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

THIS THURSDAY, THE 1ST DAY OF APRIL, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/2637/2016

BETWEEN:

ETERNA PLC …….. CLAIMANT

AND

HYMSAR OIL LIMITED ……. DEFENDANT

JUDGMENT

By a Writ of Summons and Statement of Claim dated 30th September, 2016 and filed same date at the Court's Registry, the Plaintiff claims the following Reliefs against Defendant as follows:

a. **A Declaration that the Defendant is bound by contract to execute a fresh written lease agreement over all that property, more particularly described as a Petrol Filling and service Station together with its appurtenances situate at Plot 1031, Obafemi Awolowo Way, Utako District Abuja for another term of ten years, upon the same terms as the original lease agreement duly executed between the parties save for the stipulation as to the rent payable.**

b. An order of the Honourable Court directing specific performance of Clause 5 of the original lease agreement made between the parties and thereby compelling the Defendant accordingly, to execute a new lease agreement for another ten years, upon the terms of the original lease save for the rent already agreed and paid by the plaintiff.

c. An order of the Honourable Court imposing an injunction, restraining the Defendant whether by itself, its servants, Directors, Principal Officers, agents, solicitors, assigns or privies howsoever known, named, or described from further trespassing and, or erecting any structure or fixture on the demised premises at Plot 1031, Obafemi Awolowo Way, Utako District Abuja.

d. General Damages in the sum of N20, 000, 000. 00 (Twenty Million Naira) only against the Defendant for trespass as shown by the breach of the Defendant's Covenant to allow the Plaintiff quiet and peaceful possession and enjoyment of the demised premises.

e. Costs.

The Defendant filed an Amended Statement of Defence and set up a Counter-Claimant against Defendant on 9th November, 2018 as follows:

1. A Declaration that the failure of the Defendant to the Counter-Claimant to renew the lease agreement of 2005 at its expiration in August, 2015 rendered her renewal right under the lease, voidable.

2. A Declaration that there is no valid contract between the Counter-Claimant and the Defendant and that the Defendant is entitled to a refund of the sum of N200 Million paid by her after deduction of the mense profit by the Counter-Claimant.

3. An Order of Court directing the Defendant to pay an additional sum of N120 Million to the Counter-Claimant to complete the total sum of N320 Million being the acceptable lease Value of the property in issue by the Counter-Claimant or IN THE ALTERNATIVE

4. **An Order of Court directing the Defendant to vacate and hand over possession of the property in issue with the licence to the Counter-Claimant and take back the sum of N200 Million in possession of the Counter-Claimant after deduction of mense profit at the rate of N26.6 Million per annum till the date the Defendant hands over possession of the property together with the operating licence to the Counter-Claimant.**

5. **An Order for payment of the sum of N10, 000, 000 only as general damage for the inconveniences that the Defendant has caused the Counter-Claimant.**

The Plaintiff filed a Reply to the Defendants Amended statement of Defence and Counter-Claim on 23rd November, 2018.

Hearing then commenced. In proof of its case, the plaintiff called only one (1) witness **Saidu Usman Gajo**, the supply claims officer of plaintiff who testified as PW1. He deposed to two (2) witness depositions dated 30th September, 2016 and 13th March, 2017 which he adopted at the hearing. He tendered in evidence the following documents:

1. Lease Agreement between Hymsar Oil Ltd and Eterna Plc in respect of Plot 1031 Obafemi Awolowo Way, Cadastral Zone B5 Utako District Abuja was tendered and admitted as **Exhibit P1.**

2. Letter dated 18th February, 2015 by Eterna Plc to the Principal Partner Abubakar Usman and Associates was admitted as **Exhibit P2**.

3. Letter by the law firm, Sani Abubakar & Co. dated 31st August, 2005 to the M.D. of Eterna Plc was admitted as **Exhibit P3**.

4. Letter by Eterna Plc to the Principal Partner, Sani, Abubakar & Co. dated 21st December, 2015 together with the attached proposed lease renewal Agreement was admitted as **Exhibit P4**.

5. Letter by Eterna Plc to the Principal Partner Sani, Abubakar & Co. dated 9th February, 2016 with twenty (20) copies of cheques in the sum of N10, 000, 000 each were admitted as **Exhibit P5**.

6. Letter by defendant, Hymsar Oil Ltd dated 22nd March, 2016 to the M.D. Eterna Plc was admitted as **Exhibit P6**.

PW1 was then cross-examined by counsel to the defendant and with his evidence, the plaintiff closed its case.

On the part of the defendant, they also called one witness, Muhammad Y. Hussaini the Managing Director of Defendant who testified as DW1. He deposed to two (2) witness depositions dated 26th January, 2017 and 9th November, 2018 which he adopted at the trial in support of the defence and counter-claim. He tendered in evidence the following documents:

1. Letter by Eterna Plc to the Principal Partner Abubakar Usman & Associates dated 5th May, 2015 was admitted as **Exhibit D1**.

2. Letter by the law firm of Sani, Abubakar & Co. dated 13th July, 2015 to the M.D. Eterna Plc was admitted as **Exhibit D2**.

3. Letter by Eterna Plc to the Principal Partner Sani, Abubakar & Co. dated 23rd July, 2015 was admitted as **Exhibit D3**.

4. Letter by the law firm Sani, Abubakar & Co. to the M.D. Eterna Plc dated 27th July, 2015 was admitted as **Exhibit D4**.

5. Letter by Eterna Plc to the Principal Partner Sani, Abubakar & Co. dated 3rd August, 2015 was admitted as **Exhibit D5**.

6. Letter by the law firm of Idi Danabubakar & Co. dated 14th August, 2015 to Eterna Plc was admitted as **Exhibit D6**.

7. Letter by Eterna Plc dated 24th August, 2015 to the Principal Partner Idi Danabubakar & Co. was admitted as **Exhibit D7**.

8. Letter by the law firm Sani, Abubakar & Co. to the M.D. of Eterna Plc dated 7th October, 2015 was admitted as **Exhibit D8**.

9. Letter of appointment of new solicitors by Hymsar Oil Ltd to the M.D. of Eterna Plc was admitted as **Exhibit D9**.

10. Letter by law firm of Jimmy & Jimmy Associates to the M.D. Eterna Plc was admitted as **Exhibit D10**.

11. Letter by Total Nigeria Ltd to the M.D. of Hymsar Oil Ltd was admitted as **Exhibit D11**.

12. Copy of statement of account of Hymsar Oil Ltd with Jaiz Bank was admitted as **Exhibit D12**.

13. Letter by Agorchik (Nig.) Ltd to the M.D. of Hymsar Oil Ltd dated 2nd December, 2015 was admitted as **Exhibit D13**.

14. Letter by the law firm Jimmy & Jimmy Associates to the M.D. of Agorchik (Nig) ltd dated 16th December, 2015 was admitted as **Exhibit D14**.

15. Letter by Grace Links ltd to the M.D. of Hymsar Oil ltd dated 6th June, 2016 was admitted as **Exhibit D15**.

16. Letter by the law firm Jimmy & Jimmy Associates dated 6th June, 2016 to the M.D. of Grace Links Ltd was admitted as **Exhibit D16**.

17. Letter by Hymsar Oil ltd to the M.D. of Eterna Plc was admitted as **Exhibit D17**.

18. Letter by Hymsar Oil Ltd dated 22nd March, 2016 to the M.D. of Eterna Plc was admitted as **Exhibit D18**.

DW1 was cross-examined by counsel to the plaintiff and with his evidence, the defendant then closed its case.

At the close of the case, parties filed and exchanged final written addresses. The final address of defendant/counter-claimant is dated 13th January, 2020 and filed same date at the Court's registry. In the address, two (2) issues were raised as arising for determination:

1. **Whether from the pleadings and evidence adduced in this court, the plaintiff has established her case to be entitled to the Reliefs sought by her.**

2. **Whether the defendant has established her case in the counter-claim against the plaintiff to be entitled to the Reliefs sought by her.**

On the part of the plaintiff, the final address is dated 19th February, 2020 and filed on 20th February, 2020. Two (2) issues were equally raised as arising for determination:

1. **Whether the payment of the sum of N200, 000, 000.00 by the claimant which was accepted by the defendant, is tantamount to an agreement for a lease of the property for another term of ten years?**

2. **If the answer to the above is in the affirmative, whether the claimant is not thereby entitled to the Reliefs sought?**

Now there is no doubt that there is a claim and a counter claim in this case. It is trite law that for all intents and purposes, a counter claim is a separate, independent and distinct action and the counter claimant like the plaintiff in an action must prove their case against the person counter claimed before obtaining judgment on the counter-claim. See **Jeric Nig. Ltd V Union Bank (2001) 7 WRN 1 at 18, Prime Merchant Bank V Man-Mountain Co. (2000) 6WRN 130 at 134.**

In view of this settled position of the law, both the plaintiff and the defendant have the burden of proving their claim and counter-claim respectively. This being so, the issues formulated by the defendant/counter-claimant appear to have fully captured the essence of the issues that really require the most circumspect of consideration in this case. I shall however slightly modify the issues as framed by defendant as follows:

1. **Whether the plaintiff has proved its claims on a balance of probabilities to entitle them to any or all of the Reliefs sought.**

2. **Whether the defendant/counter-claimant has on a balance of probabilities proved its counter-claim and thus entitled to all or any of the Reliefs sought.**

The above issues are not raised as alternatives to the issues raised by parties, but the issues canvassed by parties can and shall be cumulatively considered under the above issues. See **Sanusi V Amoyegun (1992) 4 N.W.L.R (pt.237) 527.** The issues thus raised will be taken together as it has in the courts considered opinion brought out with sufficient clarity and focus, the pith of the contest which has been brought to court for adjudication.

Let me quickly make the point that it is now settled principle of general application that whatever course the pleadings take, an examination of them at the close of pleadings should show precisely what are the issues upon which parties must prepare and present their cases. At the conclusion of trial proper, the real issue(s) which the court would ultimately resolve manifest. Only an issue which is decisive in any case should be what is of concern to parties. Any other issue outside the confines of the critical or fundamental questions affecting the rights of parties will only have peripheral significance, if any. In **Overseas Construction Ltd V. Creek Enterprises Ltd &Anor (1985)3 N.W.L.R (pt13)407 at 418,** the Supreme Court instructively stated as follows:

"By and Large, every disputed question of fact is an issue. But in every case there is always the crucial and central issue which if decided in favour of the plaintiff will itself give him the right to the relief he claims subject of course to some other considerations arising from other subsidiary issues. If however the main issue is decided in favour of the defendant, then the plaintiff's case collapses and the defendant wins."

It is therefore guided by the above wise exhortation that I would proceed to determine this case based on the issues I have raised and also consider the evidence and submissions of counsel. In furtherance of the foregoing, I have carefully read

the final written addresses filed by parties. I will in the course of this judgment and where necessary make references to submissions made by counsel.

Now to the substance. I will take or treat the **two substantive questions** raised together because they are interconnected and having significant bearing on each other. This will then provide both factual and legal basis to determine the key questions of whether the reliefs sought by parties on both sides of the aisle are availing.

I had at the beginning of this judgment stated the **claim** and **counter-claim** of the parties. The facts, at least, the primary facts forming the basis of the relationship of parties are largely not in dispute. It is common ground that parties had a lease agreement vide **Exhibit P1** in respect of a **"filling station lying, situate and known as Plot 1031, Obafemi Awolowo Way Utako District, Abuja."** It is equally common ground that the lease agreement was for an initial period of 10 years and it commenced in the year 2005.

The dispute here and that is where parties have given contrasting narrative is with respect to what happened after the expiration of the initial lease Agreement. The crux of this dispute relates to whether there was a renewal of the lease or not. In addressing this critical question three (3) important questions immediately arise:

1. **What is the precise import of the clause in the original lease agreement with respect to a renewal?**

2. **Did the parties activate the clause and comply with the renewal provision of the initial lease agreement, and;**

3. **Did the parties agree to a new lease agreement and what are the terms of this agreement?**

The case of the plaintiff is simply that it has complied with the terms of the initial lease agreement and had exercised its option to renew the lease and made payments and accordingly that the defendant is bound to execute a fresh lease agreement over the property.

On the other side of the aisle, the case of defendant stated simply is that the plaintiff did not clearly exercise its option to renew the initial lease agreement as provided for in the agreement as the plaintiff did not agree to and meet the rental demands of defendant. Further that the initial lease agreement had since lapsed and no new lease agreement was agreed to or executed by parties.

As already alluded to, it is now imperative to situate the lease agreement, the ambit and or remit of same and its application. It is therefore to the pleadings which has streamlined the facts and issues in dispute and the evidence that we must now beam a critical judicial search light in resolving these contested assertions.

In this case, the plaintiff filed a twenty four (24) paragraphs statement of claim which forms part of the Records of Court. I shall refer to specific paragraphs where necessary to underscore any relevant point. The evidence of their sole witness is largely within the structure of the pleadings.

The defendant on its part filed a copious eighteen (18) paragraphs and fifty (50) paragraphs Amended statement of defence and Counter-Claim joining issues with the plaintiff. I shall equally refer to relevant paragraphs where necessary. The evidence of the Managing Director and sole witness for the defendant/counter-claimant were equally largely within the structure of the defence and counter-claim.

I shall in this judgment deliberately and *in extenso* refer to the above pleadings of parties as it has clearly streamlined or delineated the issues subject of the extant inquiry. The importance of parties' pleadings need not be over-emphasised because the attention of court as well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings and ultimately the quality and probative value of the evidence led in support.

Before going into the merits, let me state some relevant principles that will guide our evaluation of the evidence led by parties. It is settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those

facts exist. **Section 131(1) Evidence Act.** By the provision of **Section 132 Evidence Act**, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations.

1. The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;

2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was

adduced. See **Section 133(2) of the Evidence Act.** It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

Let me also equally here situate the import of **Declaratory Reliefs** which (1) forms the fulcrum of Relief (1) of the plaintiff's claims and on which other Reliefs sought have significant bearing and, (2) forms also the fulcrum of Reliefs (1) and (2) of the Defendant/Counter-claimants claims and on which the other reliefs sought by them similarly have important bearing.

In law Declarations are in the nature of special claims or reliefs to which the ordinary rules of pleadings particularly on admissions have no application. It is therefore incumbent on the party claiming the declaration to satisfy the court by credible evidence that he is entitled to the declaration. See **Vincent Bello V. Magnus Eweka (1981) 1 SC 101 at 182; Sorungbe V. Omotunwase (1988)3 N.S.C.C (vol.10)252 at 262.**

The point to underscore is that it would be futile when a declaratory relief is sought to seek refuge on the stance or position of parties in their pleadings. The court must be put in a commanding position by credible and convincing evidence at the hearing of the claimants' entitlement to the declaratory relief(s).

Now a convenient starting point is to understand the precise situational basis that underpins the relationship of parties and this is where the initial **lease agreement Exhibit P1** on which both sides have anchored submissions in support of the case made out comes into play.

It is important to state here that parties have vide this **Exhibit P1**, a precisely streamlined lease Agreement for a period of ten (10) years commencing sometime in 2005. This document ordinarily provides the fulcrum or basis for the mutual Reciprocity of legal obligations as between the parties and our attention will shortly be focused on it, particularly the **renewal clause**.

I will shortly determine the import and parameters of the agreement and the attendant relevant clauses but it is the law that in construction of agreements or contracts such as **Exhibit P1**, the duty of court is to carefully construe the terms of the agreement so as to discover the intention of parties in the event of an action

arising therefrom. See **Ajay Ltd V AMS Ltd (2003) 7 N.W.L.R (pt.820) 577 at 634 A-D.**

By virtue of **Section 128 (1) of the Evidence Act**, oral evidence would not be admitted to prove, vary, alter or add to the terms of any contract which has been reduced into writing when the document is in existence except the document itself. See **Scoa .V. Bondex Ltd (1991) N.W.L.R (pt.138) 389 F-G.**

Now on the pleadings and evidence, and as already alluded to, parties entered into a lease Agreement over a filling station situate at Plot 1031, Obafemi Awolowo Way, Utako District Abuja. The Lease Agreement clearly apart from stating the year 2005 did not situate a particular commencement date. It is important to point out, even if parties did not make it a decisive issue on which the case turns, that one of the essential elements of a lease is that it should have a certain term, meaning that the lease must grant a definite term; the duration which is made up of the commencement date and the expiration date of the lease must exist or be streamlined. Indeed it is advisable that the commencement and expiration dates be expressly stated as a lease cannot enure in perpetuity. See **UBA V Tejumola & Sons Ltd (1988) 2 NWLR (pt.79) 662**.

Where the commencement of a lease is expressly stated in the lease, there won't be any difficulty in determining date of commencement. Where there is no commencement, date, authorities appear to donate the position that the commencement date can be reasonably inferred from the words used in the instrument creating the lease and the circumstances of each case. See **Okechukwu V Onuorah (2001) FWLR (pt.33) 219; Bosah V Oji (2002) 6 NWLR (pt.762) 137**. I leave it at that.

Now in paragraph 2 of the statement of claim, the plaintiff averred that the agreement was to take effect from 1st September, 2005. The defendant on the other hand contends in paragraph 4 of its defence that the Agreement took effect in August 2005.

In evidence and contrary to the pleadings of plaintiff, the documentary evidence tendered by them contradicts the position donated in their pleadings that the lease agreement took effect on 1st September, 2005 and lends credence more to the case

made by defendant that the commencement date of the lease agreement was in August 2005.

In Exhibit P2, written by plaintiff dated 18th February, 2015 when they wanted to activate the renewal clause of the lease agreement, the plaintiff unequivocally stated that the lease agreement between parties **"commenced on 31st day of August, 2005 …"**

Indeed even when parties were exchanging correspondence with respect to the rent per annum for the leased property, the plaintiff in its letter dated 23rd July, 2015 vide **Exhibit D3** indicated that payment for the rent will be made "not later than 31st August, 2015." clearly in my view taking cognizance of the commencement date.

It is also relevant to here refer to **Exhibit D2** written by solicitors to the defendant during the period of fresh negotiations for rent of the new lease agreement wherein they clearly stated that if the new rent proposed by defendant was not acceptable, that they should "hand over possession of the filling station to us on or before the 31st August, 2015" again here taking cognizance of when the initial lease agreement commenced.

On the basis of these documents of parties and more consistent with the case made by defendant, I find and hold that the lease agreement commenced on "31st day of August, 2005" for a period of ten (10) years.

On the pleadings and evidence, it would appear that parties fully enjoyed the benefits of this relationship which then prompted the plaintiff to exercise its option to renew the lease agreement as provided under clause 5 as follows:

"5. The Lessee shall have an option to renew the lease hereby granted for a further term of ten (10) years at an annual rent/terms to be agreed upon by the parties upon the Lessee giving six (6) months notice in writing to the Lessor of their intention to renew the lease provided that at the time of such notice there shall be no existing breach or non observance of any covenant on the part of the Lessee to herein before contained."

The above **clause** is clear and self explanatory. The **lessee** by the above clause is at liberty to renew the lease agreement for a further term of ten (10) years on the following conditions:

1. At an annual rent/terms to be **agreed** upon by parties;

2. Upon the lessee giving six months notice in writing to the lessor of their intention to renew the lease provided that at the time of such notice, there shall be no existing breach or non observance of any covenant on the part of the lessee.

I will return to the pleadings and evidence shortly to situate compliance with the clear mandate of **Clause 5** but it is important to again underscore the point that the court treats as sacrosanct the terms of agreement including clause 5 of Exhibit P1. This is because parties to a contract enjoy their freedom to contract on their own terms so long as same is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitute the contract are invariably the guide to its interpretation. When parties enter into a contract, they are bound by the terms of the parties. The court, however, has a duty to construe the surrounding circumstances including written or oral statement so as to discover the intention of the parties. See **BFI Group Corp V. BPE (2012) 18 NWLR (pt.1332) p.209 (SC). See also Afrotec Tech. Services (Nig.) Ltd V M.I.A. & Sons Ltd. (2003) 15 NWLR (pt.844) 545.**

Now back to requirements of **clause 5**. I start with the second condition. In this case on the pleadings and evidence, the plaintiff elected or chose to exercise its option to renew when it wrote the letter dated **18th February, 2015 vide Exhibit P2** giving the six (6) months notice in writing to defendant of its intention to renew the lease Agreement. The defendant in paragraph 7 of the Amended defence averred that the option to renew was exercised after the expiration of the lease Agreement in "glaring violation of Clause 5." It is difficult to situate the value of this averment. If the tenancy Agreement commenced on 31st August, 2005 for a period of ten (10) years, it meant the lease would end on or about 31st August, 2015. It is therefore difficult to situate how the notice vide Exhibit P2 given in

February 2015 can be said to be given after the lease Agreement had expired or in violation of clause 5. If there was any breach with respect to giving of the notice as envisioned under the lease Agreement, there is no evidence to that effect by the defendant.

Indeed it is logical to hold and I so hold that it was because, the plaintiff exercised its option to renew the lease and there was no breach that the defendant then entered into fresh on new negotiations with respect to rent and terms preparatory to the entering into a new lease Agreement over the Filling Station.

The **second condition** of the mandate covered by **clause 5** earlier streamlined was therefore met by the plaintiff. I now come to the critical aspect of the mandate of clause 5 which has to do with **agreement** on rent and terms. There is no doubt that while the plaintiff has the option to give notice of intention to renew the lease Agreement, clause 5 makes it abundantly clear that the **rent and terms** has to be a product of Agreement of both parties. Let me quickly add here that a leasehold relationship or interest exist between two or more parties where one party gives out or lets out his property to another person to use for a period and usually, though not always, in consideration of payment of rent. It is a contract for the exclusive possession and profit **of land** for some definite period. See **Prudential Assurance Co. Ltd V. London Residuary Body (1992) 2 AC 286**. In a lease, the consideration flowing from the Lessor to the Lessee is the demised premises. The consideration paid by the Lessee is the rent and the observance of any condition or covenant in the lease. The title to the land is not conveyed, only the use and occupation of the property is in issue; the property reverts back to the Lessor after the expiration of the term. This feature is significant for it distinguishes a lease from a freehold which is characterized by uncertainty of term; it is essential in leases that the term is certain. The right of the Lessor to the reversion of the demised premises is essential because if the intention is to absolutely transfer the interest, it will amount to an assignment and not a lease.

The question here is whether parties reached such an agreement within the purview of Clause 5 within a reasonable time frame. Parties on the pleadings have taken contrasting positions with respect to whether there was an agreement on these critical elements of rent and terms to govern the new lease Agreement.

Indeed Parties on the pleadings and evidence traded blames with respect to compliance with this clause 5 and tendered surfeit of documents to support their narrative. The plaintiff averred that an agreement was eventually reached and attributed the delay to the actions of defendant. The defendant countered otherwise contending that no agreement was reached at all as the plaintiff was not interested or serious in agreeing to terms and the new rent as proposed by defendant.

Now in law, where a surfeit of documents are tendered on a particular subject as in this case, the best way of determining the intention of parties is to carefully scrutinize the documents together especially in this case where the transaction appear long drawn out. This is what I intend doing here. I find support for this in the decision of **Royal Exchange Assurance Nig. Ltd & Ors V Aswani Textile Industries Ltd (1991) 2 N.W.L.R. (pt.176) 639 at 669 D** where it was stated thus:

> ***"Where documents form part of a long drawn transaction, such as in the instant case, they should be interpreted not in isolation but in the context of the totality of the transaction in order to fully appreciate their legal purport and import. That is the only way to find out and determine the real intention of the parties. A restrictive and restricted interpretation which does not take cognisance of the total package of the transaction in which the documents are integral part cannot meet the justice of the case"***

In this case, as already alluded to, a fair resolution of this case must involve carefully examining the documents tendered in the context of the entire trajectory of the narrative of the transaction to fully appreciate their legal purport and to enable a proper discernment of the intention of parties.

Now by **Exhibit P2**, the plaintiff may have exercised the option to renew the lease agreement but recognising that the defendant has to concur and agree to this new agreement, they clearly indicated in the letter **"please revert as you deem fit"** situating this new reality.

As stated earlier, I will here extensively consider the entire circumstances surrounding the transaction and in particular the documentary evidence tendered. It is trite law that Documentary evidence makes oral evidence more compelling. Indeed where documentary evidence supports oral evidence, oral evidence

becomes more credible. This is so because documentary evidence serves as a hanger from which to assess oral testimony. See **Mil. Gov. Lagos V Adeyiga (2012) 5 NWLR (pt.1293) 291; Kimdey V Mil. Gov. Gongola State (1988) 2 NWLR (pt.77) 445**.

Now on the evidence, it is clear by **Exhibit D1** dated 5th May, 2015 that the plaintiff in response to a letter by the defendant dated 9th March, 2015 proposed **"... a rent of N10, 000, 000 (Ten Million Naira)"** per annum totalling the sum of N100, 000, 000 (One Hundred Million Naira) as rent for the next ten (10) years.

The Defendant clearly did not accept this proposal and made a counter offer on rent and by letter dated **13th July, 2015, vide Exhibit D2**, the plaintiff was informed that since it has not responded to the proposed rent of defendant, that it should hand over possession of the filling station on or before 31st August, 2015. Indeed in this letter, the plaintiff was informed that defendant has commenced negotiations with other interested companies.

By **Exhibit D3**, dated 23rd July, 2015, the plaintiff increased the offer of rent to N15, 000, 000 (Fifteen Million Naira) per annum which the plaintiff indicated will be paid not later than 31st August, 2015, if accepted. The defendant rejected this offer vide **Exhibit D4** dated 27th July, 2015 and made a counter offer of N20, 000, 000 (Twenty Million Naira) per annum as the **"minimum acceptable rent".**

There is nothing on the pleadings and evidence **situating** that the plaintiff accepted **this offer** by defendant during the subsistence of the existing original ten (10) years lease Agreement from 31st August, 2005 to 31st August, 2015 and in compliance with the dictates of clause 5 of the Agreement. What is clear on the evidence is that by **Exhibit D5** dated 3rd August, 2015, written by plaintiff with just days to the end of the initial lease agreement, they had not decided on whether to accept the terms proposed by defendant. In this letter, they stated that **there "Managing Director/C.E.O (Mr. Mahmud Tukur) is out of the country at the moment. We will arrange for a meeting to discuss further on the subject immediately upon his arrival."**

The defendant in the letter in response to Exhibit D5 written by its solicitors dated 14th August, 2015 vide **Exhibit D6** made it clear that the lease agreement of

plaintiff ended in August and gave the plaintiff a further **seven (7) days** to agree to its proposal, failing which it would accept other offers. The plaintiff on the evidence did not respond or accept the proposal of defendant as requested.

On the part of the defendant, there was no equivocation with respect to what they wanted and this they made clear.

Indeed by **Exhibit P3** tendered by the plaintiff dated 31st August, 2015, a date the original lease Agreement ended by effluxion of time, the defendants solicitors conveyed to plaintiff that the defendant did not accept the N16, 000, 000 (Sixteen Million Naira) offer of rent made by plaintiff and instead insisted on N20, 000, 000 as rent per annum because of the long relationship, notwithstanding the competing offers it had at higher sums of N23, 000, 000 (Twenty three Million Naira) and N22, 000, 000 (Twenty Two Million Naira) from prospective tenants. The plaintiff was then urged to **"confirm interest to enable us furnish you with the Bank details of our client."**

The clear implication or deduction to be made from these documents is that parties have not agreed or reached an agreement relating to critical elements or requirements of clause 5 with particular respect to rent and terms of the lease and the said clause 5 was by implication legally and factually overtaken by events at the end of the lease agreement. Yes, the plaintiff may have indicated or exercised the option to renew, but parties clearly did not agree on the annual rent/terms for the new lease agreement. **Clause 5** strictly speaking at that point will no longer be **operative** since the original lease had ended except of course by evidence parties agree otherwise. There is no such clear evidence before this court.

This Lease Agreement Exhibit P1 therefore became spent or ended when the ten (10) years lease agreement came to an end by effluxion of time on **31st August, 2015** and the plaintiff was then expected to yield up possession of the premises, since there was no renewal of rent pursuant to clause 5. Indeed **clause 10** of the lease agreement, Exhibit P1 makes this abundantly clear thus:

"The lessee shall at the end or determination of this lease yield up possession off the petrol service filling station to the lessor in good and tenantable condition, all wears and tears excepted" (underlining supplied).

The above clause is clear and unambiguous. Two words are of interest here. First is the word **shall** which is a mandatory word or a word of command. It denotes obligation and gives no room to discretion. See **Environmental Development Const. & Anor V Umara Associates Nigeria (2000) 4 NWLR (pt.652) 293 at 303**.

The second word is **"or"** which is prima facie and in the absence of some restraining context to be read as disjuncture. Put another way, the word 'or' is a disjuncture participle used to express an alternative or to give a choice among two or more things. See **Abia State University V Anyaibe (1996) 3 NWLR (Pt.439) 646 at 661; Savannah Bank Nig. Ltd V Starite Industries Overseas Corp. (2001) 1 NWLR (pt.693) 194 at 211**.

In this case, the plaintiff was expected clearly in the light of the failure to reach an agreement on renewal of the lease in line with clause 5 to immediately yield up possession when the lease Agreement ended on **31st August, 2015** in line with clear mandate of clause 10.

The plaintiff on the evidence clearly did not yield up possession as required by clause 10 but there is no dispute or doubt on the evidence that as at **31st August, 2015** the initial 10 years tenancy had lapsed or is spent inclusive of the lease Agreement, **Exhibit P1**. At the risk of prolixity, parties clearly had therefore not reached any agreement to renew the lease Agreement pursuant to **clause 5** of the lease Agreement before it lapsed on 31st August, 2015.

The defendant then through its solicitors demanded for vacant possession of the filling station in its letter dated 7th October, 2015 vide **Exhibit D8**. This Exhibit made it clear that the **"lease Agreement"** between parties **"has since expired"**.

The point to underscore is that a **lease agreement** of this nature must be a product of agreement of parties. Courts do not have jurisdiction to make contracts for parties. Any Agreement must be a product of freewill. It is a fundamental principle of law that parties to any agreement must reach a consensus adidem as regards the terms of conditions for a contract to be regarded as legally binding and enforceable.

In this case as I have demonstrated, from when plaintiff expressed its intention to renew the lease agreement vide clause 5 of Exhibit P1 in February, 2015 till the lease agreement ended in 31st August, 2015, the minds of parties in this case clearly never met at the same point with respect to the rent and terms. They clearly were saying different things at different times which indicates clearly that they are not adidem and no valid contract could thus be formed in such circumstances till the expiration of the lease Agreement.

Now what is interesting here is that months after the **expiration** of the **initial lease** Agreement, the plaintiff would appear to have made a fresh offer of N18, 000, 000 (Eighteen Million Naira) which were rejected by defendant in its solicitors letter dated 25th November, 2015 vide **Exhibit D10** and a specific time frame was then given to the plaintiff to agree and pay the N20, 000, 000 (Twenty Million Naira) per year earlier proposed by defendant and long before the initial lease agreement expired.

Perhaps let me allow the letter speak for itself thus:

"…Further note that your offer of N18 Million per year for renewal of the Filling Station has equally been communicated to our Client. We have been mandated to state unequivocally that the N20 Million per year earlier demanded by our Client still stands, and if the said amount is not agreed upon and paid within 7 days from receipt of this letter, your renewal right under the expired lease shall extinct irredeemably."

Again the plaintiff did not agree or accept this proposal or respond to this letter or indeed make any payments within the **7 days time frame** suggested by defendant. This offer accordingly also lapsed since there was no clear acceptance.

Now on the evidence, the plaintiff then on **21st December, 2015 vide Exhibit P4** sought to now accept rather belatedly the spent offer long made to it. This is what the letter says:

"… This letter serves to formally accept your client's offer of N20, 000, 000 (Twenty Million Naira) per annum for lease of the above referenced property for a duration of 10 years.

As a sign of our commitment to closing out the issue, we have attached two cheques with a combined value of N20, 000, 000 (Twenty Million Naira) being payment of rent for the current year.

We have also attached the proposed Lease Renewal Agreement for your attention. The balance sum of N180, 000, 000 (One Hundred and Eighty Million Naira) will be paid upon receipt of the executed Lease Renewal Agreement."

In the context of the clear trajectory of the facts of this case, that I have evaluated in detail, this letter properly viewed and understood cannot be legally construed as an acceptance of any offer by defendant. As stated severally, **clause 5** no longer has any application since the lease Agreement has since lapsed. This acceptance did not meet with the clear time frames either within the context of the spent **clause 5** or the first **7 days** defendant gave vide Exhibit D6 for the plaintiff to accept the offer made or even the further additional 7 days given again to the plaintiff long after the tenancy had expired vide **Exhibit D10**. Most importantly, this letter only attached two cheques of **N20, 000, 000** payment for only one year instead of **N200, 000, 000** demanded for 10 years. The letter stated that the balance of N180, 000, 000 will be paid on receipt of the executed lease Renewal Agreement.

The point I am trying to make here is that **Exhibit P4** is clearly and undoubtedly a new offer to defendant and has no legal nexus with the earlier lapsed lease Agreement. The proposed new lease Agreement attached by plaintiff to this letter accentuates this position. The defendant clearly rejected this offer and this is underscored by the fact that about two (2) months later, the **plaintiff forwarded vide Exhibit P5 dated 9th February, 2016** cheques in the sum of N200, 000, 000 instead of the earlier staggered payments proposed by them made vide **Exhibit P4**.

Again even in the said Exhibit P5, the plaintiff stated as follows:

"…we look forward to receiving your Reply to execute the lease renewal Agreement."

In response to the above letter, the defendant in **Exhibit P6 or D18** dated 22nd March, 2016 stated as follows and I will quote the letter at some length thus:

"RE: LEASE OF FILLING STATION AT PLOT 1031, OBAFEMI AWOLOWO WAY, UTAKO DISTRICT, ABUJA

We write to acknowledge receipt of the sum of N200 Million for the lease of the Filling Station described above.

Kindly be informed that the prevalent lease value of the Filling Station within the neighbourhood is N250 Million. Having delayed the renewal of your lease and same having been effectively terminated by our Solicitor's letter to you dated 25th November, 2015, we wish to notify you that we have accepted the deposit of N200 Million made by you on the following terms:

1. **That the balance of N50 Million be paid to us within one month from the receipt of this letter failing which, we shall be compelled to increase the lease to N270 Million or such higher sum as would reflect the prevalent price of lease of Filling Stations within the neighbourhood or District.**

2. **A new Lease Agreement (copy attached) be signed between your Company and ours within two weeks of receipt of this letter failing, which you shall hand over possession of the Filling Station and have your money refunded after appropriate deductions have been made for the period you have overstayed.**

Please note very importantly that the terms and conditions of the attached Lease Agreement are not negotiable and shall be observed strictly. Where you, for any reason, do not subscribe to the terms and conditions in the agreement, you are at liberty to vacate the Filling Station and have your money refunded on pro rata basis as aforesaid."

The above letter again is **clear and donates** unequivocally that the defendant did not accept the **N200, 000, 000** as rent for the filling station made by the plaintiff for reasons clearly indicated in the letter above.

As repeatedly stated in this judgment, courts cannot make or force contractual terms on parties. Generally in law, a contract is an **agreement** between two or more parties which creates reciprocal legal obligations to do or not to do a

particular thing. To bring a contract to fruition where parties to the contract confer rights and liabilities on themselves, there must be mutual consent and usually this finds expression in the twin principles of offer and acceptance. The offer is the expression of readiness to contract on terms as expressed by the offeror and which if accepted by offeree gives rise to a binding contract.

It should be pointed out clearly that the offer itself is not the contract in law but the taking of preliminary steps that may or may not ultimately crystallize into a contract where the parties eventually become *ad-idem* and where the offeree signifies a clear and unequivocal intention to accept the offer. See **Okubule Vs Oyegbola (1990)4 N.W.L.R (pt. 147) 723.**

Putting it more succinctly, the basic elements in the formation of a contract are:

1. The parties must have reached agreement (offer and acceptance)
2. They must intend to be legally bound, that is an intention to create legal relation.
3. The parties must have provided valuable consideration.
4. The parties must have legal capacity to contract.

See Alfotrim Ltd Vs A.G Fed (1996)9 NWLR (pt.475) 634 SC; Royal Petroleum Co. Ltd. Vs FBN Ltd (1997)6 NWLR (pt.570) 584: UBA Vs. Ozigi (1991)2 NWLR (pt.570) 677.

The critical foundational element of parties reaching an agreement is conspicuously absent in this case.

In the context of this very long dawn out transaction, it is difficult to accept the contention of plaintiff that the payment of **N200, 000, 000** made by them **months** after the initial lease ended, without more, and after time given to pay had lapsed meant that parties are adidem on the issue of rent for the property or that binding terms have been agreed especially here where the plaintiff remained in possession for another six (6) months after the initial lease agreement ended without paying any amount as rent for the continued use of the filling station and undoubtedly generating income.

The plaintiff here appear to want to eat their cake and still have as is expressed in a popular English idiomatic proverb or figure of speech. The offer by defendant to plaintiff to pay N200, 000, 000 for ten (10) years at N20, 000, 000 per annum was made long before the original lease agreement lapsed. As demonstrated, the plaintiff never accepted the offer till the tenancy lapsed. They kept on making or offering different figures for rent which were all rejected. Even when time was extended, for them to make payments on different occasions, the plaintiff did not positively respond until about six (6) months later after the original lease had ended and time given for them to make payments had lapsed.

It is therefore difficult to situate how the principle of ***pacta sunt servanda*** has any application in this case and in the clear absence of any streamlined agreement. The principle translate literally as **"agreements must be kept"** and forms the basis of the common law of contract where two parties willingly and knowingly enter into a contract, the terms of the contract must necessarily be upheld by both parties. There is no such clear agreement in this case between the parties. Agreements cannot be a matter of speculation or conjecture. The **plaintiff** cannot elect or choose when to make payments or agree to terms of payment essentially at its whim and when it chooses and then at the same time seek to compel or force the other party to accept same willy-nilly. The approach of plaintiff derogates in a fundamental respect from what an Agreement entails as stated above. The plaintiff having belatedly expressed readiness to contract on terms, it was now left to the defendant to accept or not. As stated earlier, it is also relevant to note that the plaintiff was curiously silent about the rent due on the property for the nearly **six (6) months** it stayed on after the initial lease ended. What is to happen to these rental payments due or is it part of the N200, 000, 000? These are issues parties will have to sit and discuss as alluded to by defendant in its letter vide Exhibit P6 or D18.

The trajectory of the case presented shows clearly that it was the plaintiff that did not accept the terms of rent on the lease made by defendant in good time as the documents evaluated have shown. The belated payments made long after the initial lease agreement had lapsed was completely rejected by defendant via Exhibit P6 or D18. Exhibit P6 or D18 was essentially a counter-offer made to plaintiff which shows that there offer was not accepted. The options open to

plaintiff was to accept it, reject it or make another offer and continue negotiations or vacate the premises.

The point to underscore is that the question of rent must be clearly agreed to. Again, it is not a matter of guesswork or speculation. It is now settled principle of general application that any unilateral increase or decrease of rent is invalid in law unless there is an agreement to that effect between the landlord and the tenant. A tenancy is a product of Agreement between two parties. Any change or variation must equally be a product of Agreement by both parties. Where a landlord, for example, unilaterally increases his rent, it is at best an offer or proposal and where the tenant refuses to pay the increased rent, the landlord is required to take necessary steps as required by law to terminate the tenancy. See **Udi V Izedonmwen (1990) 2 NWLR (pt.132) 357**.

The legal position equally applies ***mutatis mutandis*** to a tenant. A tenant cannot equally unilaterally decrease his rent. It is similarly at best an offer or proposal subject to acceptance by the landlord. If the landlord refuses to accept, then the tenant either keeps to the existing rent or peacefully vacate the premises. I leave it at that.

Again the issue of **waiver** raised by plaintiff clearly will again not fly in the light of the facts of the long drawn out transaction as already demonstrated. On the evidence, the defendant took all necessary steps and timeosly too, to make proposals for rent for the filling station when plaintiff indicated interest to renew the lease but the plaintiff did not positively accept the proposal or make any payments. This was a process that started vide **Exhibit P2** when plaintiff indicated interest to renew, and it did not accept the proposal made by defendant in the six (6) months before the tenancy lapse on 31st August, 2016 and then another six (6) months after the initial lease ended before payment was then made in February 2016. When it was finally made, it was clearly accepted on clear conditions expressed vide Exhibit P6 or D18. These conditions the plaintiff was not prepared to meet, and they filed this case. It is difficult to situate any waiver of any rights by defendant in the context of the facts of this case. Waiver unfortunately holds no legal or factual traction in this case.

Learned counsel to the plaintiff has tried so much in the final address to construct a case not based on the structure of the pleadings and evidence led. Cases are decided on the pleadings and evidence led in support and not addresses of counsel. Address of counsel is no more than a handmaid in adjudication and cannot take the place of the hard facts required to constitute credible evidence. No amount of brilliance in a final address can make up for deficit in quality of evidence to prove and establish or disprove and demolish points in issue. See **Iroegbu V. M.v Calabar Carrier (2008) 5 NWLR (pt.1079) 147 at 167**.

It is therefore difficult by the confluence of the above facts to situate a legally binding contract in the present situation. The question of whether or not parties have agreed to confer rights and impose liabilities on themselves cannot be a matter for speculation or guess work or as stated earlier even the address of counsel no matter how beautifully written and articulated. That question is one of whether the mutual assent between them which must be outwardly manifested can be situated within the evidence. Indeed the test of existence of mutuality is objective and where there is such mutuality, the parties are then said to be *adidem.* In the absence of mutuality, then there is no consensus *adidem* and therefore any claim or pretention to the existence of a contract in such circumstances is compromised. See **Bilante Int Ltd V NDIC (2011)15 NWLR (pt.1270)407 at 423 C-F.**

Flowing from the above and as a logical corollary, the point must be underscored that on the evidence of PW1 and exhibits tendered, there is no clear path way or template to situate an enforceable agreement between parties which is the foundation of plaintiff's claims.

In **AG Rivers State V. Akwa Ibom State (2011)8 N.W.L.R (pt.1248)3 at 49, Katsina Alu C.J.N** stated as follows:

"It is the duty of the trial Court to determine whether there is a binding contract between parties and this is done by considering the evidence led. The documentary evidence tendered and accepted by the court and the oral testimony in line with pleaded facts. The terms of a written contract on the other hand are easily ascertained from the written agreement. The traditional view is to look for offer, acceptance and consideration. In the absence of any

of them, there is no valid contract. Although that is not always the case. Valid contracts can exist in the absence of offer, acceptance and consideration such as in settlement contracts. The overriding consideration in determining if there is a binding contract between the parties is to see whether there was a meeting of the minds between the parties, that is, consensus *ad-idem*. In all cases of contracts, there must be consensus *ad-idem*.

The point flowing from the above decision is the critical role of evidence as a fundamental basis for any decision relating to the existence and the precise parameters and application of any relationship. What is more and as stated earlier, the substantive **Relief 1** sought by plaintiff is a declaratory relief which as repeated severally is not a matter for admissions, neither is it operational or availing within the unwieldy realms of speculations or conjectures.

Flowing from the above **Relief (a) seeking a Declaration that the Defendant is bound by contract to execute a fresh written lease agreement over all that property, more particularly described as a Petrol Filling and service Station together with its appurtenances situate at Plot 1031, Obafemi Awolowo Way, Utako District Abuja for another term of ten years, upon the same terms as the original lease agreement duly executed between the parties save for the stipulation as to the rent payable** must fail. As stated severally, the initial lease agreement lapsed on 31st August, 2015 and parties did not utilise the provision of clause 5 to agree to new terms or lease agreement. That lease Agreement clearly has since lapsed. Indeed there is nothing in clause 5 of the spent lease Agreement that even compels either party to execute a new or fresh agreement.

Agreements are completely a product of freewill of parties as already demonstrated. Where parties agree, and that is critical, the court then compels compliance. This is not the case here. There is however nothing in evidence before me that provides basis to support the contention that defendant is bound by a contract, in this case a spent contract, Exhibit P2 to execute a fresh lease agreement over the filling station on terms as contained in the original lease Agreement. Can the court really force terms on parties? I just wonder. A fresh lease agreement could only be executed after parties must have agreed on new rent and terms. I leave it at that. Relief (a) fails.

With failure of Relief (a), **Relief (b) for specific performance of clause 5 of the original lease agreement made between the parties and thereby compelling the Defendant accordingly, to execute a new lease agreement for another ten years, upon the terms of the original lease save for the rent already agreed and paid by the plaintiff** stands undermined.

In law the remedy of specific performance operates in the field of contract, which means there must be a concluded contract, complete and certain, in accordance with the law of contract. Thus, a party, who seeks specific performance must show that he has performed the conditions precedent to the performance of the contract or that he is ready and willing to perform the terms, which he ought to have performed.

See **Olowu V Building Stock Ltd (2018) 1 NWLR (pt.1601) 343 at 414 – 415**.

Indeed it is settled principle that specific performance is a court ordered remedy that requires fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. See **Best (Nig) Ltd V. Blackwood Hodge (Nig) Ltd (2011)5 N.W.L.R (pt.1239)95 at 118-119 H-B; Universal Vulcanizing (Nig) Ltd V. Ijesha United Trading and Transport & Ors (1992)5 N.W.L.R (pt.266)388.** Specific performance is a discretionary remedy and like all equitable remedies, the exercise of discretion must be exercised judicially and judiciously in accordance with settled Rules and principles.

As stated in this judgment, there is nothing to situate a clear streamlined and concluded contract between parties to provide a factual and legal basis to grant an order of specific performance. The spent lease agreement **Exhibit P1** under clause 5 shows clearly that parties shall execute a new lease agreement after agreeing on rent/terms. There is as demonstrated, no clear evidence led by plaintiff to situate that parties have indeed reached any concrete and clear agreement on rent and terms to provide firm basis to direct specific performance. Again, courts cannot compel parties to enter into contract or force them to execute a lease agreement. The sending of Bank drafts in the sum of **N200, 000, 000** six (6) months after the expiration of the original lease agreement without more and despite remaining in possession without paying rent in the six (6) months does not situate legal existence of a valid enforceable contract between parties to warrant the grant of **Relief (b)**.

Specific performance it must be emphasised as a discretionary remedy. It is not granted or withheld arbitrarily. For it to be granted, there must be clear factual and legal basis to support the grant. No such situation has been demonstrated in this case. Relief (b) thus fails. With the failure of **Reliefs (a) and (b)** and particularly in the light of the finding that the initial lease Agreement had lapsed since 31st August, 2015 and coupled with the fact that since the expiration of this lease Agreement, no new agreement has been executed, or rent paid, but plaintiff has continued in occupation, **Relief (c) seeking for an injunction, restraining the Defendant whether by itself, its servants, Directors, Principal Officers, agents, solicitors, assigns or privies howsoever known, named, or described from further trespassing and, or erecting any structure or fixture on the demised premises at Plot 1031, Obafemi Awolowo Way, Utako District Abuja** equally stands compromised and must fail.

The final **Relief (d) is for General Damages in the sum of N20, 000, 000. 00 (Twenty Million Naira) only against the Defendant for trespass as shown by the breach of the Defendant's Covenant to allow the Plaintiff quiet and peaceful possession and enjoyment of the demised premises**.

Now Trespass in law is any infraction of a right of possession into the land of another be it ever so minute without the consent of the owner is an act of trespass actionable without any proof of damages. See **Ajibulu V Ajayi (2004) 11 NWLR (pt.885) 458 at 481**.

The claim for trespass is therefore rooted in exclusive possession. All a plaintiff suing in trespass needs to prove in order to succeed is to show that he is the owner of the land or he has exclusive possession. The plaintiff may have been in possession but there is nothing in the pleadings or evidence to support the contention that the defendant trespassed into the filling station or at any time breached the covenant to allow plaintiff quiet and peaceful possession and enjoyment during the subsistence of the initial tenancy which ended on 31st August, 2015. I incline to the view that it was because plaintiff enjoyed the lease property peacefully for years without disturbance that it elected or chose to renew same. Furthermore as stated severally, since this lease ended, no new lease has been agreed by parties and executed and plaintiff has remained in the property

without paying rent and engaged in what appears to be endless negotiation over rent while enjoying the demised premises.

The bottom line here is that there is absolutely no scintilla of evidence to support this **Relief (d)**. It fails.

With the failure of **Reliefs (a) – (d)**, **Relief (e)** for cost must also fail.

On the whole, the single issue raised with respect to plaintiff's case is answered in the negative. After the expiration of the initial 10 year lease Agreement, no new agreement was reached by parties. There was therefore really nothing before court to show a refusal by defendant to perform its side of any contract in any material respect and the court cannot speculate or engage in any futile exercise of speculation or conjecture. Furthermore there was nothing before me to allow for the conclusion that the defendant do not intend to be bound by the terms, which in this case was non-existent or fluid and unclear at best, or that they are determined to do so in a manner inconsistent with their obligations. The case of plaintiff wholly fails.

This now leads to the second issue relating to the Counter Claim of defendant and whether it is availing. I had earlier stated that the counter claimant must like the plaintiff in the main action establish its case on the same principles to entitle it to the Reliefs sought. The same legal position equally holds true for **Reliefs 1** and **2** of the Counter Claim which are Declaratory Reliefs and which must be established by cogent and compelling evidence to put the court in a commanding height to grant the Reliefs sought.

I had also stated that because the claim and counter claim are inextricably tied together, I would consider the two issues raised together as a consideration of the substantive issue on the main claim would impact the issue raised with respect to the counter claim and provide broad factual and legal template to determine whether the reliefs or claims sought by the defendant/counter-claimant are availing.

Now because of the way and manner some of the Reliefs in this case were couched in a rather confusing and unclear manner, it appears incumbent to make the point clear that Reliefs are the live wire of an action. Reliefs puts in specific demanding

language the cause of action. Where there is no relief sought in an action or it is not precisely and clearly claimed as in this case, there is really nothing for the court to grant. The Reliefs are therefore the bedrock of the entire action as a case stands or fall by the reliefs sought. The language of a relief must therefore be precise, concise, simple and clear and should not be fluid, ambiguous or vague. See **Uzokwu V Ezeonu II (1991) 6 N.W.L.R (pt.2000) 708 at 784.**

The law is settled and indeed the Apex Court has made it abundantly clear that where a relief is sought, it must not be a matter of speculation or doubt as to what it entails as in this case. A court therefore cannot be expected to make an order which is subject to different interpretation as to whether it meets the relief claimed. Nor has the court a duty to engage in any semantics in the order it makes in an attempt to explain what the plaintiff intended to ask for. The guiding principle or rule is that a court must not grant a party what it has not asked for in clear terms and sufficiently proved. See **Joe Golday Co. Ltd. V. Cooperative Development Bank Ltd. (2003) 35CM 39 at 105.**

Now with respect to **Relief (1)**, the Defendant/Counter-Claimant seeks a **Declaration that the failure of the Defendant to the Counter-Claimant to renew the lease agreement of 2005 at its expiration in August, 2015 rendered her renewal right under the lease, voidable.**

I must confess my difficulty in understanding the precise import of this **Relief**. Now in our consideration of the substantive claim, the point was made that an agreement is a function of the decision of parties. Parties agreed to the lease agreement, Exhibit P1 and inserted clause 5. I had analysed the import of clause 5 of Exhibit P1 and come to the conclusion that parties did not come to any agreement on rent or terms as envisaged by the said clause. That for me should be the end of the matter. Neither party here can be punished for failure to renew the lease agreement and by the same token, neither party can be compelled to enter or renew the lease agreement. The lease agreement, Exhibit P1 in this case lapsed in August 2015. That is common ground in this case. It appears to be entirely academic to be discussing what is voidable or not in the context of an agreement that is now effectively spent. I fail to see the application or what is **voidable** in this case. **Voidable** in law is a transaction or action that is valid but may be annulled by one of the parties to the transaction. Voidable is usually used in

distinction to void abinitio (or void from the outset) and unenforceable. No such scenario played out in this case. Even if the court for example says the right of plaintiff to renew under the lease is voidable, the implication is that it can still make offers to renew and it will be valid if the defendant who is not bound agrees to give up their rights to rescission for example.

This in essence means that whatever offer that may be made or not is still subject to the acceptance or agreement of the Counter-Claimant and indeed the parties to the agreement. Relief (1) appears to me entirely academic with no utilitarian value to the crux of this dispute and the rights of parties. Relief (1) will be struck out.

Relief (2) seeks a **Declaration that there is no valid contract between the Counter-Claimant and the Defendant and that the Defendant is entitled to a refund of the sum of N200 Million paid by her after deduction of the mense profit by the Counter-Claimant**.

This is another relief not properly framed. There are about (3) three elements to this Relief. There is the question relating to whether there is a valid contract; then the issue of refund and mesne profit. I will treat the issue of **mesne** profit and **refund** together.

Again here, in my consideration of the substantive action, I had found that there was no new valid streamlined contract or lease agreement entered between parties with respect to the filling station after the initial 10 year lease expired. It is common ground that long after the expiration of the initial lease agreement, the plaintiff forwarded twenty (20) bank drafts in the total sum of N200, 000, 000 as representing rent for the filling station. By **Exhibits P6 or D18** which I had extensively analysed already, the defendant in effect collected the drafts but predicated the collection on clearly defined conditions as stated in the letter. The plaintiff did not accept these conditions and filed this action. The implication here is that parties are not adidem with respect to the rent for the filling station and no new lease agreement was thus agreed to and no terms were executed by parties. If that is the situation as indeed it is, the plaintiff is ordinarily entitled to a refund of the amount given but under **Relief 2**, the refund is predicated on deduction of **mesne profit**. The question here is was mesne profit properly claimed and proved to allow for any deduction to be made as claimed by the counter-claimant?

Let me perhaps here explain what mesne profit means. In law the expression **"mesne profit''** simply means intermediate profit, that is profit accruing between two points of time, that is the date when the defendant ceased to hold premises as a tenant and the date he gives up possession. See **Agbamu Vs Ofili (2004)5 N.W.L.R (pt.867) 540 at 571; Sabalemotu Vs Muniru Lawal (1994)7 N.W.L.R (pt.356) 263 at 213; Udih Vs Izedonmwen (1990) 2 N.W.L.R (p.t132)357.**

Put in more simple language "mesne profit'' are rents and profits which a tenant who holds over landlords premises after the lawful termination or expiration of his tenancy or a trespasser, has or might have received during his occupation of the land or premises in issue and which he is liable to pay as compensation to the person entitled to possession of such land or premises.

On the authorities, it appears settled that a claim for mesne profit can only be made when the tenancy of the tenant has been duly determined. See **African Petroleum Ltd Vs Owodunni (1991) 8 N.W.L.R (pt 210)391; Metal Construction (W.A.) V Aboderin (1998) 8 N.W.L.R (pt.563) 568 S.C.**

Now from the entirety of the **18 paragraphs** Amended statement of defence and **50 paragraphs counter claim** and the **evidence led,** no where did the counter claimant streamline the precise amount claimed as mesne profit and the period it covers and the court cannot speculate in chambers as to the sums claimed as mesne profit. It is true that on the authorities, mesne profit is not a claim for special damages requiring strict proof but this does not mean that a party will not make clear monetary claims and the period covered and then creditably establish same on the evidence putting the court in a commanding height to grant the relief in mesne profit. In the absence of a defined amount claimed as mesne profit and period covered, the implication is that there is really no clear parameters to situate the grant of mesne profit. It is clear that no meaningful deduction can be done in the present circumstances as demanded by defendant under this Relief.

As repeatedly stated Declaratory Relief(s) can only be granted on the basis of cogent and compelling evidence; there is such evidence with respect to the part of Relief 2 dealing with mesne profit. **Relief (2)** however partially succeeds on terms to be streamlined hereunder.

Relief (3) seeks for an **Order of Court directing the Defendant to pay an additional sum of N120 Million to the Counter-Claimant to complete the total sum of N320 Million being the acceptable lease Value of the property in issue by the Counter-Claimant.**

This **Relief** fails without much ado. As made clear in the substantive claim, there is no jurisdiction in court to make contract for parties. Lease Agreements and indeed all agreements are a product of negotiations which leads to a mutual arrangement that is accepted by all parties to a transaction. If the case of defendant/counter claimant and as found on the evidence is that parties have not agreed on the rent and terms, it will amount to a contradiction on terms to now pray the court to compel the adversary on plaintiff to now pay a balance of what it did not willingly agree to. Relief (3) fails.

The counter-claimant then claimed **Relief (4)** in the alternative to **Relief (3).**

In law where there is an alternative Relief or claim in civil action, the plaintiff can rely either on the main claim or the alternative. The court is not shut out from considering and deciding on the alternative claim because the main claim is not established. The contrary is in fact the case, that is, that if and where the main claim fails, however miserable, the alternative claim will be considered and the plaintiff or counter claimant can succeed therein. See **Ibekendu V Ike (1993) NWLR (pt.1299) 281**. I will now accordingly consider Relief (4).

Relief (4) is for an **Order of Court directing the Defendant to vacate and hand over possession of the property in issue with the licence to the Counter-Claimant and take back the sum of N200 Million in possession of the Counter-Claimant after deduction of mense profit at the rate of N26.6 Million per annum till the date the Defendant hands over possession of the property together with the operating licence to the Counter-Claimant**.

This relief too like some of the other Reliefs have three elements to it. The issue of vacation of the premises and return of licence; the question of the plaintiff taking back the sum of N200 Million after deduction of mesne profit at the rate of N26.6 Million per annum. I shall start with the question of vacation of the land and handing over possession and licence back to the Counter Claimant.

Now as found in the substantive claim, the Counter-Claimant gave possession and use of the filling station for a **definite term**. Under the legal regime in the FCT, there is a defined law governing recovery of possession and the procedure is clear. **Section 7 of the Recovery of Premises Act Cap 544 LFN 1990 provides the modalities as follows:**

"7. when and so soon as the term or interest of the tenant of any premises, held by him at will or for any term either with or without being liable to the payment of any rent, ends or is duly determined by a written notice to quit as in form B, C or D which ever is applicable to the case, or is otherwise duly determined, and the tenant, or if the tenant does not actually occupy the premises or only occupies a part thereof, a person by whom the premises or any part thereof is actually occupied, neglects or refuses to quit and deliver up possession of the premises or of such part thereof respectively, the landlord of the premises or his agent may cause the person so neglecting or refusing to quit and deliver up possession to be served in the manner hereinafter mentioned, with a written notice as in form E signed by the landlord or his agent of the landlord's intention to proceed to recover possession on a date not less than seven days from the date of service of the notice." (Underlining supplied).

From the above, it is clear that term or interest of a tenant in any premises can be determined in a variety of ways. For example it could be by *effluxion* of time or by a written notice to quit as provided for in forms B, C or D whichever is applicable or as is otherwise duly determined. This point is underscored by the fact that the word "or" is used as underlined above in the said provision.

In law and as defined earlier on, when "or" appears in any provision, it is a disjunctive participle used to express an alternative or to give a choice among two or more things. See **Abia State University V. Anyaibe (1996) 3 N.W.L.R (pt 439) 646 at 661.**

In this case and on the evidence, it is clear that even after the initial lease agreement ended at the end of **August 2015**, parties continued with negotiations over rent/terms which did not culminate in an **Agreement**.

On the evidence, there is nothing to show that the **lease agreement** was renewed within the purview of **Exhibit P1** or on new terms as agreed by parties. What this means is that with the apparent failure to renew, the lease agreement between parties came to an end or was duly determined by effluxion of time end of August 2015 and having failed to quit and deliver up possession as mandated expressly by clause 10 of the initial lease Agreement, the plaintiff and defendant to the counter-claim was entitled to be issued with a seven (7) days notice of owners intention to apply to recover possession. See **Iheanacho V Uzochukwu (1997) 2 NWLR (pt.487) 257 at 269-270 HA; Otegbade V Adekoya (1962) All NWLR 761 at 764.**

In this case, apart from the **7 days time frame given by the counter-claimant vide Exhibits D6 and D10** to the plaintiff to respond to the offer of rent made by the counter-claimant, there is absolutely nothing on the evidence particularly the entire **Exhibits D1-D18** tendered by the counter claimant situating that the 7 days notice of owners intention to apply to recover possession was served on the plaintiff/defendant to the counter-claim.

The failure to serve this notice clearly would undermine the aspect of the Relief for possession and the attendant return of the licence associated with possession. Despite the rather unfortunate circumstances of this case, the factual and legal reality is that if the counter-claimant wants possession and the licence over the property, proper legal steps have to be taken including service of the requisite notices as envisaged under the provision of the Recovery of Premises Act. This clearly has not been done.

Now with respect to the aspect of the relief dealing with refund or the sum of **N200 Million** after the deduction of mesne profit at the rate of **N26.6 Million per annum** till the defendant to the counter-claim hands over possession, this will appear to be a repetition of the aspects of Relief (2) earlier dealt with. It is not permissible, legally, to make two similar reliefs in the same action and constitute them as independent reliefs. For whatever it is worth, let me add that while dealing with this issue and why it failed under relief (2), the clear point was made that no clear monetary claim was made by counter-claimant as representing the mesne profit claim in the said relief and no evidence led to precisely streamlined the period covered for the mesne profit claim.

Under Relief (4), a slightly better job was made in that a sum of **N26.6 Million per annum** was stated as the claim of mesne profit but there is nothing either in the pleadings and evidence showing how the said sum accrued particularly when it is noted that in Exhibit P2, the initial lease agreement, the rent for the initial ten year period was **N84, 000, 000** at an annual rent of N8, 400, 000. As stated severally, since this lease agreement lapsed, parties have not agreed on a new rent/terms for the property. If **N26.6 Million** is assessed by counter-claimant as the mesne profit per annum for the premises, then evidential basis must be provided to situate how this sum was arrived at. In law, the agreed rental value of the property or premises is an important element in the computation of mesne profit where a tenant holds over landlords premises after the lawful termination or expiration of the tenancy or lease. See **Gabari V Ilori (2002) 14 NWLR (pt.786) 78 at 101 DE**.

The claim for mesne profit here cannot really be situated on a particular precise rent. It is also important to underscore the point that one of the fundamental distinction between a claim for rent and a claim for mesne profit is that while a claim for rent is liquidated, that for mesne profit is unliquidated. See **Chaka V Messrs Aerobell (Nig.) Ltd (2012) 12 NWLR (pt.1314) 296; Debs V Cenico (1986) 3 NWLR (pt.32) 840; Nigerian Const. & Holdings Co. Ltd V. Owoyele (1988) 4 NWLR (pt.90) 583**.

Mesne profit cannot therefore be made or claimed at large; it has to be clearly pleaded and proved by evidence. This was not done and so as stated under Relief (2), that aspect of the relief cannot be granted since no clear premise and evidence was supplied in support of a mesne profit claimed to allow for any deductions to be made. Relief (4) is clearly not availing and will be struck out to allow the counter-claimant to present a proper case to allow it ventilate its grievance with respect to possession and mesne profit. It cannot be right or fair to dismiss these Reliefs and thus prevent the litigant from filing a fresh action to recover his house and other due entitlements from a tenant who has continued in the occupation of the premises of the Landlord. I find support for this position in the case of **Eleja V Bungudu (1994) 3 N.W.L.R (pt 334) 534 at 542** where the Court of Appeal per Mohammed J.C.A (as he then was) instructively observed as follows:

"Indeed the Supreme Court had held in Sule Vs Nigeria Cotton Board (1985) 2 N.W.L.R (pt 5) 17 at 36-37 that in cases of recovery of possession such as the instant case, the service of the notice of intention to recover premises on the tenant is a condition precedent to the exercise of jurisdiction. In other words, in the absence of service of valid quit notice under the law, the claim of the appellant for the recovery of possession was not properly constituted and on the authority of Ekpere Vs Afrije (1972) 3 SC 113, the appellants claim should have been struckout so as to afford him the opportunity of bringing a new action after complying with the requirement of serving valid quit notices".

So be it the extant case to.

Finally **Relief (5)** is for payment of **N10, 000, 000 only as general damages for the inconveniences that the defendant has caused the counter-claimant**.

Now in law, General damages flow from the wrong complained of and is usually awarded to assuage loss suffered by the plaintiff from the alleged act of defendant complained of. Put another way, general damages are the kinds implied by law in every breach of legal right; its quantification however being a matter for the court. See **Corporative Development Bank Plv V Joe Golday Co. Ltd (2000) 14 NWLR (pt.688) 506; UBA V BTL Ind. Ltd (2001) All FWLR (pt.352) 1615**.

The Supreme Court in **Lar V Stirling Astaid (Nig.) Ltd (1997) 11-12 SC 53 at 63** defined General damages as such damages as may be given when the judge cannot point out to any measure by which they may be assessed except the opinion and judgment of a reasonable man. See also **Elf Petroleum Nig. V Umah (2006) All FWLR (pt.343) 1761.**

Now in this case and in the context of the facts precisely streamlined on the pleadings, it is really difficult to situate a breach of the counter-claimants legal rights.

On the evidence, as repeatedly stated parties entered into a precisely streamlined lease agreement which on the evidence lapsed end of **August 2015**. It is true on the evidence that the defendant did not give up possession of the premises as dictated by the lease agreement. It is however true on the evidence that parties entered into a long drawn out negotiation which did not materialize in an

agreement. In the process, the sum of **N200, 000, 000** was collected by the counter-claimant even though it was predicated on certain clear conditions which the defendant to the counter-claimant refused to accept. The stated sums is still with the Counter claimant.

In the circumstances, it is difficult to pinpoint a wrong here done to Counter-claimant or any breach of its legal rights that would warrant the grant of **N10, 000, 000** damages as claimed in the light of the trajectory or narrative of this case. Any inconveniences that may be caused with respect to the apparent failure to agree to a new lease agreement does not tantamount to a breach of the counter-claimants legal rights.

The Counter-claimant may have averred to certain **"illegal activities"** that have attracted the **"ire"** of the development control of the FCT. These activities were pleaded in paragraph 41 (a) – (e) of the counter-claim but beyond bare challenged oral assertions, nothing concrete was put forward in evidence showing any **"partition"** or erection of an **"attachment"** and **"annexation"** of an area designated for restaurant all said to have been effected on the premises without the approval of the Department of Development Control or consent of the counter-claimant. Similarly if Quit Notices were issued by the Development Control Development, arising from these **"illegal activities"**, where are the notices and why were they not tendered in evidence?

In the absence of evidence to support these averments, they clearly will lack foundation and will be deemed as abandoned.

The way to logically approach this issue in my considered opinion is simply that if parties are negotiating over a new lease agreement and no agreement was reached, then the defendant to the counter-claim should vacate the premises. You cannot refuse to reach agreement or a new agreement and then continue to occupy the same premises. If he refuses, then the counter-claimant should take legal steps to get possession and claim whatever monetary claims over losses it alleged it suffered arising out of over stay and use of the premises after the expiration of the lease agreement and indeed any other claims in damages arising from the use of the property which of course must then be properly claimed and proved. That way,

the counter-claimant will be sufficiently imdemnified arising out of the over stay on its premises. This Relief is **unavailing**.

On the whole, the issue raised with respect to the counter-claim only partially succeeds.

In the final analysis and for the avoidance of doubt, I hereby make the following orders:

ON PLAINTIFF'S CLAIMS/RELIEFS

The plaintiff's claims fails in its entirety and is accordingly dismissed.

ON DEFENDANTS COUNTER-CLAIM

1. **Reliefs (1) and (4) are hereby struck out.**

2. **It is hereby Declared that there is no valid contract between the counter-claimant and the Defendant with respect to a renewal of the Lease Agreement.**

3. **Reliefs (3) and (5) fails and are dismissed.**

4. **I award cost assessed in the sum of N30,000 payable to the counter-claimant by the Plaintiff/Defendant to the Counter-claim.**

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Hon. Justice A.I. Kutigi

Appearances:

1. **F.R. Onoja, Esq., for the Plaintiff and Defendant to the Counter-claim.**

2. **S.M. Jimmy, Esq., for the Defendant/Counter-claimant.**