IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA

THIS WEDNESDAY, THE 13TH DAY OF OCTOBER, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/2157/14

BETWEEN:

FIRST BANK OF NIGERIA PLC .....PLAINTIFF

AND

1. BAYCO NIGERIA LIMITED

2. LUBB UNION CONSTRUCTION COMPANY LIMITED

3. SDV SECURITY COMPANY LIMITED

4. ALH. SHEHUMOHAMMED NDANUSA (alias Shehu Mahmud Abubakar)

5. ABUJA GEORGRAPHIC INFORMATION SYSTEM (AGIS)

6. FEDERAL CAPITAL DEVELOPMENT AUTHORITY

7. MINISTER OF THE FEDERAL CAPITAL TERRITORY

...DEFENDANTS

RULING

I have carefully considered the submissions above on the admissibility of the following documents to wit:

1. **Copy of document titled "Re Application for statutory Right of Occupancy within the F.C.T dated 5th February, 2002.**

2. **Copy of acceptance of offer of grant of Right of Occupancy within the FCT dated 5th February, 2002.**

3. **Copy of Recertification and Reissuance of C of O acknowledgment dated 5th February, 2006.**

4. **Copy of subpoena *duces tecum*.**

5. **Copies of form 49 (Notice of consequence of disobedience of order of court) and form 100 (Notice to show cause why order of committal should not be made).**

The narrow legal issue which is still not completely devoid of controversy is legal circles clearly has to do with the question of admissibility of secondary evidence of public documents.

The documents streamlined above are all no doubt public documents within the purview of **Section 102** but what clearly was sought to be tendered are photocopies or secondary evidence of the documents identified under 1-4 above. The Defendants have all contended here that under **Section 89(e) and 90(1) (c) of the Evidence Act,** it is only a certified true copy and no other secondary evidence that is admissible.

The Plaintiff's counsel has however argued to the contrary. He contends that **Section 89(a) (ii) and 91(b)** provides an exception to the requirements of **Section 102, 104 and 105 of the Evidence Act.** Learned counsel equally furnished me with a written address titled **"judicial authorities when public officer refused to certify public document upon Application".**

I have carefully considered all submissions on both sides of the aisle including the additional written address by counsel to the Plaintiff. Now as stated earlier, the documents sought to be tendered are clearly public documents within the purview of **Section 102 of the Evidence Act.**

A convenient starting point perhaps is to situate the general foundational basis for admissibility of documents which will then provide the platform to situate the admissibility of public documents and how secondary evidence of public documents may be tendered and admitted.

By virtue of the provision of **Section 85 of the Evidence Act,** the contents of documents may be proved either by primary or by secondary evidence, **Section 88 of the Evidence Act** provides that documents shall be proved by primary evidence except in the cases hereafter mentioned in the Act. The word used here is **"shall"** which is a word of commend and therefore any deviation from this provision to all for reception of any evidence other than primary evidence must be such as allowed by the same Act.

Section 89 of the Evidence Act then streamlines with clarity circumstances in which secondary evidence of the existence, condition or contents of a document may be given.

A combined reading of **Section 89(e) and 90(1)(c) of the Evidence Act** denotes the position in unambiguous terms that where the original is a public document within the meaning of **Section 102,** then **"a certified copy of the document, but no other secondary evidence is admissible."** The bottom line and flowing from the jurisprudence on the issue now is that once a document is a public document, the only admissible document is either the original and where the original is not available, then secondary evidence is admissible but the only admissible secondary evidence of the existence, condition or contents of such secondary evidence is a Certified True Copy but no other secondary evidence is admissible. The authorities of our superior courts on this point are legion. As far back as the case of **Executors of Chief J.A. Alao V. Ambrose Family & Ors (1969)1 N.M.L.R 25 at 30,** the Supreme Court construing the same subsection of the Evidence Act stated per Coker J.S.C (of blessed memory) as follows:

"The combined effect of the subject is that in the case of public documents, the only type of secondary evidence permissible is a Certified True Copy of the document and none other."

This clear streamlined position has been underscored repeatedly by our superior courts in many other subsequent decisions including **Araka V. Egbue (2003)17**

N.W.L.R (pt.848)1 at 18, Jolaymi V. Olaoye (1999)10 N.W.L.R (pt624)600 at 615; Iteogu V. LPDC (2009)12 SC (pt.1)1 at 17 per Onnoghen JSC (as he then was).

The wordings of **Section 90(1)(c) of the Evidence Act** is for me clear and unambiguous and it is difficult to situate within the provisions of **Sections 89(a) (ii) and 91(b) of the Evidence Act** any exception(s) or where any other provision of the Evidence Act derogates from the provision of **Section 90(1)(c).**

Properly understood Section **89(a)(ii) of the Evidence Act** provides for admission of secondary evidence where the original is shown or appears to be in possession or power of any person legally bound to produce it and when after the notice mentioned in **Section 91** such person does not produce it.

It is really difficult to situate how this provision applies to a public document which is specifically dealt with by the provision under **Section 89(e) and 90 (1) (c) of the Evidence Act.**

Sections 89(a)(ii) and **91 (b) of the Evidence Act** are thus general provisions and have no application to the specific issue covered by the provisions of **89(e) and 90 (1) (c)**which deals specially with public document and provides how the secondary evidence of the public document is to be admitted under **Section 90(1)(c).** The law is settled beyond any argument that where there is a specific and general provision on any issue, it is the specific provision that will govern the consideration of that issue.

Furthermore, **Section 89(a)(ii) and 91(b)** will only apply when the original is shown or appears to be in possession or power of any person legally bound to produce it and when after notice mentioned in **Section 91,** such person does not produce it.

These sections will therefore have application where indeed the adversary is shown or established to be in possession. This is not the situation here. The 5th-7th Defendants have in their defence categorically averred that they don't have the documents in question and never issued same. I shall deal in some detail with this point again in this Ruling. It suffices to say that it is difficult to situate the factual

and legal basis to apply the provisions of **Section 89(a)(ii) and 91(b) of the Evidence Act** to the facts of this case. In my considered opinion, the said sections are not availing.

So much has been made by learned counsel on the apparent difficulties and the impossibility of getting the certified true copies from the 5th to 7th Defendants. He has contended that they have taken all steps to get the documents without success. They then issued and served a subpoena; they have also prepared and served forms 99 and 100 on 5th to 7th Defendants which again did not bear fruit.

Now on the part of the 5th to 7th Defendants as briefly alluded to earlier on, their case has always been that they don't have those documents and therefore they cannot furnish to Plaintiff what they do not have. And on the pleadings which has precisely streamlined the facts and issues in dispute, it is relevant to note the defence of 5th to 7th Defendants vide paragraphs 1-7,9,11-15,19-21,30 to mention a few which has always been that the 1st Defendant never applied to 5th to 7th Defendants for a statutory right of occupancy in relation to any parcel of land including the disputed plot 478 and that they are not in possession of any title or related documents, acknowledgment copies belonging to 1st Defendant or Plaintiff in relation to the said plot. Indeed they categorically asserted that the title and related documents frontloaded was not granted or issued by them.

The argument therefore that the **"public officer refused to oblige"** after all necessary steps have been taken to secure a certified true copy of a public document will clearly not apply in this case. The case of the 5th to 7th Defendants here is not that of refusing to oblige but it is a case of the impossibility of giving what they have repeated stated they don't have.

Perhaps let me here quote the relevant portion of paragraph 30 of the defence of 5th to 7th Defendants dated 3rd August, 2015 and filed as far back as 30th October, 2015 thus:

"…The 5th to 7th Defendants do hereby state that it is not in possession of any documents belonging to the Plaintiff and therefore cannot produce same at the trial of this suit."

In the circumstances, the cases of **Onyekwuluje & Anor V. Benue State Govt. & Ors (2015) LPELR 24180(SC) or (2015) AII FWLR (pt.809)842, 848 and 869-870** and the case of **Stanbic Bank PLC V. Longter on Global Capital Ltd & Ors** (unreported) referred to in the additional written submission of Plaintiff's counsel remain good law but clearly have no application in the context of the facts of this case.

Even the heading of the additional written address to wit: **"Judicial authorities when public officer refused to certify public document upon application"** appears to recognize that the submissions made will only apply where a public officer refuses to certify a public document and not a situation where the public officer says I don't even have or know of the existence of the documents which you want a C.T.C.

At the risk of sounding prolix, the principle in those cases would have application where the documents sought to be tendered are proven or shown to exist with the adversary and not a situation where the adversary has repeatedly stated since the inception of this case nearly 7 years now that they don't have the documents as it never emanated from them.

Again, the above cases referred to by counsel to the Plaintiff dealt with specific situations where the documents were proven or shown to be with the adversary. There was no such demonstration here particularly when it is noted that the documents in question belong originally not to Plaintiff but the 1st Defendant. Also the cases never dealt with the scenario where the adversary has categorically pleaded or asserted that it does not have the documents. In that circumstance, the cases are distinguishable and as earlier alluded to, and cannot be cited as authority to allow secondary evidence of a public document that has not been certified to be put in evidence within the confines of **Section 90(1)(c) of the Evidence Act.**

The contention that it is a **"national and evidential impossibility"** for the Plaintiff to produce the documents applies with equal force to the case made out by 5th to 7th Defendants. How can the court compel production of documents they have repeatedly said they don't have and or then under such nebulous argument, put in secondary evidence of a public document that is not certified. I just wonder.

It is therefore difficult to legally see how the court can use the present scenario as a leeway to bring in or allow the admission of secondary evidence of a public document which is not certified, through the back door as it were.

The argument using the interest of justice cannot apply in a vacuum and to only the plaintiff but to all parties in the case. The interest of plaintiff wanting the documents to be admitted must be balanced against the interest of the 5th – 7th defendants whose case has always been that they don't have those documents and never issued same and the resolution of the extant dispute must be predicated and dictated solely by the applicable provisions of the law. It has always been justice according to law and not any other extraneous considerations.

As much as I have sought to be persuaded, I am not persuaded that the documents identified under 1 – 4 (supra) have met the clear and express requirements of **Sections 89 (e) and 90 (1) (c) of the Evidence Act**. The documents are all secondary evidence of public documents and having not been certified are clearly inadmissible and they are to be marked, tendered and rejected.

The final document(s) under (5) above are the **forms 99 and 100**. They are also public documents but they are clearly original copies. The provision of Section 85 of the Evidence Act recognizes the admissibility of primary or secondary evidence of documents without exception whatsoever. Thus, an original copy of a public document is admissible as primary evidence without any requirement of certification. See **Kwara State of Agriculture V S.G.B (Nig.) Ltd (1998) 11 NWLR (pt.624) 600 at 615; Ali V Obande (1999) 9 NWLR (pt.620) 563 at 574; Ebu V. Obun (2004) 14 NWLR (pt.892) 76 at 88**.

However, at the risk of sounding prolix, I must underscore the point that the only admissible secondary evidence of a public document is a Certified True Copy of the Document. I live it at that. The Forms 99 and 100 are admitted in evidence as **Exhibit P18 a and b**.

Signed
Hon. Judge
13th October, 2021