IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON TUESDAY, THE 29TH DAY OF SEPTEMBER, 2021
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/3437/2020

BETWEEN:

ALHAJI IBRAHIM ISYAKU MALUMFASHI **CLAIMANT**

AND

1. **MRS PATRICIA ENI ILANG**
2. **ASO SAVINGS AND LOAN PLC**

DEFENDANTS

JUDGMENT

By way of an originating summons dated the 27th day of November, 2020 and filed on the 15th of December, 2020, the Claimant instituted this action seeking for the determination of the following questions:-

1. Whether by virtue of the terms and conditions contained in the Undertaking/Agreement dated the 17th day of February, 2020, voluntarily entered between the parties hereto, there exists a binding contract between the parties.
2. Whether pursuant to the said agreement, the 1st Defendant is indebted to the Claimant to the tune of Ten Million Naira and has used the property under reference as security for the said debt?

3. Whether upon default and/or refusal of the 1st Defendant to pay the sum of Ten Million Naira due to the Claimant on/or before the 28th day of February, 2020, as agreed by the parties, the Claimant is entitled to exercise his right and/or power of sale by foreclosing the 1st Defendant pursuant to the said Agreement of 17/2/2020.
4. Whether the Claimant is entitled to foreclose the 1st Defendant by an Order or Court by reason of her failure to defray the existing debt and redeem the property under reference which is used as security/collateral for the existing debt.
5. Whether by deposit of the title document with the 2nd Defendant and agreeing to an indemnity with the Claimant for the release of the said document to the Claimant in the event of the 1st Defendant's failure to defray the existing debt, the 2nd Defendant by Order of Court should release the title documents to the Claimant in lieu of the 1st Defendant's inability to satisfy its existing debt to the Claimant.

The Claimant seeks, upon a positive determination of the above-stated questions, the following reliefs:-

1. A Declaration that pursuant to the Agreement dated the 17th day of February, 2020, there exists a binding contract between the Claimant and the Defendants and parties are bound by the terms of their agreement.

2. A Declaration that the 1st Defendant is indebted to the Claimant to the tune of Ten Million Naira pursuant to the Agreement dated 17/02/2020.
3. A Declaration that the 1st Defendant is in default and has failed, refused and/or neglected to pay the Claimant the sum of Ten Million Naira as contemplated in the underlining agreement despite several demands.
4. A Declaration that the Claimant's power of sale has arisen and is entitled to forthwith proceed to exercise same with respect to the 2-bedroom bungalow known as Block 13A, Flat 1, Kontagora, situate at Gwagwalada, Abuja, including the land for the residue of the term.
5. An Order foreclosing the 1st Defendant and forfeiting her title documents and whatever right she possesses with respect to the said property as a whole for failure to redeem her property as stipulated in the underlining agreement.
6. An Order mandating the 1st Defendant to deliver up peaceable possession of the said property to the Claimant free from intrusion and/or interference.
7. An Order directing the 2nd Defendant to deliver up/handover the title documents of the property (2-bedroom bungalow known as Block 13A, Flat 1, Kontagora, Gwagwalada, Abuja) which has been indemnified in favour of the Claimant.

8. An Order directing the Registrar of this Court or such persons including the Claimant as the Court may deem fit to forthwith place the said property under reference on auction for sale to interested members of the general public.
9. An Order directing the 1st Defendant to pay the sum of One Million Naira as general damages.
10. An Order directing the 1st Defendant to pay the sum of One Million Naira as cost of this proceeding.

The originating summons was supported by a 26-paragraph affidavit, 6 exhibits and a written address which embodies the legal argument of the Claimant in support of his suit.

Briefly, the case of the Claimant as disclosed in the facts deposed to in the affidavit is that the Claimant had advanced a loan of ₦3,500,000.00 (Three Million, Five Hundred Thousand Naira) only at the rate of 30% per month to the 1st Defendant on the 16th of September, 2019 repayable within 60 (sixty) days. The collateral for the loan was a 2-bedroom bungalow properly described as Block 13A, Flat 1, Kontagora, Gwagwalada, Abuja belonging to the 1st Defendant the documents of title of which were with the 2nd Defendant. The 1st Defendant executed a letter of indemnity in favour of the Claimant in respect of those title documents. See **Exhibits TEN 1** and **TEN 2** attached to the affidavit in support of the originating summons.

The 1st Defendant, having failed to repay the sum within the stipulated 60 (sixty) days sought for an extension of the repayment period. The Claimant granted her plea first on 17th November, 2020 and, secondly, on 17th February, 2021. The two extensions were evidenced by agreements to that effect which the Claimant attached as **Exhibits TEN 3** and **TEN 4** to the affidavit in support of the originating summons. Pursuant to **Exhibit TEN 4**, the Claimant agreed to peg the accumulated sum, which was in excess of ₦10,000,000.00 (Ten Million Naira) only, at ₦10,000,000.00 (Ten Million Naira) only.

Despite several demands by the Claimant on the 1st Defendant to pay the agreed sum, the 1st Defendant failed to repay the agreed sum. The Claimant therefore decided to exercise his right of sale and notified the 1st Defendant accordingly. See **Exhibit TEN 5**. In response, the 1st Defendant, through her Solicitors, asked for more time and the possibility of an amicable resolution of the impasse. See **Exhibit TEN 6**. Faced with this challenge, the Claimant has therefore opted to activate Clause 3 of the Agreement of 17/02/2021 which vests in the Claimant the right to foreclose the right of the 1st Defendant to redeem the property and exercise his right of sale, hence this suit.

In the written address in support of the originating summons, learned Counsel for the Claimant formulated one issue for the Court to consider.

The issue was: "whether or not the Plaintiff/Claimant (*sic*) is entitled to the reliefs sought."

In his argument on this sole issue, learned Counsel submitted that the parties were bound by the terms of their agreement which they voluntarily executed so long as the agreement or any of the terms is not fraudulent or otherwise illegal and the Court has the power to ensure compliance by the parties to an agreement with the terms of the agreement. In support of this submission, Counsel cited the cases of ***A.B.C. Transport Co. Ltd v. Omotoye (2019) LPELR-47829 (SC); Panabiz Int'l Ltd v. Addidon Nig. Ltd & Anor (2016) LPELR-41350 (CA); AG Rivers State v. AG Akwa Ibom State & Anor (2011) LPELR-633 (SC)*** and ***Afribank Nigeria Plc v. Alade (2000) LPELR-10722 (CA)***.

Drawing the attention of this Court to the nature of the relationship between the Claimant and the 1st Defendant, Counsel cited Order 58 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018 which empowers a mortgagor or mortgagee to approach the court *via* an originating summons to enforce their right in respect of the mortgage. It was his contention, therefore, that the suit was properly constituted and that Court has the power to pronounce on the bindingness of the terms encapsulated in the documents before it. The following cases were referred to in this regard: Ogundiani v. Araba & Anor (1978) LPELR-2330 (SC);

Amasson Farm Ltd v. NAL Mrechant Bank (1994) 3 NWLR (Pt. 331) page 241 at 253; B.O.N. v. Akintoye (1999) 12 NWLR (Pt. 631); Hydro-Tech Nig. Ltd v, Leadway Assurance Co. Ltd & Ors (2016) LPELR-40146 (CA); Omoniyi v. Alabi (2004) NWLR (Pt. 870) page 551.

The Claimant further contended that the 1st Defendant had subjected him to severe hardship by her refusal to repay the money he lent to her, a situation which made it difficult for him to apply his funds to more profitable ventures. In view of this, he urged the Court to hold that the 1st Defendant should not be allowed to profit from her wrong. He cited the case of Max Blossom Limited v. Mr. Maxwell T. Victor & Ors (2019) LPELR-47090 (CA) and urged the Court to grant all the reliefs sought in the originating summons.

In her response to the suit of the Claimant, the 1st Defendant, on the 12th of March, 2021 filed a Motion on Notice dated the same day. The said motion sought for an Order of this Honourable Court extending the time within which the 1st Defendant could file her Memorandum of Appearance, Counter-Affidavit and Written Address and other accompanying processes. The Motion also sought for an Order of this Honourable Court deeming the said processes already filed as properly filed and served, the appropriate filing fees having been paid. This motion was moved by Counsel for the 1st Defendant on the 6th of July, 2021 and the Court granted the prayers contained therein that same day.

In the 22-paragraph Counter-Affidavit deposed to by the 1st Defendant herself, the 1st Defendant admitted taking a loan of N3,500,000.00 (Three Million, Five Hundred Thousand Naira) only from the Claimant. Though she was aware that the Claimant was an unregistered private money lender, she agreed to take the loan at an interest rate of 30% per month. Her grouse, therefore, as evinced in paragraph 6 of the Counter-Affidavit, was the interest rate which she described as “outrageous” and against the Central Bank of Nigeria authorized interest rate of 14%. She also averred that she had started making repayments and attached Exhibit A as evidence of the payment of N500,000.00 (Five Hundred Thousand Naira) only which she made to the account of the Claimant.

In furtherance of her defence, the 1st Defendant claimed that the agreement she executed was illegal and therefore unenforceable. The particulars of illegality, as itemized by the 1st Defendant, were: (i) the claim of interest by unregistered money lender was illegal; (ii) the Claimant was unregistered/unlicensed money lender; (iii) the unregistered money lender could not charge interest; (iv) the Claimant could not rely on an unstamped and unregistered instrument to transfer title to land; (v) the sum of 30% interest rate per month charged by the Claimant on the loan granted to the 1st Defendant in the sum of N3,500,000.00 (Three Million, Five Hundred Thousand Naira) only was illegal, outrageous and fraudulent as it was

against the official lending rate approved by Central Bank of Nigeria, the body saddled with responsibilities of money policies and lending rate; and (vi) all the purported exhibits annexed to the affidavit in support of the originating summon were illegal, unenforceable and of no legal effect.

The 1st Defendant further averred that she had reached out to the Claimant through her Solicitors to work out a feasible plan for the repayment of the principal sum, but the Claimant had remained adamant to her overtures. Exhibit C annexed to her Counter-Affidavit was an evidence of this move. She therefore asserted that the Claimant was more interested in selling her property than in recovering his money. She therefore urged this Honourable Court to dismiss the claims of the Claimant.

In the written address in support of her counter-affidavit, the 1st Defendant through her Counsel formulated the following five issues for this Court to determine:-

(1) Whether the Claimant, by the forfeiture clause contained in the memorandum of understanding for the loan transaction between it and the Defendant in favour of Mrs. Patricia Eni Ilang and coupled with the execution of the deed of assignment, the power of attorney, and the loan application form between the parties as well as the deposit of the title document by the latter with the former, can clog the Defendant's

equitable right to redeem the property used as collayteral for the transaction?

(2) Whether the agreement between the parties can be taken cognizance of by a court of law, if not, whether the Claimant has any cause of action?

(3) Whether this Honourable Court possesses the jurisdiction to entertain this suit, the Claimant/Respondent (*sic*) being an unlicensed money lender and having charged unauthorized interests on the principal sum of the loan granted to Mrs. Patricia Eni Ilang in the name and for the property of the Defendant/Applicant (sic) as security for the loan contrary to section 5(1), section 6(1), section 15(1) and (3), section 16(1) and 19(1) of the Moneylenders Act CAP 525, Laws of the Federal Capital Territory, LFN 2004?

(4) Whether this suit, as presently constituted, is competent and this Honourable Court possesses the jurisdiction to entertain same, the Claimant/Respondent (*sic*) having same by means of originating summons when the issues therein are contentious or likely to be contentious?

(5) Whether this suit, as presently constituted is not an abuse of the due process of this Honourable Court.

In his argument on Issue 1, learned Counsel argued that though parties were bound by the terms of their agreement, exceptions exist to this general rule. One of the exceptions which he highlighted was illegality of the contract. Situating this exception within the context of the mortgage which existed between the Claimant and the 1st Defendant, Counsel argued that a mortgagor had an equity of redemption which coalesce into the maxim once a mortgage, always a mortgage. Since a mortgage was intended as a security for a loan, it should not be transformed into another nature once the mortgagor had paid off the loan; and, therefore, any condition which punished the mortgagor over non-payment of the loan constituted a clog on the mortgagor's right of redemption and would not be enforced by the Court. He added that the right of a mortgagor to redeem a mortgaged property had been recognized by the Courts in a plethora of cases. He cited and relied on the following cases: Yaro v. Arewa Construction Ltd & Ors (2007) LPELR-3516 page 39, para F; Seton v. Slade (1802) 7 Ves Jun 265, 273, 32 Eng Rep 108; Jones v. Horton & Horton, Inc., 100 F. 2d 345 (5th Cir. Tex 1938); Noakes & Co. Ltd v. Rice (1902) AC 24, 33-4, [1900-3] All ER Rep 34 (HL); Wiltse v. Excelsior Life Insurance Co. (1916) 29 DLR 32, 35 (Alta. CA Can); Russo v. Wolbers, 116 Mich App 327, 323 N.W. 2d 385 (1982); Jones on Mortgages (8th ed.), § 1326; and Chukwu & Anor v. Chukwu & Ors (2018) LPELR-45482 (PP. 51 – 53, paras A – E.

On Issue 2, learned Counsel for the 1st Defendant submitted that the agreement between the Claimant and the 1st Defendant was incompetent for non-compliance with the provisions of section 15 of the Land Registration Actand, therefore, should not enjoy any iota of attention from the Court. He cited the case of ***Gbadamosi v. Okege (2011) 3 NWLR (Pt. 1233) 206***. In view of its non-compliance with a mandatory provision of the law, learned Counsel contended that the Claimant was not entitled to any relief as he who came to equity must come with clean hands. In support he relied on the case of ***Ilyasu v. Ahmadu (2011) 13 NWLR (Pt. 1063) 259 and Yaro v. Arewa Construction Limited (2007), supra***.

On Issue 3, it was argued on behalf of the 1st Defendant that this Court lacked the jurisdiction to entertain this suit as the Claimant, not being a licensed money lender, lacked the power to charge an interest on monies given out as loan. Relying heavily on ***Broad Bank of Nigeria Ltd v. Zamogas Nigeria Ltd (2011) LPELR-3892; Magaji v. Ogele (2012) LPELR-9476; Kasumu v. Baba-Egbe (1956) A.C. 539***; sections 5(1), 6(1), 15(1) and (3), 16(1) and 19(1) of the Moneylenders Act CAP 525 Laws of the Federal Capital Territory, 2004 all of which he quoted *in extenso*, Counsel submitted that any contract to lend money where the party lending did not comply with the provisions of the law was unenforceable and the lender would not be able to enforce any claim in the contract. Juxtaposing

the position of the law and the facts disclosed in the affidavit in support of the originating summons, learned Counsel contended that the contract was illegal, null, void and of no effect and the Court could not be called upon to enforce same. Learned Counsel proceeded to cite a number of cases in support of his position that illegal contract were unenforceable at law. The cases were: ***Akinola v. Ogbesedanunsi; Abesin v. Iya-Egbes; Dawodu v. Tinubu (1959) LLR 128; Nwankwo v. Nzeribe (2004) 13 NWLR (Pt. 890) 422 at 428; Okonkwo v. Okoro (1962) 6 ENLR 74; andFashina v. Odedina (1957) 11 ERNLR 45***.

On Issue 4, it was argued on behalf of the 1st Defendant that this Court lacked the jurisdiction to entertain the suit, the Claimant having commenced this suit by way of a wrong adjudicatory process. Citing the cases of ***Ape v. Olomo (2010) LPELR-4988; Madukolu v. Nkemdilim, Rossek v. A.C.B. Ltd (1993) 8 NWLR (Pt. 312) 382, (1993) 10 SCNJ 20; Apadi v. Bonuso (2008) 13 NWLR (Pt. 1103) 204 at 219; Ladoja v. INEC & Others (2007) 40 WRN 1; Akinmade & Ors v. Ajayi (2008) 34 WRN 175 and Shell Petroleum Development Company of Nigeria Limited v. Abel Isaiah & Ors; Ossai v. Wakwah & Ors (2006) LPELR-2813 (SC); The Federal Government of Nigeria & Ors v. Zebra Energy Limited (2002) LPELR-3172; Habib Bank Nig. Limited v. Benson Ochete (2001) 3 NWLR (Pt. 699) page 114 at 117***, Counsel submitted that a Court could only assume

jurisdiction to hear and determine a matter where the matter was commenced via due process of law and upon the fulfilment of all conditions precedent to the exercise of jurisdiction. According to him, since the dispute and the issues surrounding same were contentious, the Claimant ought to have commenced the suit by way of a writ of summons and not by way of an originating summons since the suit raised substantial issues of fact which could be resolved only through evidence.

In his submission on the last issue he formulated, Counsel for the 1st Defendant cited the case of ***Ette v. Edoho (2009) 8 NWLR (Pt. 1144) 601 at pages 609 – 610 paras H – D*** where the Court enumerated situations under which a suit could be said to an abuse of court process. He submitted that the circumstance of this suit was one of the situations envisaged in that case being that the Claimant herein sought to use the judicial process improperly, considering that his claims were wanting in bonafide. He further cited the cases of ***Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) page 156; ARC v. JDP Construction Nig. Limited (2003) FWLR (Pt. 153) page 254 at 270 paras B – D; Mogaji v. NEPA (2003) FWLR (Pt. 153) page 239 at 249; Ayorinde v. Ayorinde (2003) FWLR (Pt. 169) page 1169 at 1183, paras C – D; Abdulfatai & Anor v. Kayode A. & Ors (2012) LPELR-14324 PAGE 56 paras A – B; Ministry of Works v. Tomas (Nig.) Ltd (2002) 2***

NWLR (Pt. 752) 740 at 781; and A.G. Bendel State v. UBA Ltd (1986) 7 SC (Pt. 11) 146 and urged this Court to dismiss the suit.

The above synopsis represents the respective cases of the Claimant and the 1st Defendant. The 2nd Defendant in this suit, Aso Savings and Loan Plc did not file any process in respect of this suit. This Court, therefore, is left to determine this suit on the basis of the facts contained in the affidavits of the Claimant and the 1st Defendants and their respective legal arguments canvassed in their respective written addresses in support of their respective positions. Since the issues canvassed by the 1st Defendant are more comprehensive than the sole issue formulated by the Claimant, this Court will adopt the five issues and the sole issue formulated by the Claimant in the determination of this suit. I have therefore coalesced all the issues formulated by the parties into the following two issues:-

i. ***Whether from the constitution of this suit this Honourable Court does not have the requisite jurisdiction to hear and determine this suit?***

ii. ***If the answer to Issue (i) above is in the affirmative, whether the Claimant is not entitled to the reliefs he seeks in this suit.***

In every adjudication before any Court or tribunal, the Court or tribunal must be shown to have jurisdiction to adjudicate over the subject matter and the parties before it; otherwise, whatever decision it arrived at will be a nullity,

Comment [FHC1]:

no matter how beautifully conducted the proceeding is. The Courts in Nigeria have accorded primacy to the issue of jurisdiction such that jurisdiction is regarded as a threshold issue. A Court that lacks jurisdiction lacks the powers to make binding pronouncement on the matter before it.

In ***Alade v. Alemuloke & Ors (1988) LPELR-398(SC)*** the Supreme Court defines jurisdiction as ***"... the legal authority, the extent of the power which has been given to a court by the law or statute establishing the said Court..."*** In ***UTIH VS ONOYIVWE (1991) LPELR-3436 (SC) page 46***, the Supreme Court per Bello CJN (as he then was) gave a graphic depiction of the nature of jurisdiction in these timeless words: ***"Jurisdiction is blood that gives life to the survival of an action in a Court of law and without jurisdiction, the action will be like an animal that has been drained of its blood, it will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise."***

As a threshold issue, the Court of Appeal in ***Akintola v. Magbubeola & Ors (2011) LPELR-3731(CA)*** defined jurisdiction as ***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision..."***It went on to hold that ***"...The importance of jurisdiction or lack of it is such that there is need for the Court to assume jurisdiction to***

ascertain first and foremost whether it has jurisdiction over a matter before it. And once the Court reaches the conclusion that it has no jurisdiction, the matter is incompetent and ought to be terminated.

It is therefore necessary to subject the contention of the 1st Defendant on the question of jurisdiction to the microscopic focus of the above authorities. According to the 1st Defendant, this Court lacks the jurisdiction to hear and determine this suit because it was initiated via an improper mode. According to her, since the issues were contentious in nature, the suit ought to have commenced by way of a writ of summons and not by way or originating summons. Indeed, in the *locus classicus* on jurisdiction, ***Madukolu v. Nkemdilim (1962) 2 SCNLR 341***, the Federal Supreme Court laid down the tripod on which the competency of the Court rests. According to Bairamian, FJ,

"…a court is competent when

1. ***It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and***
2. ***The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and***

3. ***The case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction***

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication"

There is no question that this Court is properly constituted. There is also no doubt that the subject matter and the parties are within the jurisdictional competency of this Court. The question that remains to be answered is whether the suit was initiated through due process of the law.

The Claimant commenced this suit through an originating summons. According to Order 2 Rule 3 (1) and (2),

(1) Any person claiming to be interested under a deed, will, enactment or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested.

(2) Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of an enactment, may apply

by originating summons for the determination of such question of construction and for a declaration as to the right claimed.

Besides, Order 58 of the Rules of this Court enables any mortgagor or mortgagee, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, to take out an originating summons for the purpose of obtaining appropriate reliefs from the Court. The reliefs, as seen from Rule 1 (a) – (g) are payment of moneys secured by the mortgage or charge; sale; foreclosure; delivery of possession whether before or after foreclosure to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge, or by any other person in, or alleged to be in possession of the property; redemption; reconveyance; and delivery of possession by the mortgagee.

On the other hand, a writ of summons is used where the Claimant claimsany relief or remedy for any civil wrong, damages for breach of duty, whether contractual, statutory or otherwise, damages for personal injuries to or wrongful death of any person, or in respect of damage or injury to any person, or in respect of damage or injury to any property. It is also used where the claim is based on or includes an allegation of fraud or where an interested person claims a declaration. See Order 2 Rule 2 (1) of the High

Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018. Generally, a writ of summons is used where there are substantial questions of fact, or where the dispute is so contentious that the only possible way the Court can do justice is for evidence to be taken so that the witness or witnesses can be examined in chief, cross-examined and re-examined if need be.

I have given fastidious attention to the processes filed in this suit and all the accompanying documentary exhibits. There is no doubt that the dispute revolves around the implication of the interpretation of **Exhibit TEN 1** and **Exhibit TEN 4** attached to the affidavit in support of the originating summons and also to the counter-affidavit of the 1st Defendant. The nature of the relationship these two exhibits created is obvious. The terms and conditions and other contents of these two exhibits are also explicit, clear and unambiguous. In **Exhibit TEN 5**, the Claimant notified the 1st Defendant of his intention to activate Clause 3 of the Agreement which empowers him to sell the property used as a collateral. In response to **Exhibit TEN 5**, the 1st Defendant wrote **Exhibit TEN 6**, pleading for more time. The contents of these documents are clear, lucid, devoid of opacity and, therefore, do not admit of any ambiguity.

It is trite law that documents speak for themselves. Both the Claimant and the 1st Defendant are agreed on the focal point of the agreement to wit: that

the 1st Defendant borrowed the sum of ₦3,500,000.00 (Three Million, Five Hundred Thousand Naira) only from the Plaintiff at an interest rate of 30% per month. See paragraphs ==== of the Claimant's affidavit in support of the originating summons and paragraphs 5, 6, and 8 of the 1st Defendant's counter-affidavit. A community reading of all the exhibits reveals that the parties are in concurrence over the nature of the transaction between them and the consequences that attend non-compliance thereof. What is left for this Court to determine is the questionof whether the Claimant can enforce the terms of the agreement of 17th February, 2020 between him and the 1stDefendant following the failure of the 1st Defendant to repay the said loan and the accrued interest.

Though the 1st Defendant admitted to having borrowed ₦3,500,000.00 (Three Million, Five Hundred Thousand Naira) only from the Claimant, she is challenging both the competency of the Claimant to charge interest on the said sum, since he is not licensed or registered as a moneylender and the legality of the interest rate of 30% per month pursuant to the provisions of the Moneylenders Act. The competency of the Claimant to operate as a moneylender and the validity of the interest rate of 30% per month are questions that can be determined upon the interpretation of the appropriate statute. Order 2 Rule 3(1) of the Rules of this Court provides that "***any person claiming to be interested under a deed, will, enactment or other***

written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested." Order 2 Rule 3(2) further provides that "***any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of an enactment, may apply by originating summons for the determination of such question of construction and for a declaration as to the right claimed.***"

In the case of ***Incorporated Trustees of Catholic Diocese of Ekiti State v. A.-G. Ekiti State & Anor (2018) LPELR-43510 (CA)*** held that "In originating summons, facts do not have a pride of place in the proceedings. The cynosure is the applicable law and its construction by the Court." See also ***Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 424 SC***. In ***Moses v. Eruwa & Ors (2013) LPELR-21168 (CA)***, it was held that originating summons as a mode of commencement of action in court is best suited for the expeditious determination of the cause of the parties which cause is not burdened by facts that are likely to be in dispute. See also ***Zakirai v. Muhammad & Ors (2017) LPELR-42349 (SC); A.-G. Adamawa State & Ors v. A.-G. Federation & Ors (2005) LPELR-602 (SC)***.

In addition to the above express and explicit provisions of the Rules, Order 58 Rule 1 stipulates inter alia that ***"any mortgagor or mortgagee, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out an originating summons, for such relief of the nature or kind following as may be specified in the summons, and as the circumstances of the case may require…"***

It is my considered view, therefore, that the present dispute before this Court is streamlined and well within the province of actions that can be commenced validly by way of originating summons. It is my considered belief that the present suit is competent, having being commenced by the mode appropriate to the reliefs sought herein. I so hold.

Having found that this Court has the requisite jurisdiction to hear and determine this suit, I shall now turn to the second issue I have formulated, which is, whether the Claimant is not entitled to the reliefs he is seeking from this Honourable Court. From the originating summons, the Claimant seeks ten reliefs from this Honourable Court. These reliefs are distilled from the five questions the Claimant urges this Honourable Court to determine.

Principally, the Claimant seeks a declaration that the agreement of 17th February, 2020 is binding and that parties are bound by the terms of their

agreement. The agreement of 17th February, 2021 is a loan agreement. Under the agreement, the Claimant advanced a loan of ₦3,500,000.00 (Three Million, Five Hundred Thousand Naira) only at the interest rate of 30% per month to the 1st Defendant. To secure the loan, the 1stDefendant executed a letter of indemnity in favour of the Claimant over the documents of title to a 2-bedroom bungalow properly described as Block 13A, Flat 1, Kontagora, Gwagwalada, Abuja being her property and which documents of title are in the custody of the 2nd Defendant. By virtue of this letter of indemnity annexed to the originating summons as **Exhibit TEN 2**, the 1st Defendant authorized the 2nd Defendant to deliver the said documents of title to the Claimant upon her default in repaying the loan sum and the accrued interest.

The 1st Defendant has challenged the competency of the suit on one major ground, which is, that the contract for loan is void and unenforceable *ab initio* on the ground of illegality. According to the 1st Defendant, the agreement of 17th February, 2020 is illegal *ab initio* for three major reasons, namely: that the Claimant is not a licensed or registered moneylender pursuant to the provisions of the Moneylenders Act; that the interest rate of 30% per month is illegal, being against the interest rate stipulated by the Moneylenders Act for licensed or registered moneylenders and the interest rate stipulated by the Central Bank of Nigeria for lending institutions; and,

that the letter of indemnity executed in favour of the Claimant which purported to transfer the ownership of the 2-bedroom bungalow known as Block 13A Flat 1 Kontagora Estate, Gwagwalada, Abuja was not registered pursuant to the provisions of the Land Instruments Registration Act.

I have studied the document annexed to the originating summons as **Exhibit TEN 1**. It is titled "Loan Agreement 2019". The rider to the title is: "The contents of this document details the loan agreement between Alh. Ibrahim Isyaku Malumfashi and Mrs Patricia Eni Ilang in connection with credit facility of ₦3,500,000.00 and collateral connected thereto." Paragraph 1(a) and (b) thereto contains the following stipulations:-

(a) Whereas Mrs Patricia Eni Ilang has evinced a desire to source for a credit facility of ₦3,500,000.00 from a private lender (hereinafter refer to as the Lender)

(b) The Lender has requested that the borrower provide a tenable property as collateral for the proposed loan amount and to further create an equitable mortgage over such property in favour of the Lender in consideration of the loan sum.

Clause 2 of the Agreement provides that "Parties have agreed that the duration of the loan shall be 60 days at the rate of 30% interest per month."

I have also studied the document attached to the originating summons as **Exhibit TEN 3**. It is also titled "Loan Agreement" and it was executed upon the expiration of **Exhibit TEN 1**. Paragraph 1 (a) and (b) contain similar provisions as paragraph 1 (a) and (b) of **Exhibit TEN 1** except that the amount due to the Claimant had increased to ₦5,600,000.00 from ₦3,500,000.00. Clause 2 also contains the stipulation of 30% interest per month.

Exhibit TEN 4 is titled "Undertaking 2020". This is the document the contents of which the Claimant desires this Honourable Court to interpret and give full effect to. The rider to the document states "The contents of this document details the undertaking between Alhaji Ibrahim Isyaku Malumfashi and Mrs Patricia Eni Ilang in connection with a debt of ₦10,000,000.00 as full and final payment and the collateral connected thereto." Though titled an undertaking, the nature of the agreement between the parties is manifested in paragraphs (a), (b) and (c) of the Preamble thereto. I have reproduced the relevant portions below:-

(a) *Whereas the Debtor has evinced a desire to source for a credit facility from the Secured Party on the 16th day of September, 2019.*

(b) *The Debtor acknowledged that as at 17th day of February, 2020, the sum payable is in excess of ₦10,000,000.00 which both parties covenant that on or before the 28th day of February, 2020, the*

Secured Party shall concede to the sum of ₦10,000,000.00 as full and final payment.

(c) *The Debtor hereby undertake to provide the Secured Party with a collateral (a house described as 2-bedroom Bungalow known as Block 13A Flat 1 Kontagora, situate at Gwagwalada, Abuja) to secure the debt.*

In view of the foregoing, therefore, I have no reservation in arriving at the conclusion that the relationship existing between the Claimant and the 1st Defendant is a lender-borrower relationship. By virtue of the express stipulations of **Exhibits TEN 1, TEN 3 and TEN 4**, the Claimant lent the sum of ₦3,500,000.00 to the 1st Defendant at an interest rate of 30% per month. The loan is secured by the 2-bedroom bungalow known as Block 13A Flat 1 Kontagora, situate at Gwagwalada, Abuja being property of the 1st Defendant.The question that therefore agitates the mind of this Honourable Court is whether the Claimant can recover both the ₦3,500,000.00 and the accrued interest which the parties, by consent, have agreed to peg at ₦10,000,000.00 or, in the alternative, exercise his right of sale of the property used as collateral pursuant to the provisions of **Exhibits TEN1, TEN 3** and **TEN 4**, but, particularly, **Exhibit TEN 4**?

To address this question, I have to advert my mind to **Exhibits TEN 1, TEN 3 and TEN 4**. These documents prove beyond any vestige of uncertainty

that the relationship between the parties is a lender-borrower relationship. But, was the Claimant being charitable and no more when he lent the sum of ₦3,500,000.00 to the 1st Defendant or did he lend the sum to her with the intent that he would gain a return on his investment in the form of interest on the principal sum? No doubt, the second scenario appears to be the case, considering the interest that has accrued on the original sum and the provision of a collateral to secure the loan. This raises the presumption of an organized business of moneylending and brings the Claimant within the definition of a moneylender.

In the case of ***Ibrahim Jimoh Ajao v. Michael Jenyo Ademola &Ors (2004) LPELR-5717(CA)***, the Court of Appeal, in examining sections 2 and 3 of the Moneylenders Law Cap. 103 Laws of Kwara State, 1994 held that though the mere fact that a person charges interest on the money lent does not make the person a moneylender within the meaning of the Moneylenders Law, any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed to be a moneylender until the contrary be proved. Since it is a rebuttable presumption, the onus of proving that a person who lends money is not a moneylender within the meaning of the Moneylenders Act is on the person who lends. See ***Veritas Insurance Co. Ltd. v. Citi Trust Invest.***

Ltd. (1993) 3 NWLR (Pt. 281) 349; ***Eboni Finance and Securities Ltd. v. Wole-Ojo Technical Services Ltd. (1996) 7 NWLR (Pt. 461) 464***.

From the tenor of the documents, the Claimant held himself out as a professional moneylender. Nothing establishes this fact better than the 30% interest rate per month charged on the principal loan sum and the condition that the property of the 1st Defendant be used as a security for the loan. I have gone through the processes filed herein, especially the Claimant's affidavit in support of the originating summons, and there is nothing in them that suggests that the Claimant is a licensed or registered moneylender to entitle him to carry on business as a credit institution. Significantly, the Claimant has not countered the 1st Defendant's claim in paragraphs 5, 7, 9 and 17 that he is an unregistered and unlicensed moneylender. The implication is that the presumption that he is a moneylender remains unrebutted, thereby bringing him within the meaning of a moneylender according to the Moneylenders Act. See ***Ibrahim Jimoh Ajao v. Michael Jenyo Ademola & Ors (2004) supra.***

Section 5(1) of the Moneylenders Act CAP 535 Laws of the Federal Capital Territory, Abuja enjoins a person who wishes to operate as a moneylender to take out an annual license in respect of the address at which he carries on his business as a moneylender. Section 6(1) of the same Act criminalises the infringement of the mandatory provision of section 5(1) in addition to

other acts. Significantly, section 6(1)(d) provides that "***if any person enters into an agreement in the course of his business as a moneylender with respect to the advanced or repayment of money or takes a security for money in the course of his business as a moneylender, otherwise than in his authorized name, he commits an offence and is liable on conviction…***"

Section 15(1) is equally significant. This section stipulates the interest rate chargeable "***by a moneylender or by a person other than a moneylender***" under different circumstances. On loans secured by a charge on a freehold property, etc, the interest rate is simple interest at the rate of 15% per annum for the first one thousand Naira or part thereof and at the rate of $12^{1/2}$% per annum on an amount in excess of one thousand Naira. On loans secured by a second charge on any real or personal property, the applicable interest rate is simple interest at the rate of $17^{1/2}$% per annum for the first one thousand Naira or part thereof and at the rate of 15% per annum on an amount in excess of one thousand Naira. On the other hand, the interest rate applicable to unsecured loans is simple interest at the rate of 45% per annum.

I have gone through the entire contents of all the exhibits annexed to both the originating summons and the counter-affidavit in opposition to the originating summons. I have also juxtaposed both the agreement of 17th day

of February, 2020 which the Claimant seeks this Honourable Court to interpret and the depositions of the Claimant in support of the originating summons with the provisions of the Moneylenders Act. It is immediately obvious to me that the Claimant has been in grave infractions of the Moneylenders Act. Though the Claimant did not describe himself as a moneylender, the terms of **Exhibit TEN 1, TEN 3 and TEN 4** vest him with the attributes of a moneylender and, therefore, bring him within the contemplation of the Moneylenders Act. Even if it may be argued on his behalf that since he is not a moneylender, he need not apply for and obtain a licence as such, his conduct, however, bring him within the operation of section 15(1) which uses the phrase "***…whether by a moneylender*** ***<u>or by a person other than a moneylender…</u>***" (underlining mine for emphasis) while stipulating the interest rates chargeable by a person who lends money.

It is for these reasons that I have no hesitation in arriving at the inescapable conclusion that the contract evinced by the agreement of 17th of February, 2020 by whatever name called is unenforceable being a contract which is against the express provisions of a valid, existing and substantive statute. To this end, therefore, I hold that the agreement of 17th of February, 2020 is void *ab initio*, null, and, accordingly, unenforceable being an agreement that was made against the provisions of the Moneylenders Act.

Similarly, having found that the agreement of 17th February, 2020 is enforceable, being an illegal contract, I have no difficulty in holding that Clause 3 of the said agreement is also void *ab initio*, null and, accordingly unenforceable as one cannot put something on nothing and expect it to stand. See ***McFoy v. UAC (1962) AC 152***. This is notwithstanding the registration or non-registration of **Exhibit TEN 2**, that is, the Letter of Indemnity which purported to create a mortgage in favour of the Claimant over Block 13A, Flat 1, Kontagora, Abuja being the property of the 1st Defendant.

In any case, there is no evidence before this Honourable Court that the said **Exhibit TEN 2** was ever registered in accordance with the provisions of sections 3 and 15 of the Land Instruments Registration Act applicable to the Federal Capital Territory, Abuja. In ***Kwande & Anor v. Mohammed & Ors (2014) LPELR-22575 (CA)***, the Court of Appeal held that an instrument which ought to be registered under the Land Instruments Registration Act but which is not registered cannot be admitted in evidence to prove or establish title. See also ***Okuwobi v. Achonu (2005) LPELR-11486 (CA)***. in view of the foregoing, therefore, **Exhibit TEN 2**, since it is unregistered, is not valid and, therefore, cannot purport to transfer title overBlock 13A, Flat 1, Kontagora, Abuja being the property of the 1st Defendant to the Claimant.

Though the position of the law as learned Counsel for the 1st Defendant has clinically expostulated is that an agreement to lend money which is contrary to the provisions of the Moneylenders Act is enforceable for being illegal, and I agree with him, it is now settled law that a party who willingly enters into a contract they know is illegal and even benefited from the contract cannot turn around to claim unenforceability of the same contract when they are called upon to perform their obligations under the said contract. See ***Max Blossom Limited v. Mr. Maxwell T. Victor &Ors (2019) LPELR-47090(CA); African International Bank Ltd. v. Integrated Dimensional System Ltd. (2012) 17 NWLR (Pt. 1328), pg. 1 at 43-44 paras. H-A; Artra Industries Ltd. v. Nigerian Bank for Commerce and Industries (1997) 1 NWLR (Pt. 483), pg 574 at 593, paras. F-H; Chanchangi Airline (Nig.) Ltd. vs. A.P. Plc. (2015) 4 NWLR (Pt. 1449), pg. 256, 274-275, paras. F-H among others***.

He who comes to equity must come with clean hands. This is in tandem with the Supreme Court's decision in ***Ibrahim vs. Osim (1988) 3 NWLR (Pt. 82), pg. 257, 279, paras. A-B***, where the apex Court held as follows: "***If it is an illegal transaction, the Appellant by his conduct in all the Courts below and in this Court, is praying that his crime be condoned with all the benefits that accrued to him by way of financial gains and to let it end there. That will not only be unjust but will also not be equitable. No***

person shall, after reaping benefit from a transaction of which he is a party, be heard to say such a transaction is illegal or void or voidable when it comes to him to fulfill his obligation under the transaction so far the other party has done all he pledged to do under it."

The 1st Defendant has sought to exculpate herself by claiming she entered into the contract under duress, undue influence, desperation and other such vitiating elements she could rely upon. I do not agree with her. There is no evidence to support her assertion. On the contrary, there are ample evidence to indicate that she entered into the contract freely. If this Court were to agree with her that she entered into the agreement evidenced by **Exhibit TEN 1** under duress, what of **Exhibit TEN 4**? What of **Exhibit TEN 6** which is the letter from her Solicitor negotiating for soft landing on her behalf? Besides, the usurious nature of loans from non-financial institutions, especially from loan sharks, is common knowledge. The 1st Defendant cannot be heard to claim ignorance of this common fact.

The 1st Defendant admitted in paragraphs 5, 6, and 8 that she, indeed collected the sum of ₦3,500,000.00 (Three Million, Five Hundred Thousand Naira) only from the Claimant. It is only proper, in the circumstances of this case, for this Honourable Court as a Court of justice and equity to treat the said sum, less the amount, if any, the 1st Defendant had paid to the

Claimant in liquidation of the said sum, as money had and received which the Claimant is entitled to recover from the 1st Defendant.

Furthermore, the 1st Defendant took and had been with the funds of the Claimant since September, 2019, a period of over two years, it is only fair, just and equitable that the Claimant recover damages for his money which has been in the possession of the 1st Defendant.However, cost follows events. This Court considers the fact that the 1st Defendant is indebted to the Claimant and it was her failure or refusal to pay that occasioned this suit. To this end, therefore, the Claimant is entitled to recover the cost of instituting and prosecuting this suit.

In conclusion, though the agreement of 17th February, 2020 is illegal being an agreement that was made in gross violation of the Moneylenders Act and the Land Instruments Registration Act, the 1st Defendant benefited from the said agreement and cannot be allowed to resile from it. In all, therefore, the suit of the Claimant succeeds in part and this Honourable Court hereby orders as follows:-

1. That the Claimant is entitled to recover the sum of **₦3,500,000.00 (Three Million, Five Hundred Thousand Naira) only** less the amount, if any, the 1st Defendant had refunded in liquidation of the debt as money had and received.

2. That **₦1,000,000.00 (One Million Naira)** only is hereby awarded as general damages against the 1st Defendant and in favour of the Claimant.
3. That the sum of **₦1,000,000.00 (One Million Naira) only** is hereby awarded in favour of the Claimant as the cost of instituting and prosecuting this action.
4. That the Claimant has no power or right of sale over Block 13A, Flat 1, Kontagora, Abuja being the property of the 1st Defendant.

This is the judgment of this Honourable Court delivered today, the 29th of September, 2021.

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HON. JUSTICE A. H. MUSA
JUDGE
29/09/2021

APPEARANCES:
FOR THE CLAIMANT:

FOR THE 1ST DEFENDANT

FOR THE 2ND DEFENDANT
No legal representation.