**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**
**IN THE ABUJA JUDICIAL DIVISION**
**HOLDEN AT MAITAMA ABUJA**
**ON 17TH JUNE, 2021**

**BEFORE HIS LORDSHIP HON. JUSTICE CHIZOBA N. OJI**
**PRESIDING JUDGE**

**SUIT NO: FCT/HC/CV/1292/18**

**BETWEEN:**
**1. DUBU NIGERIA LTD ..... PLAINTIFFS/APPLICANTS**
**2. HAJIYA UWANI GARBA**

**AND**

**1. DANA MOTORS LIMITED ..... DEFENDANTS**
**2. MR RAMESH HATHIRAMANI**

***APPEARANCES:***
***E .O. CHUR FOR THE CLAIMANTS***
***OGECHI OGBONNA WITH FOLMI YOHANNA FOR THE DEFENDANTS***

# JUDGMENT

This judgment was earlier adjourned to 11th April 2021 but was caught up by the 2 month JUSUN strike which was called off on 14th June 2021.

The Claimants claim against the Defendants jointly and severally as follows:-

> "(a) The sum of =NGN= 3,863,110.00 (Three Million, Eight Hundred and Sixty Three Thousand, One Hundred and Ten Naira) arrears of rent on Plot No 704, Cadastral Zone A3, Garki-Abuja covered by Certificate of Occupancy No FCT/ABU/MISC 4271.

(b) The sum of =NGN= 438,757.50 (Four Hundred and Thirty Eight Thousand, Seven Hundred and Fifty Seven Naira, Fifty Kobo) outstanding water rate bill.

(c) The sum of = NGN= 600,000 (Six Hundred Thousand Naira) special damages.

(d) 20% (percent) interest per annum on the sum of =NGN= 3,863,110.00 (Three million, Eight Hundred and Sixty Three Thousand, One Hundred and Ten Naira) arrears of rent from 2013 till judgment.

(e) 10% (percent) interest per annum on the judgment sum till final liquidation."

ALTERNATIVELY:

(a) An order compelling the Defendants to appoint an arbitrator to mediate over this dispute in accordance with the terms of the tenancy agreement dated the 10th day of June, 2013.

(b) =NGN= 1,500,000 (One Million, Five Hundred Thousand Naira) only as cost of action.

The Defendants filed a Statement of Defence in denial of the claims.
The matter poceeded to hearing.

The 2nd Claimant who was the sole witness for both Claimants adopted her witness statement on oath sworn on 22nd March 2018. Therein she testified inter alia that she is the Managing Director and alter ego of the 1st Claimant. That the 2nd Defendant is the Chairman/CEO of the 1st Defendant.

That both Defendants had been the tenants of the Claimants at Plot 704, Cadastral Zone A3, Garki Abuja, since June 2003 but vacated the property in November 2013 having behind arrears of rent to the tune of N3,863,110.00 and water bill of N438,757.50 unpaid, despite the Claimants' repeated demands for payment.

The Claimants therefore activated the Arbitration Clause (Clause 8) of their leasehold agreement by referring the matter to arbitration and appointed Mr John Agada Elachi FCIArb. UK to arbitrate in the matter, requesting the Defendants to also appoint an arbitrator in accordance with the terms of their agreement.

The Defendants however failed and/or refused to do so, till date. The Claimants were thus compelled to bring this suit.

Exhibits P1 to P8 were admitted in evidence through her. She was cross examined and discharged.

The Defendants sole witness was its Administrative Manager – Emmanuel Mordi. He adopted his witness statement on oath of 8th June 2018 wherein he denied the claims of the Claimants.

Particularly, he maintained that the Defendants have no relationship with the 2nd Claimant. That the 2nd Defendant was joined in this suit in bad faith as he was never a party to any alleged transaction with the Claimants at any time.

That the 1st Defendant was a tenant of the 1st Claimant only, and dutifully discharged all its obligations under the said tenancy and did not owe any arrears of rent or water bill or any sum at all.

That the alleged refusal/failure of a party to an agreement to appoint an arbitrator pursuant to the arbitration clause does not prevent the other party from commencing arbitral proceedings. He thus urged the court to dismiss the Claimants' suit.
He was cross examined and discharged.

In his final written address Mr Ogechi Ogbonna learned counsel for the Defendants submitted two issues for the court's determination thus:-

> "(a) Whether the claims of the Claimants have disclosed any privity of contract between the Claimants and the 2nd Defendant, and in the event that none is disclosed that this Honourable court should strike out the name of the 2nd Defendant from this suit amongst other consequences.
>
> (b) Whether the Claimants have discharged the burden of proof and have led any evidence or sufficient evidence to prove their allegation against the 1st Defendant whom they alleged is indebted to the 1st Claimant."

**ON ISSUE 1**

Learned counsel submitted that it is a fundamental principle of law that only parties to a contract can sue and be sued on any issues pertaining to the contract. Further, that a company is a distinct person from its

shareholders and directors hence, neither can sue nor be sued in respect of the affairs of the other.

It was submitted that nothing in Exhibits P1 to P8 tendered before this court indicates that the 2nd Defendant who has a separate legal identity from the 1st Defendant was a party to any alleged relationship with the Claimants. And the Claimants did not rebut this assertion. It was therefore wrong for the Claimants to join the 2nd Defendant as a party to this suit. Such joinder being in bad faith. See **KLM ROYAL DUTCH AIRLINES V TAHER (2014) 2 NWLR (PART 1393) PAGE 137 AT 207 PARAGRAPH D, TECHNIP V AIC LIMITED (2016) 2 NWLR (PART 1497) PAGE 421 AT 427 & ORS.**

Learned counsel therefore urged the court to find that the Claimants suit is an abuse of court processes and illegal; which ought to be dismissed, and the 2nd Defendant's name struck out of the suit.

**ON ISSUE 2**

The learned counsel submitted that the Claimants failed to discharge the burden of proof placed on them by law, to entitle them to the reliefs sought. See Sections 131-134 Evidence Act 2011.

Further, that the Claimants must succeed on the strength of their case, and not on the weakness of the defence. He argued that the Lease Agreement, Exhibit P1, which is the foundation of the Claimants' case failed to show:

(a) That the lease was renewed after the expiration of the term of 5 years certain in June, 2008.

(b) The terms of the renewed lease entered into by the Claimants and Defendants, including the rent, consideration and duration of the renewal.

(c) Breach of the conditions of the renewed lease by the Defendants for which the Defendants can be held liable.

He further argued that the Claimants' who failed to provide the relevant evidence by Exhibit P1, cannot seek to vary the terms of Exhibit P1 by oral evidence. He equally urged that the burden of proof does not shift to the Defendants where the Claimants have not proved their case.

Learned counsel further argued that Exhibit P1, the lease agreement is a registrable instrument under Section 2 of the Land Registration Act, and having not been registered pursuant to Section 15 of the Land Registration Act, same is inadmissible in law and ought to be expunged from the record.

See **UNION BANK LTD V SAX (1994) 8 NWLR (PART 361) PAGE 150 AT 171 OREDOLA OKEYA TRADING CO. NIG LTD V ATTORNEY GENERAL KWARA STATE & ANOTHER (1992) 7 NWLR (PART 254) PAGE 412 AT 426 PARAGRAPH B-C, 424 PARAGRAPHS C – E.**

He also contended that the Claimants failed to tender any water bill allegedy owed by the Defendants and no reason whatsoever given for their failure to so do.

He urged the court that the N600,000 claimed as solicitors' fees by the Claimants is unethical and an affront to public policy based on the decision in **GUINNESS NIG PLC V NWOKE (2000) 15 NWLR (PART 689) PAGE 135 AT 150 PARAGRAPHS C, A – E** and that Exhibits P7 and P8 sought to prove same are caught by Section 83 (3) Evidence Act 2011 as documents made in anticipation of proceedings.

Finally, he urged that the settlement arrangement alluded to by the DW1 in cross examination at best only proves that there was some dispute between the 1st Defendant and the Claimants but does not prove a tenancy agreement after the expiration of the term in Exhibit P1 from which the said dispute is said to have arisen.

Thus he urged that the Claimants' suit be dismissed.

In the Claimants' final written address filed by H.E. Ezeude Esq, two issues were raised for determination thus:-

> "1. Whether or not the Claimants have discharged their burden of proof to be entitled to the grant of their claims in this suit.
>
> 2. Whether the Claimants have proved their claims for special damages to be entitled to the grant of same by the court".

**ON ISSUE 1**

Learned counsel submitted that the Claimants tendered Exhibits P1 to P8 in proof of their case, with nothing from the Defendants to rebut same. Rather the DW1 who had denied the Claimants' claim, admitted in cross

examination that the Defendants had made an attempt to settle the arrears of rent, though the witness did not know whether the debt was settled. Learned counsel thus urged the court to find the evidence of DW1 contradictory, unreliable and lacking in quality.

In fact that the evidence of DW1 admits the claims of the Claimants, thus relieving the Claimants of the burden of proof, as facts admitted need no proof.

Finally on this point he urged the court to hold that the said debt had not been settled, settlement out of court having also failed.

**ON ISSUE 2**

He submitted that the Claimants proved their claim for special damages of N600,000 by Exhibits P7 and P8 which were tendered, without objection from the Defendants. In line with Clause 8 (e) of Exhibit P1, the court is therefore enjoined to give life to the intention of the parties that in the event of any dispute, the party at fault shall indemnify the other party.

Reliance was placed on several authorities including **CHIEF TITUS ANAMASONYE ONWUGBELU V MR EJIOFOR EZEBUO AND OTHERS (2013) 23 W.R.N. 90 AT 125, LINE 15-45; OKILI CHECHE MULTIPURPOSE COOPERATIVE SOCIETY LTD V UNITED BANK FOR AFRICA, PLC (2018) 8 W.R.N 153 AT 175 LINES 5-10; NIGERIAN NATIONAL PETROLEUM CORPORATION V ISAIAH JACOBS (2013) 3 W.R.N 97 AT 112 LINE 10-15.**

He urged the court to reject the contention that Exhibits P7 and P8 were documents made in anticipation of proceedings as the exhibits were made by the Defendants' solicitors who handled the matter, not the Defendants themselves.

In response to the Defendants issues for determination, he urged the court to hold that the 2nd Defendant is a proper party to this suit, being a director and chairman of the 1st Defendant, and that letters addressed by the Claimants to the Defendants were made specifically for the attention of the 2nd Defendant, who was indeed active and concurred on the matters which gave rise to the present suit, citing **GLOBAL WEST VESSEL SPECIALIST NIG. LTD V NIGERIA NLG LTD & ANOR (2018) 13 WRN 77 AT 102 LINES 20-40; PROF. BUKAR BABABE V FEDERAL REPUBLIC OF NIGERIA (2018) 44 WRN 1 AT 46 LINES 30-35.**

**ON DEFENDANTS' ISSUE 2**

Learned counsel submitted that there is nothing to contradict the Claimants' evidence that the Defendants vacated their premises in 2013 and that their letters demanding payment of rent arrears and water bill were not refuted by the Defendants.

He submitted that the Defendants submission that Exhibit P1 is an unregistered registrable instrument which ought to be expunged, holds no water, being an issue of law not pleaded. Citing Order 15 Rule 7(1) and (2) of the Rules of this court.

Equally it is trite law that the Defendants' counsel's address cannot take the place of evidence.

Finally, he urged that the Defendants having taken benefits from Exhibit P1 cannot now cast doubts on its legality.

He urged the court to enter judgment in favour of the Claimants as the Defendants have no defence to the action.

The Defendants filed a reply on points of law urging that the suit be dismissed.

I have considered the evidence before me and the written and oral submissions of learned counsel.

To my mind this matter can be resolved upon consideration of this sole issue as follows:-

> Whether the Claimants have proved their case to entitle them to the reliefs sought.

Before I proceed however, I shall address some prelimary issues argued by the parties.

The Defendants have contended that there is no privity of contract between the Claimants and the 2nd Defendant in this matter therefore the 2nd Defendant ought not to have been made a party to the suit. The Claimants on the other hand argued that the 2nd Defendant is a proper party.

I am inclined to agree with the Claimants on this issue. The 1st Claimant and the 1st Defendant are both artificial persons and though each is deemed to have a separate legal personality from their individual directors and shareholders, it is common knowledge that companies have no mind of their own and act through their Chairmen, Directors and other officers.

The 2nd Defendant who is the chairman and alter ego of the 1st Defendant is therefore not only a proper party, he is in fact a necessary party to these proceedings and needs to be bound by the decision in this matter.

I hold that the 2nd Defendant is properly sued in this matter.

The issue was equally raised by the learned defence counsel that Exhibit P1, the Lease Agreement is a registrable instrument and having not been registered, same is inadmissible in evidence; citing Sections 2 and 15 of the Land Registration Act LFN (Abuja) 1990.

It is trite law that an unregistered registrable instrument may be tendered in evidence to show evidence of transaction and that money changed hands. See **YARO V MANU & ANOR (2014) LPELR – 24181 (CA) PAGE 52-55 PARAGRAPH B-C PER SANKEY JCA; ALHAJA RISIKAT ALADE V CHRISTIANA ADEJUMOKE SOFOLARIN & ORS (2016) LPELR – 25008 (CA).**

In **ADESEGUN OGUNSANYA & ANOR V SKYE BANK PLC (2013) LPELR – 20555 (CA)** the Court of Appeal per Remu JCA at page 33-34 paragraphs C-F held that non-registration of a lease agreement did not have any legal

effect on the right of the lessee to the 40 year lease over the property in dispute in that case.

Applying the same principle to this matter, I hold that the non-registration of Exhibit P1 has no legal effect over the tenancy agreement evidenced therein. I therefore hold that same was properly admitted in evidence.
Now I proceed to the main issue.

I agree with the Mr Ogechi Ogbonna for the Defendants that the onus of proof lies on the Claimants to prove their case and that this onus does not shift to the Defendants unless the Claimants have discharged theirs.

Further that a Claimant ought to succeed on the strenght of his own case and not on the weakness of the Defendant's case.
See **AUBERGINE COLLECTION LTD V HABIB NIGERIA BANK LTD (2002) 4 NWLR (PT 757); SPD (NIG) LTD V ARHO-JOE (NIG) LTD (2006) 3 NWLR (PT 966) 173.**

The onus is therefore on the Claimants to prove their principal claims:-

1) That the Defendants vacated their premises leaving an arrears of rent of N3,863,110.00.

2) That the Defendants are also in arrears of water bill of N438,757.50.

All the other claims will swim or sink based on the success or failure of the principal claims.

The Defendants denied these claims in their statement of defence.

To prove their case the Claimants tendered several documents including Exhibit P1, the Lease Agreement.

The said Exhibit P1 tendered was for a lease of 5 years for the sum of N15 million commencing from 10th day of June 2003 to 9th day of June 2008. By Exhibit P1 the said N15 million had already been paid by the 1st Defendant.

As rightly argued by learned defence counsel, there is no evidence as to the terms and conditions of any renewed lease or letting of the said premises till November 2013 when the Claimants allege that the Defendants vacated the property. For instance:-

(1) What was the duration of the renewed lease?

(2) What rent was agreed on?

(3) What amount was paid to arrive at what amount was left unpaid at the time the Defendants allegedly vacated?

It is therefore not enough for the Claimants to simply say that the Defendants vacated in November 2013 leaving behind arrears of rent of N3,863.110. There must be credible evidence to sustain the claim.
The same goes for the arrears of water bill of N438,757.50 claimed. The said water bill was never tendered in evidence and no explanation was offered by the Claimants.

It is clear that water bill is demanded by Water Board, the supplier of water, and not by the Claimants.

Nonetheless, no water bill was tendered for any period in time whatsoever.

The Claimants, I must say took a lot for granted in this case.

The Claimants have relied on the evidence of DW1 in cross examination where DW1 stated:-

> "The outcome as I understood it was that when the Claimants wrote to the company concerning the amount they were owing as a result of expired tenancy of about N3,800,000 the 1st Defendant wrote back indicating that they have left 200KVA generator, interlocking and well secured fence and the generator house or cover so to say, and there was also an arrangement with Dana Management to settle the Claimants claim with N2 million. How it later transpired further, I don't know."

The learned counsel for the Claimants has urged the court to regard the above response of DW1 as an admission of their claim which requires no further proof.

This "admission" forms the contents of the Defendants letter of 30th March 2015 which the Claimants referred to in paragraph 2 of the Claimants' reply to the statement of defence dated 29th October 2018 and filed on 1st November 2018. The said letter is titled:-

> "WITHOUT PREJUDICE"
>
> SETTLEMENT OFFER OF DANA MOTORS LIMITED TO DUBU NIGERIA LIMITED.
>
> RE: NOTICE OF REQUEST FOR ARBITRATION."

The said letter was not tendered in evidence. The reason I believe is not farfetched as the law is clear on documents marked "without prejudice".

See **TORNO INTERNAZIONALE NIGERIA LIMITED & ANOR V FSB INTERNATIONAL BANK PLC (2013) LPELR- 22616 (CA) PAGE 35** where the Court per Habeeb Adewale Olumuyiwa Abiru JCA held that:-

> "It is an established principle of law that offers of compromise made expressly or impliedly by a party cannot be given in evidence or even used by the Court because the law has as its policy the protection of negotiations bona fide entered into for settlement of disputes- **ASHIBOGWU V ATTORNEY GENERAL BENDEL STATE (1988) NWLR (PT 69) 1238 FAWEHINMI V NIGERIAN BAR ASSOCIATION N0. 2 (1989) 2 NWLR (PT 105) 558."**

In **PAUL NWADIKE & ORS V CLETUS IBEKWE & ORS (1987) LPELR – 2087 SC PAGE 27 – 28 PARAGRAPH B – A** the Supreme Court per Agbaje JSC concerning a statement made without prejudice held thus:-

> " I will now deal with the point raised as regards Exhibit D to the effect that since Exhibit D was written without prejudice it cannot be used in evidence in this case. The answer to this point will appear in my view to be found in the following passages from Phipson on Evidence 12th Edition dealing with admissibility and non-admissibility of offers made without prejudice and of letters and other communication written without prejudice. The passages I have in

mind will be found at pages 295 and 296 and Articles 279 and 280 of this book.

"Offers" "without prejudice", offers of compromise made expressly or impliedly "without prejudice" cannot be given in evidence against a party as admissions,.... Letters or other communications, however are only protected where there was a dispute or negotiations pending between the parties and the letters were bona fide written with view to its compromise....And the protection applies only in the same action, and between the same parties, and not between them and the persons, but letters and negotiations between solicitors are inadmissible against themselves as well as against their clients."

That being the case, it therefore means that the so-called admission which the Claimants seek to rely on is inadmissible evidence and will not avail them in any manner whatsoever.

In summary therefore, the Claimants failed to prove their claim for arrears of rent of N3,863,110.00 and N438,757.50 outstanding water bill against the Defendants. These claims (a) and (b) having failed, the claims for N600,000 special damages also fails as well as the claim for 20% interest per annum on the sum of N3,863,110.00 from 2013 till judgment and 10% per annum post judgment interest.

The Claimants' claim in the alternative to compel the Defendants to appoint an arbitrator to mediate over this dispute in accordance with the terms of the tenancy agreement dated 10th June 2003 also fails, the Claimants having failed to establish any dispute with the Defendants.

In conclusion the sole issue is answered in the negative, the Claimants' suit is dismissed in its entirety.

Ogbonna: We do not ask for costs.

Court: No costs awarded.

**Hon. Judge**