

IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA.

BEFORE HON. JUSTICE J.E. OBANOR
ON THURSDAY THE 16TH DAY OF SEPTEMBER, 2021.

SUIT NO: FCT/HC/CV/287/2021
MOTION NO: FCT /HC/CV/M/3679/2021

BETWEEN:

AFRO-ASIA SHELTER INTERNATIONAL LTD....CLAIMANT/RESPONDENT/APPLICANT

AND

**THE COMPANY FOR HABITAT AND HOUSING
IN AFRICA (SHELTER-AFRIQUE)DEFENDANT/APPLICANT/RESPONDENT**

CONSOLIDATED RULING

By a Motion on Notice filed on 21st June 2021 and predicated on Order 43 Rule 1 of the Rules of Court 2018 and inherent jurisdiction of the Court, the Defendant/Applicant challenged the jurisdiction of this court to entertain this suit by seeking for the following orders:-

- “1. AN ORDER of this Honourable Court striking out this suit for failure to disclose a cause of action against the Defendant.
2. AND FOR SUCH FURTHER OR OTHER ORDERS as this Honourable Court may deem fit to make in the circumstance.”

The application is predicated on five grounds as set out in the motion paper. It is supported by a 7-paragraph affidavit deposed to by Okiemute Ohwahwa and Written Address of the learned Defendant/Applicant’s Counsel.

In reaction to the application, the Claimant/Respondent on 29th June 2021 filed 8-paragraph Counter Affidavit deposed to by Emeka Callistus Menkiti

along with the Written Address of its Counsel. On 5th July 2021 the Defendant/Applicant file a reply on point of law in reaction to the Claimant/Respondent's Counter affidavit and written address.

On 6th July 2021, the Claimant filed a Motion seeking the leave of the court to amend its Statement of Claim. The application is predicated on five grounds as set therein. It is supported by a 5-paragraph affidavit deposed to by Emeka Callistus Menkiti and Written Address of its learned Counsel.

In opposition to the application, the Defendant on 13th July 2021 filed an 11-paragraph Counter Affidavit deposed to by Oladayo Akinwande along with the Written Address of its Counsel.

On 15th July 2021, the Court in order to save time and resources, in the exercise of its discretion made an Order for consolidated hearing of both applications.

At the hearing on 15th July 2021, Counsel for the parties adopted their Written Addresses as their oral submissions for and against the two applications. Consolidated Ruling was then reserved for today 16th September 2021.

For the reason that challenge to jurisdiction is a threshold issue which once raised the Court is under a duty to resolve same first, the Court shall proceed to consider the Defendant's Motion on Notice and thereafter if necessary, consider the Claimant's Motion on Notice.

In the affidavit in support of the Defendant/Applicant's Motion on Notice it was averred inter alia that the Claimant/Respondent(hereinafter referred to as "Respondent") applied for a loan of US\$9,200,000 (Nine Million Two Hundred Thousand United States Dollars) through a letter dated 23 July 2014 to finance the construction of housing Units in Tafa Local Government Area Niger State. After several negotiations the Defendant/Applicant(hereinafter referred to as the "Applicant") made an offer through its letter dated 22 April 2016 to the Respondent for a sum not exceeding US\$9,100,000 (Nine Million One Hundred Thousand United States Dollars) and this offer was accepted by the Respondent through its letter of 26 April 2016. The Applicant's offer letter dated 22nd April 2016 and the

Respondent's acceptance letter date 26th April 2016 were attached as Exhibits 1 and 2 respectively. The parties executed a loan agreement dated 1st June 2016 containing certain terms and conditions including some conditions precedent to disbursement. The loan agreement dated 1st June 2016 was attached as Exhibit 3. Under Section 4.5.1(a) of the loan agreement, an effective request for first disbursement was to be made within 6(six) months after the effective date (1st June 2016) while by Section 6.1 of the loan agreement, the obligation of the Defendant to make this first disbursement is subject to the Claimant's fulfillment of 15 conditions precedent that include the perfection of the security package for the loan. One of the items under the security package is a first ranking legal charge on the property described under Section 4.7(a) of the loan agreement as a parcel of land measuring 107.812 hectares situate at Jibi Tafa Local Government Area of Niger State covered by Certificate of Occupancy No NG/SL/988 and registered as No 462 at page 462 in volume 5 at the land registry at Minna, Niger State. Although the Respondent executed a Deed of Legal Mortgage (the "Legal Mortgage"), the consent of the Governor of the State was not obtained and the Legal Mortgage was not registered within the 6-Months timeline. The Legal Mortgage dated 1st June 2016 was attached as Exhibit 4. With regard to the condition precedent to perfect the Legal Mortgage at paragraph 4.1(c) of the statement of claim the Respondent states as follows: " Upon the claimant's response that it was only the issue of perfection of a legal mortgage on the property donated or used as a collateral for the transaction that was a little delayed – this being outside its control and being followed up by the Defendant's recommended external solicitors- the Defendant through its email of 14th February 2017 (by it Zachery Munene) requested for re-appraisal of the project." The Applicant could not carry on the first disbursement upon the Respondent's request primarily because of the failure of the Respondent to perfect the Legal Mortgage within the 6- Month timeline under the loan agreement. It was the Respondent's failure to fulfill all the conditions precedent that necessitated a re-appraisal of the loan agreement. In the Applicant's email of 14th February 2017 referred to at paragraph 4.1(c) of the Statement of Claim, the Applicant stated that because of the lapse of the 6-month timeline and the Respondent's non completion of the conditions precedent, key transaction fundamentals and assumptions may have shifted. As such it will be necessary for a reappraisal and depending on the outcome of the re-appraisal, an addendum to the loan agreement will be prepared before disbursement can commence. A copy of the email of 14 February 2017 was attached as

Exhibit 5. In the applicant's letter of 13 June 2018 the Applicant decided that because of the material changes to the transaction fundamentals, it will not proceed with the transaction by way of an addendum to the Loan Agreement. A copy of the letter of 13 June 2018 was attached as Exhibit 6. The Applicant has merely complied with the terms of the parties agreement in the face of the Respondent's breach of the Loan Agreement and this suit ought to be struck out in the interest of justice.

In its counter affidavit it was averred by the deponent on behalf of the Respondent that paragraphs 4f-l of the Defendant/Applicant are false. That at paragraph 4a-g of the Statement of Claim the Claimant averred thus: The Claimant further aver that it complied with the terms or obligation on its part under the loan agreement to perform including the condition precedent to first disbursement chiefly; executed on 1st June 2016 a first ranking legal charge (Deed of Legal Mortgage and a Power of Attorney, infra on the carved out area of Land) in favour of the Defendant on a Land Measuring 7.33hectares particularly the portion that is delineated and edged red on Survey Plan Number MGVL/12475/001 being a portion of Parcel of land Measuring 107.812 hectares situate at and located at Jibi, Tafa, Local Government Area of Niger State, covered by Certificate of Occupancy No:NG/5L/988 and registered as No 462 at page 462 in Volume 5 at the Land Registry at Minna Niger State of Nigeria (Power of Attorney); procured or did a survey mapping of the area of the land donated as collateral for the loan, executed a deed of legal and a Power of Attorney dated 1st day of June 2016 respectively between it and the Defendant in respect of its property and engaged in their legal perfection or obtaining the requisite Governor's consent; awarded a contract for construction of 300 Housing Units of 2 and 3 bedroom apartments to Tomando Construction Ltd (the company) of No 8 Bishop Shanahan Road Off Timber Market-New GRA Trans Ekulu- Enugu and its letter of 26th April 2016 awarding the contract to the company included a schedule for disbursement of the loan; entered into and executed an agreement on 14th June 2016 with the company for the company's construction of 300 Housing Units of 2 and 3 bedroom apartments; got an environmental approval from the Niger State Environmental Management Authority dated 2nd November 2016 and the requisite Development Permission (Building Permit) from Niger State Urban Development Board dated 17th November 2015; settled the Defendant's solicitors (Abdulai Taiwo & Co) legal fees of N2,260,000.00 (Two Million, Two Hundred and Sixty Thousand Naira) Abdulai, Taiwo & Co's respective Invoice Numbers 0009701 are pleaded and the Plaintiff's sister company-

Rock of Ages Properties Ltd-evidence of payment of the fees through its instructions of 28th July 2016 and 26th August 2016 to its Bank-First Bank of Nigeria Ltd; paid the Defendant's all of its fees and charges (infra) in respect of the loan. Also at paragraph 4.1(a) –(c) & e of the statement of claim the Claimant averred that: it made an effective request on the Defendant, within time for the first disbursement of the loan and or it requested from the Defendant within time, for first disbursement of the loan in accordance with the loan agreement; alternatively, with respect to time or period as is provided in the loan agreement it pleads and relies on forbearance, compromise and abandonment by the Defendant; the Defendant never responded to the said request to disburse the loan until sometimes in the second week of February 2017 when it informed the Claimant that it did not meet certain condition precedent to drawdown. This was despite the claimant having met all the condition precedent and the aforesaid Power of Attorney being registered as No 5 at page 5 in volume 7 in Niger State Government Land Registry, Minna. Upon the Claimant's response showing that it was only the issue of perfection of a legal mortgage on the property donated or used as a collateral for the transaction was a little delayed- this being outside its control and being followed up by the Defendant's recommended external solicitors- the Defendant through its email of 14th February 2017 (by its Zachery Munene) requested for re-appraisal of the project; further to sub-paragraph c above it is the practice or custom of secured credit transaction or mercantile custom or practice of Banking or Financial Institutions, in Nigeria that disbursement of loan or money lent do not wait till the requisite consent to a legal mortgage is obtained. At paragraph 4.1 of the statement of claim the Claimant averred that; in consequence of the request for re-appraisal the Defendant through its email of 16th February 2017 (by its Elizabeth Ogonegbu) requested the Claimant to provide it with certain documents stated therein and the claimant responded through its mail of 23rd February 2017. At paragraph 5(a)-(b) of the statement of Claim the Claimant averred that: rather than the Defendant disbursing the loan given its meeting the requirements for disbursement of the loan within the loan agreement and the Defendant's re-appraisal, the Defendant through its letter of 28th March 2017 maintained that it will wait until foreign exchange risk inherent in the transaction is significantly reduced to its satisfaction and that this is because of its experience with its other customers; the claimant in response, through a letter of 3rd April 2017 assured the Defendant inter alia that foreign exchange dynamics would not negative the project while on the other hand rejected the contents of the Defendant's letter of 28th March

2017 particularly but not exclusively its alternative suggestion that it seeks alternative funding. That at paragraph 7a-b of the statement of Claim the Claimant averred that pursuant to the loan agreement, it submitted the Deed of Legal Mortgage referred to in paragraph 4C above to the Government of Niger State for perfection or for its consent. Through its letter of 16th August 2019 it requested the Defendant to release all the documents it gave or submitted to it. These documents include but not limited to the said Power of Attorney and executed Deed of Legal Mortgage in respect of the land involved- at Jibi Niger State, a Deed of Discharge or Release which will enable it discharge the legal mortgage created therein in the Defendant's favour but the Defendant failed and till date refused to release the documents and thus denied it the use of them in securing alternative funds. That at paragraph 11a-b of the Statement of Claim the claimant averred that the Defendant's failure to issue it with a Deed of Release or Discharge of the legal mortgage aforesaid and or its- the defendant's rejection of the aforesaid Power of Attorney prevented it from using the same property to source for alternative funds. Through a letter of 28th October 2020 by its solicitors- McCarthy Mbadugha & Co, it requested the Defendant to compensate it for the breach of the loan agreement but the Defendant failed and ignored the request. The claimant sent this letter to the Defendant through DHL Express and DHL issued it with a receipt containing inter alia Way Bill 2700384304. That at paragraph 10a-d of the statement of claim the claimant averred US\$136,500 as cost of the legal mortgage on the collateral; US\$45,500 appraisal fees to the Defendant; US\$91,000 frontend fee to the Defendant; US\$33,200 (Thirty Three Thousand Two Hundred Dollars) facilitations fees to Manfriday- the agent- that introduced the transaction-the loan- to it. At paragraph 10.1(a) –(c) of the Statement of Claim the claimant averred N1,000,000(One Million Naira) for Survey Mapping of the area donated as collateral for the loan; N3,000,000 (Three Million Naira) legal fees of the Defendant's legal counsel; N50,000,000.00 (Fifty Million Naira) being money paid by the claimant to obtain environmental approval and building permit form Niger State Government in respect of the 300 Units of 2 & 3 bedroom apartments. US\$33,200 (Thirty Three Thousand Two Hundred Dollars) facilitation fees the Claimant paid to Manfriday-the agent that introduced the transaction-the loan- to it. US\$136,000 (One Hundred and Thirty Six Thousand Dollars) being the cost of the Legal Mortgage on the collateral paid by the Claimant; US\$45,000 (Forty Five Thousand Dollars) being appraisal fees the claimant paid to the Defendant; US\$91,000 (Ninety One Thousand Dollars) being front end fees the claimant paid to the Defendant;

An order mandating the Defendant to release to or to give to the claimant all the documents the claimant gave or issued to it in respect of the loan agreement and or to issue a Deed of Discharge of the aforesaid Legal Mortgage and or an instrument of rejection of the Power of Attorney aforesaid to the Claimant. That at paragraph 12(3) (a) of the statement of Claim the claimant claimed against the Defendant N2,000,000,000.00(Two Billion Naira) for denying the Claimant the use of its property on or for which it executed a legal mortgage in favour of the Defendant and the Claimant will be prejudiced if the application is granted as it is in the interest of justice that the application is dismissed.

As aforesaid, Counsel for the parties filed and exchanged Written Addresses in support of their respective contentions. The Court has given due consideration to the averments in the affidavits of the parties. The cardinal issue that calls for determination is whether or not the Defendant/Applicant has made out a case to justify a grant of an order of this court striking out this suit for failure to disclose a cause of action against the Defendant.

The Supreme Court took time to consider what is meant by “*cause of action*”, “*reasonable cause of action*” and factors to consider in determining whether or not a suit discloses same ***in DANTATA V. MOHAMMED (2000) 7 NWLR (Pt.664) p.176***. It defined a phrase “*cause of action*” in these words:-

“The phrase “cause of action” means simply a factual situation the existence of which entitles one person to obtain a remedy against another person. It is a fact or combination of facts which when proved would entitle a Plaintiff to a remedy against a Defendant. It consists of every fact which would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the Court. That is, the fact or combination of facts which gave rise to a right to sue. It is a cause for an action in the Courts to determine a disputed matter.”

The Court also explained that, it comprises the averment or averments in the Plaintiff's statement of Claim that discloses his right to institute an action for a wrongful act alleged. With respect to the phrase "reasonable cause of action," the Court explained it thus:-

"A reasonable cause of action" is a cause of action which, when only the allegations in the Statement of Claim are considered, has some chance of success."

With regard to the factors to consider in determining whether a suit discloses reasonable cause of action, the Court directed thus:-

"In order to determine whether the Statement of Claim has disclosed a reasonable cause of action, what the Court should consider are the contents of the Statement of Claim and not the extent to which one relief can co-exist with another.

Having considered the contents of the Statement of Claim, deemed to have been admitted, the question is whether the cause of action has some chance of success, notwithstanding that it may be weak or not likely to succeed. Thus, it is irrelevant to consider the weakness of the Plaintiff's claim. What is important is to examine the averments in the Statement of Claim and see if they disclose some cause of action or raise some questions fit to be decided by the Court ..."

Therefore to determine whether a reasonable cause of action exists or not the court has to consider the facts as pleaded in the statement of claim. See ***also ILIYASU V. RIJAU (2019) 16NWLR (PT 1697) 1.***

Being properly guided by the foregoing guidelines, the crucial question is whether or not the facts in the Claimant's statement of claim herein (deemed to be admitted by the Defendant for the purpose of determination of this application) raises a reasonable cause of action. It is not part of the

duties of the Court in this exercise to determine the weakness or strength of the Claimant's case

In line with the foregoing, I have examined the facts in the Claimant's Statement of Claim, the gravamen of its case is that the Claimant applied for a loan of US\$9,200,000 (Nine Million Two Hundred Thousand United States of America's Dollars) from the Defendant to finance construction of 300 units of 2 and 3 bedroom apartments at Jibi Tafa Local Government Area of Niger State. The Defendant approved a loan of US\$9,100,000 (Nine Million One Hundred Thousand United States of America's Dollars) to the Claimant with specified terms, conditions and obligations on the part of each parties. The Claimant complied with the terms or obligation on its part under the loan agreement and made request on the Defendant within time for the first disbursement of the loan in accordance with the loan agreement. The Defendant failed to release the loan and informed the Claimant that it did not meet certain conditions precedent to drawdown. The Defendant was in breach of the loan agreement as it would have made a profit of N1,725,351,245.35k (One Billion, Seven Hundred and Twenty-Five Million, Three Hundred and Fifty One Thousand, Two Hundred and Forty-Five Naira, Thirty-Five Kobo) from the sale of the entire 300 Units of 2 and 3 bedroom apartments. The Claimant also expended various sums of money towards ensuring that the loan transaction materialize. Thereafter the claimant requested the Defendant to release all the documents it gave or submitted to it to enable the claimant use them in securing alternative funds to finance the project but the Defendant failed and till date refused to release the documents. The Claimant also requested for compensation which was honoured. The Claimant then instituted this action seeking a declaration that the Defendant is in breach of the loan agreement, special damages for various sums of money expended in pursuit of the loan, an order for release of all the documents submitted, further special and general damages.

There is no gainsaying the fact that by the above, the Claimant/Respondent has disclosed, at least an issue fit for adjudication by Court. This is the issue of whether or not the Defendant is in breach of the loan agreement and also whether or not the Defendant refused to release its documents

and thus denied it the use of them in securing alternative funds till date. These issues constitute not just cause of action but reasonable causes of action which the Court ought to adjudicate upon and determine between the Claimant/Respondent and the Defendant/Applicant. As directed by the Supreme Court in the **DANTATA V. MOHAMMED** case, supra, it is not part of the duties of the Court at this stage to consider the weakness of the Claimant/Respondent's case. That is irrelevant at this stage. Whether or not the case is strong or weak is a matter that will be determined on the merit. Having established that there is a reasonable cause of action the sole issue raised above is resolved in favour of the Claimant/Respondent and in consequence this application is hereby dismissed.

With regards to the Claimant/Applicant's application for amendment, I have carefully considered the averments in the affidavits of the parties and submissions of their learned counsel. The crucial issue for determination is whether or not the Claimant/Applicant has made out a case to justify a grant of this application.

Order 25 Rule 1 of the Rules of Court 2018 gives the Court a discretion at any stage of the proceedings to allow a party alter or amend his pleadings before pre-trial conference and not more than twice during the trial but before the close of the case. Court are also enjoined to allow amendment in such a manner and on terms as may be just and all such amendments shall be as may be necessary for determining the real question in controversy between the parties. In **OJAH & ORS V. OGBONI & ORS (1976)1 NWLR p. 95**, the Supreme Court laid it down as a general rule that an amendment under the Rules will be granted if it is for the purpose of determining in the existing suit the real questions in controversy between the parties.

In exercise of the discretion which ought to be exercised judicially and judiciously, the Court is guided by some factors. An application for amendment is to be refused where: -

- (i). It is made malafide

- (ii). It could cause unnecessary delay.
- (iii). It will in anyway unfairly prejudice the opposite party.
- (iv). It is quite irrelevant, useless or immaterial.
- (v). It will entail injustice to the Respondent.
- (vi). By his blunder, the Applicant has done some injury to the Respondent which cannot be compensated by costs or otherwise.
- (vii). It would only and merely raise technical issues.

See: ***ITA V EKPENYONG(2001) 1 NWLR (PT. 695) P. 587;ADETUTU V ADERUHUNMU(1984) 1 SCNLR P. 515;ADEKEYE V AKIN-OLUGBADE (1987) 3 NWLR (PT. 60) P. 214.***

IN ITA V EKPENYONG *supra*, the Supreme Court made the point that after evidence has been concluded by the parties, an amendment that will introduce new issues will not be entertained by the Court.

In ***ITA V ADAZIE (2000) 4 NWLR (PT. 652) P. 168***, the Court however held that an amendment cannot be said to be fraudulent, intended to overreach or cause the other side an irreparable loss merely because if it is allowed, the other party's case will collapse as this is not enough to refuse an amendment.

In this matter, an examination of the Claimant/Applicant's affidavit shows it is averred therein that the amendment sought will assist the court in determining the real issue in controversy between the parties in this suit.

On the other hand the Defendant/Respondent has contended that the amendment sought will overreach the Defendant/Respondent by introducing new issues as shown in its affidavit.

I have carefully read and considered the Claimant/Applicant's proposed Amended Statement of Claim attached to this application as Exhibit MM.

As earlier mentioned, the Court of Appeal did state in ***ITA V ADAZIE supra*** that an amendment cannot be said to be fraudulent, intended to overreach or cause the other side an irreparable loss merely because if the amendment is allowed the other party's case will collapse. In this case, the Court cannot in a proper exercise of its discretion hold that this application is overreaching in the circumstances of this matter as the Respondent can always have their Statement of Defence amended to meet any challenge thrown up by the instant application at this initial stage. At least let the

Court have before it facts relating to all issues in controversy between the parties.

For the reason of the foregoing, the Court resolves the sole issue raised above in favour of the Claimant/Applicant against the Defendant/Respondent. In consequence, this application is granted.

Leave is granted to the Claimant/Applicant to amend its Statement of Claim with words stipulated in **Order 25 Rule 6 of the Rule of Court 2018** endorsed thereon in the term of the Proposed Amended Statement of Claim attached as Exhibit MM to the application.

Leave is also granted to the Applicant to file a Witness Statement on Oath consistent with the amendments.

The duly amended Statement of Claim are to be filed and served on the Defendant/Respondent not later than 7 days from today.

Leave is also granted to the Defendant/Respondent to file and serve consequential amendment of its Statement of Defence within 7 days after receipt of the Claimant/Applicant's amended pleadings, if necessary.

I make no order as to cost.

SIGNED
HON.JUDGE
16/9/2021.

LEGAL REPRESENTATIONS:

1. Prof. Joseph N Mbadugha for the Claimant/Respondent/Applicant.
2. Mrs Olujoke Aliu/Mr D.D. Killi for Defendant/Applicant/Respondent.