**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 J. ENOBIE OBANOR – JUDGE**

**THIS THURSDAY, THE 30TH DAY OF JUNE, 2022**

**APPEAL NO: CVA/20/2022**
**SUIT NO: WZ6/CV/22/2021**

**BETWEEN:**

**MR PAUL ONWUZULIKE .....APPELLANT**

**AND**

**BINOS CORPORATE RESOURCES LTD .....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 granting the Respondents Reliefs subject of this appeal.

By an Amended plaint dated 22nd February, 2021 and filed on 24th February, 2021 before His Worship Umar Isa Dodo, the plaintiff, now Respondent, sought for the following Reliefs against Defendant, now Appellant as follows:

i. **An ORDER of the Honourable Court directing the Defendant to immediately vacate and deliver up vacant possession of the two shops namely GFF3 and 14 located in the Binos Plaza at Plot 23 Suit 200 Palm View Estate Cadastral Zone C09 Lokogoma Abuja, FCT.**

ii. **An ORDER of this Honourable Court directing the Defendant to pay the Plaintiff the sum of N58, 333, 33k (Fifty Eight Thousand, Three Hundred and Thirty Three Naira, Thirty Three Kobo only) per month, the said sums being the**

iii. **Mesne profit from 27th July, 2020 when the tenancy was determined until judgment is delivered, and thereafter until possession is delivered by the Defendant to the Plaintiff.**

iv. **N500, 000.00 (Five Hundred Thousand Naira) only as the cost of this suit.**

v. **10% post judgment interest until judgment sum is liquidated.**

The Defendant filed a defendant's statement of defence (no2) dated 27th August, 2021 and the matter proceeded to hearing.

At the conclusion of trial, the court granted Reliefs (1), (3) and (4). The award for cost under Relief (3) was however in the sum of N400, 000.

Being dissatisfied with the judgment of the lower court, the Appellant filed a Notice of Appeal dated 17th February, 2022 containing five (5) grounds.

The Respondent equally not satisfied with the failure of the lower to grant Relief (2) for mesne profit also filed a cross-appeal. The Notice of cross-appeal dated 3rd March, 2022 has only one ground.

In compliance with the Rules, the Appellant filed and served his Appellants Brief of Argument dated 8th March, 2022 and filed on 10th march, 2022. In the said address, two (2) issues were raised as arising for determination as follows:

1. **Whether the learned trial Magistrate was right to have entered judgment in favour of the Respondent in the face of the evidence adduced before the court? (Grounds 1, 2, 3 and 4).**

2. **Whether the learned Magistrate exercised his discretion judiciously and judicially in awarding the sum of N400, 000 as cost against the Appellant? (Ground 5).**

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 23rd March, 2022. The Respondent raised three (3) issues as arising for determination:

1. **Whether the judgment of the Honourable Court delivered on the 10th day of February, 2022 was delivered without jurisdiction?**

2. **Whether the Appellant presented any evidence of tenant relationship with Mrs. Beatrice Ikeakor or Betti Bitrus from which the learned trial judge could infer a relationship of landlord and tenant?**

3. **Whether cost of N400, 000 awarded by the learned trial judge was punitive.**

The submissions made on the above issues equally forms part of the Record 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 5th April, 2022.

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 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 Reliefs sought by Respondent?**

The above issue raised by this court conveniently accommodates all the issues raised and addressed by parties. 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 Reliefs sought by Respondent?**

We had at the beginning alluded to the **Reliefs** sought at the lower court. From the processes filed at the lower court vide the Amended plaint (pages 1-5 of the record) and the defendants statement of defence (No2) (pages 7-10 of the Record) which identified and streamlined the issues in dispute and on the basis of which parties led evidence and the lower court decided the case, the substantive and key issue appears fairly straightforward and that is whether the Respondent from the evidence presented has met the requirements of the Recovery of Premises Act to be entitled to the possession of the property in dispute and the other ancillary Reliefs.

We note that in the Appellants statement of facts relevant to the appeal at page 1 of the Brief, the point was made that though he filed a statement of defence, that the court being a court of summary jurisdiction did not order for pleadings and that the pleadings go to no issue.

As indicated earlier, the processes filed by parties included the statement of defence (No2) filed by Appellant and it was one of the processes that was used by parties in presenting their cases and on which the lower court reached a decision. Indeed from the Record, while there is no express mention of where pleadings were ordered, but the lower court at **page 44** of the Record clearly alluded to the 25 paragraphs Amended plaint filed by Respondent and ordered same to be served on defendant together with a hearing notice. The defendant filed his defence of 20 paragraphs and hearing commenced on the basis of these processes.

The provision of **Order xxiii Rule 2 of the District Court Rules** provides that "in all suits, written pleadings may be ordered by court." The word used in this provision is 'may' which in law is permissive or an enabling expression. See

**Odoinye Ohanaka V Edmund Achugwo & Anor (1998) 9 NWLR (pt.564) 37 at 66**. The fact that there is no express indication that pleadings were ordered is therefore not fatal and does not also affect the validity of the pleadings used by all parties.

The contention that the pleadings be discountenanced simply because there was no express order for the filing of same, but after parties used it as forming part of the processes at trial, we consider resort to technicality of the extreme kind. The Appellant having acquiesced in filing a defence and its use at the trial court cannot be seen to now canvass on appeal that the processes used by all parties and the court be jettisoned for reasons that are not clear. The mantra that propels proceedings at the District Court and indeed in all courts nowadays is that of substantial justice. Technicalities are a blot upon the administration of justice and the courts have moved away from allowing them to make a mockery of the administration of justice. All courts are encouraged to pursue the course of substantial justice, a situation which deserves great commendation. See **Odua Investment Co. Ltd V Talabi (1997) 10 NWLR (pt.532) 1 at 52 EF; Ojah V Ogboni (1996) 6 NWLR (pt.454) 272 at 292 D-E**.

In any event, there is no where on the Record where defendant made any complaint related to the filing of his defence or its use or indeed the pleadings used in the case. The court in its judgment at the page 67 of the Record clearly referred to and used the statement of defence in his evaluation of the evidence before him and reaching a decision.

There is also no where in the **Notice of Appeal** where any complaint was streamlined by Appellant against the use of the statement of defence or the Amended Plaint. Submission or issues for determination on appeal cannot be made at large. They must necessarily relate to the facts or law decided by the court whose decision is appealed against. Any issue for determination and submissions made must arise and be related to the grounds of Appeal filed by Appellant, otherwise such issue and submissions made will all be incompetent. See **Imegwu V Asibelua (2012) 4 NWLR (pt.1289) 119**. In the absence of a ground of appeal or any challenge or defined complaint on this issue on the **Notice of Appeal,** the contention that the statement of defence and pleadings be discountenanced in resolving this appeal clearly has no merit and is discountenanced without much ado.

All the processes filed and evidence led will accordingly be used as a basis to determine the issued raised in this appeal. In doing so, let us at the onset situate 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 both from the **Amended plaint** and the **defence,** there is no substantial dispute with respect to the fact that there is a landlord tenant relationship

between parties, even if no tenancy agreement was presented defining clearly the terms of the tenancy relationship.

By paragraphs 1 – 5 of the Amended plaint, the plaintiff/respondent stated as follows:

**"1.The Plaintiff is a dully incorporated Company in Nigeria under the Company and Allied Matters.**

**2. The plaintiff is the owner of Binos Plaza located at Plot 23 Suit 200 Palm View Estate Cadastral Zone C09 Lokogoma Abuja, FCT.**

**3. The defendant is a tenant to the plaintiff occupying two shops, namely shop GFF3 and 14 in the said Binos Plaza.**

**4. The defendant is an annual tenant that commenced on 28th July, 2016 and expired on 27th July, 2017.**

**5. The defendant until 19th November, 2019 pays the sum of N350, 000.00 (Three Hundred and Fifty Thousand) naira only as rent for each of the two shops."**

The above paragraphs are clear and unambiguous situating that the **plaintiff** is the owner of the property in dispute and that the defendant is a tenant occupying 2 shops at an annual rent of N350, 000 that commenced on 28th July, 2016 and expired on 27th July, 2017.

In paragraphs 1 and 2 of the statement of defence, the defendant stated thus:

**"1. The Defendant admits the averment in paragraphs 2, 3, and 4 of the Amended Particulars of claim to the extent that the defendant occupies those shops and pays a rent of N350, 000 per annum for each shop.**

**2. The Defendant denies paragraphs 5 and 6 of the amended particulars of claim and avers that his rent at all material times is N350, 000 per annum and that he has never reached any agreement for the increment of the rent with the plaintiff and that no letter was served on him by the plaintiff."**

It is to be noted immediately that in the entire defence, the defendant did not join issues at all with the averment in paragraph 1 of the plaint. The implication

is that the defendant admits the said paragraph. The failure to deny or join issues with paragraph 1 read along with the above paragraphs clearly confirms the essence of the relationship with plaintiff stated in paragraphs 1 – 5 of the plaint.

The defendant essentially here admits he occupies the shops of plaintiff and that the rent at all times was **"N350, 000 per annum and that he has never reached any agreement for increment of rent with the plaintiff and that no letter was served on him by the plaintiff."** The law is settled that facts admitted need no proof. An admission essentially puts an end to proof. This is because by the admission, the parties no more join issues on the matter. Since proof presupposes a dispute and since admission drowns the element of dispute, proof becomes superfluous. See **Akaninwo & ors V Nsirim & ors (2009) 9 NWLR (pt.1093) 439.**

We note that the Appellant in the Brief of Argument has contended that during cross-examination of PW1 at page 41 of the Record, he stated that one **Mrs. Nwakego Ikeagor** is the landlord and made extensive submissions on the fact that the proper landlord is not before the court and that all actions taken on her behalf without proof that plaintiff on record acted on her behalf or as her agent are incompetent and robs the lower court of jurisdiction to entertain the action.

Now on the pleadings or processes filed by parties, there is nothing turning on whether the Respondent on record is the landlord or not. The Appellant did not in the entire 20 paragraphs of his defence aver that the Respondent was not the owner and landlord of Binoz Plaza located at Plot 23 Suit 200 Palm View Cadastral Zone C09 Lokogoma Abuja FCT where Appellant occupies two shops. The Appellant never mentioned Mrs. Beatrice Nwakezo Ikeakor as his landlord or owner of the property anywhere in the process he filed.

There was thus no issue joined at all on the issue of who the proper landlord of the premises in question is. It is rather belated for the Appellant to now on appeal seek to make it an issue which was never streamlined as a defined issue at the lower court and which the learned trial judge never dealt with. In any event the Appellant in paragraphs 1 and 2 of his defence essentially admitted as already demonstrated that the Respondent was his landlord, if not he will not be saying that he never reached an agreement for increase of rent with plaintiff and no letter was served on him by plaintiff vide paragraph 2 of the defence above.

The Appellant through learned counsel cannot seek to present a case on appeal completely outside the pleadings and processes filed and cases are decided on the pleadings and evidence led in support, not by address of counsel. The Appellants brief like an address is no more than a handmaid in adjudication and cannot take the place of the hard facts required to constitute credible evidence. No amount of brilliance in a brief can make up for lack of evidence to prove and establish or disprove and demolish points in issue. See **Iroegbu V MV Calabar Carrier (2008) 5 NWLR (pt.1079) 147 at 167, Michiki Local Govt. V N.N.P.C (1998) 11 NWLR (pt.573) 201.**

Learned counsel to the Appellant has made heavy weather of the response to the question he asked PW1 on page 49 of the Record as follows:

**Q. What is the name of the landlord.**

**A. Mrs. Nwakegor Ikeafor.**

We believe that unnecessary strain is been placed on this rather unclear question which elicited the answer PW1 gave. The Appellant here has deliberately chosen this particular question and answer out of other questions asked to dilute the context of what transpired.

On page 49 on the Record, the following was the exchange between counsel and PW1 during cross-examination:

**Q. Tell Court how long you have been in the management of the said property.**

**PW1: I have been in the management of the property for four (4) years.**

**Q. So you know everything pertaining to the said property.**

**A. Yes.**

**Q. You mentioned in your evidence that the landlord's son intends to use the property.**

**A. Yes.**

**Q. What is the name of landlord son.**

**PW1: Mr Obinna Okafor.**

**Q. What is the name of the landlord.**

**PW1: Mrs. Nwakego Ikeafor.**

The above answer must be seen in the context of paragraphs 1, 23 and 24 of the plaint where Respondent stated thus:

**"1.The Plaintiff is a dully incorporated Company in Nigeria under the Company and Allied Matters.**

**23. The plaintiff needs the said shops for its personal use and as a result her adult son, Mr. Obinna Ikeazor has bought at all necessary equipment to commence computer/ICT training in the said shops only but waiting for the defendant to vacate the two shops.**

**24. The plaintiff is entitled to the two shops namely GFF3 and 14 in the said Binos Plaza located at Plot 23 Suit 200 Palm View Estate Cadastral Zone C09 Lokogoma Abuja, FCT."**

It is clear that the Plaintiff/Respondent on record by paragraph 1 of the plaint is an incorporated company and obviously cannot be the landlord who gave birth to Mr. Obinna that PW1 is talking about. There is on the record no confusion on the part of PW1 as to the landlord and owner of the plaza. At pages 45-46 of the Record, PW1 in his examination in chief stated clearly that he works as a manager of the plaza which belongs to plaintiff and that he knows the defendant because he is a tenant occupying two shops in the plaza. This evidence was not challenged or contested and is consistent with the case Plaintiff/Respondent made on the plaint with respect to the owner of the plaza.

PW3, one of the facility managers of the plaintiffs plaza corroborated this context and evidence of PW1 at page 57 of the Record when he stated that the son of the Managing Director, Obinna Efekor (sic) ordered for some materials out of the country and needs to use the space occupied by defendants. There is therefore no confusion as to the owner and landlord of the plaza where defendant occupies two shops.

As stated earlier, the issue or question of the landlord of the two shops is completely a non issue as not been a defined issued at the lower court. We only treated the issue in some depth out of abundance of caution.

Finally on the point, the defendant/appellant who seeks to project the point that he had a different landlord from plaintiff on record did not proffer any scintilla of evidence to prove that the plaintiff is not the landlord or that he had another

landlord. At the risk of prolixity Paragraph 2 of his defence where he stated that he did not reach any agreement with plaintiff over increment of rent and that no letter was served on him by plaintiff detracts from the credibility of his narrative that he had another landlord other than plaintiff.

To further undermine the case of plaintiff on who is his landlord, he stated under cross-examination, at page 63 of the Record, that when he paid for service charge, the receipt bare the **name of plaintiff** and when he last paid rent, he paid through bank transfer into plaintiff's account. No mention was made of any other person as is being done now through the Brief of Argument.

There is no doubt flowing from our evaluation of the evidence that the **Appellant** and **Respondent** had a landlord and tenant relationship which Appellant admitted in paragraph 2 commenced on 28th July, 2016 and expired on 27th July, 2017 at an annual rent of **N350, 000**.

The case of Respondent is that at the expiration of the tenancy on 27th July, 2017 the defendant did not renew his rent until 2019 after a demand letter was served on Appellant and that the defendant last paid his three years rent in arrears in October 2019 which has expired on 27th July, 2020 and which the Appellant has not renewed.

In response to the above, the Defendant/Appellant in paragraphs 3, 16, 17, 18 of his defence stated as follows:

**"3. The Defendant in answer to paragraphs 7 and 8 states that upon the expiration of his rent, he caused a cheque for the sum of N700, 000.00 for the due rent with accompanying letter to Netanexus Solicitors and the said rent was refused: the purported non renewal was due to refusal of the Netanexus Solicitors to accept his cheque. The defendant shall rely on a copy of the letter and the cheque. The defendant is therefore given notice to produce the original during trial.**

**16. Further to all the paragraphs above, the Defendant upon the expiration of rent was unable to pay immediately due to the Covid-19 pandemic which led to huge loss of income and general lock down in the country.**

**17. That after the lifting of the lockdown, he traded for some months and was able to raise the rent for the two shops in the sum of N700, 000.00 in**

**which he instantly issued transfer instruction in the name of the plaintiff vide a cheque dated 30th September, 2020.**

**18. The cheque was sent to the plaintiff with a cover letter dated 30th September, 2020 which was sent to the plaintiff's solicitors. The defendant pleads and shall rely on a copy of the cheque and the letter during trial. The plaintiff is hereby put on notice to produce the original letter during trial."**

Now in evidence, the Appellant never tendered any of the cheque(s) representing the rental payments or any transfer instructions as pleaded above to support the alleged payments he sought to make to renew the relationship. In the absence of any evidence to situate or support the pleadings, the averments go to no issue. It is settled that averments in pleadings do not amount to evidence. Where evidence is not led in support of averments, they are deemed as abandoned. See **Aregbesola V Oyintola (2011) 9 NWLR (pt.1253) 458 at 594 A-B**.

We note that in the cross-examination of PW1 at page 51 of the Record, he alluded to the fact that the Appellant sent a cheque payment which did not reflect the increment in rent made for the shops and the plaintiffs lawyer returned the cheque.

We only need say that with respect to the question of increment of rent from N350, 000 to N750, 000 for each shop, there is nothing on the evidence showing that parties agreed to the increase. The question of rent is or must necessarily be a product of agreement between parties. It is settled principle that a unilateral decision by a landlord to increase the amount of rent payable under a tenancy agreement is invalid unless there is an agreement to that effect between the landlord and the tenant. A unilateral increase of rent is at best, an offer or proposal and where the tenant refuses to pay the increased rent, the landlord is required to take necessary steps as required by law to terminate the tenancy. See **Udi V Izedonmwen (1990) 2 NWLR (pt.132) 357.**

On the evidence it is clear that when the annual tenancy expired on 27th July, 2020, the Appellant did not renew the tenancy by paying the increased rent or yield up possession which is an implied obligation if he is not interested in renewing the relationship. The failure to pay the increment is a recognition that

parties were not ad-idem on the issue of rent allowing the landlord to take steps to recover the premises as allowed by law.

Now the law on recovery of premises is clear. **Section 7 of the Recovery of Premises Act Cap 544 LFN 1990 provides the modalities as follows:**

**"7. when and so soon as the term or interest of the tenant of any premises, held by him at will or for any term either with or without being liable to the payment of any rent, <u>ends or is duly</u> determined by a written notice to quit as in form B, C or D which ever is applicable to the case, <u>or is otherwise duly determined</u>, and the tenant, or if the tenant does not actually occupy the premises or only occupies a part thereof, a person by whom the premises or any part thereof is actually occupied, neglects or refuses to quit and deliver up possession of the premises or of such part thereof respectively, the landlord of the premises or his agent may cause the person so neglecting or refusing to quit and deliver up possession to be served in the manner hereinafter mentioned, with a written notice as in form E signed by the landlord or his agent of the landlord's intention to proceed to recover possession on a date not less than seven days from the date of service of the notice." (Underlining supplied).**

From the above, it is clear that term or interest of a tenant in any premises can be determined in a variety of ways. For example it could be by *effluxion* of time or by a written notice to quit as provided for in forms B, C or D whichever is applicable or as is otherwise duly determined. This point is underscored by the fact that the word "or" is used as underlined above in the said provision.

In law when "or" appears in any provision, it is a disjunctive participle used to express an alternative or to give a choice among two or more things. See **Abia State University V. Anyaibe (1996) 3 N.W.L.R (pt 439) 646 at 661.**

On the evidence on Record particularly the evidence of PW2, the bailiff of court, he effected the service of the notice of quit dated 24th January, 2020 together with Certificate of Service vide **Exhibit D** on Appellant who received or collected the notice but refused to acknowledge receipt and he equally served on the Appellant Notice of owners intention to apply to recover possession dated 10th August, 2020 together with certificate of service vide **Exhibit E** which he again received but refused to acknowledged receipt.

We have carefully evaluated the evidence of PW2 on record, and nothing was put forward by Appellant to challenge or impugn the narrative that he served the notices on Appellant. The certificates of service vide **Exhibits D** and **E** are prima facie evidence of service on Appellant and in the absence of any evidence on record to detract from its credibility, we must accordingly accord the certificates probative value and weight.

In the Brief of Argument, the Appellant submitted that the Respondent **"concocted evidence leading to the production of the Certificate of Service"** but the basis of such **"concocted evidence"** or how Appellant determined it was concocted was not explained or defined. If the certificates of service of the Notices bear the same date as argued, the bailiff or PW2 gave evidence as to when and how he served the processes and he was not challenged or questioned at all on the Record on the dates on the processes. PW2 was not shown the certificate of service by Appellants' counsel and followed up with any question(s) about the dates on the processes to impugn the credibility of the bailiff who served the notices.

The Appellant here clearly seeks to make a case outside of the processes filed and evidence led at trial. As stated earlier, addresses of counsel, no matter how beautifully articulated are no substitute for evidence. The Appellant clearly has not impugned the fact of the service of the notices. Happily in this case, the Appellant in evidence at page 61 of the record agreed that the **summons** was pasted **"on my shop."**

We only need point out that the jurisprudence on service of statutory notices has now shifted from the hitherto rigid adherence to technicalities of service of notices which tenants took advantage of to stay undeservedly in the premises of a landlord. The salutary dynamic advocated by the Apex Court situates that a tenant cannot stay in a premises, refuse to pay rent and be complaining or raising technical issues about dates on notice or that the notice is faulty. Serving of the substantive plaint or summons takes care of such situations.

In **Pillars (Nig.) Ltd V Desbordes (2021) 12 NWLR (pt.1798) 122**, the Apex Court stated instructively and I will quote them at length as follows:

**"the justice of this case is very clear, the appellant has held on to the property regarding which it had breached the lease agreement from day one. It had continued to pursue spurious appeals through all the hierarchy**

**of courts to frustrate the judgment of the trial court delivered on 8th February, 2000 about twenty eight years ago.**

**After all, even if the initial notice to quit was irregular, the minute the writ of summons dated 13th May, 1993 for repossession was served on the appellant, it served as adequate notice, the ruse of faulty notice used by the tenants to perpetuate possession in a house or property which the landlord had slaved to build and relies on for means of sustenance cannot be sustained in any just society under the guise of adherence to any technical rule. Equity demands that where and whenever there is controversy on when or how notice of forfeiture or notice to quit is disputed by the parties or even where there is irregularity in giving notice to quit, the filling of an action by the landlord to regain possession of the property has to be sufficient notice to the tenant that he is required to yield up possession. I am not saying here that statutory and proper notice to quit should not be given. Whatever form the periodic tenancy is, whether weekly, monthly, quarterly, yearly, etc, immediately a writ is filled to regain possession, the irregularity of the notice if any, is cured, all the dance drama around issue of the irregularity of the notice ends."**

This decision of the Supreme Court was followed by the Court of Appeal in the Judgment delivered this January, 2022 in the case of **Bankole & Anor V. Oladitan (2022) LPELR – 56502 (CA)**, where the appellant had urged the court to invalidate the writ of summons based on the fact that the Notice of owners intention to recover possession was invalid. The court held thus:

**"...the Supreme court has now responded to the sad occurrence by coming to the rescue of landlord and property owners whose cantankerous and recalcitrant tenants have over the years been clinging on to the issue of improper service of statutory notices to unjustifiably hold on to the landlord's properties without payment of agreed rent or complying with the terms of the lease agreement.**

The Court of Appeal quoting the decision in **Pillars (Nig.) Ltd V Desbordes (2021) 12 NWLR (pt.1789) 122** went further and stated thus:

**"To the glory of God, we are now at a new dawn with above-quoted decision of the apex court. On the basis of this authority, which I must kowtow, I hold that notwithstanding the irregularity in the service of the notice to tenant of Owner's intention to Recover possession of property on**

**the 1st Appellant, the writ initiating this suit cannot be invalidated as the service of the writ itself constitute sufficient notice to the Appellants that the Respondent want to recover possession of the property together with arrears of rent"**

The above decisions have breathed much needed fresh air with respect to issue of notices which tenants have taken undue advantage of to prevent landlords from recovering their premises.

Flowing from the above and on the evidence, the yearly tenancy relationship ended on 27th July, 2020 by effluxion of time. The defendant agreed he could not raise the rent, meaning he did not renew the tenancy. He also stated that he was not willing to pay the increased rent for the premises. The option to the Appellant at that point was limited. If you cannot pay the new rent, then you vacate the premises.

As rightly found by the trial court, with the determination of the tenancy and having failed to quit and deliver up possession, the Appellant was entitled to be issued with a seven (7) days notice of owners intention to apply to recover possession. See **Ihenacho V. Uzochukwu (1997)2 N.W.L.R (pt.487)257 at 269-270 H-A; Otegbade V. Adekoya (1962)AII A.N.L.R 761 at 764**

In this case, although the Respondent gave or issued notice to quit vide **Exhibit D,** the law is settled that where a tenancy agreement creates a tenancy for a fixed term, notice to quit is not necessary to determine the term at the end of the fixed term expressed; the only notice required before possession is the seven days notice under **Section 7** and indeed the service of the notice to quit as was done in this case does not amount to waiver of the right to hold that the tenancy was determined by *effluxion* of time. See **Tinuola & Ors V. Okon (1966) A.N.L.R 469; Obi Okoye, Essays on Civil Proceedings Vol.1, Pg. 27 Par. 21.**

As stated earlier, the requisite notices were all duly served on Appellant vide **Exhibits D** and **E**. He was also duly served with the **summons or plaint**. Nothing was put forward to challenge or impugn the service of the notices. Even if there was validity to the complaint with respect to service of the notices, we referred to decisions of the **Superior Courts** which donate the position that, such complaint can no longer defeat the legitimate complaint of a landlord to get his premises back from a tenant not living up to his commitments. The service of the summons or writ of summons serves as sufficient notice to the

Appellant in this case that the Respondent want to recover possession of the shops with arrears of rent.

On the record, all the pieces of evidence and or facts found as established by the lower court on the basis or the evidence of Respondent on the nature of the relationship with appellant, the service of requisite quit notices on him were not as indicated earlier on challenged or materially contradicted by the Appellant who was given every opportunity of doing so. The law has always been that where evidence given by a party to any proceedings is not challenged by the opposite party who has the opportunity to do so, it is always open to the court seized of the proceedings to act on the unchallenged evidence before it. See **Agagu V Dawodu (1990)7 N.W.L.R (pt.160)67.**

We therefore have no difficulty in holding that the Appellant continued in occupation of the rented flats since the end of the tenancy without fulfilling the implied and clear obligations required of such relationship. It is logical to hold that if the Appellant cannot pay rent or live up to the commitments under the relationship, then he has no business remaining in the property. The decision of the lower court grating Relief (1) clearly cannot be **faulted in the circumstances and is affirmed**.

This now leads us to the issue of the propriety of the cost awarded in this case in the sum of **N400, 000** which the Appellant consider as punitive while the respondent argued to the contrary.

Now on the plaint, the respondent claimed **N500, 000** (Five Hundred Thousand Naira) only as cost of this suit.

In the judgment at page 71, all the learned trial judge said is **"I award the sum of N400, 000 (Four Hundred Thousand Naira only) in favour of the plaintiff against the defendant as the cost of this action."** No more.

We note immediately that there is nothing in the entire judgment situating the parameters or basis for the award of cost or how he arrived at the sum awarded as cost of the action. It is not in doubt that the award of cost is solely at the discretion of the court to award cost. The award is however not be made at large or on whimsical or no grounds at all. The award must be done judiciously and judicially.

In awarding cost, the court will look at the reasonable cost incurred, the length of time in the prosecution of the action, amount of appearances etc, and award

cost accordingly. See **Theobros Auto Ink Ltd V B.I.A.E. Co. Ltd (2013) 2 NWLR (pt.1338) 337**.

It is equally true that cost follow events and a successful party like the respondent should not be deprived of cost unless for good reasons. As already alluded to, the essence of cost is to compensate the successful party of the reasonable loss incurred in litigation. Cost cannot cure all the financial loss sustained in the litigation. It not meant to be a bonus to a successful party and it cannot be awarded on sentiments or extraneous considerations. See **Ero V Tinubu (2012) 8 NWLR (pt.1301) 104; Salby V Olaogun (1999) 14 NWLR (pt.637) 128 and Akinbola V Plisson Fisko Nig. Ltd & ors (1991) 1 NWLR (pt.167) 270**.

We have at length situated the **principles** governing the award of cost, unfortunately we cannot situate on the basis of these principles how the award of **N400, 000** was made. From the record, the plaint was filed on 22nd February, 2021. There is no clear indication on what fees was paid or how many appearances counsel to Respondent made as no address was proffered in support of cost. The case was first mentioned before the lower court on 11th October, 2021 and hearing commenced on 18th November, 2021 with judgment delivered on 10th February, 2022 all within a period of **four months**.

In the circumstances, and in the absence of any rationale basis to support this award, it is difficult to sustain same. The judgment as stated severally is completely silent as to how the sum was arrived at. In law, while the court is reluctant to interfere with exercise of discretion to award cost, where however the discretion has been exercised in an arbitrary or illegal manner without due regard for all necessary considerations or factors, the appellate court is entitled to interfere. See **Ero V Tinubu (supra); Efetiroroje V Okpalefe (1991) 5 NWLR (pt.193) 517**.

We are in no doubt that the amount awarded is extremely on the high side. If the Respondent wanted such huge amount as cost, it should have made a credible case for it or claim damages and establish same at trial. It is proper for us to intervene and we reduce the award of cost to **N60, 000** which is reasonable recompense in the circumstances.

On the whole, except for the issue of cost which we reduced the quantum of the sum granted or awarded to the sum of **N60, 000** (Sixty Thousand Naira only), the substantive appeal clearly has no merit and is accordingly dismissed.

Now to the **cross-appeal**. The cross-appeal relates to the failure of the learned trial judge to award the claim of mesne profit under Relief (2) in the sum of **N58, 333.33** (Fifty Eight Thousand, Three Hundred and Thirty Three Naira, Thirty Three Kobo) only per month from 27th July, 2020 when the tenancy was determined until judgment is delivered and thereafter until possession is delivered. The cross-appellant filed the cross appellants brief of argument on 23rd March, 2022 and raised one issue as arising for determination:

**"Whether or not the Cross-Appellant having proved his case of recovery of possession and the Appellant having admitted owing rent since July, 2020, the Cross Appellant is not entitled to mesne profits/arrears of rent owed to the Cross Appellant by the Appellant/Respondent?"**

Submissions were made on the issue which forms part of the Record of Court to the effect that the trial court was wrong in not granting the mesne profit award having found that the Appellant held over the property after the determination of the tenancy agreement.

The cross-respondent filed a brief or argument on 3rd April, 2022 and equally raised one issue as arising for determination:

**"Whether the learned trial judge was right in not entering judgment for the cross-appellant as to the reliefs relating to mesne profit?"**

Submissions were equally made on the issue which forms part of the Record of Court and it is essentially a rehash of the submissions made in the substantive appeal without addressing the key point on the cross-appeal dealing with the propriety or otherwise of the failure of the trial court to make an award of mesne profit in the circumstances. We note that in the brief, the Cross-Respondent raised a preliminary point to the effect that the Cross-Respondent was not personally served with the Notice of Cross-Appeal. We do not think that this is an issue we should dissipate energy on.

On the record, **counsel who settled the cross-respondents brief**, Victor C. Chimezie only took over the matter during the hearing of the appeal and filed the Reply brief to the Respondents brief and the cross-respondents brief. There is however no doubt that the law firm of **Eric Apia & Co** conducted the entire proceedings at the lower court, filed the notice of appeal and even settled the **Appellants brief**. The Respondents brief of Argument, the notice of cross-appeal and the cross-appellants brief were all served on the said law firm from

which present Appellants counsel must have obtained the processes which allowed him to file the Reply brief.

It is therefore strange that counsel who is not part of the law firm of **Eric Apia & Co** can be heard to make a representation that the law firm that conducted the trial proceedings from beginning to the end and settled the Appellants brief do not have the instructions of Appellant to accept the Notice of Cross-Appeal.

Does counsel now want the court to believe that the law firm of Eric Apia & Co. was instructed to only file the appeal but not respond to the cross-appeal? Where is the evidence to support the lack of instructions to the law firm of Eric Apia & Co.? None was proffered.

If for whatever reasons, Appellant elects to change his counsel as done during the hearing of the extant appeal, that is no reason to make unfounded and purely speculative assertions bereft of any evidence. Again the brief of argument of counsel is no conduit to make this type of complaint. The objection is accordingly overruled as lacking in merit.

Now to the substance of the cross-appeal, on the question of the propriety or otherwise of the lower court refusing the claim of mesne profit. Now in law, the expression "mesne profit'' simply means intermediate profit, that is profit accruing between two points of time, that is the date when the defendant ceased to hold premises as a tenant and the date he gives up possession. See **Agbamu Vs Ofili (2004)5 N.W.L.R (pt.867) 540 at 571; Sabalemotu Vs Muniru Lawal (1994)7 N.W.L.R (pt.356) 263 at 213; Udih Vs Izedonmwen (1990) 2 N.W.L.R (p.t132)357.**

Put in more simple language "mesne profit'' are rents and profits which a tenant who holds over landlords premises after the lawful termination or expiration of his tenancy or a trespasser, has or might have received during his occupation of the land or premises in issue and which he is liable to pay as compensation to the person entitled to possession of such land or premises.

On the authorities, it appears settled that a claim for mesne profit can only be made when the tenancy of the tenant has been duly determined. See **African Petroleum Ltd Vs Owodunni (1991)8 N.W.L.R (pt 210)391; Metal Construction (W.A.) V Aboderin (1998)8 N.W.L.R (pt.563) 568 S.C.**

Now on the record, we have again carefully read the judgment of the lower court, and there is no where to situate where he treated or dealt with the **Relief (2)** on mesne profit which he was duty bound to consider one way of the other.

Now on the unchallenged evidence, as found on Record, the Appellant rented two shops from Respondent at the rate of **N350, 000** for each of the two shops. The rent per year for the two shops is **N700, 000**. On the record, the learned trial judge found that the tenancy expired **"since 27th day of July 2020"** without the Appellant renewing or vacating he rented flats (see page 71 of the Record). The defendant did not deny that he was owing his rent as earlier found.

On the basis of this clear finding, it became incumbent on the lower court to have determined whether the claim of **N58, 333,33k** claimed per month by the Respondent as mesne profit was availing in the context of the rent for the two flats in the sum of N700, 000.

Now the law obviously will not support a situation as in this case where the defendant has obviously profited from a given situation, to wit: the occupation of the demised premises while at the same time he blatantly seeks to shirk or renege from its lawful obligations. Any agreement is useless if one party does not respect it or the terms he willingly accepted to be bound by. On the established facts, there cannot be any doubt that the Respondent is entitled to mesne profit which will be computed from the date the tenancy expired and the defendant holds over the property.

At the risk of prolixity, as found on the processes and evidence, there is no dispute that the rent for the two premises was N700, 000 at N350, 000 each per annum or year. Any mesne profit claim must be predicated on this amount. In law the agreed rental value of the property or premises is an important element in the computation of mesne profit where a tenant holds over landlord's premises after the lawful termination or expiration of tenancy. See **Gabari V Ilori (2002)14 N.W.L.R (pt786)78 at 101 D-E.**

The sum of **N58, 333.33k** claimed by Respondent clearly without any doubt represented the approximate monthly mesne profit for the two flats that has a cumulative annual rent of N700, 000. This appears to us a fair recompense for the Respondent covering the period that the Appellant has held to the demised flats and or uptil when he gives up possession and which the court can in exercise of its powers properly grant. We find support for this in the decision of **Agbamu V. Ofili (2004) 5 NWLR (pt. 867) 450 at 572 D–E** wherein Augie

J.C.A. (as she then was) stated as follows **"If the Appellant is still in possession, and the award of mesne profits upheld, the mesne profit will be calculated up to the date he gives up possession. If the Appellant has given up possession and the award of mesne profit is upheld, the mesne profit will be calculated up to the date he gave up possession."**

The only point we must underscore is that a **claim for mesne profit** is not a claim for special damages requiring strict or specific proof or indeed any extraordinary proof. The philosophical basis of this specie of relief is to ensure that a defendant who holds over after the expiration of his tenancy and denies the landlord access to his legitimate earnings pays a price or suffers some consequences for holding over. We find support for this in the case of **Oceanic Bank International Plc V Aweto Guest Quarters Hotels Ltd (2011) LPELR – 9110 (CA)** per Ejembi Eko JCA (as he then was) stated instructively as follows:

**"…Mesne profit is not a claim for special damages requiring strict proof or specific proof. It suffices only that the claimant for mesne profit proves his assertion that his tenant held over his premises unlawfully after the termination of his tenancy. The claimant does not have any greater burden of proof under Section 135 – 137 of the Evidence Act. He only needs to prove that the defendant, his tenant, held over the leased property after the termination of his tenancy and that has prevented him from realizing or earning economic rents from the property."**

In law where the findings 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 or where the lower court refuses to evaluate facts and or evidence on issues properly presented, 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.**

The cross-appeal has considerable merit and is allowed. The lower court erred in refusing to consider the claim on mesne profit. We accordingly grant Relief (2) on the following terms:

1. **The Appellant is ordered to pay the Respondent the sum of N58, 333,33k (Fifty Eight Thousand, Three Hundred and Thirty Three Naira, Thirty**

**Three Kobo) per month being mesne profit on the two flats Appellant occupies from 27th July, 2020 when the tenancy was determined until when possession is delivered.**

On the whole and for the avoidance of doubt, except for the reduction in the amount of cost awarded by the lower court, the substantive Appeal fails and is dismissed. The Cross-Appeal however succeeds and is allowed on terms as streamlined above.

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| ***HON. JUSTICE A.I. KUTIGI*** | ***HON. JUSTICE J. ENOBIE OBANNOR*** |
| ***(PRESIDING JUDGE)*** | ***(JUDGE)*** |

***Appearances:***

1. ***Victor C. Chimezie, Esq., for the Appellant/Cross-Respondent.***

2. ***A.C. Okoye, Esq., for the Respondent/Cross-Appellant.***