

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION**

HOLDEN AT HIGH COURT MAITAMA –ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE S.U. BATURE

COURT CLERKS: JAMILA OMEKE & ORS

COURT NUMBER: HIGH COURT NO. 24

CASE NUMBER: SUIT NO. FCT/HC/CV/492/2015

DATE: 24TH JUNE, 2022

BETWEEN:

ASO SAVINGS & LOANS PLC..... CLAIMANT

AND

- 1. MERCURY RESOURCES LTD**
- 2. DAVID INYANG**

DEFENDANTS

APPEARANCE:

Ezenwa Okoli Esq for the Claimant.

Francis C. Ani Esq for the Defendants.

JUDGMENT

The Claimant instituted this suit against the Defendant via Undefended List Procedure, which was later transferred to the general cause list and parties were ordered to file pleadings accordingly.

In compliance with the order of the Court, the Claimant filed a statement of claim and written statement on Oath of Emmanuel Uwandule on the 18th of February, 2016.

The Claimant subsequently filed an amended statement of Claim dated 29th April, 2016, wherein it seeks the following reliefs to wit:-

- "a. A Declaration that the Defendant is indebted to the Plaintiff in the sum of ₦38,359,3586.90 (Thirty Eight Million, Three Hundred and Fifty Nine Thousand, Nine Hundred and Eighty Six Naira Ninety Kobo) only, being the total outstanding sum due to the Claimant from the Mortgage transaction as at 29th June, 2016.**
- b. 23% Pre-Judgment interest as per the terms of the Mortgage Loan Agreement.**
- c. Post Judgment interest at Court rate till execution is levied.**
- d. An order directing the Defendant to submit the original title document of the said Mortgage property to the Plaintiff as required under the Mortgage Agreements.**
- e. An order for sale of the Mortgage Property in order to apply part or all the proceeds towards the liquidation of the debt."**

Upon being served with the originating process, the Defendants filed a joint statement of defence and equally Counter Claimed against the Claimant as follows:-

- "a A Declaration that the 1st Defendant/Counter Claimant is not owing or indebted to the Plaintiff/Defendant to Counter Claim the sum of ₦37,114,425.99 (Thirty-Seven Million, One Hundred and Fourteen Thousand, Four Hundred and Twenty-Five Naira, Ninety-Nine Kobo) or any sum whatever.**
- b. A Declaration that the Plaintiff threat to sell or dispose the 1st Defendant's/Counter Claimant's property situate**

(sic) and lying at NO. (sic) House No. 2 Block C Lake view Estate, Kado Phase 1, Abuja covered by the allocation letter dated 15th December, 2009 whilst this suit is pending and yet to be heard and determined is illegal, null and void.

- c. A Declaration that the deed of legal mortgage executed between the Plaintiff and the 1st Defendant dated 16th March, 2016 is illegal, null and void and unenforceable having not been registered with the Abuja Geographic Information System (AGIS) and the consent of the Minister of the Federal Capital Territory was not first had and obtained it (sic) was executed).***
- d. An Order of this Honourable Court striking out the name of the 2nd Defendant for being an agent of a disclosed principal i.e. 1st Defendant/Counter Claimant.***
- e. An Order of this Honourable Court restraining the Plaintiff either by itself, or its agents assigns, heirs, personal representatives or privies or any person purporting to be acting on its behalf from appointing, registering and or purported to appoint or register a receiver/manager and or taking possession or (sic) over the 1st Defendant's property situates (sic) and lying at NO. (sic) House No. 2 Block C Lake View Estate, Kado Phase 1, Abuja.***
- f. An order of perpetual injunction restraining the Plaintiff either by itself or its agents, assigns, heirs, personal representatives or privies or any person howsoever called or described from interfering with, or doing anything whatsoever including, trespassing from (sic) auctioning, selling and/or alienating the 1st Defendant's property at situates (sic) and lying at NO. (sic) House No. 2 Block C Lake View Estate, Kado Phase 1, Abuja.***

g. ₦10,000,000.00 (Ten Million Naira) only being general damages occasioned by the unlawful acts and harassment by the Plaintiff.

h. Cost of filing this Counter Claim."

It should be noted that this suit was initially before My Learned brother Hon. Justice. V. V. M Venda (RTD). Upon her retirement, the suit was transferred to this Honourable Court for trial denovo.

Trial commenced in this suit with the Claimant opening its case on 10 February, 2021 by calling its sole witness, Akachukwu Okechukwu, who testified as PW1, adopted his statement on Oath filed on 29th April, 2016 and tendered the following documents in evidence which were admitted and marked as followings:-

- 1. Allocation letter for a House at Lake View Homes, Kado Phase 1, Abuja dated 15th December 2009 was admitted and marked as Exhibit 1.***
- 2. Offer letter of Mortgage loan dated 16th March 2009 was admitted and marked as Exhibit 2.***
- 3. Board Resolution of Mercury Resources Ltd dated 26th March, 2009 was admitted and marked as Exhibit 3.***
- 4. Loan agreement dated 16th March was admitted and marked as Exhibit 4.***
- 5. Deed of Legal Mortgage dated 16th March, 2009 was admitted and marked as Exhibit 5.***
- 6. Account Statement of the Defendant covering the periods i.e 5th June 2008 -29th June, 2016 was admitted with a certificate of compliance and marked as Exhibit 6.***
- 7. A letter titled "Re: Your Outstanding past due ₦2, 218,818.10" dated 17th August, 2010 written by the claimant to the Defendant was admitted and marked as Exhibit 7.***

8. ***A letter titled "Your outstanding Mortgage facility with past due balance of ₦10,807. 82 as at date" written to the Defendant by the Claimant and dated 10th April, 2012 was admitted and marked as Exhibit 8.***
9. ***A letter titled "outstanding Mortgage Facility" also written by the Claimant to the Defendant and dated the 26th April, 2012 was admitted and marked as Exhibit 9.***
10. ***A letter titled "Second reminder- Your outstanding facility with past due balance of ₦10,036,158.06 as at date and written by the Claimant to the Defendant dated 19th June, 2012 was admitted and marked as Exhibit10.***
11. ***A letter written by the Claimant to the Defendant titled "Re: demand for immediate payment" dated 5th February, 2013 was admitted and marked as Exhibit 11.***
12. ***A letter titled "Demand Notice" dated 21st May, 20-13 was admitted and marked as Exhibit 12.***
13. ***A letter titled "Payment of Mortgage loan dated 8th July, 2013 was admitted and marked as Exhibit 13.***
14. ***A letter titled "Re: Demand for immediate payment" dated 18th July 2013 was admitted and marked as Exhibit 14.***
15. ***A letter titled "Re: Demand for immediate payment was admitted and marked as Exhibit 15.***
16. ***A letter titled "Re: Appeal for acceptance of payment plan" written by the Defendant to the Claimant and dated 29th July, 2013 was admitted and marked as Exhibit 16.***
17. ***A letter titled "Re: Demand for immediate payment" dated 9th October, 2013 was admitted and marked as Exhibit 17.***

- 18. A letter titled "Re: Demand Notice "dated 17th January, 2014 was admitted and marked as Exhibit 18.**
- 19. A letter titled "Final Appeal on repayment of our Mortgage loan" dated 5th February, 2014 was admitted and marked as Exhibit 19.**
- 20. A letter titled "Repayment of our Mortgage" dated 26th March, 2014 was admitted and marked as Exhibit 20.**
- 21. A letter titled "Re: Repayment of our Mortgage loan" dated 27th March, 2014 was admitted and marked as Exhibit 21.**
- 22. A letter titled "Request for a one-off concessionary payment dated 24th July, 2014 and written by the Defendant to the Claimant was admitted and marked as Exhibit 22.**
- 23. A letter titled "Re: Request for a one-off concessionary payment dated 23^d February, 2015 was admitted in evidence and marked as Exhibit 23.**
- 24. A letter titled "Re: Request for a one-off concessionary payment dated 21st April 2015 was admitted and marked as Exhibit 24**
- 25. A letter titled "Re: a passionate appeal for the granting of ₦20 Million as one-off concessionary payment" dated 9th May, 2015 was admitted and marked as Exhibit 25.**
- 26. A letter titled "Demand for immediate payment of your past due obligation of ₦17,216,788.17 DR" dated 23^d June, 2015 was admitted and marked as Exhibit 26.**
- 27. Letter titled "Re: an appeal to pay the sum of ₦22,000,000.00 as full and final payment" dated 7th July, 2015 written by the Defendant to the Claimant was admitted and marked as Exhibit 27.**

28. Signature of PW1 was also admitted on 10th February, 2021 during cross examination and marked Exhibit 28."

PW1 was accordingly cross-examined, re-examined and discharged accordingly. The Claimant closed their case.

On the other hand, the Defendants opened their defence on 13th December, 2021 by calling their sole witness by name David Inyang (the 2nd Defendant) who testified for himself and the 1st Defendant as DW1 adopted his statement on Oath and tendered the following documents in evidence which was admitted and marked as follows:-

- "1. Acknowledgement of receipt of the sum of \$4,700 by Emmanuel Uwandulu dated 16th March, 2015 was admitted and marked as Exhibit 29.**
- 2. Zenith Bank cheque dated 4th September, 2015 was admitted and marked as Exhibit 30.**
- 3. Signature of DW1 made in open Court during cross-examination, was admitted and marked as Exhibit 31.**
- 4. Application for consent of the Minister was also admitted and marked as Exhibit 32."**

DW1 was cross-examined by the Claimant's Counsel and was thereafter discharged accordingly.

Evidence having been concluded on both sides, the matter was adjourned for adoption of final written addresses. As stipulated in order 33 of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules) 2018.

The Defendant's final written address is dated the 29th day of December, 2021 and filed same day. The Defendant's equally filed a reply on point of law dated 9th day of February, 2022 and filed same day.

The claimant on the other hand filed their final written address dated 1st day of February, 2022 and filed same day.

In the said Defendant's final written address learned Counsel, Francis Chukwudi Ani, Esq, formulated three issues for determination to wit:-

- i. Whether the alleged transaction and instruments evidencing same which purportedly Mortgaged the 1st Defendant's title and interest in the property known as Block C. House No. 2, Lakeview Homes, Kado Phase 1, Abuja in favour of the Claimant are not illegal, invalid, null and void for lack of the mandatory Ministerial consent.
- ii. Whether the Claimant has adduced cogent and satisfactory evidence to be entitled to the reliefs it has sought in its amended statement of claim.
- iii. Whether the Defendants are entitled to their counter claim.

Before learned Counsel argued the issue for determination he commenced argument on the admissibility of Exhibits 2, 4, 5, 31 and 32.

On Exhibits 2, 4 and 5, Counsel submitted that they are registrable instruments and they must be registered and that the said Exhibits were not registered. Counsel referred the Court to Sections 2, 6, and 15 of land registration Act, Cap 515 laws of the Federal Capital Territory, Abuja. And the cases of **OGBIMI V. NIGER CONSTRUCTION LTD (2006) NWLR (PT. 986) 474; ORDOLA OKEYA TRADING CO. V. A.G KWARA STATE (1992)7 NWLR (PT. 254) 412 para 426, paras B-C; ABDULLAHI V. ADETUTU(2020) NWLR (PT. 1711) 338, page 365, paras E-F.**

In another submission Counsel stated that it is settled law that the consequence of unregistered instruments is so strict and inflexible that not only is it legally inadmissible, the trial Court, in compliance with the provision of the law, apart from rejecting the documents, must also strike out the paragraphs of the pleading where such document has been pleaded. In this respect, Counsel cited the cases of **OKOYE V. DUMEZ (1985) 1 NWLR (PT. 4) 783 AT 790, PARA E-F; AGBOOLA V U. B. A PLC (2015) 11 NWLR (PT. 1258) 375, PAGE 406, PARAS E-F; ABU V. KUBAYANA (2002) 4 NWLR (PT. 758) 599, PAGE 615-616 PARAS B-G; AGWUNZDU V. ONINUMERE (1994) 1 NWLR (PT. 321) 375, PARAS 387, PARAS A-G.**

Consequently, Counsel referred the Court to paragraphs 4, 5 and 6 of the claimant's Amended statement of Claim and contended that Exhibits 2, 4 and 5 were not pleaded as evidence of a transaction or acknowledgment of

payment but that they were pleaded to show that on the basis of the claimant's disbursement of the Mortgage loan of ₦26,630,000.00 to the 1st Defendant for the purchase of the subject property, the Claimant acquired a legal interest over the property by way of a legal Mortgage. Counsel equally referred the Court to paragraph 22 (e) of the amended statement of claim.

Therefore, counsel urged the Court to reject Exhibits 2, 4 and 5, expunge them from the record of the Court and then proceed to strike down paragraphs 4, 5, and 6 of the amended statement of claim and every other paragraph thereof where the offensive documents were pleaded. Reliance was placed on the cases of **SHANU V. AFRIBANK (NIG) PLC (2002) 17 NWLR(PT. 795) 185, PAGE 2022, PARAS C-E; NATIONAL INVESTMENT AND PROPERTIES CO. LTD V. THE THOMPSON ORGANISATION LTD (1989) 1 ALL NLR 136, PAGE 142-143; SADAWANI V. SADAWANI (NIG) LTD (1989) 2 NWLR (PT. 107) 72 PAGE 82, PARAS F-G; ABUBAKAR V CHUKS (2007) 18 NWLR (PT. 1066)386, PAGE 416 PARA F.**

It was the contention of the defendant's counsel while submitting that Exhibits 2, 4 and 5, are the only basis of the Claimant's claim in this case and having properly demonstrated that they are inadmissible documents, they cannot form the basis of any declaration or order as sought by the Claimant in this case and urged the Court to dismiss the Claimant's case. Reference was made to the case of **OREDOLA OKEYA TRADING CO. V. A.G. KWARA STATE (Supra) page 426 paras C-D.**

On Exhibit 32, Counsel urged the Court to reject and expunge same from the record of the Court or discountenance and refuse to attach any probative value to it. Counsel referred the Court to the testimony of PW1 under cross-examination and the cases of **ALAO V. AKANO (2005) 11 NWLR (PT. 935) 160; EZE V. OKOLOGU (RTD) & ORS (2009) LPELR-3922 (CA) PAGE 19-20 PARAS D-B; ABI V CBN & ORS (2011) LPELR-4192 (CA) PAGE 31, PARA a.; TERAB V. LAWAN (1992) 3 NWLR (PT. 231) 569, PAGE 590, PARAS G-H.**

On issue one which is whether the alleged transaction and instruments evidencing same which purportedly Mortgaged the 1st Defendant's title and

interest in the property known as Block C House No. 2, Lake view Homes, Kado Phase 1, Abuja in favour of the Claimant are not illegal, invalid, null and void for lack of the mandatory ministerial consent. Learned Counsel referred the Court to clause 6 of the recital of Exhibit 4 and contended that the parties expressly incorporated Exhibit 2 into Exhibit 4 and submitted that it is settled law that where a document is incorporated into an agreement by reference, such document, to all intents and purpose forms part of the agreement. Reference was made to the cases of *IWUOHA V N. R. C* (1997) 4 NWLR (PT. 500) 419. Page 430, paras **B-C; N. B. C PLC V. EKPO (2020) LPELR-51997 (CA), page 19-20 paras G-C; NORTHERN ASSURANCE CO. LTD V. WURUOLA (1969) LPELR-25562 (SC), PAGES 11-13, PARAS G-G.**

In his further argument counsel stated that the consent of the Minister of FCT was not first had and obtained before Exhibits 2, 4, and 5 were executed. Counsel referred the court to sections 22 (1) 26 and 51 (2) of the land use act Cap I5, LFN, 2004. Reference was also made to the cases of **SAVANA BANK OF NIGEIRA LTD & ANOR V. AJILO & ANOR (1989) 1 N. S. C. C 135 page 158 paras 10-20; UNION BANK OF NIGERIA PLC & ANOR V. AYODARE & SONS (NIG) LTD & ANOR (2007) 13 NWLR (PT. 1052) 567, PAGE 584, PARAS. D-E.**

Moreso, counsel submitted that the burden is on the claimant who relies on Exhibits 2, 4, and 5 to prove that the consent of the Minister of FCT was first had and obtained before the instruments were executed. Reliance was placed on the cases of **ROCKNOTH PROPERTIES CO. LTD V. NITEL PLC (2001) 14 NWLR (PT. 733) 468, PAGE 566 PARAS A-B; CHIDIKAK V. COKER (1954) 14 WACA 506 AT 508.**

To that extent, counsel stated that Exhibit 32 is not the mandatory Ministerial consent rather it purported to be an application for the said ministerial consent and urged the court to discountenance the said Exhibit 32 and attach no probative value to it.

Finally on issue one, counsel submitted that both the loan transaction and the instrument by which the Claimant purported to argue a legal interest in the property used to search the loan are illegal, null and void. Therefore, Counsel urged the Court to resolve this issue one in the affirmative.

On issue two which is whether the Claimant has adduced cogent and satisfactory evidence to be entitled to the reliefs it has sought in its amended statement of claim, counsel submitted that the claimant has not adduced any evidence in proof of its claim before this Court. Counsel referred the court to Exhibits 4 and 5 as well as the Evidence of DW1 And stated that the 1st Defendant has made a total payment of the loan to the tune of ₦42,227,207.00 (Forty Two Million, Two Hundred and Twenty-Seven Thousand, Two Hundred and One naira) and stated that on the basis of the amount of the loan so far repaid by the 1st Defendant, it is logical and follows necessarily that the monetary Claim of the claimant is not based on the principal loan sum (which is ₦26,630,000.00), but on the accrued interest on the said principal.

Consequently, Counsel referred the court to paragraphs 9, 10, 11, 12, 13 and 22 (a) & (b) of the amended statement of claim and contended that the reliefs in paragraph 22(a) &(b) are based on pre-judgment interest, they are in the specie of special damages and must be specifically pleaded and strictly proved. Reliance was placed on the cases of **LADGROUP LTD V. F. B. N PLC, (2017) 12 NWLR (PT. 1580) 469, PAGE 511-512 PARAS G-BL Y. B. A PLC V. SEPOK (NIG) LTD (1998) 12 NWLR (pt. 578) 439 page 475 para 8.**

In addition, counsel contended that the claimant has based its claim on interest on Exhibit A4, which the counsel submitted that Exhibit 4 is legally inadmissible and must be expunged for being an unregistered registrable instrument and also null and void for the absence of the mandatory ministerial consent.

In another submission, counsel stated that the figure relied upon by PW1 in his written deposition does not tally with the claim of ₦38, 359,986.90 which means that the evidence led by the claimant does not support its claim.

It is the contention of the learned Counsel that the claimant did not plead the 35% interest rate in its amended statement of claim, that what is pleaded is 23% interest rate per annum. To this extent counsel submitted that it is settled that civil cases are fought and decided on pleadings. He referred to the cases of **OYEKANMI V. NEPA (2000)15 NWLR (PT.**

690) 414, PAGE 432, PARAS E-F; MBINECHE V AKUBOSI, (2010) 12 NWLR (PT. 1203 383, PAGE 403, PARAS F-H.

It was the learned Counsel to the Defendants submission that where a claim for special damages is not supported by particulars and credible evidence in proof of same it must be dismissed. Reliance was made to the cases of **CAMEROON AIRLINES V. OTUTURU (2011) 4 NWLR (PT. 1238) 512 page 544, para A; AKINKUGBE V. E. H (NIG) LTD (2008) 12 NWLR (PT. 1098) 375, page 404, para G-H.**

In another submission, Counsel referred the court to statement on Oath of PW1 and paragraph 21 of the Claimant's amended statement of claim and stated that the figure which PW1 testified on as the 1st Defendant's outstanding payment obligation as at 17th November, 2015 is contradictory to and at variance with the figure pleaded by the Claimant in paragraph 21 of its amended statement of claim as the 1st Defendant's outstanding payment obligation as at the same 17th November 2015.

Consequently, counsel submitted that the law is formally settled that evidence of a party which is at variance with the averment in its pleadings on a natural point goes to no issue and will result in his claim being dismissed as was held in the case of **OKHUAROYO V. AIGBE (2002) 9 NWLR(P.T. 771) 29 page 47, paras B-C.**

On the claim of post judgment interest as claimed in paragraph 22 (c) of the amended statement of claim, counsel submitted that same must fail with the reliefs in paragraph 2 (a) and (b).

On the claims in paragraph 22 (d) and (e) of the amended statement of claim, counsel submitted that same must fail and be dismissed because the deed of legal Mortgage (Exhibit 5) upon which the claims are based is an inadmissible evidence for being an unregistered registrable instrument.

Finally on issue two, counsel urged the Court to resolve same in the negative and dismiss the entirety of the reliefs claimed by the claimant in paragraph 22 of its amended statement of claim.

On issue three, which is whether the Defendants are entitled to their counter claim, counsel states that they have withdrawn relief 40 (a) of the

Counter claim and urged the Court to grant their reliefs 40 (b), (c), (d), (e), (f), (g) and (h) of the counter claim having adopted their arguments under issue one above.

Meanwhile, in the Plaintiff's final written address, learned Counsel, Ezenwa Okoli Esq, distilled two issues for determination to wit:-

- "1. Whose duty is it to seek and obtain consent to Mortgage a property for a loan under the existing laws? Is it the Mortgagor or the Mortgagee?"***
- 2. Whether the Claimant has been able to prove its case on a preponderance of evidence, especially the myriad of documentary evidence, to be entitled to judgment?"***

In arguing the issues, Counsel submitted on issue one that it is not in doubt that the Governor's consent is required in order to consummate a Mortgage transaction, however the law is that it is the duty of the Mortgagor to seek the consent of the Governor for him to Mortgage his property. In this respect reference was made to the cases of **UGOCHUKWU V. CO-OPERATIVE 7 COMMERCE BANK (NIG) LTD (1996) 6 NWLR (PT. 456) 532 at page 54; SAMUEL OMONIYI V. UNITED BANK FOR AFICA LTD (2001) 5 NWLR (PT. 708) 240.**

Therefore, counsel submitted moreso that the Defendant misconceived the position of the law with respect to who has the duty and responsibility to obtain the Governor's consent in a Mortgage transaction. That it is the Defendant, who is the Mortgagor that has the responsibility under the law to seek for and obtain ministerial consent (because the land is located in the Federal Capital Territory) before the Mortgage transaction.

Consequently counsel contended that the Defendant's attempt to pass or shift this legal responsibility to the Claimant, in order to avoid repayment of land/Mortgage is to say the least, fraudulent and unfortunate.

The learned Counsel further stated that ministerial consent/Governor can be obtained either before or after the Mortgage transaction. Reliance was placed on the cases of **MOSES OLA & SONS LTD V. BANK OF THE**

NORTH LTD (1992) 3 NWLR (PT. 229) 377; HARUNA V. SAVANAH BANK LTD (1995) 2 NWLR (PT. 377) at 342.

The Learned Counsel, referred the Court to Exhibits 31 and 32 and stated that the Defendants whose duty it is under the law to seek and obtain consent applied for consent. That Exhibit 31 (Defendant's signature) tallies with every other signature he signed in the record of the Court.

To this extent, Counsel urged the Court to resolve issue one in favour of the claimant and hold that it is the duty of the Defendants to seek consent of the Governor and that their deliberate failure to seek and obtain same, will not entitle the Defendants to benefit from the said wrong.

On issue two which is whether the claimant has been able to prove its case on a preponderance of evidence especially with the myriad of documentary evidence to be entitled to judgement, counsel started by withdrawing prayer 22 (b) of the Claimant's amended statement of claim and stated that prayer 22(a) has taken care of the entire prejudgment interest and default charges.

Therefore counsel referred the Court to Exhibits 7, 8 and 9 and submitted that it is trite that documents speak for themselves and that oral evidence cannot be used to exclude documentary evidence. Reference was made to Section 128 of the Evidence Act Cap. **E14 LFN, 2011 and the cases of LARMIE V. DATA PROCESSING & SERVICES LTD, (2005) LPELR-1756 (SC); EZEMBA V IBENEME (2004) 14 NWLR (PT. 894) 617.**

Furthermore, the Learned Counsel stated that the Defendant willingly entered into the Mortgage agreement with the claimant and executed all documents without any objection, including the deed of legal Mortgage (Exhibit 5) and loan agreement (Exhibit 4). In this respect Counsel referred the Court to Exhibits 3 and 6 as well as the testimony of DW1 under cross-examination.

To this extent, Counsel urged the Court to hold that the issue of excess or missing payments are all an afterthought which is not supported by any evidence.

In another submission counsel referred the Court to Exhibits 8, 9 and 25 and stated that the Claimant has proved its case by credible documentary evidence and is therefore entitled to Judgement as contained in prayer 22 (a) of the reliefs sought in this case. Reliance was placed on the case of **TOWER SECURITIES INVESTMENT CO. LTD V. CORONATION MERCHANT BANK LTD (2020) LPELR-5141 (CA)**.

The learned Counsel further submitted referring the Court to Exhibit 6 and paragraph 21 (a) of the amended statement of claim that the law is that in a claim for special damages as in the instant case to what the claimant should prove, is that parties either expressly or in their pleadings intended that interest will be payable. Reliance was placed on the cases of **FCMB V. AKANIMO (2007) LPELR-9027 (CA); VEEPEE INDUSTRIES LTD V. COCOA INDUSTRIES LTD (2008) NWLR (PT. 1105) 486**.

Therefore, Counsel stated that the basis of the claim for pre-judgment interest is clearly shown in clause 2.1 and 3.2 of Exhibit 4 and same was pleaded at paragraph 21 of the amended statement of claim dated 22nd July, 2016. As such that the argument of the Defendants that the claim is vague and not particularised is not correct.

Moreso, it was contended by the learned Counsel that there is no evidence before the court by the pleading of the parties and during oral testimonies to show that the entries in the 1st Defendant's account are in issue or distorted. In that regard, Counsel urged the Court to hold that the Claimant is entitled to the grant of reliefs 22(a), as same has been proved by documentary evidence (Exhibit 6) which was tendered and not objected to either before or after trial by the Defendants.

Finally, the Learned Counsel equally urged the Court to grant prayers 22(c) and (d) as same are bonafide and aimed at realizing the debt owed to the claimant for which the Mortgage was made in the first place.

On the other hand, in the said reply on points of law, learned Defendant's counsel submitted that the claimants failure to respond to their argument that Exhibits 2, 4, and 5 are legally inadmissible for being unregistered registrable instruments means that it has wholly conceded the points raised therein. Reference was made to the cases of **NWANKWO V. YAR'ADUA**

(2010) 12 NWLR (PT. 1209) 518 page 556, para C; RUFAl V. STERLING BANK PLC & ORS (2018) LPELR-46674 (CA) page 40-41 paras G-G.

Consequently, Counsel urged the Court to discountenance any arguments of the Claimant that is based on Exhibits 2, 4 and 5 except the argument surrounding the absence of Ministerial consent as it affects only Exhibit 5.

In further reply on points of law, counsel referred the Court to paragraph 6 of the Defendant's joint statement of Defence and paragraph 2B of the Claimant's reply to the Defendants pleadings and submitted that no issue was raised by either party in their respective pleadings that it was the duty of 1st Defendant as Mortgagor to seek and obtain the consent of the Minister before the execution of the deed of legal Mortgage. That the claimant cannot address the Court on that point, as the court is only bound to determine this case on the issues canvassed by the parties in their pleadings. In this respect Counsel cited the case of **OVERSEAS CONSTRUCTION LTD V. CREEK ENT. LTD (1985) 3 NWLR (PT. 13) 407. Page 419 para D.**

In his further reply on points of law. Learned Counsel submitted that the cases of **UGOCHUKWUV. CO-OPERATIVE AND COMMERCE (NIG) LTD (Supra) AND OMONIYI V. UNITED BANK FOR AFRICA PLC (Supra)** relied upon by the claimant are not applicable to the facts of this case. In support of his submission, counsel referred the court to the cases of **SAVANNAH BANK OF NIGERIA LTD & ANOR V. AJILO & ORS (1989) 1 NWLR (PT. 97 305; BUCKNOR-MACLEAN V. INLAKS LTD (1980) 8-1 SC. 1; PAN BISBILDER (NIG) LTD V. F. B. N LTD (2000) 1 NWLR (PT. 642 684 page 695, para A; A. I. C. LTD V. N.N. P. C(2005) LPERL-6 (SC), page 16, paras A-B; THE ADMINISTRATORS & EXECUTORS OF THE ESTATE OF ABACHA V. EKE-SPIFF & ORS (2009) LPELR-3152 (SC) 44 paras C-D.**

Again counsel in his reply on points of law stated that the claimant did not respond to all their arguments on the admissibility of Exhibit 32, as such submitted that it has wholly conceded that the document is inadmissible and urged the Court not to countenance the Claimant's argument on

Exhibit 32. Reference was made to the cases of **NWANKWOV. YAR'ADUA (Supra) RUFAl V. STERLING BANK PLC & ORS (SUPRA).**

Moreso, counsel submitted in his reply on points of law urging the court to decline invitation by the claimant to compare the admitted signatures of DW1 on record with the signature on Exhibit 32. In this respect, he referred the court to the case of **YONGO V. C. O. P (1992) 8 NWLR (PT. 257) 36 AT 57, para B-C; DURIMINAYA V. C. O. P (1961) NNLR, 70; NDOMA-EGBA V. A. C. B. PLC (2005) 14 NWLR (PT. 944) 79 at 106, para E-F; UCHA V. ELECHI (2012) 13 NWLR (PT. 1317) 330 AT 367-368 PARAS H-A.**

On the argument of the claimant that the land use Act is not applicable in the Federal Capital Territory, Abuja, counsel in his reply on points of law referred the Court to section 51 (2) of the land use Act and submitted that land use Act is part of the body of laws of the Federal Capital Territory, contained in Vol.3 thereof.

On the Claimant's issue two, Learned Counsel contended in his reply on points of law that the claimant has not proved its claim of ₦38,359,986.90.

Therefore, counsel submitted that special damages must specifically be pleaded and strictly proved and as the claimant's claim is in the nature of special damages, it did not provide particulars of the claim in its pleading. That Exhibit 6 is not the Claimant's pleadings where it should have provided the complete particulars of its claim of ₦38,359,986.90.

Learned Counsel contended moreso that the Claimant beyond tendering the 1st Defendant's statement of account, did not prove or adduce any oral evidence to explain how the figure in the document were arrived at, that the law is settled that mere tendering of a statement of account without more is not enough to prove a party's indebtedness. Reliance was placed on the case of **BILANTE INTERNATIONAL LTD V. N. D. I. C (2011) 15 NWLR (PT. 1270) 407 pages 428-429, paras F-B; HABIB NIGERIA BANK LTD V. GIFTS UNIQUE (NIG) LTD. (2002) 15 NWLR (PT. 896) 408, pages 427-428, paras H-A.**

Finally, Counsel urged the court to resolve the two issues for determination raised by the claimant against it and proceed to dismiss the claimant's claims and grant the Defendant's counter-claim.

I have carefully gone through the amended statement of claim, the reliefs sought thereon, the witness statement on Oath, the Defendant's joint statement of defence and Counter claim together with the witness statement on Oath as well as the reply to joint statement of defence and counter claim. I have also evaluated the entire evidence adduced by the parties at the trial, both oral and documentary evidence. In addition, I have studied extensively the final written addresses and the reply on points of law.

Having painstakingly done all these it is therefore by humble view that the issues for determination are as follows to wit:-

- "1. Whether the Claimant has proved its case against the Defendants as required by law to be entitled to the reliefs sought.**
- 2. whether the Defendants have proved their counter claim against the Claimant to be entitled to same."**

Before I dwell on the issue for determination distilled above, I will first of all consider the arguments of the learned Counsel to the Defendants as it affect particularly Exhibits 2, 4 and 5.

It is the argument of the Learned Counsel to the Defendants inter alia that the said Exhibits 2, 4 and 5 are registrable instruments within the meaning of the law and same were not registered as required by law which renders them inadmissible.

Moreso, that Exhibits 4 and 5 were executed without the appropriate consent of the Governor, in this case the FCT Minister, being sought and obtained as required which renders the transaction illegal, invalid, null and void. Therefore, counsel urged the Court to so hold.

Exhibit 2 is the offer of Mortgage loan, Exhibit 4 is a loan agreement, while Exhibit 5 is a deed of legal Mortgage.

As rightly submitted by the Defendant's Counsel, Section 15 of the land Registration Act provides that no instrument shall be pleaded or given in evidence in Court as affecting a land unless same has been registered in the proper office. Similarly section 22(1) and 26 of the land use Act have provided that any alienation of statutory Right of occupancy over a land without the consent of the Governor but in this instant case the FCT Minister is null and void.

It is not in dispute from the evidence before the Court that the 1st Defendant was granted a loan facility to the tune of ₦26,630,000.00 (Twenty Six Million, Six Hundred and Thirty Thousand Naira) as evidenced by Exhibit 2. Sequence to the loan facility, the Claimant and the 1st Defendant executed a loan agreement (Exhibit 4) and a deed of legal Mortgage (Exhibit5).

A careful perusal of the said Exhibits particularly Exhibits 4 and 5, will show that they are documents pertaining and/or relating to land i.e property located at Block C House No. 2, Lakeview Homes, Kado Phase 1 Abuja, requiring registration. Moreso, Exhibit 5 Expressly stated that Exhibit 2 is incorporated and forms part of Exhibit 5. From these analysis therefore, Exhibits 2, 4 and 5 fall within the contemplation of section 2 of the land registration Act, Cap 515 laws of the Federal Capital Territory, Abuja. I so hold.

Furthermore, from the evidence before the Court, there is nothing to show or prove that Exhibits 2, 4 and 5 were registered as required by law and/or the appropriate consent of the Governor, in this case FCT Minister was obtained. In that regard, i refer to the case of **ALMAROOF & ANOR V. BUCKNOR (2015) LPELR-40906 (CA) at PP. 25-26, PARAS A-D, Per Sidi Dauda Bage, JCA** (As then was) where it was held thus:-

"It is trite law that any instrument requiring registration remains ineffectual unless and until it is registered. Unless it is registered, it cannot be placed or given in evidence."

In addition, it is settled law that non-consent of the governor before execution of a Mortgage, is null and void. See the cases of **OKUSANYA V. OGUNFOWORA (1997) 9 NWLR (PT. 520)347 P. 353, paras E-f;**

SAVANNAH BANK (NIG) LTD V. AJILO (1989) 1 NWLR (PT. 97) 305.

However, the Claimant's Counsel in his written address submitted inter alia that it is the duty of the Mortgagor the Defendant in this case to seek the consent of the Governor (in this case the FCT Minister) for him to Mortgage his property. He further contended that for the Mortgagor (the Defendant in this case to turn around a few years after executing the Mortgage deed and when as a result of his default, the Mortgagee, (The Claimant in this case) seeks to exercise its right under the Mortgage deed to assert that the Mortgage was null and void for lack of the Governor's consent is fraudulent and unconscionable.

It should be noted as stated earlier that the 1st Defendant was granted a loan facility by the Claimant to the turn of ₦26,630,000.00 (Twenty Six Million, Six Hundred and Thirty Thousand Naira only) and Mortgaged his property situate and known as Block C No. 2 Lake View Homes, Kado as Security by executing Exhibits 4 and 5 in favour of the Claimant.

At this juncture, the question that comes to mind is whose duty is it to seek for the Governor's (in this case the FCT Minister's) consent to Mortgage a property for a loan facility, as in the instant case.

In that regard, i refer to the case of **HAJIYA LAMI MUSA V. BASHIRU AHMAD (2018) LPELR-44247 (CA) at page 20, para C** where it was held that:-

"It is the owner of a statutory certificate of occupancy that is obliged to obtain the consent of the Governor by virtue of Section 22 of the land use Act....."

See also the case of **AWOJUGBEGBE LIGHT INDUSTRIES LTD V. CHINUKWU (1993) 1 NWLR (PT. 270) 485.**

In the instant case therefore and in view of the foregoing, it is my considered opinion that it is the 1st Defendant who is the owner of the property Mortgaged for the loan going by the provision of section 22 of the land use Act that has the duty to obtain the Governor's (in this case the FCT Minister's) consent. I so hold.

Consequently, the 1st defendant in the instant case, having failed, refused or neglected to seek and obtain the Governor's (in this case, the FCT Minister's) consent, the law is trite that he cannot turn around and use its neglect as a sword to attack the other party, as the Defendant tried to do as seen in their submission. In addition, it is equally the law that no one should be permitted to profit from his own wrong or default.

This position of the law was reinstated by Court of Appeal in the case of **ADEDEJI V. N. B. N LTD (1989)1 NWLR (PT. 96)212 at226-227, Per Akpatah J.C. A** where it was held thus:-

"Apart from the principle of law involved in this case it is normally despicable for a person who has benefited from an agreement to turn round and say that the agreement is null and void. In pursuance of the principle that law should serve public interest, the Courts have evolved the technique of construction in bona paratem. One of the principles evolved from such construction is the interpretation of statutes is that no one should be allowed to benefit from his own wrong (nollus commodum capere postest de juria sua propria). As widgery. L. J said in Buswell v. GODWIN (1971) 1 ALL E. R. 418 at page 421, "the proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one and one which the court would wish to endorse" the effort is usually that the literal meaning of the enactment is departed from where it would result in wrongful self-benefit."

Similarly, in a more recent time, the Court of Appeal has this to say in the case of **DOLIZ BROWN GROUP LTD & ORS V STERLING BANK (2020) LPELR (CA) Per Mohammed Baba Idris JCA at pp 32-37, paras B-B.** Where it was held thus:-

"What is the position of the law as regard these argument by the Applicant's Counsel has rightly said section 22(1) and 26 of the land use Act has provided that any alienation of statutory right of occupancy over a land without the consent of the Governor but in this case the FCT Minister is null and

void. Also, Section 15 of the land instruments registration act also provides that no instrument shall be pleaded or given in evidence in Court as affecting a land, unless the same has been registered in proper office. However, just as the trial court had held the applicants cannot take advantage of the loan granted and had rely on his own failure to invalidate the deed of Tripartite legal Mortgage. Equity acting in personal will not allow a party to come to the temple of justice with dirty hands and unclean conscience. It also does not allow a party to benefit from his iniquity. See the case of MR. GIDEON OGINPEHIN V. NUCLEUS VENTURE (2019) LPELR-48772 (SC) (P. 241 paras D-E) Per Ejimbi Eko JSC. The argument of the Applicants counsel that the trial judge cannot hold that the Tripartite deed of legal Mortgage was created with respect to the Mortgage property does not hold water as my interpretation of the trial Court's decision is that even though there is the provision of the land use act by virtue of Section 22 and 26, equity must prevail the 2nd Appellant used his property known as plot No. 594B New Ref NO. FHA/ES/GWA/11/P594b, New Ref. No. FHA/ES/GWA/11/P. 594B of 19/10/8 situate and lying within Gwarinpa 11 Estate, FCT, Abuja for the facilities it was granted by the respondent in the event it failed to honour its obligations the interest in the said land was not by deed, transferred or even alienated by the 2nd Appellant to the Respondent to warrant prior consent of the Governor as required under Section 22 of the land use act in fact, the deed cannot even be said to be a contract agreement for the alienation of the land in question between the Appellant and the Respondent, but simply an agreement to use the land as security for the facility granted to the Appellants. A proper agreement for the alienation of the land in question would come later after the Respondent has effectively called in and taken to realize the security secured by deed. It is therefore a gross misconception for the Appellant's Counsel to argue that the Governor's prior consent was required for the deed

by which the land in question was only given as a security and not alienated by 2nd Appellant see the case of OKUNEYE V FBN PC (1996) NWLR (PT. 457) 749. In any case, the learned trial's Court is right that the 2nd Appellant would not be allowed to use the land to benefit from its own wrong since the duty to obtain the Governor's consent even if required, was on him see the cases of OMOZEGHIAN V ADJARHO (Supra) SOSAN V H. F. P ENG NIG. LTD (2004) 3NWLR (PT 861) 546 and AMADI V NSIRIM (2004) 17 NWLR (901) 111. It is therefore the decision of this Court on this issue that the Appellants cannot claim under the contract and now turn around to claim a defect in the agreement which was his duty to perform. On the other hand, however. I have made in my finding, the Governor's consent is only premature at this stage where the Mortgage property has not been alienated as the tripartite deed of Mortgage is only an agreement to alienate the said property of the 2nd Appellant and not to alienate the property perse. Also, the argument of non-registration of the tripartite deed of legal Mortgage cannot also avail the Appellants as I have already held the Appellants cannot gain from the contract and now be found to complain when it is time to fulfil its own obligation in the same contract he now complains of."

In a similar vein, the Supreme Court also lent its voice in the case of **UGOCHUKWU V. COOPERATIVE AND COMMERCIAL BANK (NIG) (1996) LPELR-3320 (SC) Per OGUNDARE, J. S. C at page 29 para B thus:-**

"To allow a Mortgagor to resile from his liability on the ground of his failure to that which the law enjoins him to do will only result in paralysis of economic activities in this country. The Court, I dare say, will not allow such a situation to arise."

See also the cases of **SODIPO V LEMNINKAINEM (1986) 1 NWLR (PT. 15) 220; F. B. N. PLC V. SONGONUGA (2007) 3 NWLR (PT. 1-21) 230.**

In view of the above analysis coupled with the authorities cited, the 1st Defendant in the instant case having benefited from the loan facility granted to it by the Claimant, cannot turn around and attack the transaction as illegal, null and void for failure on his part to do needful. I so hold.

In consequence therefore, I distance myself from the submission of the learned Counsel to the Defendants urging the Court to hold that the loan transaction and the instruments used to secure same are illegal, null and void. See the case of **HYDRO HOTELS LTD & ANOR V. AMCON (2020) LCN/14294 (CA) OR CA/A/78/2018.**

Having cleared the air on Exhibits 2, 4 and 5, I will now turn to consider the issues for determination.

On issue one which is whether the Claimant has proved its case against the Defendants as required by law to be entitled to the reliefs sought.

Before I dwell on the issue, it is germane to state that it is the case of the Claimant briefly as distilled from the statement of Claim that sometime in 2009, the 1st Defendant applied to the Claimant for a loan facility to enable it purchase the property known as House No. 2Block C, Lakeview Homes, Kado Phase 1, Abuja (to be subsequently referred to as "the subject property" or "the property" as each context permits). By a letter dated 16th March 2009, and titled "Offer of Mortgage loan", the Claimant conveyed to the 1st Defendant its approval of the loan in the sum of **₦26,630,000.00 (Twenty-Six Million, Six Hundred and Thirty Thousand Naira).**

On the said 16th March, 2009, the Claimant and the Defendant (the parties executed a loan agreement and a deed of legal Mortgage covering the Mortgage loan. The loan was secured by a legal Mortgage over the subject property. The commercial loan was offered to the 1st Defendant at an interest rate of 23% per annum and by the agreement of parties, the 1st Defendant was to liquidate the loan by making a monthly payment of

₦568,677.78 (Five Hundred and Sixty-Eight Thousand, Six Hundred and Seventy-Seven Naira, Seventy-Eight Kobo).

By a letter dated 26th March, 2009, the 1st Defendant conveyed to the Claimant, its acceptance of the offer of the Mortgage loan. On or about 31st March 2009, the Claimant disbursed the loan to the 1st Defendant and the 1st Defendant, in line with the agreement of the parties immediately commenced the repayment of the loan.

The Defendant constantly and persistently defaulted in the monthly repayment of the loan, and this led to a series of demand letters and warnings, but to no avail. The Claimant also heeded to the pleas Defendants for concessions and indeed agreed to a one off concessionary payment of ₦33, 308, 062.70; as at February 27, 2015. The Defendant could not meet up with this concession and the default persisted.

When the Defendant's debt including interest rose to an alarming sum of ₦38,359,986.90 (Thirty-Eight Million, Three Hundred and Fifty Nine Thousand, Nine Hundred and Eighty Six Naira, Ninety Kobo), the Claimant had no option than to institute the extant suit to recover the outstanding debt and foreclose the Mortgage property in satisfaction of the debt.

Having stated the Claimant's case brightly it is trite law that the burden of proof lies on the party who asserts. To put it differently, he who asserts must prove with credible and admissible evidence. This position of law was encapsulated in section 131(1) of the Evidence Act. 2011 which provides thus:-

"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."

See also the case of **MUSTAPHA V. ZARMA & ORS (2018) LPELR-46326 (CA) AT pages 36-44 paras F-D** where it was held per Abiru J.C.A thus:-

"As rightly stated by the lower court, the legal burden of proof in civil cases is on a Claimant to prove to the satisfaction of the Court the assertions made in the

pleadings of the contention upon which he meets his case and he has the onus of proving his case by preponderance of evidence, the refusal of Defendant to testify cannot alleviate the primary burden on the claimant."

Similarly, it was equally held in the case of **NSEFIK V MUNA (2007) 10 NWLR (PT. 10). 502 at 514, paras D-F.**

"The burden of proof rests with the party who asserts the positive and not on one who affirms the negative. The maxim he who asserts must prove operates thus: that a man cannot be expected to prove a negative assertion. The latin saying sums up the matter as follows:- E incumbit probation qui dicit non qui negat cum per rerum naturam factum negantis probation nulle sit, which means the proof lies upon him who affirms not him who denies. Since, by the nature of things, he who denies a fact cannot produce any proof."

At trial, the Claimant called a sole witness by name Akachukwu Okechukwu who testified as PW1. During evidence in-chief, pw1 tendered several documents in evidence which were admitted and marked accordingly.

From the totality of Evidence of PW1, it is clear that the Claimant granted a loan facility to 1st Defendant to the turn of ₦26,630.00 which is evidence in Exhibit 2. The loan was accepted by the 1st Defendant as evidence in Exhibit 3.

Consequently, it is settled law that parties are bound by the terms of the agreement freely entered. In this respect, I refer to the case of **MARADUN V TAMBUNWAL (2015) LPELR-24443 (CA) per Paul Adamu Galumje J. C.A, p. P. 32-33 para E.** Where it held thus:-

"In the law of Contract, a written agreement entered into by parties is binding on them. Where there is any disagreement between the parties to such written agreement on any particular point, the only reliable evidence to the claim is the written contract of the parties. The reason being that where the intention of the parties to a contract are clearly expressed in a document, the Court cannot go outside the

document in search of other document not forming part of the intention of the parties.....”

See also the case of **ALHAJI BABANGIDA V ALHAJI NASIRU MOHAMMED (2014) LPELR-32298 (CA)**

The PW1 in his evidence in chief testified that the 1st Defendant has persistently defaulted in its repayment obligations.

PW1 was asked under cross-examination inter alia thus:-

Question: So, from your evidence, when you look at your paragraph 10, there was a repayment default of ₦2,218,818.10K and this was within a period of 17 months. And, at another time, there was a repayment default of ₦8,588,506.72K accruing at another period of 20 months.

ANSWER: Yes the repayment default kept on accruing because the defendant was not paying the loan.

In the same light the 2nd Defendant who testified as the sole witness of the Defendants stated under Cross examination when he was asked among other questions thus:-

Question: Have you ever missed any month or has been in default?

DW1 Answer: Well, we cannot deny the fact that we have.

From the above testimonies it is clear that the 1st Defendant has been in default in repaying the loan facility granted to it.

In addition, an x-ray of Exhibits tendered by the Claimant, particularly Exhibits 7, 10, 11, 12, 13, 14, 17 and 21 will further show that the 1st Defendant is in default of repayment of the said loan facility granted to it.

Again, a careful perusal of Exhibit 6 will further buttress the fact that the 1st Defendant is in default and the total exposure as at June 29, 2016 stands at ₦38,359.986.90.

To this extent, it is trite law that documents speaks for themselves. In support of this, I refer to the case of **AIKI V. IDOWU (2006) 9 NWLR (PT. 984) 47 at 65, para A-C**, where Court of Appeal held thus:-

"Documents when tendered and admitted in Court are like words uttered and do speak for themselves. They are even more reliable and authentic than words from the vocal cord of man because they are neither transient nor subject to distortion and misinterpretation but remain permanent and indelible through the ages."

See also the case of **AKINBISADE V STATE (2006) 17 NWLR (PT. 1007) 184.**

It should be pointed out that the issue of date which 17th November 2015 was indicated in the PW1's Statement on Oath as the date which the indebtedness of 1st Defendant stands, Counsel to the Claimant submitted that the said date was written in error as the correct date was reflected in the amended statement of Claim and paragraph 6 of the reply to the joint statement of defence and counter claim and urged the Court to discountenance the phrase "as at 17th November, 2017" which was made in error. In this regard, I believe the law is settled that the essence of an amendment of pleading is to correct an error, omission or mistake in order to bring out the real issue for the Court to determine.

Therefore, it is my considered opinion that the 17th November, 2015 written in the PW1 witness statement on Oath was properly and adequately corrected with the amended statement of claim, particularly paragraph 22(a). I so hold.

Furthermore, a community reading of Exhibits 19, 20, 22, 25, 26 and 29 will reveal that the 1st Defendant acknowledged its indebtedness to the Claimant, particularly in Exhibit 22 where the 1st Defendant stated therein among other things that they were informed that their indebtedness is in excess of ₦30,000,000.00 which informed its request for a one-off concessionary payment. In this respect, I refer to the case of **FCMB V. ROPHINE (NIG) LTD & ANOR (2017) LPELR-42704 (CA) Per GARBA, J. C. A. (PP. 25** para A where it was held thus:-

".....a debtor who benefited from a loan or an overdraft from a Bank has both moral and legal duty and obligation, express or implied to repay it as and when due."

See also the case of **NATIONAL BANK OF NIGERIA V. SHOYOYE (1977)5 SC 181.**

However, DW1, in his statement on Oath which he adopted before the Court as his testimony, stated particularly at paragraphs 13, 22 and 31 which for ease of reference, I shall reproduce same hereunder. It reads thus:-

- "13. That from 1st May 2009-2013, the 1st Defendant has made a total deposit of the sum of about ₦30,000,000.00 (Thirty Million Naira) but because of the onerous and illegal charges and deductions by the plaintiff, the plaintiff insisted that the loan had not been fully repaid.***
- 22. That despite the fact that the 1st Defendant had so far made payments in the sum of more than ₦40M (Forty Million Naira) to the plaintiff, the Plaintiff requested the 1st Defendant to pay the sum of ₦26.5M as full and final payment of the loan sum, a sum above even the principal.***
- 31. That it is not indebted to the plaintiff in the sum of ₦37,114,425.99 or any other sum having paid more than ₦40 Million in liquidation of the loan."***

Moreso, under cross-examination of DW1 the following ensued inter alia:-

Question: If you've been in default like you admitted then you'll no longer pay 23% but 35% in addition to 23%?

Answer: Yes that is correct but with a caveat. The Claimant is biased and has intimidated us.

Question: Have you ever complained to the Claimant in writing that you were harassed or intimidated?

Answer: I waited to come to Court and testify. The Claimant has not been fair to us. I wanted to come and testify before the Court on the atrocities of Aso Savings and Loan Against us.

Question: You've written so many letters and exchanged correspondences with the Claimant. Have you ever complained of excess charges?

Answer: Yes, I think we have. I will need to cross-check our documents.

Consequently, the 1st Defendant has not adduced any evidence before the Court to prove that it has paid off the loan as deposed in the DW1's statement on Oath (particularly the paragraphs referred above). To that extent therefore, I call in the decision in the case of **ALHAJI IBRAHIM IDRIS V ALL NIGERIAN PEOPLES PARTY (ANPP) (2008) 8 NWLR (PT. 1088) 97 at paras C-D 153, para F-G** where Court of Appeal held thus:-

"A witness statement on Oath is in nature of the pleading which cannot be equated with evidence. Consequently, evidence must be adduced in proof of a witness statement on Oath otherwise it is useless."

Also, it was held in the case of **OKOROGBA V STATE, (1992) 2 NWLR (PT. 222) 244 at 250-254, ONU J. C. A** (as he then was) said thus:-

"It is an established principle of law that the duty of the Court is to consider the evidence produced before it and never to proceed to indulge in speculation and to what might have happened nor must a judge substitute his own supposition for the testimony of witnesses given on Oath before him....."

At this juncture, it is important to state that the law is settled that burden of proof in civil cases is not static, it shifts from side to side depending on the evidence led. In support of this I refer to the case of **S. P. O. C (NIG) LTD V. EMELUM(2007) 5 NWLR (PT. 1027) 347 at 372-373 PARAS D-B** where it was held thus:-

"It must be stressed here that in civil cases unlike in criminal matters, the burden of proof is not static, it does shifts..."

From the foregoing, I am of the considered opinion that the burden of proof in this case has shifted from the claimant to the Defendants to prove

that the 1st Defendant has paid off the loan granted to it and/or is not indebted to the claimant.

As pointed out earlier, from the totality of evidence adduced before the Court I am of the firm view that the Defendant have failed to prove that it has paid off the loan granted and/or is not indebted to the claimant. I so hold. In view of this, I refer to the case of **FCMB V ROPHINE (NIG) LTD & ANOR (Supra)** where court of Appeal Per Garba JCA held at page 25, paras A thus:-

".....since the Respondent did not dispute benefitting from the facility granted to them by the appellant and did not make or prove that they have fully repaid the facility as at when due, they own both the legal and moral obligation and duty to repay or pay what they owe the appellant as proved by the unchallenged and satisfactory evidence adduced and placed before the High Court as demonstrated in the lead Judgment which I completely agree."

To this end, the law is settled that the standard of proof in civil cases is on the balance of probability in that regard, see the case of **NNADI & ANOR V ODIKA & ORS (2017) LPELR-43448 (CA) Per OGUNWUMIJU JCA, at page 20-21, paras E-F** where it was held that:-

"It is no doubt the law that the standard of proof in civil cases is on the Preponderance of evidence or balance of probability. After parties to an action have presented their cases to the court, it is the duty of the Court to place such process of evidence on either side on the imaginary scale and see which side the balance tilts to....."

See also the case of **EHWARUDJE V WARRI LOCAL GOVT & ANOR (2016) LPELR-40052 (SC) (PP 35, PARA A)**

On the whole and without necessarily repeating myself, it is my considered opinion that the claimant has proved its case as required by law. I so hold.

Therefore, and without further ado, I hereby resolve issue one in favour of the claimant against the Defendants and hold very strongly that the

Claimant based on the evidence adduced has prove its case on the preponderance of evidence.

That takes me to issue two which is whether the Defendant has proved their counter claim against the claimant to be entitled to same. I think i need not belaboure myself in determining this issue having held earlier that the Defendants have failed to prove that it has paid off the loan granted and/or is not indebted to the claimant, the counter claims will naturally fail. I so hold.

Consequently, this issue two is equally resolved against the defendants in favour of the claimant.

In the final analysis and based on the totality of the Evidence before the Court and in the interest of justice, I hereby enter judgment in favour of the claimant against the Defendants as per its claims in the amended statement of claim same for prayer 22(b) which Counsel applied to withdraw, and is hereby struck out. 10% interest is awarded. The Counter Claim is hereby dismissed in its entirety. No order as to cost.

Signed:

***Hon. Justice S. U. Bature
24/6/2022.***