

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT JABI**

**THIS 22<sup>ND</sup> FEBRUARY, 2022**

**BEFORE HIS LORDSHIP: HON. JUSTICE A.A FASHOLA**

**SUIT NO: FCT/HC/CV/3104/2020**

**BETWEEN:**

**DR KIZITO CHIJIJOKE OJIAKO----- CLAIMANT**

**(suing through his lawful Attorney, Barr. Chidiebere Nwachukwu)**

**AND**

**1. BRAINS & HAMMERS LIMITED**

**2. BRAINS & HAMMERS CITIES LIMITED } DEFENDANTS**

**JUDGMENT**

The claims in this suit are contained in the writ of Summons dated and filed on the 6<sup>th</sup> November, 2020 wherein the claims against the Defendants herein are as follows:

- 1. A DECLARATION** that the defendant's refusal to hand over the 4 bedroom terrace Duplex with plot number **A105W (3)** at Brains & Hammer City Estate Life Camp Abuja in view of the claimant having fully paid for same and/or complied with all the terms and condition in respect of the contract/property transaction since 2016

with the defendants amounts to a breach of contract by the Defendants.

2. **AN ORDER** directing the defendants to immediately complete and hand over all that plot **A105W (3)** at Brains & Hammer City Estate Life Camp Abuja FCT to the claimant having fully paid for same and/or complied with all terms and conditions in respect of the contract/property transaction since 2016 with the Defendants.
  
3. **AN ORDER** of specific performance directing the defendants to pay the claimant jointly and severally, the sum of **Seven Million Naira (N7,000.000)** being refund of rents to be earned by the claimant over the property over the years.

### **PARTICULARS OF SPECIFIC CLAIMS.**

- i. Rent from 1<sup>st</sup> January, 2018 to December, 2018. Is the sum of N3,500,000.00 (Three Million, Five Hundred Thousand Naira)only.
- ii. Rent from 1<sup>st</sup> January, 2019 to 31<sup>st</sup> December, 2019. Is the sum of (Three Million, Five Hundred Thousand

Naira) making a total sum of Seven Million Naira only  
**(N7,000,000.00).**

4. The sum of **Ten Million Naira (N10, 000,000.00)** against all the defendants jointly and severally as aggravated exemplary damages.
5. The sum of **Five Million Naira (N5,000,000.00)** against all the Defendants jointly and severally as general damages.
6. Cost of this suit at **One Million Naira (1,000,000.00)** only.
7. 10% post judgment sum annually, until judgment sum is liquidated.

### **FACTS:-**

The facts of this matter from the pleadings and the oral evidence before the court are as follows:-

The Claimant is a Nigerian citizen resident at Dartmonth Court, Burr Ridge, Illinois, United State of America. The first Defendant is a registered company doing real estate business in Nigeria and has its registered office Address at Brains & Hammer City Estate, Life Camp, Abuja, FCT within the jurisdiction of this Honourable court. Sometime in the year 2016, one Barr. Chidiebere

Nwachukwu informed the claimant about the defendants and their properties up for sale at the defendants' company. The claimant filled the defendants forms, made payments in installments, a letter of allocation dated 2<sup>nd</sup> September, 2016, and since completion of payment for the property, the defendants have failed/neglected to deliver the property to the claimant.

The Claimant filed a 13 paragraphs statement of claim dated the 6<sup>th</sup> November, 2020 and the Defendant filed a statement of Defence dated the 9<sup>th</sup> March, 2020 in response.

The trial commenced in this action on 3<sup>rd</sup> March, 2021 and concluded on 9<sup>th</sup> February, 2022.

The plaintiff called a witness to testify as 1<sup>st</sup> claimant (PW1). The defendant also called a sole witness who testified as DW1.

The PW1 testified first and stated that his name is Chidebere Nwachukwu, he live at No.1 Nnewi street, Garik, Area 2 Abuja, a legal practitioner and the Attorney to the claimant in this action. PW1 adopted his written statement on oath. PW1 tendered Exhibit CN1 to CN14 which was not objected to by the learned counsel to the defendants and same were admitted in evidence as Exhibits and marked as CN1 to CN14 respectively. He then asked this court to grant his claim. Under cross-examination by

the defence counsel he confirmed that he is the claimant's attorney and also the lawyer to the claimant. PW1 said he did not discharge all the financial obligations in paragraph 9 of exhibit CN7. On whether there is any agreement between the claimant and the defendant that the property was to be put on rent? He answered in the negative. He said he visited the defendant's office, he also requested for the house. He however does not have any evidence to show that he visited the property. He said that the registered name of his law firm is Nwachukwu & Co. That Oloruntoba Elisha is a lawyer in his law firm; he signed the writ of summons. He stated that the defendants promised to deliver the keys to the property 18 months after payment. He stated that he could not tell when the property was completed by the defendants herein. PW1 was not re-examined. The learned counsel to the plaintiff announced the closure of their case. The case of the plaintiff was closed.

The defendant witness testified as DW1. He stated that his name is Ume Okon Asuquo, he works with the 1<sup>st</sup> defendant company as the sales manager. He knows the claimant in this suit by a letter of Allocation given to him and the house number. He said that he deposed to a witness statement of Oath at the Registry of this Honourable court. He adopted the statement on oath already

before the court. He tendered exhibits CN 15 and CN 16 as exhibits which was not objected to by the claimant counsel and same were admitted in evidence respectively.

Under cross-examination, DW1 confirmed that the defendants did not fail to deliver the property to the claimant herein. He further confirmed that the defendants have delivered the property to the claimant because it has been completed. On whether he has any evidence that the property has been completed, he stated that the pictures are his evidence of delivery. He said that delivery is when the client clear his financial obligations. He stated that the claimant has financial obligations' in form of legal fees and value added tax.

He confirmed that the plaintiff has not been handed the keys to the property. He said that the plaintiff completed payment as at 2016. He stated that after given exhibit CN 9 to the claimant, they have not delivered the property to the claimant.

The DW1 was not re-examined. With the conclusion of the evidence of this witness learned counsel for the defendant closed the case for the defendant and the matter proceed to final address. The court ordered addresses and counsel complied. Learned counsel for the defendant submitted his written address

first. It is dated 18<sup>th</sup> June, 2021 and consists of 16 pages. Learned counsel to the claimant written address is dated 18<sup>th</sup> July 2021 it consists of 24 pages.

## **ISSUE FOR DETERMINATION**

Mr. Abba Olainyi Shettu of counsel for the defendant on page 3 of his written identified the following issues for determination:

1. Whether the defendant has failed and refused to complete and handover the four(4)bed-room Terrance Duplex situate at Brains & Hammers City life camp Abuja.
2. Whether the claimant has proved his case on balance of probability as required by law to be entitled to judgment.
3. Whether Chidiebere Nwachukwu who happened to be the claimant's lawyer and doing business under the name and style Nwachukwu Nwachukwu & Co can double as an advocate and a witness for the claimant.
4. Whether claimant can claim from the defendant the sum of N1,000,000.00 (one million naira)only being counsel's professional fees/or cost which was not specifically agreed by both parties.

List of cases cited by the Defendants counsel in his written address.

- 1. OBIOZOR VS NNAMUA (2014) LPELR**
- 2. A.G.OF ABIA STATE VA.G. OF THE FEDERATION & ORS (2005)6 SC (PT.1)63.**
- 3. MR LAWRENCE AZENABOR V. BAYERO UNIVERSITY, KANO & 1 OR (2009)17 N.W.L.R(P.T.1169)96 AT PAGE 102 RATIO 7,**
- 4. GODFREY NSIONU & OR VS CHUKWUNONSO NSIONU (2011)16 N.W.L.R. PART 1274 AT PAGE 536,**
- 5. UNITY BANK PLC VS BOURI (2008) 2-3 SC (PT.11)**
- 6. DENNIS OGBONNA OKATTA (For Himself and on behalf of the member of management committee of the Onitsha sport club) VS THE REGISTERD TRUSTEES OF THE ONITSHA SPORT CLUB (2008)13 NWLR PT.1105) AT PAGE 632**
- 7. CHRISTOPHER NWANJI VS COASTAL SERVICE (NIG.) LTD.(2004)11 N.W.L.R. (PT.885) AT 569,C-D.**
- 8. GUINNESS NIG.PLC VS EMMANUEL NWOKE (2000)15 N.W.L.R.(PT.689)135.**
- 9. IHEKWOABA VS A.C.B. LTD (1998)10 N.W.L.R.(PT.571)AT 610-611.**
- 10. SPDC V. OKONEDU (2008)9 N.W.L.R. (PT.1091)AT 85.**

Mr. OLORUNTOB ELISHA of counsel for the claimant on page 5 of his written argument identified the following issues for determination:

1. Whether the defendants have a defence before this Honourable court.
2. Whether the defendants have not violated the claimant's right to full disclosure of information and right to the timely performance of their obligation to the claimant as provided under the Federal competition and consumers protection Act, 2018.
3. Whether the claimant has proved his case to be entitled to the reliefs sought as per the writ of summons.

List of cases cited by the Claimant counsel in his written address.

1. **EDE VS MBA (2012)6 WRN 1 @ 34-35, Lines 45-15**
2. **VIANANA VS ESHAROBERT & ORS (2018)LPELR-44787 (CA)**
3. **MACFOY V. UAC (1961) 3 W.L.R 1405**
4. **SUFFOLK PET. SERVICE LTD-V-ADNAN MANSOOR NIGERIA LTD (2019) 2 NWLR (PT. 1655) 1 PER ORJI ABADUA**
5. **AGBI-V- OGBEH (2005) 8 NWLR (PT. 926) P 40 @ PARAS A-D,**
6. **ARAB CHEM LTD-V- PHARM RALPH OWODUENYI (2013) 10 NWLR (PT.1361) 89 CA**
7. **MTN (NIG) COMM. LTD V. WI G.T & INV LTD (2013)**

8. **ADENIRAN V. ALAO (2000)18 NWLR(PT.745)361 @ 381-382,**
9. **CHIEF ABBA VS CHIEF WARRI OGODO (1984)4 SC 84 @ 112,**
10. **A.B MANU & CO. VS COSNTAIN (W.A) LTD (1994) LPELR 14550 (CA)**
11. **LAGOS STATE GOVERNMENT-V-TOLUWASE (2013)1 NWLR (PT.1336) 555 @ 572 PARAS E-G,**
12. **ARU & ORS VS OHAFIA LINE SERVICE LTD (2014) LPELR-23158 (CA)**
13. **SHINGI V BANDADO (2018) LEPLR-46549(SC),**
14. **ABIDAKUN & ORS V. OYEBODE & ORS (2013)LPELR-20483(CA) (PP.12-14,PARAS.E-C)**
15. **SHINGI V BANDODO (2018) LPELR- 46549 (CA),**
16. **U.B.N. PLC-V-NWANKO (2019) 3 NWLR (PT 1660)SC 474 @ 478**
17. **ODIBA & ANOR. V. MUEMUE (1999)LPELR-2216 (SC)**
18. **MEKWUNYE. V. EMIRATES AIRLINES (2019) 9 NWLR (PT 1677) SC 191 @ 217**
19. **OANDO PLC VS ABDULLAHI & ANOR (2014) LPELR-23619(CA),**
20. **BOARD OF CUSTOM & EXCISE VS BARAU (1982)LPELR-786 (SC)**
21. **OKONJI & ORS-V- NJOKANA ORS (1991)7 NWLR(PT.202)181**
22. **MUDUN & ORS VS ADANCHI & ORS (2013) LPELR-20774(CA)**

## **ISSUES FOR DETERMINATION:-**

I will adopt the issues for determination as formulated by the defendants counsel as they appear more appropriate in the circumstances of this matter but will however in so doing consider also the arguments advanced by counsel for the claimant in support of the issues as formulated by him in his written address.

In that vein, I will begin by considering issue number one as formulated by the counsel for the claimant first whether the defendant has a defence before this Honourable court?. Learned counsel to the claimant argued in the main that before a court can act on a document or a process before it, such a document or a process must be competent before it. He contended that the memorandum of appearance and the statement on oath of DW1 are incompetent and same cannot be acted upon in line with the Supreme Court decision in the case of **EDE V. MBA (2012) 6 WRN 1 AT 34 – 35, LINES 45-55.** That the defendants did not file any process to regularize filing their processes out of time. Hence there is no defence before this Honourable court.

In the case of **MOBIL PRODUCING NIG. UNLIMITED V. MONOKPO (2003) 18 NWLR (PT.852) 346 AT 411 PARA A-B, PAGE 412 PARA H.** Per Uwaifo JSC it was held that a court faced with the difficulty as to the late filing of a statement of

defence should not shut its eyes to such a process, even if filed irregularly or sought to be filed, it ought to have a look at it to see if it discloses a defence which might be considered in the interest of justice. A court of law or a tribunal has a legal duty in our adjective law to hear any court process, including a motion before it. The process may be downright stupid, unmeritorious or even an abuse of court process. The court must hear the parties or rule on it one way or the other. In view of the above, I find that the submission of the learned counsel to the claimant hold no water, it is hereby resolved against him. I find that there is a defence before this Honourable court. Having so found, I shall proceeds to issues as formulated by the learned counsel to the defendant.

Issue number 2: Whether the defendants has failed and refused to complete and handover the four (4) Bedroom Terrance Duplex at Brain & Hammers Life Camp, Abuja, when the claimant has not fully discharged his obligation as indicated in the provisional letter of Allocation.

On this, Learned counsel to the defendants submits that the defendants have not failed to complete and handover the four(4) bedroom terrance duplex situate at Life Camp, Abuja to the claimant. He pointed the attention of this Honourable court to

exhibit CN7 and CN15 which is the provisional letter of Allocation. That the claimant has failed and neglected to discharge his obligations as contained in clauses 10, 20, 59 of the letter of allocation. That the claimant has failed to pay legal fees, service charge and value added tax. At this juncture, the question which comes to mind is whether the claimant complied with CN 7 and CN 15 which is the provisional letter of allocation? For clarification purposes, I hereby reproduce clause 10 of exhibit CN7 and CN 15 herein which states as follows:-

*“The allottee shall be given possession of the property upon full payment of the consideration including legal fees, service charges, infrastructure leasing as well as other impositions herein-contained and all allocations are provisional until all payments have been received by the vendor.”*

Clause 59 of exhibit CN 7 and CN 15 says *“All allocations of housing units within the estate are provisional until all payments as contained in the provisional and final letter of offer are made by the allottee”*.

Under cross-examination, the PW1 said he did not discharge all the financial obligations in paragraph 9 of exhibit CN 7. He said he visited the defendant’s office; he however did not have

evidence of the visit. DW 1 on the other hand in his cross-examination said he is of the opinion that the defendant company had delivered the property to the claimant on the grounds that they have completed the building of the property, he relies on the photographs he tendered in evidence (exhibit CN 16). He said delivery is when the client clears his financial obligations to the defendant herein. He stated that the claimant has financial obligations in form of legal fees and value added tax to render to the defendant. DW 1 said under cross examination that the claimant has not been handed the keys to the property. As can be gleaned from the exhibits before me, this is a contract of sale of property between the claimant and the defendants herein. A valid or binding contract means an agreement between the two or more parties creating obligations that are enforceable or otherwise recognizable at law. It is therefore elementary to state that there are three basic essentials to creation of a contract. These are: Agreement, contractual intention and consideration.

The test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the others. See the case of **AKINYEMI V ODU'A INVESTMENT CO. LTD (2012)17 NWLR P. 209**SC(.

There is no doubting the fact that all of these elements are

present in the instant matter. The parties to any contract are bound by the terms or conditions in a contract, whether parole or written, between the contracting parties. The court lacks the power to add or subtract from the terms of contract between the parties. This has acquired the sobriquet and mantra of sanctity of contract. See **KOIK V MAGNUSSON (1999) 8 NWLR (PT. 615)492**. The defendants in exhibit CN 9 dated 4<sup>th</sup> August, 2020 the defendants admitted their failure to deliver the property and indeed apologised to the claimant herein. The defendant promised to deliver the property to the claimant by 29<sup>th</sup> September, 2020. It is noteworthy to mention here that the defendants failed to mention to the claimant payment for legal and value added tax or state in exhibit CN 9 that payment of the above fees is a prerequisite for handling the keys of the property to the claimant herein. Having said that, in my opinion both parties i.e the claimant and defendants are in breach of the contract they both entered into. I so hold.

Issue No. 2: The learned counsel to the defendants herein argued on this issue that the burden of proof in civil cases is on balance of probability or on preponderance of evidence which rest squally on the shoulder of the claimant by relying on the strength of his own case and not on the weakness of the defendant. He

referred the court to the case of **MR. LAWRENCE AZENABOR V BAYERO UNIVERSITY, KANO & 1 OR (2009)17 NWLR (PT. 1169)96 AT PAGE 102 RATION 7.** He said the claimant herein did not lead credible evidence before this Honourable to prove his case against the defendants. He rely on section 137(1)(2) of the evidence Act. He also rely on the case of **UNITY BANK PLC V BOUARI (2008)2-3-SC.**

On the other hand the claimant counsel contended that the standard of proof in a civil matter is based on preponderance of evidence. Based on the testimony of the PW 1 and the documents before this Honourable court the claimant has placed material facts backed by evidence to show that he paid for the 4 bedroom Terrance Duplex with plot No. A 105 10 (3) at the defendants Estate at Life Camp, Abuja. That the claimant has established his case before this Honourable court to be entitled to judgment. He relies on Section 131 of the evidence Act, 2011. Also **AGBI V V- OGBEH (2005) 8 NWLR (PT.926)PG 4(A) 137 PARAS A-D** amongst others to be entitled to the judgment of this court in his favour as his claim.

The standard and burden of proof in civil cases are determined on the preponderance of evidence and balance of probability. He who assert must prove in order to succeed in his claim. See

**ISEOGBEKAN V ADELAKUN (2013)2 NWLR PG. 141 SC 291.** See also **WOLUCHEM V. GUDI (1981)5 SC 291.** A party who asserts must proof same. See section 135 evidence Act 2011. See **A.G. RIVER STATE V. A.G BAYESA STATE (2013)3 NWLR (PT. 1340) P. 123.** In the instant case the claimant herein was able to proof the payment for the 4 bedroom Plot A 105 W (3) at Brains & Hammer City Estate, life camp Abuja, FCT. Having fully paid for it however the claimant herein failed and neglected to pay for the legal fees and value added tax as agreed upon pursuant to clause 9 of exhibit CN 7. The PW1 confirmed this under cross examination In my opinion, the claimant herein has only been able to prove complete payment for the property in issue and not complete payments of his financial obligations under the contract.

In view of this, I find that the claimant has performed substantially his obligations under the contract. I so hold.

On issue No3: On this issue, learned counsel for the defendants submits that Chidieber Nwachukwu who is a lawyer to the claimant cannot testify or give evidence in favour of the claimant and also no lawyer from the law firm of Chidiebere Nwachukwu who practices law under the registered name Nwachukwu & Nwachukwu & Co is allowed by law and practice to appear for the

claimant. He argued that this form of practice adopted by Chidiebere Nwachukwu of counsel accepting to act as witness and allowing Mr. Oloruntoba Elisha who is a lawyer in his firm to appear in a matter that he knew he is likely to be a necessary witness and be called during trial and indeed he was called is absurd and against the Rules of professional conduct for legal practitioners. He refers this court to RULE 20 (1) of the Rules of professional conduct for legal practitioners. He urged this Honourable court to resolve the issue in favor of the defendant by disqualifying Mr. Chidiebere Nwachukwu, his law firm and Oloruntoba, Esq from prosecuting the instant case.

By the provision of Rule 20(6)of the Rule of professional conduct for legal practitioner 2007, a counsel can perform the dual role of given evidence and advocating for a party in one proceeding when an abandonment of the latter will be prejudicial to the interest of his client. See **U.F.P.(NIG)LTD V. OPOBUJI (2012)6 NWLR P. 429.** In the case of **ELEBANJO V. TIJANI VOL 2 1997 – 1988 PAGE 464** Supreme Court Judgment on evidence -on whether Mr. Otukoya who acted as a counsel for the plaintiff before the actual hearing but did not represent the plaintiff at the hearing -as in this present matter a competent witness for the plaintiff. It was held in paragraph 8 of that

judgment by the Supreme Court that counsel is a competent witness in the case he is conducting on behalf of his client, and he can give evidence in that case. It was further held that the practice requiring counsel to withdraw as a counsel before appearing as a witness in case is a rule of practice designed to ensure a proper administration of justice. There is no irregularity in counsel not observing the rule of practice. It is instructive to note that in the instant matter counsel appeared as PW1 while Mr. Oloruntoba Elisha appeared as a counsel for the plaintiff herein. Pursuant to the above stated legal authorities therefore, it is my humble legal view that this issue as raised by the defendant is of no moment, it is hereby resolve against the defendant herein.

Issue no. 4: Regarding issue No. 4 as to whether the claimant can claim from the defendants N1,000,000.00 (One Million Naira) only being counsel's professional fees/or cost which was not specifically agreed by parties?. Learned counsel to the defendant submits that the claimant cannot claim from the defendants the counsel fee or any cost or other legal charges he allegedly paid to his solicitors. He referred this court to the case of **CHRISTOPHER NWANJI V. COASTAL SERVICES (NIG)LTD (2004)11 NWLR (PT. 885)AT 569 C-D. GUINNESS NIG.**

**PLC V. EMMANUEL NWOKE (2000) 15 NWLR (PT. 689)135.**

In conclusion he urged this Honourable court to resolve all the issues raised and canvassed by the defendants in favor of the defendants and dismiss the case of the claimant.

On the issue of solicitors fees paid in this suit by the plaintiff to his solicitor as proved by exhibit CN 12. It is the law that the burden of solicitor's fee shall not be passed on the other party to the suit. The courts have held that "it is unethical and affront to public policy to pass the burden of solicitor's fee to the other party." See the case of **GUINNESS NIG. PLC V EMMANUEL NWOKE )2000(15 NWLR (PT. 688) 133.**

The superior courts have also held that cost which includes solicitor's fee if properly pleaded and proved are usually paid. See **BAUD V. SIMON (2014) ALL FWLR (PT. 753)C.A. 1878.**

In this action, the cost of solicitor's fee has not been proved. I hereby resolve this issue against the claimant herein.

That said, I now turn to the reliefs. It must be stated here that the success of the plaintiff's relief are predicated on the plaintiff's ability to establish his claim on balance of probabilities as required

by law. On the whole, the claimant's claims herein partially succeeds. That said, **IT IS HEREBY ADJUDGED AS FOLLOWS:-**

1. *I hereby declare that the defendant's refusal to hand over the 4 Bedroom Terrance Duplex with plot number A 105 W (3) at Brains & Hammer City Estate Life Camp, Abuja, claimant having fully paid for the said property or complied substantially with all terms and conditions in respect of the property transaction since 2016 with the Defendants amounts to breach of contract by the Defendants.*
2. *The Defendants are hereby ordered to complete and handover all that plot A 105 W (3) at Brains & Hammer City Estate Life Camp, Abuja having paid fully for the property.*
3. *The plaintiff is hereby ordered to pay to the defendants legal fees and value added tax in line with the provisions of the provisional letter of offer between the parties. legs 3, 4, 5, 6 and 7 of the claimants claim fails for failure by the plaintiff to establish same by preponderance of evidence. This is the judgment of this Honourable court.*

**Appearances:**

Claimant Attorney in court  
Oloruntoba Elisha for the claimant  
Abbas Shittu for the defendants  
Judgment read in open court

**Signed**  
**Presiding Hon Judge**  
**22/02/2022**