THE HIGH COURT OF THE FEDERAL CAPITALTERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MATIAMA - ABUJA
ON 9TH DAY OF JULY, 2021

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

SUIT NO: FCT/CV/2322/13

BETWEEN:
MATTHEW OLUWATOYIN AKINYELE ……. PLAINTIFF
(TRADING UNDER THE NAME & STYLE
OF OLUTOYMA NIGERIA ENTERPRISES)

AND

1. ADENIYI OSUNKOJO ASSOCIATES DEFENDANTS
2. MR DARE OSUNKOJO

N.Q. NKIRI ESQ. FOR THE PLAINTIFF
OLANIYI OYINLOYE FOR THE DEFENDANTS

JUDGMENT

This matter commenced under the undefended list by a writ of summons and affidavit filed on 19th March 2013. Upon consideration of the Defendants' notice of intention to defend and affidavit in support, the court transferred the suit to the general cause list and ordered pleadings to be filed and exchanged.

By his amended statement of claim filed on 29th January 2016, the Plaintiff seeks against the Defendants:-

"a) An order compelling the Defendants jointly and severally to pay to the Plaintiff – the sum of N2,000,000 (Two Million Naira only) being the balance accruing to the Plaintiff from the sale of the property situated at Block 64, Zone C Plot 2024, Cadastral Zone E10, Karu site, Abuja.

b) An order awarding in favour of the Plaintiff 10% post,-judgment interest on the sum of N2,00,000.00 (Two Million Naira Only) until liquidation of the debt.

c) Cost of this litigation."

The Defendants filed a statement of defence/counterclaim on 15th June 2017 deemed duly filed and served on 22nd March 2018. Therein they counterclaimed for:-

(i) An order of court that the Plaintiff should pay the sum of N1,000,000 (One Million Naira) to the Counter-claimants as general damages for instituting a malicious action against the 2nd Defendant through the Nigeria Police Force.

(ii) The sum of N300,000.00 being the solicitor's fee paid in defending this suit.

The Plaintiff filed a reply to the (amended) statement of defence and defence to counterclaim on 18th April 2019 deemed properly field and served on 29th April 2019.

To prove his case, the Plaintiff called 2 witnesses. He testified as PW1, adopting his amended witness statement on oath filed on 29th January,

2016 and witness statement on oath of 18th April 2019. Several exhibits were admitted in evidence through him, marked Exhibit P1 to P14.

PW2 was Mrs Akinyele Christiana Olubukola, the wife of PW1. She adopted her additional witness statement on oath of 29th January, 2016.

The case of the Plaintiff is that he is a businessman and a building contractor trading under the name and style of Olutoyma Nigeria Enterprises. He is also the Managing Director of Corporate and Allied International Limited– a company engaged in general contracts and merchandizing.

That one Dr Mrs Funmilayo Ekpe, the owner of the property known as Block 64, Zone C Plot 2024, Cadastral Zone E10, Karu Site, Abuja instructed him to renovate, manage, maintain and sell her said property.

To facilitate the terms of the agreement, time and money were to be invested in order to put the building in a good marketable condition.

That part of the arrangement with the owner was that the property should be sold for N16,000,000 (Sixteen Million Naira Only), to be remitted to her and any additional monetary gains made should be kept to recover the investment on the property.

That sometime in May 2012, the 2nd Defendant was introduced to PW1 by the PW2, his wife. That the 2nd Defendant indicated interest in facilitating the sale of the property.

That part of the agreement reached between the Plaintiff and the 2nd Defendant was that the property was valued at N20,000,000 (Twenty Million Naira only) out of which N16,000,000 (Sixteen Million Naira only)

would be paid to the owner and N4,000,000 (Four Million Naira only) to the Plaintiff as agent in charge of the property. The Defendants were to be paid by the buyer whom they would be acting for. That only when the payments are complied with in full that the Plaintiff would release the title documents in his care and possession for the conclusion of the sale. PW2 was in the know and witnessed all these.

That when a prospective buyer showed up, he removed all his belongings and other items not part of the property for sale such as work tools, tiles and some old burglary irons left after the renovation.

That on or about 5th November 2012 when the sale was concluded, the 2nd Defendant paid N16,000,000 (Sixteen Million Naira) to the owner and paid him Plaintiff N4,000,000 (Four Million Naira) in two banking instruments – a Skye Bank Plc cheque of N2,000,000 (Two million Naira) and a First City Monument Bank draft of N2,000,000 (Two million Naira) following which the Plaintiff released the title documents to the 2nd Defendant; in the presence of PW2.

However the Skye Bank Plc cheque of N2,000,000 (Two Million Naira) was later declared a dud cheque and was returned unpaid.

That the 2nd Defendant at first apologised for the dud cheque stating that the Economic and Financial Crimes Commission was after him, but later denied owing the Plaintiff, despite several demands for payment by the Plaintiff.

The Plaintiff later reported the 2nd Defendant to the Garki, Abuja Divisional Police Officer, Economic and Financial Crimes Commission,

Attorney General of the Federation and Inspector General of Police for issuing him a dud cheque. The matter was investigated by the police who were satisfied the 2nd Defendant be charged to court.

That the police withdrew the matter from court without his knowledge.
That the 2nd Defendant never denied issuing the dud cheque and the sum of N2,000,000 is still due from the 2nd Defendant who has vowed to deny the Plaintiff the fruit of his labour.

The evidence of PW2 was in tandem with that of PW1.

Both witnesses were thoroughly cross examined and discharged.

DW1, the 2nd Defendant testified as the sole witness for the Defendants. He adopted his witness statement on oath of 15th June 2017 and affidavit in support of the notice of intention to defend of 23rd July 2013.

He tendered Exhibit D1 to D5 in evidence.
His case is that the property in question was initially given to the Plaintiff to maintain, manage or sell by Dr Mrs Funmilayo Ekpe, the previous owner.

That the agreement was that the property be sold for N18,000,000 (Eighteen Million Naira) and N16,000,000 (Sixteen Million Naira) be given to the Dr Mrs Funmilayo Ekpe, and N2,000,000 be given to the Plaintiff. That whatever was gotten above N18,000,000 was for the 2nd Defendant and any others who facilitated the sale.
That title documents would be released to the 2nd Defendant once these conditions were met.

That the Plaintiff did not invest any money in the property before the 2nd Defendant sold the property on the written instruction of the solicitor to Dr Mrs Fumilayo Ekpe.

That the Plaintiff stole building materials from the property. That by a letter dated 12th June 2012 Dr Mrs Funmilayo Ekpe had to terminate the Plaintiff's instruction to manage and sell the property because she found his services unsatisfactory.

That the PW2 was never part of this transaction.

That the Plaintiff's appointment had been terminated by the previous owner though he refused to return the title documents.

That there was no oral agreement with the Plaintiff that he will be paid anything other than N2,000,000 as instructed by the previous owner. That the Plaintiff out of greed demanded an additional N2,000,000 from the 2nd Defendant before he would release the title documents.

That the 2nd Defendant had to give the additional cheque of N2,000,000 to the Plaintiff on 5th November 2012 "with the understanding that the Plaintiff should not present the cheque until the matter of how much is to be paid to him is resolved with the previous owner of the property, Dr Mrs Funmilayo Ekpe." (Emphasis mine)

That the suit be dismissed with substantial costs.

ON THE COUNTERCLAIM

It was deposed that the Plaintiff knowing they had no obligation towards him initiated police investigations and the arrest of the 2nd Defendant by

reporting to Garki Police Station Abuja that the 2nd Defendant owed him N2000,000 which he knew to be false.

That the Plaintiff's action was malicious and in bad faith which has caused the Defendants especially the 2nd Defendant loss of income as the 2nd Defendant's clients are wary of doing business with him.

He also tendered a certified true copy of Notice of Withdrawal at Karu Court withdrawing the First Information Report against him and he had to pay his solicitor N300,000 to defend this suit.

DW1 was duly cross examined and discharged.

In his final written address dated 20th March 2020 but filed on 3rd June 2020, Mr Olaniyi Oyinloye for the Defendants distilled two issues for the court's determination as follows:-

> "(1) Whether the Plaintiff has been able to prove his claim to be entitled to the sum of N2,000,000.00 (Two Million Naira) being the balance of the money he claimed he used to renovate the property has (sic) instructed by the former owner, (Dr (Mrs) Funmilayo Ekpe in accordance with Sections 131 and 134 of the Evidence Act 2011.
>
> (2) Whether the Defendants have been able to proof (sic) their case in accordance with Section 131 and 134 of the Evidence Act 2011 to be entitled to judgment on their counterclaim in view of the evidence before the court."

ON ISSUE 1

Learned counsel submitted that in proof of this debt of N2,000,000 the Plaintiff placed heavy reliance on the cheque for the sum of N2,000,000 issued by the 2nd Defendant to the Plaintiff which sum the 2nd Defendant denied owing the Plaintiff in his witness statement on oath before the court and in Exhibit P11, letter from Niyi Oyinloye & Co dated 12th April 2013. He urged that there was no reply to Exhibit P11 but the Plaintiff rather reported the issue of the returned cheque to the police.

Learned counsel argued that the fact a cheque was issued is not conclusive proof of indebtedness, as the Plaintiff must prove the said indebtedness. See Sections 133 (1) and 134 Evidence Act 2011.

It was further argued that the Plaintiff was not able to establish the fact that he renovated the property before it was sold by the 2nd Defendant. Also, that the Plaintiff failed to establish there was an agreement that the Plaintiff will be paid N4,000,000 rather than N2,000,000 which the 2nd Defendant paid him, and that the 2nd Defendant would be paid nothing for his services nor be paid by the buyer. The Defendants on the other hand tendered Exhibit D1 dated 12th June 2012 which shows that Dr Mrs Olufumilayo Ekpe terminated the Plaintiff's agency on her properties for misconduct, thus showing in essence, that as at when the property was sold in October 2012, the Plaintiff had no authority to sell or delegate same. To buttress the fact, the said Dr Mrs Funmilayo Ekpe was paid directly by the 2nd Defendant.

Learned counsel further submitted that Exhibit D3 clearly indicated that the Plaintiff was only entitled to N2,000,000. He urged that where documentary evidence is tendered, no oral version of the same evidence is admissible. See **ANYAEBOSI V BRISCOE (NIG) LTD (1987) NWLR (PT 59) 84.**

He urged the court to find the Plaintiff has failed to prove his claim of N2,000,000.

ON ISSUE 2

On the Defendants' counterclaim learned counsel submitted that since Exhibit D1 proves that the Plaintiff had no authority to sell the property at the time the 2nd Defendant sold same, all his actions thereafter were based on fraud and deceit, as he no longer had the authority to deal on the property neither was he entitled to the N2,000,000 he was paid.

He urged the court to find that Exhibit D2, Notice of withdrawal of First Information Report/Charges dated 25th June 2013 supports the Defendants' claim for malicious prosecution. **SEE UBA V OKOLI (2018) LPELR-45082 (CA); EJIKEME V NWOSU (2001) LPELR – 5494 (CA), BALOGUN V AMUBIKAHUN (1989) 3 NWLR (PT 107) 18**.

Because the Plaintiff had no cause of action against the Defendants learned counsel equally urged the court to award the solicitor's fees of N300,000 against the Plaintiff as costs follow events.

Thus he urged the court to find in favour of the Defendants/Counterclaimants.

In his final written address dated and filed on 3rd July 2020, Mr Babatunde Oyefeso for the Plaintiff raised a preliminary issue by way of objection to the Defendants/Counterclaimants motion no M/7301/2020 and final written address on the ground that the defence counsel's seal on both processes had expired.

The said processes though dated May 2020, have counsel's seal with expiry date of March 2020.

Mr Oyefeso argued that fixing an expired seal is equivalent to not filing any process at all. See **ROUGH DIAMOND TELECOMS LTD V MINISTER OF FEDERAL CAPITAL TERRITORY & ANOR (2019) LPELR – 48371 (CA); SENATOR BELLO SARAKI YAKI RTD & ANOR V SENATOR ATIKU ABUBAKAR BAGUDU & ORS (2015) 18 NWLR (PART 1411) 288 @ 316 PARA B-G per Ngwuta JSC, DR UMAR ARDO V INEC & ORS (2017) 13 NWLR (PART 1583) 450 @ 483 PARA F, per Augie JSC.**

He urged that the motion no M/7301/2020 and the Defendants'/Counterclaimants' final written address be struck out. Should the court hold otherwise, in the alternative, he also raised 2 issues similar to those of Defendants/Counterclaimants for the court's determination thus:-

> "1) Whether the Claimant has proved his case on preponderance of evidence.
>
> 2) Whether the Defendant/counterclaimant has proved his case and is entitled to relief sought."

ON ISSUE 1

Learned counsel submitted that the parties agreed to knowing each other and the property being the nexus. They also agreed that two separate financial instruments were issued by the Defendants and received by the Plaintiff. Hence facts admitted need no proof.

See **MBA V MBA (2018) LPELR 44925 (SC).** He queried why the Defendants issued the cheque if they had no intention of paying the Plaintiff.

It was submitted that the Defendants deliberately and intentionally set out to use the Skye Bank cheque to induce/deceive the Plaintiff into releasing the certificate of occupancy. Sections 233, 132 and 134 Evidence Act and case law were cited in support. He urged the court to find in favour of the Plaintiff.

ON ISSUE 2

It was submitted that the Defendants failed to prove the ingredients required to succeed in a case of malicious prosecution as it was the police who determined that the Defendants be prosecuted, and that the case against the Defendants was discontinued for further investigation and therefore not determined on its merits in favour of the Defendants.

He urged that the Defendants never denied issuing the dud cheque which is a crime the police and the Attorney General of the Federation are empowered by law to prosecute.

It was further argued that the bill of charges Exhibit D5 was dated 6th July 2013, months after this matter commenced in court.

Further that on the authority of **UBA PLC V VERTEX AGRO LTD (2019) LPELR- 48742 (CA),** the solicitor's fees were not recoverable as damages. Thus he urged that the Defendants failed to prove their counterclaim. The court was urged to enter judgment in favour of the Plaintiff.

RESOLUTION

Let me begin with the preliminary issue of expired seal raised by Mr Oyefeso. Mr Oyinloye for the Defendants/Counterclaimants did not respond to the argument of Mr Oyefeso. I think it is important that counsel should address arguments raised by opposing counsel to enable the court have the benefit of hearing from both sides on all issues raised before it, before arriving at a decision. Counsel should not leave it to the court alone.

In any event, in the instant case, it is on record that Mr Oyinloye had moved the said motion no M/7301/2020, filed on 3rd June 2020 on 30th March 2021. The prayers in the said motion are:-

> "1. An order of this Honourable court extending the time within which the Defendants/Applicants are to file their final written address, time for filing same having lapsed.
>
> 2. An order deeming as properly filed and served the herein attached above mentioned process all filing fees having been paid.
>
> 3. (struck out)
>
> 4. And for such further order(s) as this Honourable Court may deem fit to make in the circumstances of this case."

At the time of moving the said motion, Mr Oyefeso had no objection to the motion. Thus the court granted the prayers of the Defendants/Counterclaimants which precisely was to deem the Defendants/Counterclaimants' final written address as properly filed and served.

Having had no objection to the said motion and final written address, I think Mr Oyefeso, has waived the irregularity, if any in the said processes. I was unable to lay my hands on **ROUGH DIAMOND TELECOMS LTD V MINISTER OF FEDERAL CAPITAL** cited by Mr Oyefeso. However, in **EMECHEBE V CETO INTERNATIONAL (NIG) LTD (2017) LPELR – 45365 (CA) AT PAGE 16-18 PARAGRAPHS A-E** Tijani Abubakar JCA had this to say:-

> "In my view the purpose of the Nigerian Bar Association stamp and seal is to ensure that legal practitioners who file processes in court have their names on the roll of legal practitioners in Nigeria and that quacks, impostors and meddlesome interlopers do not infiltrate the legal profession and present themselves to litigants as legal practitioners. As I stated recently in **ROSOLU V FRN (UNREPORTED APPEAL NO. CA/L/271/2013)**, page 63 delivered on 24th February, 2017, "the requirement and purpose of Rule 10 (1) of the Rules of Professional Conduct for Legal Practitioners 2007 is that the legal practitioner who signed the legal process must affix his stamp and seal. The rationale behind this requirement in my view, is to checkmate quacks in the legal profession and ensure that legal processes are filed by genuine legal practitioners who are registered members of the Nigerian Bar Association and are truly qualified to practice law." To hold as

the learned counsel for the Appellant strenuously urged us to do will amount to enthroning technicalities over substantial justice, no matter how ornamental, fancy and high – sounding submissions of counsel may appear to be, we must elevate substantial justice over and above technicalities. It is a matter of duty for the court to do. See **TODAY'S CAR LIMITED VS LASACO ASSURANCE PLC & ANOR (2016) LPELR – 41260 (CA) PAGE 6-86, PARAGRAPH C-C**. The originating processes were duly signed and stamped by the learned counsel for the Respondent, and a stamp of a legal practitioner affixed even though expired, in my view, there is no sufficient basis to strike out the said process, so doing in my view will amount to pushing technicalities too far. In **NYESOM VS PETERSIDE & ORS (2016) LPELR – 40036 (SC) PAGE 35 PARAGRAPH B-D** the Supreme Court considered the failure to affix Nigerian Bar Association stamp and seal on the originating petition and held as "with regard to lack of NBA stamp and seal on the petition, I refer to the recent decision of this court in **GEN. BELLO SARKIN YAKI V SENATOR ABUBAKAR ATIKU BAGUDU IN SC.722/2015** delivered on 13th November 2015 when this court held that the failure to affix the approved seal and stamp of the NBA on a process does not render the process null and void. It is an irregularity that can be cured by an application for extension of time and a deeming order."

In the instant case, had Mr Oyefeso raised his objection before the hearing of the motion on notice, the court would have ordered Mr Oyinloye to affix his current seal or stamp on the motion and on the final written address, but having not done so, and having not raised an

objection to the said processes earlier than in his final written address, the moment to object has passed. Mr Oyefeso can no longer do so now.

In **ONODAVWERHO V FRN (2019) LPELR – 47185 (CA)** (delivered Friday, 5th April 2019) at page 29 paragraph B-F, Helen Moronkeji Ogunwumiju JCA held that:-

> "The other point made by the Appellant is that of the supposed incompetence of the Respondent's final written address which in spite of objection was considered by the learned trial judge in determining the case at trial.
>
> I agree with the learned Respondent's counsel that failure to affix a stamp/seal to the processes does not invalidate the processes filed without a seal. I am of the view that the authorities are ad idem on the issue and it was not erroneous on the part of the learned trial Judge to have considered the Respondent's address more so when at this stage, I cannot see how it has caused miscarriage of justice to the Appellant. See **NYESOM V PETERSIDE & ORS (2016) LPELR – 40036 (SC), FOLORUNSHO V FRN (2017) LPELR – 41972 (CA); MEGA PROGRESSIVE PEOPLES PARTY V INDEPENDENT NATIONAL ELECTORAL COMMISSION (NO. 1) (2015) 18 NWLR (PT 49) PAGE 207."**

In the final analysis, I do not see what injustice the Plaintiff will suffer if the court considers the Defendants/Counterclaimants' final written address. The court having deemed the Defendants' final written address as having been properly filed and served, the preliminary issue/objection is overruled. The Defendants/Counterclaimants' final written address shall be considered in this judgment.

I have considered the evidence before me and the written and oral submissions of learned counsel on both sides. I shall adopt the two issues raised by the parties, particularly by the Plaintiff.

ON ISSUE 1

The claim of the Plaintiff is the sum of N2,000,000 (Two Million Naira) being the balance accruing from the sale of the property situate at Block 64, Zone C, Plot 2024, Cadastral Zone E10, Karu Site, Abuja; 10% post judgment interest on the said sum till liquidation of the debt.

I take notice of the fact that the Plaintiff does not claim the N2,000,000 as balance on renovation.

The law is trite that the onus of proof lies on the Plaintiff to prove his case and he who asserts must prove.

Where a prima facie case is made out by the Plaintiff the burden then shifts to the Defendant to adduce counter evidence to sustain their defence. See Section 133 (1) and (2) Evidence Act 2011, **NDUUL V WAYO & ORS (2018) LPELR – 45151 (SC) PAGE 51-53 PARAGRAPHS A-B per Kekere – Ekun JSC; INEME V INEC (2013) LPELR – 21415 (CA) PAGE 19-22 PARAGRAPH F-B per Otisi JCA.**

The Plaintiff in proof of his case called two witnesses – himself as PW1, and PW2. They both testified that Dr Funmilayo Ekpe instructed him to renovate, manage, maintain and sell her property known as Block 64, Zone C, Plot 2024, Cadastral Zone E10, Karu Site, Abuja via Exhibit P5.

That part of the agreement with the owner was that the property should be sold for N16,000,000 and be remitted to her, and any additional monetary gains made should be kept to recover investment on the property.

That when the Plaintiff introduced the property to the 2nd Defendant that their agreement was that the value of the property was N20,000,000, to be disbursed as follows – N16,000,000 to the owner, N4000,000 to the Plaintiff as the agent in charge of the property for the release of the certificate of occupancy, and the Defendants were to be paid by the buyer whom they would be acting for.
PW1 and PW2 stated that this agreement was oral and that PW2 witnessed the agreement.

They were thoroughly cross examined and were not shaken in cross examination.

PW1 and PW2 further testified that after the sale by the 2nd Defendant, the 2nd Defendant paid to the Plaintiff N2,000,000 by bank draft and N2,000,000 by cheque and the Plaintiff released the certificate of occupancy.

It was also the evidence of PW1 and PW2 that the Skye Bank Plc cheque No. 10000153 dated 5th November 2012 for N2,000,000, Exhibit P8, was dishonoured and returned unpaid and that all efforts to get the 2nd Defendant to pay the said sum of N2,000,000 proved abortive.

The 2nd Defendant did not dispute that he issued the cheque of N2,000,000 which was dishonoured. His defence is that the Plaintiff was not entitled to N4,000,000, but only entitled to N2,000,000 which he

had already paid to the Plaintiff. That the Plaintiff demanded the further N2,000,000 out of greed.

That the agreement between the parties was that the property be sold for not less than N18,000,000 out of which N16,000,000 will be paid to the owner and N2,000,000 be paid to the Plaintiff and whatever could be gotten above N18,000,000 will be for the Defendants and others who facilitate the sale.

The 2nd Defendant having admitted that he issued the dishonoured cheque of N2,000,000 to the Plaintiff as payment for the release of the copy of occupancy. The onus lies on the Defendants to prove that the Plaintiff was not entitled to the money, for in the ordinary course of business, one would not issue a cheque in favour of another if one did not owe the other a debt.

The Defendants tendered Exhibit D1 dated 12th June 2012, this letter purports to terminate the agency of the Plaintiff and demands the return of the certificate of occupancy, and singed by Dr Mrs Funmi Peter Ekpe.

PW1 denied knowledge of the letter. He said he was not aware of it, so did PW2.

The letter was admitted in evidence despite the objection of Mr Oyefeso for the Plaintiff.

Now, admissibility is separate from probative value. The question is:-

"Of what probative value is Exhibit D1?"

I think that the PW1, who is the alleged addressee of the letter, having denied knowledge of the letter, and there being no evidence on the face of the letter that same was in fact received by the PW1, the onus was on

the Defendants to call as a witness, Dr Mrs Funmi Peter Ekpe to testify before this court that she wrote and sent the said letter to the Plaintiff, terminating his agency and demanding the return of her certificate of occupancy in connection to this property.

The Defendants failed to do this and no reason was given for their failure to do so. See Section 169 (d) Evidence Act.

Exhibit D1 to my mind, has no probative value. See **WIKE EZENWO NYESOM V HON DAKUKU ADOL PETERSIDE & ORS (2016) LPELR – 40036 (SC) PAGE 56 PARAS A-E; BELGORE V AHMED (2013) 8 NWLR (PT 1355) 60 AT 100 PARA E-F** the Court of Appeal held that:-

> "Where the maker of a document is not called to testify, the document will not be accorded probative value."

Exhibit D3 is dated 2nd October 2012. It is the Authority to Sell issued by Uche Nwagu Esq, solicitor to Dr Mrs Funmi Ekpe.
Exhibit D3 is audibly silent on the agreed amount for sale of the property, though it mentions that N2,000,000 be given to PW1 for him to release the original documents of the house in question.

The question begging for an answer is, if the PW1's agency had been terminated by Exhibit D1 since June 2012, why did the PW1 still have the title documents to the property in October 2012?
Again, why did Dr Mrs Funmi Ekpe not retrieve them from him? Why did the Defendants succumb to a demand of extra N2,000,000 rather than ask Dr Ekpe to get the documents from PW1?

Exhibit P11 leaves more questions than answers. More important is the agreement between the Plaintiff and the Defendants.

Now Exhibit P11, is dated 12th April 2013 and relied upon by the Defendants.

It is a response by Niyi Oyinloye Esq to the Plaintiff's then solicitor, on his demand for payment of debt of N2,000,000. therein it was stated inter alia:-

> "The parties agreed that the property will be sold for N18,000,000 (Eighteen Million Naira) only and that our client will not be paid any fees from the sum of N18,000,000 but his fees will be whatever amount he is able to sell above the N18,000,000.
>
> This understanding was reached between the parties in my clients office in the presence of one Barrister Dorothy Oguigo who your client also introduced the property to.
>
> According to our client, also known to your client, the sum of N2,000,000 is to be paid to your client from the N18,000,000 while N16,000,000 is to be remitted to the owner of the property, Dr (Mrs) Funmi Ekpe through her solicitor, Barrister Uche Obinna who can attest to this...
>
> There are witnesses to allude to the fact that the property is to be sold for a total of N18,000,000 and to be disbursed as stated above." (Emphasis mine)

Despite the assertion that witnesses to this agreement abound, it is curious therefore that none of these vital witnesses were brought to court by the Defendants to prove this agreement that only N2,000,000

was to be paid to the Plaintiff out of a sale price of N18,000,000, and no reason was given for not producing these witnesses.

The law is trite that failure to call a vital witness is fatal to the case of the party who failed to call him. See **MR JONNY LAR SALBIE & ANOR V INDEPENDENT NATIONAL ELECTORAL COMMISSION (2009) LPELR - 4923 (CA) PAGE 21 PARAGRAPHS A-C, AUDU V GUTA (2004) NWLR (PART 864) 463 AT 482 PARAGRAPHS D-H; 485 PARAGRAPHS A-D.**

Finally on this point, the 2nd Defendant in paragraph 22 of his witness statement on oath averred thus:-

> "That the Plaintiff (sic) had to give another cheque to the Plaintiff on the 5th November 2012 with the understanding that the Plaintiff should not present the cheque until the matter of how much is to be paid to him is resolved with the previous owner of the property Dr (Mrs) Funmilayo Ekpe. The Plaintiff never listened but went ahead and lodged the draft and the cheque." (Emphasis mine)

In other words, that there was no agreement on how much the Plaintiff was to be paid. I think that this is where the Defendants finally put a nail in the coffin in their case. For this final piece of evidence contradicts the entire case of the Defendants whose defence has been that the agreement had been or was that the property would be sold for N18,000,000 and N2,000,000 given to the Plaintiff (see Exhibit D3 for instance to release the title documents.)

In **HUSSAINI ISA ZAKIRAI V SALISU DAN AZUMI MUHAMMAD & ORS (2017) LPELR – 42349 (SC)** Augie JSC at page 70 to 71 paragraphs G to C held that:-

> "The law insists that where there are material contradictions in the evidence adduced by a party, the court is enjoined to reject the entire evidence as it cannot pick and choose which of the conflicting versions to follow **– KAYILI V YILBUK & ORS (2015) LPELR – 24323 SC.**
>
> A piece of evidence is contradictory to another when it asserts or affirms the opposite of what that other asserts. Put another way, evidence contradicts evidence, when it says the opposite of what the other evidence says, not on just any point, but on a material point – **ODUNLAMI V NIGERIA ARMY (2013) LPELR – 20701 (SC)."**

In **EMMANUEL NDUKUBA & ANOR V PATRICK NWANKWO & ORS (2016) LPELR – 40937 (CA) AT PAGE 40 PARAGRAPHS C-F**, the Court of Appeal per Tom Shaibu Yakubu, JCA agreed with the trial court that material contradictions in the evidence of a party and that of his witness makes the case of that party unreliable and that such a party cannot be said to have proved his case as required by law. Rather such a party has failed in the primary responsibility of proving his case on a balance of probability.

In the instant case, I must reject the evidence of the Defendants that the Plaintiff was entitled to only N2,000,000 from the sale of the property as unreliable.

On a balance of probabilities I must and do hold that the evidence of the Plaintiff that the parties' agreement was that the Plaintiff will be

paid N4,000,000 from the sale of the property out of which defendant paid only N2,000,000 leaving a balance of N2,000,000 is cogent and reliable. I therefore hold that the Plaintiff has proved his claim of N2,000,000 against the Defendants.

Accordingly, I enter judgment in favour of the Plaintiff and order the Defendants, jointly and severally to pay the Plaintiff the said N2,000,000 accruing to the Plaintiff from the sale of the property situate at Block 64, Zone C, Plot 2024 Cadastral Zone E10, Karu Site, Abuja.

2) Pursuant to Order 39 Rule 4 of the Rules of this court, I award the Plaintiff 10% post judgment interest per annum on the sum of N2,000,000 from today until the judgment sum is fully liquidated.

3) On costs, this case lasted 8 years from 2013 to 2021. I awards costs of N100,000 in favour of the Plaintiff against the Defendants.

ON THE COUNTERCLAIM OF THE DEFENDANTS

I find that the Defendants owe the Plaintiff the sum of N2,000,000 claimed by the Plaintiff, the 2nd Defendant did not dispute issuing the Skye Bank cheque that was dishonoured for lack of funds in the account. It was therefore for good reason that the Plaintiff reported a case of issuance of dud cheque to the police in Exhibit P12 a crime the police are authorised by law to investigate and prosecute. There is equally no malice proved on the part of the Plaintiff.

There is nothing to challenge the fact that the police charged the 2nd Defendant to court on a First Information Report and later discontinued the criminal proceedings “for the purpose of further investigation”.

The discontinuance of the criminal proceedings was not on the merits of the case, that is, it was neither a discharge nor an acquittal on the merits of the case.

The discontinuance of the criminal proceedings cannot therefore be a ground to sue for or claim damages for malicious prosecution.
Without further ado, I thereby hold that the Defendants have not proved their case of malicious prosecution to entitle them to the sum of N1,000,000 damages claimed.

The Defendants are equally not entitled to the claim of solicitor's fees of N300,000 having failed in their counterclaim and on the authority of **NWANJI V COASTAL SERVICES NIG LTD (2004) 18 NSCCR 895** cited by the Plaintiff's learned counsel.

In conclusion I hold that the Defendants have failed to prove the counterclaims.
The counterclaim is hereby dismissed in its entirety.

Hon. Judge