as loss of earnings is highly speculative. The Claimant did not produce any proof to support her claim for loss of earnings. There must be strict proof and the exact calculation of the loss of earnings. The claim of the Claimant for loss of earnings is unproven and it is hereby dismissed.

On damages for breach of contract: Before an award for damages for breach is contract can be sustained there must be proof that there was actual breach of contract. On what constitutes a breach of contract, the Court in the case of **OCEANIC BANK INTERNATIONAL LTD V CHITEA INDUSTRIES LTD (Supra)** held:

***"Breach of a fundamental term occurs in contract when a party fails to carry out the contract in its essential terms such a breach goes to the root of the contract."***

A breach of contract is further defined in **OCEANIC BANK INTERNATIONAL LTD V CHITEA INDUSTRIES LTD (Supra)** as a *'failure without legal exercise to perform any promise which forms the whole or part of a contract, unequivocal, distinct and absolute refusal to perform an agreement.'* In the case at hand, the complaint of the Claimant was the delay in delivery of the property to her. I could observe catalogue of complaints on behalf of the Claimant in the counsel's address. It is a notorious fact that an address of counsel no matter how beautiful it is cannot take the place of credible evidence. I refer to paragraph 4.1.2 at page 9 of the counsel's address. These are facts not pleaded and they go to no issue. The contention of the claimant that the defendant stopped work on the construction site within the subscription period was denied by the defendants in their pleadings and in the adopted evidence of the defendants' witness. The witness also denied

that the 1st defendant remained incommunicado; he referred to several email correspondences between the Claimant and the 1st defendant. He was not cross-examined on these facts. The Claimant in her evidence in chief stated that she was prevented from taking possession of the already allocated 2 units of 3 bedroom luxury flats on the grounds that there remain yet other sundry fees to be paid before the keys and property could be handed over to her. In the offer of subscription, Exhibit HB2; *'the property would be delivered 3 months after full and final payment.'* From Exhibit A13; *'full and final payment which encompassed the net purchase and all the ancillary fees.'* The Claimant under cross-examination admitted that she paid all fees as contained in Exhibit A13 and keys were handed over to her and in fact there are tenants in the house. It is the evidence of the Claimant under cross-examination that she made payment in respect of the aspects contained in the provisional allocation in November 2019 and keys were subsequently handed over to her. The burden of proof that there was a breach of contractual agreement she had with the 1st defendant has not been satisfactorily discharged by the Claimant. See also the case of **KAAN INT'L DEV. LTD V LITTLE ACORNS TURNKEY PROJECTS LTD & ANOR (2018) LPELR 45291 CA** where the Court of Appeal held on the guiding principles for award of damages for breach of contract thus:

***"The issue of damages in this case arises only when the appellant satisfactorily establishes a breach of contract in existence between the***

***parties because damages for breach of contract are essentially a compensation to the plaintiff for the loss or injury suffered through that breach. Its objective is to place the plaintiff in the same position as if the contract has been performed. See OMEGA BANK (NIG) PLC V O. B. C. LTD (2005) 8 NWLR (PT. 928) 547. Therefore in any action for breach of contract, the measure of damages is the loss flowing naturally from the breach. See GONZEE NIG LTD V NERDC (2005) 13 NWLR (PT. 943) 63."***

I accept the submission of the defendants' counsel that the Claimant have failed to demonstrate with any shred of evidence (documentary or otherwise) her entitlement to the damages sought. The Claimant's claim for damages is also unproven and it is hereby dismissed.

Finally on the Claimant's entitlement to cost of solicitor, I have gone through the submission of the learned counsel for the defendants, I endorse all the arguments in respect thereto. I hold therefore that the claim for cost of solicitor as urged by the Claimant cannot be sustained; this is because a claim for cost of solicitor cannot be passed on to the other party. I refer to the case of **GUINESS V NWOKE (2000) LCN 0759 (CA**) where the Court of Appeal held:

***"It is also unethical and an affront to public policy to pass on the burden of solicitors fees to the other party, in this case the cross-respondent."***

The Courts have also held that the cost of litigation is not a loss arising from a breach of contract as there is as to cost no restitution intergum. The plaintiff's claim for cost of litigation is invalid and it is herby dismissed.

**Signed**

**Hon. Judge**
**30/6/2022**