IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT GUDU - ABUJA

DELIVERED ON THURSDAY THE 1STDAY OF JULY, 2021.

BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO-ADEBIYI

SUIT NO. CV/2561/2019

BETWEEN

UGBAGWU IJATO MARIGORETTI---------- CLAIMANT

AND

1. **GLOBAL FORMWORK NIGERIA LTD**
2. **HON. MINISTER FEDERAL CAPITAL TERRITORY ----DEFENDANTS**
3. **FEDERAL CAPITAL DEVELOPMENT AUTHORITY**

JUDGMENT

By a Writ of summons filed in this court on the 30th of July, 2019 the Claimant claims jointly and severally against the Defendants as follows,

a) To put the Claimant in possession of the Unit Type A, Unit No.
2002, Plot No. 35, Akwa Ibom Link Saraji District, APO,
Abuja.

b) General damages in the sum of N10,000,000.00 against each of the Defendants.

c) Cost of this suit at N1,500,000.00 against each of the

defendants.

OR IN THE ALTERNATIVE

d. AN ORDER to the 1st Defendant to refund the sum of N7,358,000.00being the total money collected from the Claimant.

e. General damages in the sum of NI0,000,000.00 against each of the Defendants.

f. Cost of this suit at N1,500,000.00 against each of the defendants.

Parties exchanged pleadings and the Court fixed a date for hearing. The Claimant opened her case on the 12th of February 2020 and called her sole witness, the Claimant herself as PW1 where she adopted her witness statement on oath as her evidence in this case. The summary of the facts as stated in her evidence is that by virtue of a lease agreement and an addendum to the agreement, the 1st Defendant entered into an agreement with the 2nd and 3rd defendants to develop and build low cost houses at the Saraji District, Abuja in line with the Federal Government of Nigeria's national housing scheme with the objective of providing affordable housing for the benefits of residents of the FCT and Nigerians in general on behalf of the 2nd and 3rd Defendants. The 1st Defendant thereon named the housing scheme "Malaysian Gardens" and thereafter marketed it to the public. The Claimant showed interest because of the collaboration of all the Defendants and was offered Unit Type 1A Block/Plot No. 35, Akwalbom Link, with Unit No. 2 — 002 measuring

approximately 64 sqm at the price of N7,358,000.00 inclusive of 5% VAT and a delivery of the housing unit to be within eleven months after confirmation of full payment. The Claimant agreed to the offer with the terms set by the 1st Defendant and paid the said sum with an application fee of N8,000 for the type 1A house. The 1st Defendant issued receipts No. QR0764 and QR 0532 for the Application fee and the payment for House Type 1A respectively and both are dated 7th October, 2008. That she waited for the 1st Defendant to fulfil its obligations just as she has done hers but the 1st Defendant failed to deliver possession to her within the specified period which expired on 6th September, 2009. That Claimant demanded for explanation for the breach to no avail. She thereafter made several demands for her money to no avail.That the Claimant got to know of the disputes between all the Defendants via newspaper publications.Claimant stated that aside the Defendants breaching their obligations; they have also caused the Claimant embarrassment and denied her the use of her money.

PW1 tendered the following documents as exhibits in proof of her case as follows:

1. Copy of development lease agreement dated 2/02/2004 admitted as Exhibit A1.
2. Addendum to development lease agreement dated 25/05/2006 admitted as Exhibit A2.
3. Letter from FCDA dated 11/10/2006 addressed to MD Global Formwork Nig. Ltd and signed by A. C. Ike admitted as Exhibit A3.

4. Offer for the purchase of housing unit, unit type 1A (Akwa Ibom Link) in Malaysian Gardens at Saraji District Abuja dated 8/10/2008 addressed to Plaintiff and signed by Global Formwork Nig. Ltd admitted as Exhibit A4.
5. Two (2) receipts no 0764 for N8,000.00and 0532 for N 7,350,000.00 issued to the Plaintiff admitted as Exhibit A5 and A6 respectively.
6. Copy of Equitorial Trust Bank draft for the sum of N7,358,000.00 dated 26/09/2008 made payable to Global Formwork Nig. Ltd admitted as Exhibit A7.
7. Green box logistics Airway Bill No: 002517admitted as Exhibit A8.
8. Letter from Indemnity Partners dated 7/6/2019 "demand for refund of N7,350,000.00" addressed to Global Formwork Nig. Ltdadmitted as Exhibit A9.
9. Letter from Indemnity Partners dated 7/06/2019 addressed to G. M Global Formwork Nig. Ltd No. 14/16, 24 Crescent Gwarinpaadmitted as Exhibit A10.
10. EMS Courier dated 19/06/2007 from Indemnity Partners to GM Global Formwork 14/16, 24 Crescent Gwarinpa admitted as Exhibit A11.
11. Compliance Certificate pursuant to Section 84 (4) Evidence Act 2011 dated 16/01/2020 admitted as Exhibit A12.
12. Daily Trust Newspaper Publication dated 22/07/2019 admitted as Exhibit A13.

The 1st Defendant on the other hand, filed its Statement of Defence and opened its defence on the 30th day of September, 2020 and called a sole

witnessAmah Kalu, the Administration Manager of Global Formwork Nig. Ltd who testified as DW1 and adopted his written statement on oath. The summary of facts as stated in the statement on oath is that the Development lease agreement between the 1stDefendant, the 2nd and 3rd Defendants was extended as per arbitral award without a limited time. That it is correct that the Claimant paid the sum of N7,358,000.00 inclusive of VAT for house unit type IA Plot/Block No. 35 Akwa Ibom Link unit No. 2 — 002 of about 64 sq.mto the 1st Defendant. That the apartment has since been built by the 1st Defendant and still stands firm at the estate site.That the confirmation of full payment and delivery to any allottee is further subject to other expressed concurring terms/conditions contained both in the development lease Agreement founding the Estateproject, alongside those set out in the offer letter agreement of October, 2008.That the house type IA Block/Plot No. 35 Akwa Ibom Link Unit No. 2-002 bargained for has since 2009 been completed including toilet fittings and ceramic tiles but the other necessary outstanding final touches for delivery could not be attended to for reasons arising from the effectuation of necessary logistics and components at the instance of the 2nd& 3rdDefendants authorities.That the dispute between it and the 2nd & 3rdDefendants was the reason why the apartment was not delivered to the claimant eleven months after payment as rightly captured by the Claimant in her pleadings.That the dispute between the 1stDefendant, 2nd and 3rd Defendants is being resolved.That the 1st defendant never received any letter from the Claimant neither did it reject any letter from the Claimant.That the

Claimant cannot with the knowledge of the dispute between the 1st, 2nd &3rdDefendants maintain that the 1stDefendant is in breach of its obligations to deliver the apartment within Eleven months after payment.The 1stDefendant at all material times in the transaction had performed its own obligation with the Claimant but for the dispute with the 2nd & 3rd Defendants which was resolved by an arbitral award in favour of the 1st Defendant.That the 1st Defendant having already built the said house type 1A bargained for and with the money paid by the Claimant is prepared and willing if the Court so directs for the Claimant to take possession of the apartmentas per relief (a) sought by the Claimant and thatreliefs (b) and (c) inclusive of the alternative reliefs be dismissed.

The 1stDefendant in proof of its case tendered Exhibit A14 (Photograph of Block/Plot No. 35 Unit No. 2-002-024) Akwa Ibom Link and Exhibit A15 (Certifies True Copy of Arbitration Award between 1st Defendant, Hon. Minister,FCT and The Ministry of Federal Capital Territory Administration

At the close of the case, the Court adjourned for parties to file their final written addresses.

The Claimant in her final written address, raised a sole issue for determination, which is;

> "whether the claimant has proofed her case to be granted the reliefs sought".

Learned Counsel submitted that it is a settled principle of law that he who assert must proof and cited**Uzokwe v Dansy Industries Nig. Ltd & Anor (2002) 2 NWLR (pt. 752) pg. 528**and **Section134 of the Evidence Act, 2011**. Counsel submitted that the Claimant has disclosed in her pleadings and during her testimony before the honourable, proofs to substantiate her facts thereby satisfying the requirement of the law which now shift the onus of the burden of proof from her to the Defendants.Counsel then submitted that upon the evidence adduced by the Claimant and the admission of the 1stDefendant, the onus of proof of a binding contract between the Claimant and the 1st Defendant is established andurged this honourable court to so hold.Counsel further submitted that the admission of the 1st Defendant needs no further proof to establish that it is guilty ofbreach of contract, **Cameroon Airlines v Otutuizu (2011) 4 NWLR (pt. 1238) 512** and that where there is a breach, the victim is entitled to award of damages as held in **B. B. Apugo& Sons Ltd v OHMB (2016) 13 NWLR (pt. 1529) 206.** Learned counsel relying on**Nospecto Oil & Gas LTD v Kenny &Ors(2014) LPELR - 23628 (CA)**submitted that the defendanthas not satisfied the requirement of the law by providing in details when the dispute between it and the 2nd and 3rd defendants arose, that the 1stDefendant simply dumped exhibit A15 on the court without relating the said exhibit to his case. Counsel submitted that the testimony of the 1stDefendant's witness in question particularly on exhibit A14 is not an issue raised by the Claimant. Thatthe agreement the parties had is contained in clause 10 which is delivery of a residential house. Assuming without conceding

that the 1stDefendant's argument is right, counsel submitted that exhibit A14 does not depict a house in a delivery state and testimony on it cannot not be relied upon. He cited the authority of **Ogoejeofo V Ogoejeofo (2006) LPELR-2308(SC) 14**and urged the court to discountenance 1st Defendant's final writtenaddress. In conclusion, counsel submitted that the 1st Defendant with the support of the 2nd and 3rd Defendants breached the contract it had with the Claimant who is entitled to damages.

The 1stDefendant in its written address filed, raised a sole issue for determination thus;

> "Whether considering the dispute between the 1st Defendant and the 2nd& 3rd Defendants as evidenced by the Arbitration award Exhibit A15, the contract agreement with the Claimant can be said to have been frustrated justifying the inability of the 1st defendant to deliver the house in question to the claimant?".

Learned counsel submitted that it is trite law that no fact need be proved in any civil proceedings on which the patties to the proceedings or their agents admit and cited **Section 123 of the Evidence Act 2011**. Counsel submitted that the 1st Defendant is not in breach of the agreement reached with the claimant vide the offer letter dated 8/10/2020, cited **ODUTOLA V. PAPERSACK (NIG) LTD (2006) 18 NWLR (PT. 1012) PG. 470; BEST (NIG) LTD V. B. H. (NIG) LTD (2011) 5 NWLR (PT. 1239) PG. 95 AT PG. 117, PARAS A-C, etc**. Also that the

1st defendant cannot in law be said to have breached the provision in Clause 10 of the parties agreement in view of the act of the 2nd & 3rd Defendants who are the Lessors to the1st Defendant in failing to grant 1st defendant outstanding approvals and perform their obligations under the Development Lease Agreement which would have enabled the 1st Defendant to deliver within Eleven months as agreed. Counsel submitted that the contract between the 1st Defendant and the Claimant was caught up by the doctrine of frustration of contract, that it was the actions of the 2nd and 3rd defendants that hindered the 1st Defendant from delivering the already built house Type to the claimant.He cited **CAMERON AIRLINES V. OTUTUIZU (2011) 4 NWLR (PT. 1238) PG 512 of pg 545 Paras A-C; NWAOLISA V. NWABUFOH (2011) 14 NWLR (Pt 1268) PG 600 AT 630; A.G. CROSS RIVER STATE V. A.G FEDERATION (2012) 16 NWLR (PT 1327) PG 425 AT PG 479 PARAS G-H PG 480 PARA F etc**.Counsel urged the Honourable court to look at the entire circumstances of this case, the pleadings and evidence before the court particularly exhibits Al, A2, A14 & A15 to come to a conclusion whether the contract executed between the Claimant and the 1st Defendant was frustrated justifying the inability of the 1stdefendant to deliver the apartment to the Claimant as envisaged in the parties agreement.Counsel further submitted that until the "obstacle erected by the 2nd and 3rd defendants to the completion of the Estate project is fully resolved, which hopefully will be resolved soonest, the 1st defendant cannot deliver the said house to the claimant except with an order of court for fear of a possible violation of the lease

agreement without an approval received from the 2nd & 3rd Defendants incompliance with Arbitration award. He urged the court to dismiss the Claimant's reliefs (b) & (c) inclusive of the alternative reliefs.

I have examined processes filed by respective counsel and reviewed same alongside the Exhibits tendered by both parties. I will adopt the issue for determination as espoused by both learned counsels: -

(1) Whether considering the dispute between the 1st, 2ndand 3rd Defendants as evidenced by the Arbitration award, Exhibit A15, the contract agreement with the Claimant can be said to have been frustrated justifying the inability of the 1st Defendant to deliver the house in question to the Claimant.
(2) Whether the Claimant has proved his case to be granted the reliefs sought.

From the evidence of both parties, the following facts are unchallenged and uncontroverted.

(1) That 1st Defendant offered and Claimant accepted to purchase a unit from the low cost houses units that Defendant was to build.
(2) That Claimant paid the ₦7, 358,000 to the 1st Defendant as consideration for the house and purchase of application form.
(3) That 1st Defendant entered into contract that Claimant would take delivery of his residential unit within 11 months after confirmation of full payment.

(4) That 1st Defendant issued a receipt to the Claimant confirming full payment, receipt of housing unit purchase dated 7/10/2008.

(5) That till date, 1st Defendant is yet to put Claimant into possession.

From the above, it is not in doubt that there is binding contract between Plaintiff and 1st Defendant.1st Defendant had prior to selling to the Claimant entered into development lease agreement between 1st Defendant on the one part and 2nd& 3rd Defendants on the other part. The agreement is for the 1st Defendant to build a low cost housing scheme within the FCT which 1st Defendant named "Malaysian Gardens". The said agreement between all Defendants is dated 2nd July, 2004 also admitted as exhibit is an addendum to the lease agreement between all 3 Defendants dated 25thMay, 2006.From evidence before me, dispute arose between all 3 Defendants which culminated into all 3 Defendants submitting themselves for arbitration. The chief Judge of the FCT High Court had set up the process of arbitration on the 15the November, 2012.Claimant had filed this suit against all 3 Defendants but from evidence and exhibits before me 2nd& 3rd Defendants are not parties to the contract agreement between Claimant and 1st Defendant neither did 1st Defendant disclose in the agreement between 1st Defendant and Claimant that 2nd& 3rd Defendant are his principal.Likewise, claimant is not a party to the contract between all 3 Defendants.

In law, a contract exists only between the parties to it therefore, a person who is not a party to a contract cannot be sue upon it.From exhibits before me, each contract is an independent document on its own affecting only the parties to the contract.It is important to note that nowhere in the evidence of the Claimant did she claim to be a party to the lease agreement between all 3 Defendants.Although Claimant gave evidence that she was aware that there was a lease agreement between all 3 Defendants, awareness does not make the claimant a party to an agreement. By the elementary principle of law, a contract cannot confer rights or impose obligation arising there from on any person except parties to it. This in legal parlance is called privity of contract. See **REICHIE VS NBCI (2016) LPELR (40051) 1 @ 25**.The doctrine of privity of contract is to the effect that a person who intends to enforce a contract must show that he is a party to that contract. See **MAKWE VS NWUKOR (2001) 14 NWLR (Pt. 733) 356 where Iguh JSC** held that a contract affects only the parties thereto and cannot be enforced against a person who is not a party to it as only a party to a contract has the right to sue and be sued on it. Hence, Claimant having failed to prove that he entered into contractual agreement with 2nd& 3rd Defendants cannot successfully bring an action against 2nd& 3rd Defendants as they are not parties between Claimants agreement with 1st Defendant. Consequently, it is my view and I therefore hold that there is no privity of contract between Claimant and 2nd& 3rd Defendants. Consequently, the claim against the 2nd& 3rd Defendants fails in its entirety.

On the 2nd issue for determination, it is settled that contract between Claimant and 1st Defendant on the one hand and contract between all 3 Defendants on the other hand are two different contracts independents on its own and parties are bound by their agreement. Learned counsel in his written address raised a fundamental issue which frustration of contract occasioned by the 2nd& 3rd Defendants inability to comply with the terms of the agreement they had with the 1st Defendant' culminated into the inability of the 1st Defendant to deliver the housing unit to the Claimant. It is trite that no matter how brilliant a lawyer's written address is written, it cannot take the place of evidence of parties. Learned counsel to the 1st Defendant did not raise the doctrine of frustration of contract as a defence in its pleadings nevertheless, this court would spare no effort in considering same.

Frustration of contract as defined by **ADEKEYE JSC in G.N. NWOLISAH VS PASCHAL NWABUFOH (2011) 14 NWLR (Pt1268) 600 @ 630 H TO 631 A-F** occurs whenever the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performances is called for would render it radically different from what was undertaken by the contract.

The Supreme Court listed the following as events that will constitute frustration: -

(1) Subsequent legal changes or statutory impossibility.

(2) Outbreak of war

(3) Destruction of the subject matter of the contract or literal impossibility.

(4) Government acquisition of the subject matter of contract.

(5) Cancellation by an unexpected event like where other parties to a contract for personal service dies or either party is permanently incapacitated by ill health, imprisonment etc.

1st Defendant in this suit has relied heavily on the dispute between it and 2nd& 3rd Defendants as failure to actualize the delivery of the unit apartment to the Claimant. Unfortunately, counsel to the 1st Defendant is of the mistaken belief that frustration to contract has occurred in this circumstance surrounding this case due to the dispute between 1st Defendant and 2nd& 3rd Defendants.

On the contrary, time is of essence where parties have expressly made it so or where circumstances show that it is intended to be of essence or where a definite time has been fixed for execution. Hence failure to perform a contract within the limit with no tangible reason adduced for the failure the defence of frustration of contract will not avail a party who fails to prove that frustration occurred within the time limit agreed upon by parties. Failure to prove such would constitute a breach of contract.**See A.G. CROSS RIVER STATE VS A.G. OF THE FEDERATION (2012) 16 NWLR (Pt. 1329) 425 @ 479 H – 480 A-F**. Exhibit A4 which is the contract of sale between Claimant and 1st Defendant states:-

> "Time of delivery: Each allottee shall take delivery of his/her residential house within eleven months (11 months) after confirmation of full payment".

Receipt confirming full payment price was issued to Claimant on 7/10/2008 (Exhibit A6) which in effect connotes that Claimant was to take delivery of his house before 1st October, 2009. Unfortunately, 1st Defendant failed to give evidence as to date and time when dispute arose between all 3 Defendants but from exhibit A15 which is the Arbitral Award pg. 4, paragraphs 1.6 states "following the disagreement and other disputation between parties, claimant on 24/10/2012 instituted suit no. CV/489/12 before the High Court of the FCT against the Respondent" (i.e. 2nd& 3rd Defendants)

Paragraphs 1.7 states: -

> "By a letter dated 15 November, 2012 signed by the registrar of the Abuja Multi-Door Court house, the matter was on the order of the Hon. Chief Judge of the FCT in the due exercise of powers conferred on him, transferred to its Abuja Multi-Door Court (AMDC) unit for pre session meeting, hearing and determination following which claimant duly nominated J.H.C Okolo (S.A.N) as a member representing it on the arbitration panel".

Apart from the excerpts culled from the arbitration award (Exhibit A15),1st Defendant in its entirety of its evidence before this court did not proffer an explanation as to what caused the delay within the time limit

of 11 months as agreed in the agreement between 1st Defendant and Claimant. Housing unit was to be delivered to the Claimant on or before 1st October 2009 but from evidence before the court dispute between parties broke out in the year 2012. 1st Defendant having failed to deliver within the time frame of eleven (11) months, having failed to proffer any explanation as to its failure to deliver within the time frame agreed upon by parties, it is my view and I so hold that defence of frustration of contract cannot avail the 1st Defendant.

To proceed into the substance of this suit, it is uncontroverted that 1st Defendant failed to deliver to Claimant the unit apartment (subject matter) purchased by Claimant within the specified time. 1st Defendant in its statement on oath stated that it is willing to deliver the apartment to the Claimant if the court so orders but contradicted itself by also stating that the unit apartment subject matter of this suit is not fully completed as stated in paragraphs 9 of statement on oath of DWI:-

> "In further answer to paragraphs 14, the 1st Defendant state that the house type 1A Block/Plot No. 35 Akwa Ibom Link No. 2 – 002 bargained for has since 2009 been completed including toilet fittings & ceramic tiles <u>but the other necessary outstanding final touches for delivery could not be attended to for reasons arising from the effectuation of necessary logistics and components at the instance of the 2nd and 3rd Defendants authorities".</u>

From evidence of DWI as quoted above, it is evident that the unit of residential apartment paid for by the Claimant is not ready for delivery neither is it fit for habitation.Claimant having paid 1st Defendant since 7th October, 2008 which is over 12 years presently is definitely entitled to a remedy. The maxim "Ubi jus ubi remedium" comes to fore here where there is a wrong there must be a remedy.

The Claimant is asking for the sum of ₦10,000,000.00 as general damages for the breach of contract. The law is that once there is a breach of a contract entered into by parties, the party in breach would be liable in damages resulting from the breach to the other party to the contract against whom the breach was committed. In this instant case, the Claimant has proved that the 1stDefendant has breached their contract by the failure to keep to the terms of the offer letterto deliver possession to the Claimant on the agreed time (eleven (11) months) after confirmation of full payment thereby causing her embarrassment and denied her the use of her money.The Court in **ALHAJI MUSTAPHA ALIYU KUSFA V. UNITED BAWO CONSTRUCTION CO. LTD. (1994) 4 NWLR (PT. 336)** 1, held "that in cases of breach of contract, the damages that would be awarded are the pecuniary loss that may fairly and reasonably be considered as either arising naturally from the breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as a probable result of the breach".

On the backdrop of the above I therefore hold that Claimant has successfully proved her claim before this court. However, claimant in this suit filed two claims, the 2nd being an alternative claim thereby giving this court the discretion to adopt whichever of the claim/remedy is best suited for this action and I am of the view that in the present circumstance, the 2nd alternative would be most appropriate.

Consequently, IT IS HEREBY ORDERED AS FOLLOWS: -

1. That the 1st Defendant immediately refund the sum of₦7, 350,000 to the Claimant being the money collected from the Claimant for the purchase of the unit apartment known as Unit Type A, Unit No. 2 – 002, Plot No 35, Akwa Ibom Link Saraji District, Apo, Abuja.
2. General damages in the sum of ₦10, 000,000 (Ten Million Naira) onlyis hereby awarded against the 1st Defendant in favour of Plaintiff.
3. Cost in the sum of ₦1, 000,000 (One Million Naira) only is hereby awarded against the 1st Defendant only.

Parties: Absent

Appearances: Hammed Ogunbiyi for the Claimant. Victor Agunzi for the 1st Defendant.

HON. JUSTICE M. R. OSHO-ADEBIYI

JUDGE

1ST JULY, 2021