IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE ASMAU AKANBI – AKANBI

DELIVERED ON THE 26TH FEBRUARY 2021

SUIT NO: CV/97/18

RELIABLE INTEGRATED SERVICES LIMTED … PLAINTIFFS/APPLICANTS

AND

1. **OTUNBA TAIWO AYODELE**
2. **MR. OLADIPO OLORUNFEMI**

} **…….. DEFENDANT/RESPONDENT**

JUDGMENT

This matter was initially commenced via the undefended suit and upon the order of the court on the 12/12/19 transferring same to the ordinary cause list; both parties filed and exchanged pleadings.

The claimant filed the statement of claim and witness statement on oath on the 28/12/2019. The defendants filed their statement of defence on the 17/10/2020. The claimant further filed a reply to the statement of defence on the 5/2/2020.

Olotu Muritala, the Pw1 testified on behalf of the claimant on the 24/02/2020. It is the case of the claimant; a licensed money lender via exhibits A & B that the 1st defendant sometimes in August, 2017 applied for a loan facility from the claimant in the

sum of #40,000,000.00 via Exhibit C. The 2nd defendant guaranteed the loan on behalf of the 1st defendant via exhibit E.

The claimant approved and gave a loan in the sum of #18,000,000.00 to the 1st defendant on the 25th August 2017 via exhibit F. It is contained in exhibit F that the tenure of the loan is for one month and the interest per month is 9%; the value date of the loan is 25th September, 2017 and that late payment attracts 3.0% interest on the outstanding balance after the maturity date. The security used to guarantee the loan is;

1). Mercedes Benz E320 (Black Colour) Reg. No. RBCB 46 JT Chassis No: WDDHF8HB9AA112352

2) Honda Accord (White Colour) Reg. No. ABJ 795 LP Chassis No: IHGCR2F30DA142351

The 1st defendant and his guarantor failed to repay the loan as and when due. The claimant wrote a letter to the 1st defendant via exhibit F1. Furthermore, it is stated that the claimant's solicitors wrote the 1st defendant demand letters to settle his indebtedness with accrued interest and default penalty; that the claimant auctioned the Mercedes Benz with Reg. No. RBCB 46 JT Chassis No: WDDHF8HB9AA112352; that the Honda accord is yet to be auctioned as prospective buyers are bidding less than #2,000,000.00 for the car.

The following documents were admitted in evidence;

1. Money lenders certificate (form B) dated the 21/12/2016 as Exhibit A
2. Money lenders licence (form C) dated 21/12/2016 as exhibit B

3. Reliable integrated services ltd application form signed on the 21/8/2017 together with the photocopy of the drivers' licence as exhibit C
4. Change of ownership and purchase receipt dated 25th May, 2018 as exhibit D1 & D2 respectively
5. Letter of guarantee in the name of Oladipo Olorunfemi dated 21/8/2017 marked exhibit E
6. Letter of offer of #18,000,000.00 short term loan dated the 25th August 2017 marked as exhibit F
7. Documents tagged outstanding loan #22,860,00 signed for Reliable Integrated services ltd marked as exhibit F1
8. Re: Recovery of debt…notice of sale of collaterals to recover debt dated the 07/03/2018 admitted and marked as exhibit F2

The pw1 was cross examined by the defendants counsel.

The claimant's claims against the defendants are as follows:

1.The sum of #57,361,485.56 (Fifty Seven Million, Three Hundred and Sixty- One Thousand, Four Hundred and Eighty Five Naira Fifty six kobo) only being the outstanding indebtedness of the defendants to the claimant as at 25th September, 2018 arising from the loan facility granted by the claimant to the defendants at the 1st defendant's request in August, 2017.

2. Interest on the said #57,361,485.56 at the rate of 15% per annum from the date of the institution of this suit until judgment is delivered and 10% interest per annum on the judgment sum from the date of the delivery thereof until the liquidation thereof.

The defendants did not call any witness; they chose to rest their case on the claimant's case and matter was adjourned for the

adoption of final written addresses. The implication of a defendant resting his case on that of the claimant is as stated in the case of **OKPOKO *COMMUNITY BANK LTD & ANOR v. DR P. C. IGWE (2012) LPELR-19943(CA)*** *"In the instant case, at the close of the plaintiff's case (now respondent) the appellants did not testify, rather, they rested their case on that of the Respondent. In Newbreed Organisation Limited v. Erhomosele (supra) the Supreme Court held that where a defendant rests his case on that of the plaintiff, such a stance is a legal strategy and not a mistake. According to the Apex Court, the implication is that: (a) the defendant is stating that the plaintiff has not made out any case for the defendant to respond to; or (b) he admits the facts of the case as stated by the plaintiff, or (c) he has a complete defence in answer to the plaintiff's case. See also Agwocha v. Agwocha (2005) 1 NWLR (Pt. 906) 165, Akanbi v. Alao (1989) 3 NWLR (Pt. 108) 118 and NEPA v. Olagunju (2005) 3 NWLR (Pt.913) 602."*

Learned counsel for both parties filed and exchanged their final written addresses. Learned counsel for the claimant Nnamdi C. Nwachukwu Esq. settled a final written address for the claimant and same was filed on the 20/11/2020; he nominated a sole issue for determination, that is;

1. Whether the claimant has proved its case to be entitled to judgment in its favour in this suit

In the final address filed on behalf of the defendants on the 8/12/2020.Ali D. Zubairu Esq nominated two issues for determination to wit;

1. Whether this suit as initiated by the claimant is not statute barred and liable to be dismissed.

2. Whether from the state of pleading and the evidence adduced the claimant has proved its case to be entitled to judgment.

The claimant thereafter filed a reply to the defendants' final written address on the 15/12/2020.

I have carefully considered the written addresses of counsel as well as the issues formulated and I find it convenient to adopt the issues formulated by the defendants**.**

Issue one

Whether this suit as initiated by the claimant is not statute barred and liable to be dismissed

It is the submission of counsel to the defendants that recourse must be made to when the cause of action in this suit arose because time begins to run against a claimant for the purpose of limitation from the date the cause of action accrued and that in order to determine when the cause of action arose in a suit, the court is to refer to the writ of summons and statement of claim filed by a claimant. He referred the court to the cases of **BELLO V YUSUF [2019] 15 NWLR [PT 1695] 250 AT 270 PARAS A- C; MOBIL PRODUCING [NIG] UNLTD V DAVIDSON [2020] 7 NWLR [1722] 1 AT 27 PARAS D – H.** It is the argument of the defendants that by exhibit F the repayment of the loan granted on the 25/08/2017 was to be paid on the 25/09/2017; that in the statement of claim and the witness statement on oath of Pw1 [see paragraph 9 and 10] respectively, the Pw1 while being cross examined confirmed that the loan lapsed on the 25/8/2017. He further submits that this suit was initiated on the 5th November, 2018 a period of one year, one month and ten days from the date i.e. 25/9/2017 the cause of action arose; that the

suit is statute barred by the provision of **SECTION 32 OF THE MONEY LENDERS ACT. CAP 525 LAWS OF THE FCT NIGERIA**. He stated that the claimant ought to have filed this suit within one year from the 25/09/2017 when the cause of action arose and not thereafter; that the only condition stated in the Act that could have changed the cause of action from the 25/09/2017 to another date, would have been a written undertaking by the defendants to repay the claimant. He further referred the court to **ETIEMONE V APINA [2019] 15 NWLR [PT. 1696] P. 557 AT 585 PARAS A – D** to establish the fact that the provisions of the Money Lenders Act of the FCT is on all fours with the Section 28 of the Money Lenders Law Bayelsa State. He therefore urged the court to hold that by virtue of exhibit F the suit is statute barred and further urged the court to dismiss the suit. He placed reliance to the case of **IBENEME V BAYELSA STATE GOVT. [2020] 5 NWLR [PT. 1717] P. 202 PARA B**.

The claimant contends that the defendants' submission is grossly misconceived; that the claimant did not institute the action as a money lender. The claimant further stated that assuming without conceding that the action was so commenced, the defendants did not raise and plead that the suit is statute barred and also caught up with the Money Lenders Law of the FCT. The claimant referred to the case of **N.I.I.A V AYANFALU [2007] 2 NWLR PART 1018 PAGE 246 @ 263 PARAGRAPHS D – G. SEE ALSO FAJIM V LAGOS STATE TRAFFIC MANAGEMENT AUTHORITY [2015] 2 C. A. R PAGE 1 AT 19 – 20 PARAGRAPHS G – D** to buttress his submission that the defence of an action being statute barred under any limitation law is a special defence which must be specifically pleaded in the statement of defence.

He further stated that the case of **ETIEMONE V APINA [SUPRA]** relied on by the defendants counsel shows that the defendant in that case

specifically pleaded that the action of the plaintiff was statute barred under the Money Lenders Law of Bayelsa State; that the defendants in the instant case did not plead so. He further submits that the defendants didn't deny receipt and content of exhibits F1 and F2. He placed reliance in the case of **HASSAN V OBODOEZE & ORS [2012] LPELR 14355 @ 36 – 39 PARAGRAPHS C – A.** He submits that the exhibit F2 is dated the 7th March, 2018 whilst the suit was commenced on the 2nd November, 2018 and by way of calculation it is not up to 12 months as stated in the Money Lenders Act of Abuja.

Resolution

I have carefully considered the submissions of counsel on this issue; particularly the contention of the defendants that by virtue of s.32 of the Money Lenders Act the action commenced by the claimant against them is statute barred. The question I ask here is can the defendants raise the issue of limitation in their final written address? The answer is not farfetched and same shall be answered in due course.

In **ALHAJI JIMOH OMOTOSHO v. BANK OF THE NORTH LIMITED & ANOR (2006) LPELR-7580(CA)** generally, failure to determine the issue of limitation when raised is a grievous error. The question to be answered here is whether or not a party must plead the statute of limitation before it can rely on it. **Order 24 Rules 6(1) of the High Court Civil Procedure Rules Cap. 68 Laws of Kwara State** provides categorically as follows: **"6(1)** A party shall plead specifically any matter for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality - which, if not specifically pleaded might take the other party by surprise." (Italics mine.) The law is that a defence founded on

limitation can be raised in limine without evidence in support provided the dates of accrual of cause of action and filing of writ are disclosed in the writ of summons and statement of claim, See PN**. UDOH TRADING CO LTD. V. SUNDAY ABERE (2001) 11 NWLR (PT. 723) PG. 114**. Thus, in relation to proper pleading of the defence of limitation it is not necessary to plead more than the facts necessary to enable the court to hold that the action is statute barred. On the time and context of when the issue of limitation was raised by appellant's counsel, the fact that an action is statute barred is a matter of mixed fact and law. Address of counsel cannot be used to raise issues which do not emerge from the pleadings and evidence. See **ODUBEKO V. FOWLER (1993) 7 NWLR (PT.308) PG. 637**. In fact, it is improper to raise issues of fact in counsel's final address. See **BURAIMOH V. BAMGBOSE (1989) 3 NWLR (PT. 109) PG. 352**. Niki Tobi, J.C.A. as he then was in **AINU V. JINADU (1992) 4 NWLR (PT. 233) PG. 91 AT PG.110** said: "In order to determine whether an action is statute barred or not, the court must be involved in the exercise of calculation of years, months, and days to the minutest detail. It is really an arithmetic exercise, which needs a most accurate answer." From the above, it is clear that a trial judge can only make a finding on whether an action is statute barred after pleadings are filed, if the issue is raised in limine or after evidence based, if the pleadings have been led. See **SALAMI V. SAVANNAH BANK (1990) 2 NWLR (PT.13) PG. 106**. Learned appellant's counsel also submitted that the issue of limitation is a matter of law which affects the jurisdiction of the Court and which can be raised at any time and even for the first time on appeal. It is my humble view that an issue of jurisdiction which can be raised at any time even on appeal would be strictly a matter of law. An appellant will not ordinarily be allowed to raise

on appeal a question which was not raised, tried or considered by the trial Court, but where the question involves substantial points of law and it is plain that no further evidence would have been adduced which would affect the decision, the Court will allow it to prevent miscarriage of justice. "Where limitation of action is related to torts and contract (as in this case) it is an accepted principle that the statute of limitation is a defence which can be waived. To that extent it cannot strictly be said that an action taken outside the limitation period is incompetent for lack of jurisdiction of the Court. However, after the plea of limitation has been raised and established, the Court lacks jurisdiction to proceed further to determine other issues of merit in the case." (Italics mine) See **ARAKA V. EJEAGWU SUPRA AT PG. 718,** per Ayoola J.S.C. concurring with the leading judgment. Thus, the decision law is that the defence of limitation would affect the competence and jurisdiction of the Court only when the issue is raised by the defendant as a shield against litigation at the appropriate time. The answer to issue one is that a party must plead the statute of limitation in order to rely on it."

Furthermore, **ORDER 15R 7 HCR 2018** provides;

1) All grounds of defence or reply which makes an action unmaitainable or if not raised will take the opposing party by surprise or will raise issues of facts not arising out of the preceding pleadings shall be specifically pleaded.
2) Where a party raises any ground which makes a transaction void or voidable or such matters as fraud, limitation law, release, payment, performance, facts showing insufficiency in contract or illegality either by any enactment or by common law, he shall specifically plead it.

In the instant case as stated earlier the defendants filed their statement of defence but chose not to lead evidence; the defendants instead rested their case on that of the claimant. It is to be noted that the **ORDER 15 RULE 7(1) (2)** of this court is similar to the provisions of **ORDER 24 RULE 6 KWARA STATE HCR** which came up for interpretation in the case of ALHAJI JIMOH OMOTOSHO v. BANK OF THE NORTH LIMITED & ANOR [supra] . The issue of statute of limitation was raised for the first time by the defendants in their final written address. It is trite that address of counsel can neither take the place of evidence nor pleadings. I also agree with the claimant's counsel that the ***ETIEMONE'S CASE*** cited by the defendants does not support their case as evidence was led by the defence in ***ETIEMONE'S CASE***. The defendants here had the opportunity to either present their facts before the court and/ or raise the issue of limitation in limine; they however chose to abandon their processes; thus the defendants will therefore not be allowed to take the claimant by surprise, as they are deemed to have waived their right and I so hold.

The issue one is hereby resolved against the defendants and in favour of the claimant.

Issue Two

Whether from the state of pleading and the evidence adduced the claimant has proved its case to be entitled to judgment

It is the submission of counsel for the claimant that the defendants did not dispute the content of exhibits F1 and F2; that the defendants failed to respond to the documents. He relied on the cases **HASSAN V OBODOEZE [2012] LPELR- 14355; HAJIYA GAMBORUWA V**

ALHAJI ISMAILA BORNO [1997] 3 NWLR PART 495 PAGE 430 AT 543; AMAECHI V INEC & ORS [2008] LPELR 446 (SC)AT PAGE 179 PARAGRAPH A; MAGNUSSON V KOIKI & ORS [1993] LPELR 1818 (SC). Learned counsel to the claimant submits that the defendants filed a statement of defence, witness statement on oath, but did not lead the witness in evidence. He stated that a written statement on oath cannot be evidence unless it is adopted by the witness from the witness box. He cited the case of **SPLINTERS NIGERIA LTD V OASIS FINANCE LTD (2013) 18 NWLR (PT. 1385) PAGE 118, AT 226** to support the fact that defendant's witness statement on oath is deemed abandoned having failed or neglected to adopt same. Counsel to the claimant submits that the burden of proof placed on the claimant is based on the preponderance of evidence or balance of probability and urged the court to hold that the claimant has been proved its case.

Learned counsel for the defendants submits that in civil matters the ultimate burden of establishing a case is as disclosed on the pleadings and further submits that the person who would lose if on completion of pleadings no evidence is led on either side. He referred the court to **SECTION 133 (1) (2) EVIDENCE ACT; YUSUF V ADEGOKE (2007) 4 SC (PT 1) PAGE 126 AT 139**

It is the defendants' counsel argument that the transaction between the claimant and the defendants is governed by exhibit F. He urged the court to hold that exhibit F clearly states how the principal and accrued interest will be recovered from the defendants in case of default. He submits that parties are bound by the agreement they freely entered into; that the parties are bound by the express contents of exhibit F which supersedes exhibits F1 & F2; that exhibits F1 & F2 cannot vary or alter the contents of exhibit F. He urged the court to so hold. He referred

the court to **ABAA V EKE & ANOR (2015) LPELR 24370 (CA) P. 40-44 PARAS A-F**. He argued that the cars were deposited as security to be used to recover the principal and accrued interest in case of default; that from the express contents of exhibit F, the two cars were sufficient security which if sold could offset the principal and accrued interest; that there was no basis for the claimant to have sent exhibits F1 and F2 to the defendant. Counsel submits that the auctioneer of one the cars were not presented before the court. He referred the court to **BUHARI V OBASANJO (2005) 7 S.C [PT.1] PAGE 1 AT PAGE 38**. It is the view of the defendants' counsel that the claimant's arguments that the failure of the defendants to call or lead any evidence means they have admitted the position of the claimant. He submits further that the evidence elicited from pw1 were issues pleaded by the parties to this suit. He referred the court to **LAWAL V U.B.N PLC {1995} 2 NWLR [PT.378] P. 407 AT 430 PARAS B – F; INNTRACO UNIVERSAL SERVICES LTD V U.B.A PLC [SUPRA]** he submits that the evidence elicited during cross examination is potent. He urged the court to resolve the issue in favour of the defendants.

Learned counsel to the claimant submits that the defendants having failed to respond to exhibits F1 and F2, they are deemed to have accepted the contents stated therein. He referred to **HASSAN V OBODOEZE [SUPRA]** argued that the submission of the defendants' that exhibit F settles the loan transaction is misconceived. He submits that if that were to be so, the exhibit F wouldn't have made provision for the accrual of interest on the said facility upon the default to liquidate same. He submits that the defendant didn't deny the fact that the car was sold for #3.5 million, thus there was no need for the claimant to call the auctioneer as a witness. He cited the authority of **BAALO V FRN [2006]**

LPELR 40500 (SC) to state that what is admitted needs no further proof. Counsel further submits that the defendants were entitled to utilize the evidence elicited under cross examination; that the defendants reliance on the cases of **LAWAL V U.B.N PLC {1995} 2 NWLR [PT.378] P. 407 AT 430 PARAS B – F; INNTRACO UNIVERSAL SERVICES LTD V U.B.A PLC** is grossly misconceived. He submits that there is no reliable and compelling evidence procured from the cross examination of the claimant's witness. He urged the court to enter judgment for the claimant.

Resolution

It is the law that the standard of proof in civil cases is on the preponderance of evidence or balance of probabilities. After parties to an action have presented their cases to the Court, it is the duty of the Court to place such pieces of evidence on either side of the imaginary scale and see which side the balance tilts to.

Also by the provisions of Sections 131 - 134 of the Evidence Act 2011, the claimant in an action has the legal burden of establishing his claim. The onus probandi rests on him as he is the one who would fail if no evidence is led at all. It is only after the plaintiff has adduced sufficient credible evidence that the burden of proof would shift to the Defendant. **SEE BABATAYO & ANOR V OJILO & ANOR (2017) LPELR 43703 (CA).** Now, it does appear that there is no dispute over the loan given to the 1st defendant; exhibit F governs the transaction between the 1st defendant and claimant. The terms and conditions of the loan are stated therein. The law is trite regarding the bindingness of terms of agreement where parties voluntarily enter into an agreement and willingly too endorse the said terms, the agreement must be honoured, Courts of law being Courts of justice and conscience will certainly not

allow anything to be read into an express agreement, terms on which parties were not in agreement. See JALBAIT VENTURES NIGERIA LIMITED & ANOR v. UNITY BANK PLC (2016) LPELR-41625(CA)

From exhibit F, it is clear the 1st defendant received the loan of #18,000,000.00 from the claimant on the 25/8/2017; the tenure of the loan is for one month and interest on same is 9% per month. The repayment schedule of the loan is #19,620,000.00 and it is to be paid on 25th September 2017. The late repayment of the loan attracts 3% in addition to the existing interest. The 2nd defendant is stated as the personal guarantor. The security for the loan is

1). Mercedes Benz E320 (Black Colour) Reg. No. RBCB 46 JT Chassis No: WDDHF8HB9AA112352

2) Honda Accord (White Colour) Reg No. ABJ 795 LP Chassis No: IHGCR2F30DA142351.

It is further contained in exhibit F that where the 1st defendant is in default after 30 days, the collateral will be sold to recover the principal, accrued interest and default penalty; the principal sum is the #18,000,000.00 whilst the accrued interest is 9% of the loan sum; by exhibit F where the 1st defendant fails to pay, the claimant is entitled to 3% in default of the repayment of the loan. The content of exhibit F is clear and unambiguous. I find it pertinent to reproduce the repayment clause stated in exhibit F

Note after 30 days of default, the car stated above will be sold to recover the principal, accrued interest and default penalty.

Upon being cross examined by the defendants' counsel, the pw1 was asked:

Ques: it is not in dispute that before the defendants were granted the loan facility, they deposited two cars

Ans: yes; as part of collateral

Ques: show the court from exhibit F where it is stated as part of the collateral

Ans: it is not here

Going further Pw1 was asked

Ques: Exhibits D1 and D2 I would be correct to say that the claimant auctioned the cars by themselves

Ans: yes

Ques: is your company a licensed or registered auctioneer

Ans: we are not, but we gave it to somebody

Ques: so tell the court the name of the auctioneer who carried out the auction

Ans: I can't remember vividly the name of the company, but the name of the person that won the bidding is stated here

Ques: I would be correct to say that you appointed the auctioneer and not the court

Ans: yes

As stated earlier the onus of proving an allegation in civil cases is on the claimant and the onus does not shift until he has proved his claim on the preponderance of evidence and balance of probabilities. It is after the burden of proving the case has been

discharged in accordance with the above principle of law that the burden shifts and continues to shift.

The general burden of proof in civil cases lies on the party against whom judgment would be entered if no evidence was adduced by either party. He who asserts must prove. See ***BULLET INT'L (NIG) LTD & ANOR V OLANIYI & ANOR (2017) LPELR 42475 (SC)*** where it was held

"Whoever desires a court of law to give him judgment as to any legal right, dependent on the existence of facts he asserts, has the burden or onus of proving that those fact exist. Failure to prove or establish positively asserted facts leads to assumption, admittedly that those positively asserted facts do not in fact exist."

It is also trite that evidence elicited during the cross fire of cross examination is potent. On the issue as to whether both parties called evidence in support of their pleadings as held by the lower Court, it is settled law that evidence elicited from a party or his witness (es) under cross examination which goes to support the case of the party cross examining, constitute evidence in support of the case or defence of that party. If at the end of the day, the party cross examining decides not to call any witness, he can rely on the evidence elicited from cross examination in establishing his case or defence. In such a case, you cannot say that the party called no witness in support of his case or defence, not evidence, as the evidence elicited from his opponent under cross examination which is in support of his case or defence constitutes his evidence in the case. The exception is that the evidence so elicited under cross examination must be on facts pleaded by the party concerned for it to be relevant to the determination of the question/issue in controversy between the parties. See **EVA**

ANIKE AKOMOLAFE & ANOR v. GUARDIAN PRESS LIMITED (PRINTERS) & ORS (2010) LPELR-366(SC)

I am not unmindful of the fact that the defendant didn't lead evidence; however the failure to do so will not stop the claimant from proving his claims. The defendants' filed a statement of defence on the 17/10/2020 and stated interalia;

Paragraph 8: the defendants state that in compliance with the condition handed down by the claimant, the 1st defendant provided the 2nd defendant as his guarantor as well as two of his cars as the security/support for the loan to wit: 1). Mercedes Benz E320 (Black Colour) Reg. No. RBCB 46 JT Chassis No: WDDHF8HB9AA112352

3) Honda Accord (White Colour) Reg No. ABJ 795 LP Chassis No: IHGCR2F30DA142351

Paragraph 10: The defendants aver that, it was based on the success of the exercise conducted in the preceding paragraph and after the claimant was well satisfied that value of the two [2] will be sufficient to cover for the loan sum and accrued interest in the event of default before it now approved and granted the 1st defendant the sum of #18,000,000.00 as a short term loan which was lesser than the value of the two [2] cars

Paragraph 11: The defendants add that the loan was granted on the 25/8/2017 for a tenure of 30 days which was to mature on the 29/09/2017 and that the sum of #19,620,000.00 was to be paid by the 1st defendant which included principal, interest and other accrued charges.

Paragraphs 12: the defendants' state that it was also agreed that after 30 days of default i.e. from 25/10/2017 the two cars that the

1st defendant gave as security for the loan will be sold to recover the principal, accrued interest and default penalty as shown on the face of the offer letter which the 1st defendant consented and signed as follows: Note after 30 days of default, the car stated above will be sold to recover the principal, accrued interest and default penalty.

It is clear from the above paragraphs that the evidence elicited from the Pw1 are facts pleaded by the defendants in their statement of defence. It therefore shows that the defendants can legally rely on the evidence elicited without the need to call any witness and I so hold. See **EVA ANIKE AKOMOLAFE & ANOR v. GUARDIAN PRESS LIMITED (PRINTERS) & ORS [supra]**

I again bore you with what is expected of a claimant in civil cases the onus of proving an assertion is on the claimant and the onus does not shift until he has proved his claim on the preponderance of evidence and balance of probabilities. It is after the burden of proving the case has been discharged in accordance with the principle of law that the burden shifts and continues to shift. *"In civil cases the initial burden of proof is on the party who desires that Judgment be entered in his favour based on facts which he asserts to prove those facts as required by law…*SECTIONS **131, 132 AND 133 OF THE EVIDENCE ACT 2011**. *But the burden of proof in civil cases is not static; it shifts depending on the state of the pleading of the parties. See the case* of **BUHARI VS OBASANJO (2005) 7.S.C. PART II PAGE 123.** *The standard of proof in civil cases is on the balance of probabilities or preponderance of evidence*. See SECTION **134 OF THE EVIDENCE ACT 2011."**

The standards of proof in civil cases are discharged on the balance of probabilities or the preponderance of evidence. It is the duty of the court to weigh the evidence by placing it on an imaginary scale of justice before arriving at a decision. From what I can deduce from the evidence placed before the court as told by the Pw1, the burden is still on the claimant to prove that what is stated in exhibit F no longer exists between parties; having stated expressly in exhibit F the action to be taken in case the defendants default in the repayment of the loan. The loan in question was granted on the 25/8/2017 and it's for a period of one month; same became due on the 25th September, 2017 and in default of payment after 30 days parties agreed that the security used in granting the loan be sold to recover the principal, accrued interest and default penalty. It is therefore clear that parties agreed from the beginning to sell the collateral to offset the principal loan, accrued interest of 9% as well as 3% on the outstanding balance which is the default penalty; the 1st defendant defaulted in repayment of the loan when it became due, and as a result of the default the claimant was/is entitled to sell the security without recourse to the defendants. When or how the collateral will be sold, is no longer the business of the defendants! The question that also comes to mind here is, what was the basis of exhibits F1 and F2, when parties had already agreed via exhibit F that in the event of default the cars are to be sold to recover the principal loan, accrued interest and the default penalty, I cannot but agree with the argument of the defendants that the claims of the claimant is an afterthought, as there was no basis whatsoever for the claimant to have issued the exhibits F1 and F2 to the 1st defendant, having concluded the transaction. See exhibit F. Once terms of a contract are embodied in documents, the parties are presumed to intend what they have written down. The words used are given their ordinary and plain meaning. Neither the Court nor the parties can rewrite the contract or import words to vary the intentions of the parties as

written. **SOUTH TRUST BANK & ORS v. PHERANZY GAS LIMITED & ORS (2014) LPELR-22340(CA)**

As stated earlier, civil matters are decided on the preponderance of evidence or probabilities; a claimant must succeed on his own strength, even when no evidence was led by the other party. *See s.134 Evidence Act.* It is the duty of the trial Court to weigh the evidence of the parties on an imaginary scale of justice and give judgment to the side whose evidence weighs more. ***CATHERINE OKORIE v. EZUGBO CHUKWUDI (2013) LPELR-21203(CA),*** having placed the testimony of the Pw1 on the scale of evidence and justice, most importantly the exhibit F as well as the evidence elicited during the cross examination of the Pw1, I cannot deviate from same and at the risk of being repetitive, the pw1 under cross examination stated that the two cars were *part of the collateral* he however failed to present any other documentary evidence where parties agreed to some other security, probably what could have being the remaining part of the collateral are the cheques stated in exhibit E; the exhibit E which is the letter of guarantee signed by the 2nd defendant provides that the short term loan is in the sum of #40,000,000.00. Can exhibit E be the same loan referred to in exhibit F. certainly not! It is further stated in exhibit E that the guarantor agreed to be held responsible and also indemnify the claimant for the principal, accrued interest and any other expenses incurred to ensure repayment as contained in the offer letter. It further states that the 2nd defendant authorized the claimant to present the under listed cheques for settlement of the principal, accrued interest element and penalties in the event that the borrower failed to pay without recourse to him. The offer letter of #40,000,000.00 mentioned in exhibit E is not before the court; also on the face of exhibit E, the column where the bank and cheque details are to be stated is blank and no cheque was tendered and or admitted in this case. I find that no subsequent document varies the Exhibit F, which is the agreement between the parties.

It is now firmly settled that documentary evidence is the best evidence. It is the best proof of the contents of such a document, and no oral evidence will be allowed to discredit or contradict the contents thereof, except where fraud is pleaded. See **THE ATTORNEY GENERAL OF BENDEL STATE & ORS v. UNITED BANK FOR AFRICA LIMITED (1986) LPELR-3163(SC)**

Accordingly the second issue is resolved against the claimant in favour of the defendants.

On the whole, I hold that the claimant has failed to prove its case on the balance of probabilities. Judgment is hereby entered against the claimant. The claims of the Claimant are refused and the suit is hereby dismissed.

There is no order as to cost.

ASMAU AKANBI – YUSUF

(HON JUDGE)

APPEARANCES:

Nnamdi C.Nwachukwu Esq. for the Claimant.

A.O Zubairu, M. Akinluyi Esq. for the Defendant.