IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT 28 GUDU – ABUJA
DELIVERED ON WEDNESDAY THE 27TH DAYOF JANUARY 2021.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE .R. OSHO-ADEBIYI
SUIT NO.CV/556/2019

SAMBIL KADAMA NIGERIA LIMITED----------PLAINTIFF
(Suing through his Lawful Attorney
ANTHONY BIOSE ESQ)

AND
ESKOM PLC---------- DEFENDANT

JUDGMENT

The Plaintiff filed this suit via a writ of summons against the Defendant claiming the following reliefs;

1. AN ORDER compelling the Defendant to pay the claimant the sum of N5, 000,000.00 (Five Million Naira) only being arrears of rent for the period of 24th September 2016 to September, 2017.
2. AN ORDER ejecting the Defendant and granting the Plaintiff possession of Plot 395A Eteng- Ogboli Crescent , Jabi Abuja (5) five bedroom semi-detached Duplex (Wing B) with one room Guest Chalet with two rooms boys quarters and a swimming pool duplex.
3. AN ORDER granting mesne profit in the sum of N 833,000.00 monthly against the Defendant from October, 2017 until the Defendant delivers possession of the Demised premises to it.
4. The sum of N500,000.00 as cost of this suit.

5. 10% of the judgment sum until the entire judgment sum is liquidated.

The defendant on the other hand, filed its statement of defence and a counter claim wherein the Defendant claimed the following;

a. A declaration that the demised Premises for which the Plaintiffrented to the Defendantis not fit for habitation despite the huge sums paid by the Defendant as rent on yearly basis.
b. An Order of this honourable court mandating the Plaintiff/Defendant to refund the sum of N12, 500,000.00 (Twelve million five hundred thousand naira) to the Defendant/Counterclaimant as contemplated in the parties tenancy agreement. In the alternative to this refund, the above amount be converted as setoff for the outstanding rent after reduction to 50%.
c. An order mandating the Plaintiff/Defendant to pay the sum of N250,000.00 (two hundred and fifty thousand naira) spent by the Defendant/Counterclaimant to construct a water sumor in the demised premises against what was promised by the Plaintiff/Defendant.
d. An order mandating the Plaintiff/Defendant to pay the sum of N10 million as general and aggravated damages suffered by the Defendant/Counterclaimant in the said premises after paying huge sums as rent without deriving value therefrom.
e. Any other cost this honourable court deems proper to award against the Plaintiff/Defendant.

The Plaintiff filed a reply to the statement of defence and counter claim. Trial in this suit commenced on the 12th day of March 2020 and the Plaintiff opened its case by calling its sole witness to testify in proof of its case. The PW1, in his examination in chief, adopted his witness statement on oath as his evidence in proof of the Plaintiff's case. From the facts stated therein, it is the case of the Plaintiff that Defendant is a Tenant in the Demised Premises of the Plaintiffinitially for a period of two(2) years certain commencing from 24th September 2014 to 24th September 2016 at an agreed annual rent of N10,000,000.00 which the Defendant cumulatively paid the sum of N20,000,000.00for two (2) years for the Demised property.

That after the expiration of the tenancy agreement on 24 September 2016 Defendant renewed his tenancy for the period of 23rd September 2016 to 24th September 2017 by paying part-payment of N5,000,000.00(Five Million Naira)only, with a balance ofN5,000,000.00(Five Million Naira) only, left unpaid.

That since the part-payment of N5,000,000.00(Five Million Naira) only, the Defendant has refused to pay the balance sum of 5,000,000.00(Five Million Naira) only, to make up for the rent for 24th September, 2016 to 24 September, 2017.

That after several demand for the outstanding rent, the Defendant wrote to the Plaintiff demanding a discount on the oustanding sum of N5,000,000.00 (fiveMillion Naira)only and the Plaintiff offered to discount the sum by 10 percent from the outstanding sum by bringing the payable outstanding to the sum of N4,500,000.00.

That the Defendant wrote a follow up letter on the 18th of May, 2019 for a further discount which the Plaintiff refused. That the defendant

wrote a letter on the 4th of October, 2018 assuring the Plaintiff that substantial sum shall be paid from the outstanding by November, 2018. That despite the promises, the Defendant refused to pay the arrears of N5,000,000.00 and the mesne profit from the period of unlawfully holding over till date despite repeated demands. That after the expiration of the said 2016 to 2017 tenancy, the Defendant has held over the property and refused to yield vacant possession to the Plaintiff despite repeated demands. That despite the service of a 7 days Notice of owners intention to recover possession, the Defendant refused, neglected and failed to yield up vacant possession. That the Plaintiff is entitled to the grant of the reliefs in its claim. The Plaintiff tendered the following documents in evidence;

1. Letter of authority dated 10/1/2015 addressed to PW1 and signed by Plaintiff admitted as Exhibit A1;
2. Duly executed Tenancy Agreement between parties dated 24th September 2014 admitted as Exhibit A2;
3. Letter of demand for rent dated 17/11/2016 addressed to Defendant as Exhibit A3;
4. Letter of demand for rent dated 22/06/2017 addressed to SoniEgbaji and signed by Lifeline Chambers as Exhibit A4;
5. Letter of demand for rent dated 8/6/2017 addresssed to Lifeline Chambers and signed by SoniEgbaji as Exhibit A5;
6. Letter for review of rent and renovation of the subject matter (Property) dated 18/05/2018 addressed to Lifeline Chambers and signed by Defendant as Exhibit A6;
7. Letter dated 17/5/2019 addressed to Defendant and signed by Lifeline Chambers as Exhibit A7;

8. Letter dated 4/10/2018 addressed to Lifeline Chambers and signed by Defendant as Exhibit A8;
9. Letter of update dated 3/12/2018 addressed to Defendant and signed by Lifeline Chambers as Exhibit A9
10. Notice to tenant of owner's intention to apply to recover premises dated 2/10/2019 addressed to Defendant and signed by Lifeline Chambers as Exhibit A10.

Under cross-examination, the PW1 stated that he commenced managing the property in 2015 but was contradicted by Defence Counsel as the letter authorising him to manage the property shows he commenced management of the property on 29th September 2016. That before he commenced, he had heard that one "Amiefuna" who is deceased was handling the management. That he was properly briefed of the agreement between the parties upon taking over the management. That he is not aware of complaints from the Defendant as he had not started management of the property at the time. That as he took over towards the end of the Defendant's tenancy, he noticed wear and tear due to usage, that is, peeling walls that required painting. That the discount offered in Exhibit 4 was as a result of the economic hardship and not an acknowledgment of defects in the property. That the Defendant's failure to pay the balance was not as a result of the defects complained of but that the Defendant paid the N5m on the ground that the balance was not readily available. PW1 stated further that the Defendant's initial tenancy was for 2014 to 2016 which effluxed in 2016 and since 2016 till date, Defendant has refused to pay rent, instead, complained persistently of the wear and tear and inhabitable state of the

property but refused to vacate. That prior to the Defendant taking possession of the property, they did physical inspection of the property therefore the statement that the facilities had not been functioning since inception of the tenancy is false.

The Defendant open its case on the 10th day of June 2020, calling a sole witness to testify in its case. DW1 adopted his two-witness statements on oath both dated 20/2/2020. One in support of the statement of defence filed and the 2nd in support of the counter claim of the Defendant. It is the case of the Defendant that Defendant made part payment of N5million for the new tenancy year in 2016 after the expiration of the earlier tenancy following discussion with the plaintiff to reduce the rent by 50% considering the fact that the Defendant had not enjoyed the demised premises since its inception as a result of massive defects or wear and tear of the building. That the Defendant had made this very clear in the letter dated the 18th of May where the defendant rejected the offer of discount of rent by only 10% from the plaintiff but insisted on 50% discount considering the fact that the Defendant has only occupied 40% of the entire building therein due to rainfall leakages that had ravaged the entire building rendering substantial parts of it uunhabitable.That before the letter dated the 4th of October 2018 pleaded by the Plaintiff, the Defendant had written several other letters complaining to the Plaintiff the predicament being faced in the premises. That aside from the office spaces made unusable due to wear and tear, other facilities such as the 3 rooms boys quarters, the entire inner CEO's office, the car park, kitchen and the swimming pool has consistently been unused due to damage caused by rain wherein the POP fell

completely to the floor of both the boys quarters, guest room and the car park causing serious nuisance in the premises. That since inception of the tenancy, the swimming pool which was one of the key attraction of the Defendant to pay for the premises has never been in use for one day due to default in construction as it was found not to have any discharge outlet, thereby it became a lake, inhabiting all sorts of creatures as well as a den of mosquitoes. That the defendant has exhausted all approaches of external evacuation which failed due to the plaintiffs refusal to effect structural change to the pool. That in an attempt to repair, the Defendant spent monies in purchasing external Pumping Machine, Hosts, Labour and water refill on different occasions until all efforts proved abortive. That the Plaintiff has vindicated the Defendant's case by atleast admitting to making a reduction of 10% in rent to mediate the damage and defect suffered by the Defendant. That if the property was in a perfect state as assured by the Plaintiff from the beginning of the tenancy, there wouldn't be any need for reduction. That several letters and phone calls pleading with the Plaintiff to effect repairs on the premises to atleast give the Defendant the value for its amount paid as rent all fell on deaf ears. That Defendant offered to carry out the renovation on its own if the Plaintiff permits and make reconciliation of the money spent but the Plaintiff consistently rejected this offer, instead the Plaintiff kept on mounting pressure on the Defendant to pay more money without seeing the value for what has already been paid. That the offer of the Plaintiff to only reduce the rent by 10% as pleaded in paragraph 8 of the Statement of Claim is grossly inadequate considering the level of decay and damage which has

consistently deprived the Defendant from enjoying the huge sum of N10million paid as annual rent for the premises. That clause 4(b) entitles the Defendant to a refund of its rent paid in the event where value is not derived as agreed. That contrary to the Plaintiff's claim, the Defendant's letter of 4th October 2018 had a conditional clause which is subject to the resolution of the necessary repairs of the building but Plaintiff refused or neglected to effect the repairs as agreed. That Defendant is not holding over the demised premises but that the Plaintiff has refused to make the premises habitable for the Defendant despite payment of over N25Million naira since inception of the tenancy.

It is also the Defendant's evidence in proof of the counter claim that the electrical installations had always been defective since inception of occupation of the premises and sometimes staff are left in darknessand leaving them at risk of fire outbreak in the premises and yet nothing was done. That Claimant told the Counterclaimant that the premises has water running however, upon moving into the premises, the Counterclaimant realised there was no water right from the inception of the tenancy thus leaving them with no option than to undertake the task of constructing a water summor and surface drainage piping at a cost of N250,OOO.OO (two hundred and fifty thousand naira) . That the fence which was poorly constructed with sub-standard materials is almost falling even after some renovation and painting was done by the Counterclaimant. That there's been leakage in the property which has made full occupation of the building impossible as the leakage had caused the P.O.P (Plaster of Paris) in most rooms to collapse. That all these defects had

been there and consistently been communicated to the Plaintiff/Defendant but nothing had been done about them.

In proof of its case, the Defendant tendered the following documents;

1. Copy of letter dated 18/05/2018 addressed to Lifeline Chambers titled "rent review and need for renovation written by Eskom PLC admitted as Exhibit A11.
2. Letter dated 8/6/2017 from SoniEgbaji Solicitors titled "Letter of Demand for rent for the Year 2016/2017 as Exhibit A12
3. Letter of Complaint dated 12/05/2015 addressed to Barr. J.A.Amaefula and written by Eskom PLC as Exhibit A13.

The DW1 under cross examination stated that he witnessed the signing of the tenancy agreement. That by experience, he acquired expertise in building matters as they operate several estates. That although there is no board resolution granted to him to testify in this case, he is testifying on the instruction of the Managing Director of the Defendant who is the greatest share holder. Learned Counsel to the Plaintiff made heavy waters about the issue of electricity, non-payment of electricity bills, generator powering the building etc, which issue had no bearing at all with the case before this Court, hence, the Court will discountenance all questions and answers on NEPA during the cross-examination of DW1. That the Defendant had only paid N5m as rent after the effluxion of the 2014 to 2016 term as a result of the failure of the Plaintiff to fix the complaints on the property, more so, as they only occupy 40% of the building due to waterlog and P.O.P collapse in the other rooms. That the swimming pool which was the attraction of the property has become a lake due

to structural defects and all efforts to have the Plaintiff address the issues proved abortive. That there are no technical reports to show the defect. That upon vacating the property they informed the Plaintiff through their Counsel.

At the close of trial, the respective counsel filed their written address. The Defendant in the written address filed, raised two issues for determination;

1. Whether the Plaintiff has adduced sufficient evidence to warrant the grant of his reliefs particularly having admitted to wear and tear as well as defect in the demised premises complained by the Defendant.
2. Whether this honourable court can grant the Defendant's reliefs as contained in the counterclaim.

In arguing the first issue, counsel submitted that from the totality of the evidence adduced, the Defendant is not liable to the claim of the Plaintiff having admitted towear and tear and persistently refusing to fix the defects and that the Plaintiff has not discharged the burden of proof. Counsel submitted that the Plaintiff has failed to establish a case before this Court to be entitled to the reliefs sought. Counsel stated further that from Clause 4(b) of the tenancy agreement, the plaintiff agreed to refund the rent or fair portion of it to the tenant where there is wear and tear and Plaintiff failed to fix same. Counsel urged the Court to resolve this issue in favour of the Defendant.

Arguing issue 2, counsel submitted that the Plaintiff did not specifically deny the pleadings of the counterclaim as the Defendant has sufficiently established before this Court the fact that the Defendant has suffered so much damage by not fixing the wear and

tear in the premises or making a reduction in rent. Counsel urged the Court to hold that the Defendant has placed before this Court, credible evidence to justify its defence to the claim of the Plaintiff and in proof of its counter claim. Counsel relied on the following authorities: -

1. ADIELE IHUNWO V. JOHNSON IHUNWO & ORS (2013) 8 NWLR PT.1357 PG.550 @555
2. AMINU ISHOLA INVESTMENT LTD V. AFRIBANK NIGERIA PLC (2013) 9 NWLR PT.1359 AT PG.380
3. DALEX NIG LTD V. OIL MINERAL PRODUCING AREAS DEVELOPMENT COMMISSION (2007) 7 NWLR PT.1033, PG.402
4. F. K CONSTRUCTION LTD VS. N.D.I.C (2013) 13 NWLR PT.1371 AT PG.393
5. SAIDU AHMMED & ORS V. CBN (2013) 2 NWLR PT.1339 PG 530
6. UBN V. AJABULE & ANOR (2011) LPELR-8239 (SC)

The plaintiff in their final written address, raised three issues for determination;

1. Whether having regard to the evidence led in this case, the Plaintiff is entitled to the grant of reliefs a, c, d and e as captured in the Writ of Summons of the Plaintiff?
2. Whether Mr. CahmirEbelechi, a personal assistant to the Managing director of the defendant company is a competent witness to testify in this proceeding?
3. Whether there is a valid counterclaim before the Court warranting consideration?

Arguing issue one, counsel submitted that the tenancy relationship is governed by the tenancy agreement and parties are bound by the terms therein as the Plaintiff has proved by sufficient uncontroverted evidence that the Defendant breached the terms by failing to pay rent and vacating the property upon termination of its tenancy, therefore, Plaintiff is entitled to the reliefs claimed as per the arrears or rent, mesne profit, cost and post judgment interest. Submitted that the Defendant has failed to defend the suit of the Plaintiff and has also failed to prove its counter claim.

On the 2nd issue raised, counsel submitted that the witness, not being a director, shareholder, secretary or having not executed the Agreement, is not a competent corporate witness to testify without a board resolution authorising him to so testify.

The Plaintiff'sCounsel on whether there is a valid counter claim in this suit submitted that the failure of the Defendant's witness to adopt its witness statement on oath in proof of its counter claim, there is no evidence in support of the purported counterclaim. Counsel urged the Court to grant the reliefs a, c, d and e of the Plaintiff's claim and dismiss the Defendant's counterclaim. Counsel relied on these authorities:

1. DICKSON & ANOR V. ASSAMUDO (2013) LPELR-20416 CA PG.30
2. CHEMIRON (INT'L) LIMITED V. STABILI VISIONI LIMITED (2018) LPELR-PP 15-17
3. OSAWARU V. EZEIRUKA (1978) 5-7 S.C
4. TOYOTA (NIG) LTD V. MICHELIN (NIG) LTD & ORS
5. ABEKE V. ODUNSI (2013) ALL FWLR (PT.697) 1797

6. CORPORATIVE DEVELOPMENT BANK OLC VS. JPOE GOLDAY CO LTD (2002) 14 NWLR (PT.688) 506
7. AIKI VS. IDOWU (2006) 9 NWLR (PT.984) P.50
8. ALALADE V. NATIONAL BANK OF NIGERIA LTD (1997) LPELR-5540 (CA)
9. OJO V. GHARORO (2006) LPELR-6239 (SC)
10. STB LTD V. INTERDRILL NIGERIA LTD (2006) LPELR-9848
11. OGBONNA V. A.G OF IMO STATE & ORS (1992) LPELR-2287
12. ONYENWE & ANOR V. ANAEJIONY (2014) LPELR-22495 (CA)
13. LADUNNI & ANOR V. WEMA BANK LTD & ANOR (2010) LPELR-4418

Replying on points of law on the competence of the Defence witness, the Claimant'sCounsel submitted that by Section 175 of the Evidence Act 2011, all persons shall be competent to testify save for those the Court considers not being able to understand the questions put to them for reason of age, disease or unsound mind, therefore the contention of the Plaintiff's counsel is misconceived.

On whether the Defendant abandoned its counter claim, the Defence Counsel submitted that the Plaintiff has showed anunserious attitude to the proceedings by not being attentive to note that the Defence witness adopted both witness statements on oath. Counsel urged the Court to dismiss the Plaintiff's case and uphold the case of the Defendant/counterclaimant.

I have gone through and considered the case of the plaintiffs, the defence and counter claim of the defendant as well as the reply to the statement of defence and counter claim.

The issues for determination in this case are:-

1. Whether the plaintiff has by a preponderance of evidence proved its case for entitlement to the reliefs sought in the statement of claim.
2. Whether the defendant has successfully established by credible evidence its entitlement to the counter claim before the court.

Before I delve into the issues for determination, I would first deal with the issue of the competence of the Defendant's witness and whether there is a valid counter claim in this suit.

The Plaintiff's counsel has urged on this court to hold that the Defendant's witness is not a competent witnessnot being the director, secretary or shareholder and having not been given the authority to testify through a board resolution.

The question that begs to be answered therefore is whether this witness can testify on behalf of the Defendant whoisa company. The Court in the case OF COMET S. A. NIG LTD VS. BABBIT NIG LTD (2001) 7 NWLR (pt.712) pg.442, 452 para. B, per Galadima JCA (as he then was) held that:

> *"Companies have no flesh and blood. Their existence is a mere legal abstraction. They must therefore, of necessity, act through their directors, managers and officials. Any official of a company well placed to have personal knowledge of any particular transaction in which a company is engaged can give evidence of such transaction."*

In this instant case, the Defendant's witness stated in his witness statement on oath that he was the Personal Assistant to the

Managing Director at the time of the transaction. He further stated that he has the instruction of the Managing director to testify on behalf of the Company. There is no law that a board resolution must be passed to authorise an official to testify on behalf of the Company. Having had the instruction of the Managing director, he is competent to testify by virtue of his position, that is, being the Personal Assistant. It is in evidence under cross examination that he was present during the execution of the tenancy agreement. Therefore, he would have the requisite information with respect to the transaction between the parties. The argument of the Plaintiff's counsel is misconceived as the Supreme Court in SALEH V B. O. N. LTD (2006) NWLR (Pt.976) 316 at 326 - 327 held that a company is a juristic person and can only act through its agents or servants. Consequently, any agent or servant can give evidence to establish any transaction entered into by a juristic personality. Even where the official giving the evidence is not the one who actually took part in the transaction on behalf of the company. Such evidence is nonetheless relevant and admissible and will not be discountenanced or rejected as hearsay evidence.Standing by the above authorities, I hold that the Defendant's sole witness is a competent witness.

On whether there is a valid counter claim before this court, the Plaintiff's counsel urged on this court to discountenance the counter claim of the defendant having not been adopted by its witness. The Courts and parties are bound by the proceedings of the Court and upon examination of the Court's record of the 10th day of June 2020, the Defence witness adopted two statements both dated 20th February 2020, one in defence of the Plaintiff's claim and the other in

support of the counter claim. I agree with the Defendant's Counsel that the Plaintiff's counsel failed to devote his complete attention to the proceeding of that date thereby failing to observe and note that the witness adopted his two statements on oath. The Defendant's witness, having adopted his statements on oath in support of the counterclaim, I therefore hold that there is a valid counter claim before this Court.

Now going into the crux of the matter, the first issue to be determined is "**Whether the plaintiff has by a preponderance of evidence proved its case for entitlement to the reliefs sought in the statement of claim."**

This issue will be dealt with in relation to the reliefs claimed by the Plaintiff and the law is well settled that a Plaintiff, must succeed on the strength of his own case and not on the weakness of the defence. The Plaintiff in proof of its case, called a sole witness who testified that the parties initially entered into a tenancy agreement for two years term certain for the sum of N10M per year and the Defendant paid the sum of N20M for 2014 to 2016. That upon the expiration of the term the Defendant sought to renew for another term 2016 to 2017 and paid the sum of N5M with the promise to pay the balance at a later time. That the Defendant, despite repeated demands to pay the rent, failed to accede and instead asked for a discount which the Plaintiff indulged by giving 10% of the remaining N5M left unpaid. That the Defendant dissatisfied with the 10% requested for 50% which was not accepted by the Plaintiff. That the Defendant failed to pay rent and has also failed to vacate the property. The Plaintiff

tendered the tenancy agreement, and several demand letters in proof of its case.

First dealing with the relief of the claimant urging the court to grant an order ejecting the Defendant and granting the Plaintiff possession of Plot 395A Eteng- Ogboli Crescent , Jabi Abuja (5) with five bedroom semi-detached Duplex (Wing B) with one room Guest Chalet with two rooms boys quarters and a swimming pool.There is undisputed fact before me that the Defendant has vacated the said property. The Defendant's witness particularly on the 13th of October 2020 when prompted by the Plaintiff's Counsel "***from 2016 till you left in 2020 you have only paid N5M of the rent?***The witness replied ***"Yes, because of the non-compliance of the Landlord to making the place habitable to run our business as contained in the tenancy agreement".***Also, the Plaintiff's Counsel on the 9th day of July 2020 informed this Court that the Defendant has vacated the demised premises.This is enough proof that the Defendant has vacated the premises. it will therefore be an academic exercise to determine this relief as the relief has been overtaken by event,more so, as it had been abandoned by the Plaintiff.

Now I will deal with the claim for arrears of rent and mesne profit simultaneously. The Court in the case of DEBS VS. CENICO NIGERIA LTD (1986) 3 NWLR Pt. 32 Pg. 846, Oputa JSC held thus:

> "*Rent is different from mesne profits. Rent is liquidated, mesne profits are not. Rent is operative during the subsistence of the tenancy, while mesne profits start to run when the tenancy expires and the tenant holds over."*

The Plaintiff in proof of its case, tendered the Tenancy Agreement admitted as Exhibit A2, which states the yearly sum payable as rent. This fact was not disputed by the Defendant that the amount to be paid as rent is the sum of N10,000,000.00 and that Defendant had paid N5m of the rent and the sum of N5m is left unpaid for the year 2016 to 2017. The Plaintiff also tendered Exhibit A3 which is a letter from Plaintiff's solicitor acknowledging the sum of N5,000,000,00 as rent for the period of 2016 to 2017 and also urging the Defendant to pay the outstanding sum. The Defendant, despite repeated demands failed to pay the rent on the grounds that Plaintiff failed to carry out repairs on the demised premises. The fact that the Defendant opted to renew his tenancy and even paid 5 million Naira as part rent is not disputed. However, what is in dispute is whether the Plaintiff is entitled to the balance left unpaid. The Defendant's refusal to pay the balance is on the ground that there are defects in the property which the landlord is obligated to fix as stated in the tenancy agreement and by that, requested for a discount of 50% which the Plaintiff has refused to indulge.

Parties are bound by the terms of their agreement. A cursory look at the agreement in page 3, paragraph 1 line 4-8 states:-

> *"N10m being rent paid for the second year shall be paid within 4 months of the execution of this agreement, to wit (24/1/15 certain) for which a U.B.A post-dated cheque has been issued by the tenant which the landlord hereby acknowledges; and subsequent rents shall be paid annually by the tenant without prejudice to the terms herein contained"*

The use of the word "without prejudice" throws the whole agreement in a different look. The Tenancy Agreement is for a term certain of 2 years, 24th September to 24th September 2016 (as stated in the agreement) at the rate of N10m per annum. In a tenancy for a term certain, it is for a fixed term; hence, the term effluxes upon the expiration of the 2 years. It is unchallenged that the tenancy agreement effluxed on the 24th of September 2016 having expired. The question at this point is whether subsequent rents/tenancy shall be subject to the terms of this agreement bearing in mind that it is boldly captured in the agreement that "**subsequent rents shall be paid annually by the tenant without prejudice to the terms of this agreement**". When the word "without prejudice" is inserted in a letter or a negotiation document, it simply means that facts as contained therein cannot be used against either of the parties concerned in a court of law. Section 196 of the Evidence Act 2011 states

> "*A statement in any document marked "without prejudice" made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceedings in proof of the matters stated in it".*

Although Section 196 of the Evidence Act as stated above merely mentions "negotiations" and "settlement", the "without prejudice" rule is an age long one in the legal profession. It is a general rule that a document marked "without prejudice" disqualifies such document from being admissible in evidence but there are exceptions to this

rule and this is well elucidated in the case of JADESIMI VS. EGBA (2003) 1 NWLR (PT.827) PG.1 Ratio 4 where the Court held:-

> *"Although the rule of evidence which bars the admission of statements made "without prejudice' in evidence is of common law origin, the statutory authority for its application in Nigeria is Section 25 of the Evidence Act. Consequently, in applying the rule, it is the provision of Section 25 of the Evidence Act that the Nigerian Court must use as a guide and not the principle of common law. The doctrine of "without prejudice" does not exist under our law independently of the provisions of Section 25 of the Evidence Act"*

Also, Section 26 of the Evidence Act 2011 states :-

> "*In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or in circumstances from which the Court infer that the parties agreed together that evidence of it should not be given."*

In this case, although the inclusion of the word "without prejudice" is not inserted in a settlement dispute, rather, it is inserted into a Tenancy Agreement duly executed by both parties, thus, by the provisions of Section 26 of the Evidence Act 2011, when parties agree that evidence of a particular admission shall be given in Court, it makes such evidence relevant. It is trite that parties are bound by the terms of their agreement. See the case of JERIC NIG LTD VS. UNION BANK NIG PLC (2008) 15 NWLR (Pt.691) Pg. 447 SC, where

the Apex Court held that where there is a valid contract agreement, parties must be held bound by the agreement and by all its terms and conditions. There should be no room for departure from what is stated thereon.

It is my view that parties are bound by the terms contained in the Tenancy Agreement, hence, the word "without prejudice" used in the context as stated above, simply connotes that after the effluxion of the term certain on the 24th of September 2016, subsequent rents are to be paid without recourse to the Tenancy Agreement as the Tenancy Agreement cannot be used against any of the parties in a Court of law and I so hold. Consequently, this Court will disregard the Tenancy agreement as it is no longer valid in respect of the Tenancy commencing from October 2016. It simply connotes therefore that the new rent of which Defendant paid a part payment of N5M is subject to the Recovery of Premises Act Cap 544 Laws of the Federationof Nigeria1999 applicable to FCT, as there is no longer a valid agreement before this Court governing the Tenancy between parties after the effluxion of the term certain.

TheClaimantis claiming for arrears of rent, mesne profit, N500,000.00 as cost of this suit and 10% interest on the judgment sum until the entire sum is liquidated. On the issue of arrears of rent, it is unchallenged by Defendant that the rent per annum is N10,000,000.00, it is also uncontroverted that the Defendant paid N5,000,000.00 out of the rent leaving a balance of N5,000,000.00 yet unpaid. Rent becomes in arrears when it is outstanding for more than the agreed period of the payment of rent. In a case for claim for arrears of rent, the landlord must prove that on the date he

commenced proceedings for possession in Court, not only was the rent lawfully due but also that it has not been paid. Hence, it is the duty of the tenant who is challenged for non-payment of rent to prove that he has paid his rent. See OSAWARU VS. EZEIRUKA (1978) 6/7 SC/35. Evidence before me points to the fact that Defendant is in arrears of rent of N5m from the September 2016 to September 2017 and I hereby HOLD that Claimant has proved its case and is entitled to arrears of rent from the Defendant more so, as Defendant admitted only paying N5m out of the N10m.

Claimant is also praying the Court for mesne profit at N833,000.00 monthly, from October 2017 until Defendant delivers possession of the demised premises. Mesne profit is the compensation which a tenant holding over is entitled to pay to the landlord. Thus, the measure of mesne profits is to a matter of evidence. From the facts before me, the Defendant continued in possession after the determination of the tenancy and refused to pay rent. Defendant in this suit has not denied that he did not pay rent or mesne profit to the Claimant after the expiration of his tenancy. The Defendant's Counsel on the 9th of July 2020, informed this Court that the Defendant has given up possession, when he stated that:-

> "***Our witness is absent. However, <u>Defendant has given up possession (vacated).</u> We had earlier written a letter requesting the Court to visit the locus.***"

Also, the Defendant's witness under cross-examination admitted that Defendant vacated the premises in 2020. I therefore hold that the

Claimant is entitled to mesne profit from October 2017 till the time Defendant vacated the premises being the 9th day of July 2020.

With respect to the second issue, which is, Whether the defendant has successfully established by credible evidence its entitlement to the counter claim before the court. The Defendant in this suit filed a counter claim claiming that the property was not in a tenantable and habitable condition when it rented, paid and executed an agreement for 2 years term certain. To this extent, the Defendant had gone ahead and made certain improvements on the demised premises, but the bad state of the building is allegedly so magnanimous that Defendant was only able to use about 40% of the premises as 60% was not in a good and habitable condition. It is worthy to note that the Defendant started complaining about the bad state of the property about 6 months into the Tenancy. To this extent, the rule of "Caveat Lessee comes to fore. The principle as proposed by DEVLIN .J. in ELDER VS. AUERBACH (1950) 1 KB 359, 374 states:-

> *"It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to have them"*

In essence, the principle of "Caveat Lessee" places a responsibility on the tenant to examine the premises and decide whether to take them or not. Once a tenant inspects, pays rent and assumes possession of a property, it is assumed that the property is fit for habitation, hence, the Defendant, having paid an initial rent of N20M and moved into the property, cannot do a turnaround and complain about the unhabitable state of the property as it is caught up with the rule of

"caveat lessee". Moreover, there is no proof before this court of the pre-tenancy state and post tenancy state of the premises for comparison. From the exhibits before this Court and evidence of parties, although Defendant started complaining heavily to claimant about the unhabitable state of the premises 6 months into the Tenancy nowhere did claimant acknowledge same but rather exhibit A7, which is a letter from Claimant's solicitors dated 17th May 2018 to Defendant is simply acknowledging receipt of the various complaints of the Defendant and considered the discounted rent Defendant was praying for and to this effect, Claimant gave Defendant a discount of 10% on its rent, which Defendant termed as unsatisfactory. Nowhere in all the exhibits before me does it prove that Claimant committed himself into re-imbursing Defendant for money expended on improvement neither did Claimant acknowledge the fact that the property was indeed in an unhabitable state when Defendant took over. Evaluating the Claimant's evidence in this regard, Claimant's witness gave evidence under cross-examination and stated that when he took over management of the premises, he indeed noticed wear and tear in the premises due to usage and that the Defendant pleaded for reduction of rent due to economic hardship, hence, claimant gave a 10% reduction of the N5M outstanding but that the Defendant insisted on 50% reduction. Defendant on the other hand, through its witness, gave evidence that six months into the tenancy, Defendant started complaining about the dilapidated state of the property and the unhabitable state of the property. Defendant relying heavily on clause 4 (b) and other relevant terms of the Tenancy agreement as a shield for paying only

N5M and also demanding a refund unfortunately, after the effluxion of the tenancy agreement and the advent of the new tenancy, Defendant can no longer rely on the tenancy agreement as it ceases to be valid.

It is trite that a tenant who makes improvements on a demised premises with the consent of his landlord is entitled to be compensated by the said landlord but such consent before it can be enforceable in Court, shall be in writing. When this is the case, the tenant is free to make any improvement in the premises and shall be so compensated at the end of his tenancy. The Court in the case of DIKE & ORS VS. ADUBA & ANOR (2016) LPELR-41035 (CA) Per Agim J.C.A in p.32 para A-B held as follows,

> *"This disentitlement of the tenant to claim compensation for improvements he carried out on the premises without the written consent of the landlord is prescribed in S.155 of the Landlord and Tenant Law, thusly, a tenant shall not be entitled to compensation in respect of any improvement, unless he has executed it with the previous consent in writing of the Landlord"*

Unfortunately, there is nothing before me to suggest that the Claimant/Landlord, gave his consent in writing to the improvement made by the tenant, particularly the construction of the water sumor as specified in the counter claim. The Counter claim of the Defendant fails in its entirety and I so hold.

Consequently, it is hereby ordered as follows:-

1. That the Defendant's counter claim hereby fails and consequently struck out for lack of merit.
2. That the Defendant is hereby ordered to pay forthwith to the Claimant the sum of N5,000,000.00 (five million Naira) being arrears of rent for the period of 24th September 2016 to September 2017.
3. That the Defendant is hereby ordered to pay mesne profit to the Claimant in the sum of N833,000 monthly from October 2017 until 9thJuly 2020 when the Defendant gave up possession.
4. 10% interest on judgment sum as claimed by the Claimant is hereby refused as a claim for interest is only feasible in a suit for recovery of liquidated debt. The judgment sum in this suit is a combination of the arrears of rent and mesne profit. Mesne profit is unliquidated as it is trite that mesne profit may be higher or lower than rent previously paid. Moreover, the Recovery of Premises Act Cap 544 Laws of the Federation of Nigeria1999 provides a special procedure for recovery of premises and only allows joinder of a claim for rent and mesne profit. It does not contemplate the joinder of interest nor general damages.
5. Cost is at the discretion of the Court and this Court would not be granting cost in this suit.

Parties: Defendant present. Plaintiff absent.

Appearances: Emmanuel Onuche, Esq., for the Plaintiff.C. O. Ogar, Esq., holding brief of S. N. Igbaji, Esq., for the Defendant.

HON. JUSTICE MODUPE R. OSHO-ADEBIYI
JUDGE
27TH JANUARY 2021