IN THE APPELATE DIVISION OF THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT JABI, ABUJA

BEFORE THEIR LORDSHIPS:

1. **HON. JUSTICE ABUBAKAR IDRIS KUTIGI – PRESIDING JUDGE**

2. **HON. JUSTICE JUDE ONWUEGBUZIE – JUDGE**

THIS TUESDAY, THE 14TH DAY OF DECEMBER, 2021

APPEAL NO: CVA/407/19
SUIT NO: CV/121/2017

BETWEEN:

COLVI LIMITED .....APPELLANT

AND

ARTCO INDUSTRIES LIMITED .....RESPONDENT

JUDGMENT

The facts of this appeal are largely not in dispute. Indeed it is a fairly straightforward appeal relating to whether the lower court properly evaluated the evidence in reaching the conclusion subject of both the appeal and cross-appeal.

By a plaint dated 27th May, 2016, the Plaintiff/Respondent, (hereinafter referred to as the Respondent), sought for the following reliefs against the Defendant/Appellant, (hereinafter referred to as the Appellant) at Page 2 of the Record as follows:

1. **The sum of N4, 500, 000.00 (Four Million Five Hundred Thousand Naira only) being money owed for the lease period paid for but not used by the Plaintiff.**

2. **Interest on the Judgment sum of N4, 500, 000.00 at 10% per annum until it is liquidated.**

At the conclusion of trial, the court granted **Relief (1)** but refused **Relief (2)** for claim of 10% interest on the Judgment sum.

Being dissatisfied with the Judgment of the lower court, the Appellant filed an Amended notice of Appeal dated 5th June, 2020 containing four (4) grounds.

The Respondent equally not satisfied with the failure of the lower court to grant the relief on 10% interest equally filed a cross-appeal. The notice of cross-appeal dated 12th March, 2021 has only one ground.

In compliance with the Rules, the Appellant filed and served its Brief of Argument dated 18th November, 2020 and filed same date at the Court's Registry. In the said address, two issues were raised as arising for determination as follows:

1. **Whether the Trial Court was right in determining this suit, without a joinder of the Head Lessor, who the respondent claimed he made payment to and who was never a party to the sub-lease and further agreement between the Appellant and the Respondent.**

2. **Whether a witness statement on oath which contradicts documentary evidence tendered by the same party is admissible.**

The submissions on the above issues forms part of the Record of Court. We shall refer to the submissions as we consider necessary as we resolve issues raised by the extant appeal.

On the part of the Respondent, it filed a Respondent's Brief of Argument on 17th February, 2021. The Respondent adopted and addressed on the two issues raised by the Appellant which equally forms part of the Records of Court. We shall equally refer to aspects of the submissions as we consider necessary.

The appellant then filed a Reply brief to the Respondents brief dated 17th March, 2021.

At the hearing, counsel on either side adopted and relied on the processes filed. The Appellant's counsel urged on us to allow the appeal while the Respondent's counsel urged that the Appeal be dismissed.

We start with the substantive Appeal before we deal with the Cross-Appeal. Indeed the determination of the substantive appeal will impact one way or the other on the cross-appeal. We have carefully considered the Record of Appeal, the Briefs of argument filed on both sides of the aisle and the two issues raised by parties can be more succinctly accommodated under one single broad issue to wit:

Whether on a preponderance of evidence, the lower court was right in granting the substantive Relief (1) sought by the Respondent.

The above issue as distilled by this court conveniently accommodates all the issues raised and addressed by parties including the question of whether the failure to join the Head lessor impacts on the case or not. The issue thus raised is not raised as an alternative but cumulatively with the issues formulated by parties. See **Sanusi V Amoyegun (1992) 4 NWLR (pt.237) 527**. It is therefore on the basis of this issue as formulated by court that we will now proceed to resolve this appeal. In furtherance, we have read the Briefs of argument of parties and in the course of this Judgment and where necessary as indicated earlier on, we would be making reference to specific submissions and resolving any issue(s) arising therefrom.

ISSUE 1

Whether on a preponderance of evidence, the lower court was right in granting the substantive Relief (1) sought by the Respondent.

We had at the beginning alluded to the reliefs sought at the lower court. Both parties agree on the processes filed that there was a **sub-lease agreement** between them with terms which were subsequently altered to accommodate a new commencement date. The issues raised will involve situating the nature and precise parameters of the sub-lease agreement and whether the Head lessor could properly and legally intervene in the relationship and who is to be held responsible for the disruptions and the damages caused by the intervention by the Head lessor. The answers to these questions will provide firm legal and factual template to determine the rightness or otherwise of the decision of the lower court.

The case of the Respondent on the Record vide pages 3 – 6 is that based on the representation of the Appellant that it had taken out a lease of several years with the Head lessor, whose name was not disclosed to it, it entered into a **sub-lease**

for a defined period with Appellant. That in the course of this relationship, the Head lessor now wrote to them to vacate the premises on the ground that the head lease with the Appellant has expired. That it made efforts to get across to the Appellant without success. It then held several meetings with this Head lessor to ascertain the accuracy of the tenure of the Head lessor and it was constrained to pay **extra fees** to the third party or Head lessor as the Appellant in its view had no authority to sub-lease the property for any period after its own lease had expired. The Respondent stated that the Appellant agreed to reimburse them with the sum of **N4, 500, 000** as prorated rent for the period of 90 days which it had to forego for the period they could not use the property.

On the part of the Appellant, its case is simply that, the sub-lease agreement and the further agreement it had was solely with Respondent and that the sub-lease and the further agreement governed the terms of the relationship and that it warned the Respondent and all its tenants not to deal with any agent, person or persons purportedly coming from the Head lessor. That the two agreements signed did not made any provision for reimbursement and that the further agreement took care of the 90 days delay for which the Respondent is now claiming the sum of N4, 500, 000 and that it never at any time agreed to reimburse this amount which Respondent paid to a third party who is no party to the sub-lease agreement between parties.

As an appellate court, it is to the pleadings and evidence as streamlined in the record that we must beam a critical judicial search light in resolving the contested assertions in this appeal. Because the root or foundation of the case is predicated on a sublease agreement which is inherently contractual, let us start by situating what a contract entails and its essential elements and to restate some settled principles which will guide our evaluation of the evidence.

Now generally in law, a contract is an agreement between two or more parties which creates reciprocal legal obligations to do or not to do a particular thing. To bring a contract to fruition where parties to the contract confer rights and liabilities on themselves, there must be mutual consent and usually this finds expression in the twin principles of offer and acceptance. The offer is the expression of readiness to contract on terms as expressed by the offeror and which if accepted by offeree gives rise to a binding contract.

It should be pointed out clearly that the offer itself is not the contract in law but the taking of preliminary steps that may or may not ultimately crystallize into a

contract where the parties eventually become ad-idem and where the offeree signifies a clear and unequivocal intention to accept the offer. See **Okubule Vs Oyegbola (1990)4 N.W.L.R (pt. 147) 723.**

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

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

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

Having stated briefly what a contract entails in law, let us equally as earlier alluded to, restate some settled principles that guides a court in the process of evaluation of evidence. It is now settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

It is equally important to add that the appraisal of oral evidence and the ascription of probative value to such evidence is the primary duty of a trial court. Once a trial court has applied the established principles of law in the assessment or evaluation of evidence adduced before it, an appellate court would have no viable justification to interfere with the decision notwithstanding the style adopted in the procedure for the evaluation. The rationale in support of the duty placed on the trial court to assess or evaluate evidence is that it enjoys the privilege of listening to witnesses and watching their demeanour, and is better placed to assess their credibility on oath. See **Borishade V FRN (2012) 18 NWLR (pt.1332) p.347. See also Martins V State (1997) 1 NWLR (pt.418) 355; Omuoha V State (1989) 2 NWLR (pt.101) 23.**

Where however a trial court fails to or does not evaluate evidence properly, the appellate court is expected to evaluate the evidence and come to a decision that is correct and fair to the parties. See **Afolabi V WSW Ltd (2012) 17 NWLR (pt.1329) 286 SC and Olarewaju V Gov. Oyo State (1992) 9 NWLR (pt.265) 335.**

It is perhaps equally important to point out that when the evaluation of evidence by a particular trial court is being challenged, the principles that are examined are:

a. Whether the evidence is admissible;
b. Whether the evidence is relevant:
c. Whether the evidence is credible;
d. Whether the evidence is more probable than that given by the other party.

See **Magaji V Odofin (1978) 4 SC 91; Ojokolobo V Alamu (1998) 9 NWLR (pt.565) 226 and Agbi V Ogbeh (2006) 11 NWLR (pt.990) 65.**

Now from the evidence, it is not in dispute, indeed it is common ground that parties subject of this appeal entered into a sub-lease agreement dated **2nd December, 2013** for the lease of a six units of shop space located at No. 139 Ademola Adetokunbo Crescent Wuse II. See pages 10 – 20 of the Record. By this Agreement, the relationship was for a certain term of two (2) years to commence on **1st March, 2014** ending on **28th February, 2016**.

It is equally common ground that repair and renovation works had to be carried out on the property and in the course of the repair works, a stop work order was received on site from the Development Control Unit of the FCDA which delayed the work and so the Respondent could not move into the property on 1st March, 2014 as envisaged by the agreement which led parties to enter into a further agreement vide pages 21 – 22 of the record wherein the commencement date was now altered or changed from **1st March, 2014** to start on **28th May, 2014** and the termination date was now **27th May, 2016**.

It is important to add that in this further agreement vide **Clause 4**, the sub-lessor agreed to indemnify the lessee if at any time after the commencement of the sub-lease agreement, construction and renovation work been carried out by the sub lessee is stopped by the FCDA or Landlord.

It is clear to us therefore on the basis of these two agreements that the elements for the formation of a contract earlier highlighted are clearly present here. There was therefore a valid and enforceable contract between parties. These two documents tendered as **Exhibit P1** and **Exhibit P3** at trial clearly embodies the terms governing the relationship between the Appellant and Respondent. The documents therefore provides the fulcrum or the basis for the mutual reciprocity of legal obligations and our attention and that of parties would have

to be focused on it. It is settled principle that where a contract document exists, the duty of the court is to carefully construe the terms of the agreement so as to discover the intention of parties in the event of an action arising therefrom. See **Arjay Ltd V. AMS Ltd (2003)7 N.W.L.R (pt.820)577 at 634A-D.**

Indeed where there is a valid contract agreement or where parties as in this case enter into a defined agreement with terms streamlined, parties must be held bound by the agreement and by the terms and conditions. There should be no room for departure from what is stated therein. See **Jeric (Nig.) Ltd V Union Bank of Nigeria Plc (2000) 15 NWLR (pt.691) 447 at 462-463; 466C**.

Section 128 (1) of the Evidence Act supports this principle to the effect that oral evidence would not usually be admitted to prove, vary, alter or add to the terms of any contract which has been reduced into writing when the document is in existence except the document itself.

From the admitted facts, there is no doubt at least on the basis of the **documents** that defined the terms of the agreement that the relationship is one purely between **Appellant** and **Respondent**. Indeed at page 202 of the Record, the learned trial judge found that **"the relationship is purely between the plaintiff as sub-lessor and Defendant sub-lease (sic)."**

Indeed we have carefully gone through both the initial **sub-lease agreement** and the **further agreement** and we cannot situate the mention of any **Head lessor** or a **third party** in the **agreements** executed between parties. Indeed in the entirety of the agreements, no reference was made to any Head lessor and as stated earlier, the contents of such agreements cannot be altered or interpolations made to suit a particular purpose.

It is true that in the plaint, the Respondent alluded to the fact that the Appellant had informed them that it had taken out a lease for several years with the Head lessor which it refused to disclose and as such could lease out the shops for a period of six years but on the record, there is no evidence tendered to support the averment and indeed the two agreements did not make mention of any Head Lessor as stated earlier.

Let us perhaps at this point say some few words on the import of a sub-lease. A sub-lease or under-lease is created where a lessee for a term of years of a lease **creates** another term less than he holds. For example, where a lease is created for a term of 20 years, the lessee may decide to create another term in favour of

another person for a lesser term than he holds, and then grants a lease of say seven (7) years. The original lessor is then called the Head-Lessor; his Lessee is then referred to as the sub-lessor, while the person let into the premises by the sub-lessor is called the sub-lessee.

A sub-lease is usually created only where the Head-lease permits its creation. Where consent is a condition for example for the creation of a sub-lease, then consent must be applied for and obtained before creation. As an aside, it is pragmatic that an intended sub-lessee or his solicitor should endeavour to look at the Head-lease to situate the terms and whether it will impact on the sub-lease. We leave it at that. In this case, we note from the Record that the Head-lease was not tendered at the trial court and its terms was therefore not situated or streamlined.

Now if the Head lessor is no party to the agreement and indeed it did not feature at all in the **agreements** between parties, subject of this appeal, we fail to see what makes it a necessary party in the resolution of the dispute streamlined on the plaint filed by Respondent.

Necessary parties on the authorities are those who are not only interested in the subject matter but who, in their absence, the proceedings could not be fairly dealt with i.e. the question to be settled cannot be properly settled unless they are parties. See **O.K. Contact Point V Progress Bank (1999) 3 NWLR (pt.604) 631 at 634**.

On the basis of the **agreements** and the terms which as stated earlier is the basis for the mutual reciprocity of legal obligations, the **Head lessor** who does not feature at all in the agreements is not such a person whose presence before the court will be necessary as we will soon demonstrate to enable the court effectually and completely adjudicate or settle all questions involved in the case or matter. See **Anyanwoko V Okoye (2010) 5 NWLR (pt.1188) 497 at 519 – 520 H-B**.

Now on the processes filed by the Respondent, their case is that during the subsistence of the lease agreement with Appellant, a third party or the Head lessor wrote the Respondent a letter vide **Exhibit P4** telling them to vacate the premises on the ground that the Head Lease with the Appellant expired on 3rd April, 2014.

The **Respondent** stated that it sought to verify the position with Appellant but that Appellant was not forthcoming and that it was constrained to pay extra fees to the third party or Head lessor to **"use the remainder of the sub-lease as the defendant clearly had no authority to sub-lease the property for any period after its own lease had expired."** See **paragraph 12** of the Plaint at Page 4 of the Record.

The Respondent further in paragraph 13 of the Plaint then averred that **"it met with the defendant who agreed to reimburse the plaintiff in the sum of N4, 500, 000 as pro-rated rent for the period the plaintiff had to forgo for the period he could not use the property."**

Now on the evidence, there is no real clarity as to the basis on which the Respondent paid these **"extra fees"** to the third party or Head lessor particularly in the context of the clear findings of the learned trial judge at page 202 of the Record that the relationship is **"purely between the Plaintiff sub-lessor and the defendant sub-lease (sic)"**

The law is settled that a **contract** affects only the parties thereto and cannot be enforced by or against a person who is not a party to it. A stranger can neither sue or be sued even if it is made for his benefit and purports to give him the right to sue or make him liable upon it. There are exceptions to this principle but this case is not concerned with the exceptions. See **Makwe V Nwakor (2001) 14 NWLR (pt.733) 356 at 372; Kano State Oil and Allied Products Ltd V Kofa Trading Co. Ltd (1996) 3 NWLR (pt.436) 244 at 522**.

The bottom line is that the **sublease Agreement** and the **further Agreement** binds only parties subject of it and not 3rd parties. Again prima facie, oral evidence is not admitted to vary what is encapsulated in the Agreements. See **Agbareh V Mimre (2008) 12 NWLR (pt.1071) 378 at 412 G.**

As a logical corollary and flowing from the above, if there was any dispute or conflict with respect to the **application of the terms of the sublease agreement and the further agreement,** it is a dispute to be resolved within the context of the terms of the Agreements and of course between the **parties subject of it.**

As stated severally in this Judgment, no where in the **Sublease Agreement** and the **Further Agreement** does the Head lessor appear. Again it logically follows, in our opinion, that if there is a dispute between the Head lessor and the

sub-lessor, that is a distinct and separate relationship from that between the **sub-lessor (The Appellant)** and the **sub-lessee (The Respondent).**

On the evidence, we find it difficult to situate the legal and factual basis for the Respondent to deal directly with the **Head Lessor** who he has absolutely no relationship, contractual or otherwise with.

The Respondent may have received a letter from the solicitors to the Head lessor vide **Exhibit P4**, but what is the basis for the averment in paragraph 12 of the plaint and the evidence of PW1 in paragraph 12 of his deposition vide page 55 of the Record that they were constrained to pay **extra fees to the third party to use the remainder of its sub-lease as the Defendant clearly had no authority to sub-lease the property for any period after its own had expired**.

There is on the record and evidence nothing situating the basis or parameters used by the Respondent leading to such decision or conclusion that the "**lease between Head Lessor and the sub-lessor had ended**." As stated earlier, the lease between the Head Lessor and the sub-lessor was not tendered at the trial court. Now what is interesting here is that the Respondent through its witness stated that the Head lessor introduced certain property managers to them whom they entered into a new **tenancy agreement** for a period commencing **11th February, 2016** to **31st February, 2017**. The witness recognised by paragraph 15 of his deposition that by the further agreement with the Appellant (sub-lessor) the sub-lease agreement was to end on May 27, 2016 but that to save his business and to avoid been evicted, it paid the new Landlord to cover the period 1st February, 2016 to 27th May, 2016 comprising period it had already paid for.

The question here is how could the Head lessor who is no party to the sub-lease Agreement and further agreement intervene to disrupt the agreement between the Appellant and Respondent in this appeal bearing in mind that the Head lease was never tendered or produced at the trial court? If the Respondent made payments to the Head Lessor and entered into a new tenancy agreement, on what basis was the payments made and how is the Appellant responsible for the payment? If the Appellant agreed to reimburse for these extra payments, where is the evidence to support this concession or agreement?

Let us see how the learned trial judge resolved the issue at page 205 of the record thus:

"The Defendant's EXB D1 warned the Plaintiff not to deal with any 3rd party over the property but them. To the Plaintiff on (sic) order to save its business and fear of being evicted by the owner of the property when the Defendant's lease,(sic) was compelled to pay and enter into another tenancy agreement of one year which period also convert (sic) the period 1st March, 14 and 28/5/14.

Truly, EXB P6 requested the Plaintiff to make all payments to the appointed facility manager Global job concept however, EXB P8 is a receipt dated 27/2/16. It bears the name of Abdullahi Dahiru Sontino & Co. It is obvious from the face of this EXB the name of Global job concept is not shown anywhere. The Defendant argued that the Plaintiff paid money to another person not the Head lessor or its facility manager and fro Exhibit P6.

Well, I strongly and firmly reject this Area of contention of the defence. I further hold that the Plaintiff actually paid this money to the facility manager through illegal representation who now issued EXB P8 is a prime evidence of payment of N16, 000, 000 to the facility manager Global Job concept. The Plaintiff averred in paragraph 15 of the PW1 statement on oath that a receipt of payment No 0511 dated 27/2/16 and receipt acknowledgment document issued by Abdullahi Dahiru & Co (Counsel to the Global job concept) new facility for the sum of N16, 000, 000. The receipt was pleaded and this piece of evidence addressed (sic).

The Defendant did not make attempt to destroy this fact by way of cross examination during trial it had the opportunity to so do. And since this evidence is before the Court as the Defendant failed to challenge it by way of cross examination it therefore means, the averment therein are therefore admitted by the Defendant. It is on this basis, I rely on the authority of ABDU VS MUSTAPHA (SUPRA) as (sic) hold that the plaintiff actually has proved by credible evidence that it paid another money as contained in its particulars of claim. Therefore issue No2 is also resolved against the Defendant.

Consequently, the plaintiff having proved the payment rent for a period March 2014 to May 2014 to the Defendant for which period the plaintiff did not use had to pay another. Therefore I adjudged the Defendant to pay

the plaintiff the sum of N4.5M as claimed and proved the payment shall be paid on or the 30/11/19.

However, the claim of 10% interest per annum on the judgment sum is hereby refused for insufficient interest as rules of this court does not permit it. While cost of N20, 000 is awarded in favour of the Plaintiff as against the Defendant."

From the excerpts above, the **Head lessor** may own the properties but we cannot situate how it could legally intervene in the sub lease Agreement on the basis of the facts of this case. As stated severally, nobody produced the **Lease Agreement** between the Head lessor and the Sub lessor before the lower court to put it in a commanding height to situate whether it impacts the sub-lease Agreement particularly here where the lower court recognised above that by **"Exhibit D1",** the plaintiff was warned not to deal with "any 3rd party over the property but them." If this appears to be a clear finding of the lower court, what then makes the Appellant responsible for the payments made to a 3rd party by Respondent? It is not clear at all how the learned trial judge logically reacted the decision making Appellant liable to pay the Respondent the sum of ₦4.5Million.

Most importantly, from the records and evidence before the learned trial judge as earlier highlighted, by the **further agreement** between Appellant and Respondent, vide **Exhibit P3**, the sub lease Agreement, effectively commenced on 28th May, 2014 and to terminate on **27th May, 2016**. It was a two years tenancy. See **Pages 21-22 of the Record.**

By **Exhibit P4**, the letter by the Law Firm of **Chijioke Ezeh & Associates**, the **solicitors of the Head Lessor,** the position advanced to the Respondent was that the lease with their sub lessor had expired on **3rd April, 2014**.

Flowing from this letter, what this meant was that as at the time the further agreement between the Appellant was entered vide **Exhibit P3** and which was to commence on **28th May, 2014**, the sub-lessor or Appellant could not create another term in favour of the Respondent or indeed anybody. If that is the legal position, then the Respondent had plenitude of legal options to proceed against the **Appellant**, its sub-lessor. The Respondent did not take any **such steps** against Applleant.

What is **curious** here is that despite the letter by the solicitor to the **Head lessor** indicating that its tenancy with the sub lessor has ended on **3rd April, 2014**, nothing fundamentally affected the sub lease between parties as in the evidence before the lower court, it would appear that the Respondent continued to be in occupation for nearly the complete two years of the sub lease Agreement. This is borne out by the evidence of PW1 for the Respondent at Page 56 of the Record state thus:

"15. That by the provisions of the Further Agreement, the tenancy period was to expire on May 27, 2016 but in a bid to save the business of the plaintiff who was at the verge of being evicted, the plaintiff was constrained to pay afresh to the new landlord to cover for a new tenure comprising of a period already paid for (February 1, 2016 to May 27, 2016). A receipt of payment with receipt No. 0511 dated 27/2/16 and Receipt Acknowledgment document issued by Abdullahi Dahiru & Co. (Counsel to the Global Jobs concept new facility managers) for the sum of N16, 000, 000 (Sixteen Million Naira) is hereby pleaded and will be relied upon during trial.

16. That the prorated rent for 3 months is N3, 500,000 whilst the agreed refund for renovation is N1, 000, 000 with a total amount of N4, 500, 000.

PARTICULARS	**AMOUNT**
3 Months (February 2016 to May 2016)	**Rent per annum:** **14, 000, 000/12 = 1,166,666 per month.** **Therefore, 1, 666, 666 x 3 = 3, 500, 000**
Defendant's Reimbursement for Cost of renovation	**1, 000, 000**
Total	**4, 500, 000**

That the Plaintiff met with the Defendant who agreed to reimburse the Plaintiff in the sum of N4, 500, 000.00 as prorated rent for the period of 90 days, which the Plaintiff had to forgo for the period, due to the fact that

they could not use the property. The Plaintiff based on that understanding instructed its solicitors to make a formal demand to the Defendant vide its letter of December 14, 2015. A copy of the said letter is hereby pleaded and would be relied upon during the course of trial."

It is clear from the above, that despite the letter from the Head Lessor's solicitors, the **sub lease** continued well after the original lease was said to have expired or ended on **3rd April, 2014**. Secondly, the Respondent stated above that as the sub lease was about expiring on 27th May, 2016 and to save its business, it was constrained to pay to the new landlord to cover for the period already paid (1st February, 2016 – 27th May, 2016). What however is strange here is that Head lessor who stated that the tenancy of sub lessor had expired since 3rd April, 2014 did not make any demands for payment of rent which sub lessor or Appellant had already received from Respondent? Is this not a tacit recognition of the powers of the sub lessor and Appellant to sub lease to the Respondent? If there were threats to evict Respondent as alleged, on the evidence on record, the nature of the threats were not identified. No quit notices were tendered or a court action filed by the Head lessor to recover possession from Respondent. The bottom line is that there was no threats of any kind established in evidence before the trial court.

If the Respondent then chose in the circumstances, to pay for rent from **1st February, 2016 to 27th May, 2016** when the existing sub lease was running to a third party, it appears to us, again on the basis of the facts and evidence that, the appellant cannot legally and factually be responsible for the election by Respondent.

The point to underscore is that the **Relief (1)** of Respondent is for the sum of **N4, 500, 000 "owed for the lease period paid for but not used"** by them. **As we have demonstrated, there is no time in which on the evidence, the Respondent did not enjoy the sub lease created in its favour.**

It should be noted or underscored that the only time respondent did not use the premises subleased to it was when there was a stop work order by the Development Control Unit of the FCDA which led parties to prepare a **further Agreement vide Exhibit P3** to alter the commencement and termination dates as already demonstrated. The evidence of the witness for respondents captured the position at Page 55 of the Record thus:

"**7. That in the course of the repair/renovation works being done on the properly by the Plaintiff, a Stop Work Order was received on the site from Development Control Unit of the Federal Capital Development Authority.**

8. That as a result of the stop work order, repair/renovation work on site was delayed for several months and this prevented the Plaintiff from moving into the property on March 1st 2016 (2014) as envisaged by the sub-lease Agreement.

9. That as a result of the delay, parties entered into a further Agreement which shifted the commencement date of the previous Agreement from the 1st of March, 2014 to 28th May, 2014 and the termination date to the 27th of May, 2016. A copy of the further agreement is hereby pleaded and will be relled upon at trial."

The **further agreement Exhibit P3** as earlier highlighted made it clear that if there were such further disruptions, the Appellant will reimburse Respondent.

Logically therefore, on the evidence, when Respondent purported to make some payments to a third party in circumstances that are not clear, it was still in possession and enjoying the terms of the sublease.

Indeed the case of **Respondent** here even suffers from lack of clarity or ambivalence. In one breadth, the Respondent in paragraph 15 of the evidence of their witness at Page 56 of the Record stated that they were constrained to pay for a new **"tenure comprising of a period already paid for (February 1, 2016 to May 27, 2016),"** a period ostensibly in which they were clearly in occupation. In another breadth in paragraph 16 of his same Deposition, he stated that they met with Appellant who agreed to reimburse them for a period of 90 days which the Respondent "**had to forgo due to the fact that they could not use the property."**

The positions advanced even on the question of reimbursements are inherently contradictory in terms. In one breadth, the payments were said to have been made to avoid threats of eviction, so that they could continue with their business and in another breadth, the case is that the reimbursement was for the period they could not use the property.

If therefore Respondent made any payments to a third party for the period **1st February, 2016 to 27th May, 2016** during the subsistence of the sublease,

unless it can creditably explain these payments and how Appellant is responsible, and this it has not done, any claim for reimbursement will not fly. Furthermore, as stated earlier, no scintilla of evidence was proffered by Respondent showing that the Appellant agreed to make any reimbursement. In addition, apart from the fact that there is no proper delineation of what the reimbursement represents and the period it covers, we note that the sum of **₦1, 000, 000** for renovation was incorporated into the sums claimed by Respondent and we equally fail to see any evidence to support or situate the claim for ₦1, 000, 000 renovation. At what point was this incurred? Was it during the course of the sub tenancy agreement or when it paid the new landlord or is it when it could not use the premises? There is absolutely no evidence to situate this claim of renovation. Indeed in paragraph 6 of the deposition of the Respondent's witness at Page 55 of the Record, he stated thus:

"That the six unit of shops were in need of repair/renovation work before they could be used by the plaintiff and it was agreed that the renovation be done by Plaintiff with some financial assistance from the Defendant. The Plaintiff spent a total of N12, 880, 672.05 for repairs/renovation. A copy of 1st payment invoice for the sum of N3, 000, 000 (Three Million Naira Only) dated 13/12/2013 for the Ghassan Taber (c/o: Quartz Integrated Services Limited) is hereby pleaded and shall be relied upon at trial."

From the above, it is clear that the cost of renovation was to be **borne** by both parties. There is nothing here situating that the parties agreed on any sum as representing the assistance to be given by Appellant. All it says is that **"the renovation was to be done with some financial assistance from defendant (Appellant)"** No more. There is again on the evidence no indication whether it gave the financial assistance and how much it gave.

It is therefore not open to the **learned counsel** to conclude as done on **page 4, paragraph 3.3 of its address** that the Appellant agreed to reimburse Respondent in the sum of **₦1, 000, 000**. An address no matter how well written is no substitute for pleadings and evidence which must be elicited at trial and in court. Since the court does not engage in an idle task of speculations, this relief clearly as demonstrated will also not fly.

As we have sought to demonstrate at length, on the basis of the evidence, it is difficult to support the conclusion reached by the learned trial judge that the Appellant should reimburse Respondent for the payments it made to the Head

Lessor. The primary duty was on the Plaintiff/Respondent to creditably establish its case on the preponderance of credible evidence.

Where a person who asserts as the plaintiff/respondent in this case, fails to provide credible legal evidence in proof of the contested assertions, or where the evidence is weak, tenous or falls below the expected standards, that amounts in law to a failure of proof and the case must fail and the defendant need not even call evidence. In **Duru vs. Nwosu (1989) 4 NWLR (pt. 113) 24** the Supreme Court stated thus:

"… a trial judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory then he had not made out what is usually referred to as a *prima-facie* case, in which case the trial judge does not have to consider the case of the defendant at all."

In law, where the finding of fact(s) is challenged on appeal and the court finds or comes to the conclusion that the evaluation of the trial court was defective, the appellate court has the power to undertake the necessary evaluation as we have done. To do so is not a usurpation of the province of the trial court and to fail to do so is an abdication of responsibility. See **Adesina V Ojo (2012) 10 NWLR (pt.1309) 552 and Basil V Fajegbe (2012) 12 NWLR (pt.725) 529.**

On the whole, the substantive Appeal with respect to grant of **Relief 1** of Respondents claim has considerable merit and is allowed on the basis of a complete dearth of credible evidence to support the case of plaintiff/respondent.

Now to the **Cross-Appeal**. The cross-appeal as indicated earlier on relates to the failure of the learned trial judge to grant interest of 10% on the judgment sum having found the Appellant liable. The cross-appellant filed the cross-appellant brief of Argument dated 12th March, 2021 and raised one issue as arising for determination:

"Whether the Trial Court was right to refuse the relief of post judgment interest having established that the Cross-Appellant had proved its case and entitled to judgment?"

Submissions were made on the above which forms part of the Record of Court. The cross-respondent filed its brief of Argument on 24th march, 2021 and equally raised one issue as arising for determination:

"Whether the trial court was right in refusing to grant 10% post judgment relief sought by the cross-appellant."

Submissions were equally made which forms part of the Record of Court. The cross-appellant then filed a cross appellants Reply brief dated 8th October, 2021.

We have again carefully read all the Briefs on both sides of the aisle on the cross- appeal. The issue is a very narrow one and that is whether the learned trial judge having awarded the monetary claims of Respondent/Cross-Appellant ought to have awarded 10% interest on the Judgment sum granted in their favour. The cross- appellant answered the above question in the affirmative while the cross- respondent answered in the negative.

Now for us, with the success of the substantive appeal, meaning that the substantive Relief or claim of Respondent is not availing, the consideration of the cross-appeal appears now entirely academic. The necessity or requirement for 10% interest clearly is usually predicated on the success of a monetary claim. We have found the monetary claim not to be availing and this as it were undermines completely the claim of 10% interest.

Let us however briefly make some comments. Interest may be awarded in any case in two distinct circumstances, namely (a) as of right; and (b) where there is a power conferred by statute to do so in the exercise of the courts jurisdiction. See **Texaco Oversees (Nig.) Ltd Unltd V Pedmar (2002) 13 NWLR (pt.785) 526 SC; ITB V KHC Ltd (2006) 3 NWLR (pt.968) 443 CA.**

Generally unlike a claim for award of interest prejudgment where a party must specifically claim and prove same by credible evidence, the award of interest on a judgment debt as in this case is purely statutory and can only be awarded if there are provisions to that effect in the law or the Rules of Court. See **Berhet (Nig.) Ltd V Kachalla (1995) LPELR – 775 (SC)**. Indeed in regard to award of interest on a judgment debt, it needs not be specifically claimed before it is awarded; the award is at the discretion of the court and is regulated by the Rules. See **ITB Plc V. RHC Ltd (2008) 3 NWLR (pt.968) 443 CA.**

In this case, there is no doubt that the lower court is a district court and is regulated by the District Court Rules and District Court laws. There is nothing

in either legislation governing the conduct of proceedings in the lower court specifically providing for 10% award of interest on a judgment debt. In that respect, we agree completely with the learned trial judge that the procedural Rules of the Court do not make provisions for the grant of such interest claim and the call to exercise discretion cannot be done in the absence of Rules governing the exercise.

Flowing from the above, the contention that the learned trial judge should exercise his discretion and seek solace in the interest of justice to award what the Rules do not provide for clearly will not fly. The exercise of judicial discretion and the interest of justice refrain cannot be used as a conduit to create precedents that has no support in law or the Rules.

Judicial discretion properly understood is a term applied to the discretionary action of a judge or court and means discretion guided by the Rules and principles of law and not arbitrary, capricious or unrestrained. It is a legal discretion to be exercise in discerning the course prescribed by law and is not to give effect to the will of the judge or court, but to that of the law. See **Mohammed V COP (1999) 12 NWLR (pt.630) 331; In Re: Alase (2002) 10 NWLR (pt776) 553.**

Thus, a proper exercise of discretion should be according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. It must be upon facts and circumstances presented to court, from which it must draw a conclusion governed by law. See **In Re: Alase (supra); UBN Plc V Adjarho (1997) 6 NWLR (pt.507) 112.**

The provision of **Section 2 of the High Court of Federal Capital Territory (Civil Procedure) Act** which enjoins the trial court to adopt such procedure in its view, to do substantial justice between parties has no application here even if the High Court exercises supervisory jurisdiction over District Courts, precisely because, the provision of **Order 39 Rule 4 of the FCT Civil Procedure Rules 2018** which allows for the award of post judgment interest of not less than 10% has no application to the District Court.

The point to underscore is that this case is a matter on Appeal and not a case in which we are exercising original jurisdiction. The consideration of the rightness or otherwise of the decision of the lower court must be based or predicated solely on the evidence led and the laws applicable to the District Court and not otherwise.

The only point to add is that even at the High Court, the word used in the provision of **Order 39 Rule 4** is **"may"** with respect to the award of post judgment interest, which does not import a word of command. It is essentially discretionary but a discretion to be exercised judicially and judiciously. We say no more on this point.

On a calm view of the facts, we cannot fault the decision of the learned trial judge in refusing to grant post judgment interest in the circumstances where there is no law or Rule to situate the exercise. In the circumstances the cross-appeal lacks merit and is unavailing.

On the whole and for the avoidance of doubt, the substantive appeal succeeds and is allowed. The Plaintiff/Respondent did not prove its entitlement to Relief **(1)** granted by the learned trial judge. The decision of the lower court granting **Relief (1)** of the plaintiff/respondent claims is hereby set aside.

The Cross-Appeal equally fails and is hereby dismissed.

_____	_____
HON. JUSTICE A.I. KUTIGI	***HON. JUSTICE JUDE* ONWUEGBUZIE**
(PRESIDING JUDGE)	***(JUDGE)***

<u>Appearance</u>:

1. ***I.A Chidi, Esq., and Franklin Olanipekun, Esq., for the Appellant/Cross Respondent.***

2. ***Priscilla Ajayi for the Respondent/Cross Appellant.***