

37 Phase 1, Kings Court Estate, Dakbiyu District Abuja) on account of default to pay the mortgage loan."

- 2. If the answer to question one is in the affirmative;"whether the claimant is not entitled to an order directing the Defendant to surrender vacant possession of the property forthwith."**
- 3. N2, 000,000 General Damages**

In his affidavit in support of the Originating Summons, the Applicant stated via MARTINS IYARE, a manager in the Abuja branch office of the Claimant that;

1. The claimant now a Microfinance Bank was formerly known, registered and licensed as Stallion Home Savings and Loan Limited. Copy of the company change of name was attached as Exhibit STA1
2. Prior to the change of name, the claimant as a licensed primary mortgage banker registered in 1991 had strictly been in the business of mortgage financing.
3. The claimant now as a microfinance bank carries out all forms of banking activities permissible under its cadre of license granted by the Central Bank of Nigeria particularly as it relates to collection of deposit from customers and granting of facilities of various types as may be required by the customer including facilities for house financing
4. Prior to the change of name, the claimant had various customers who registered and had savings account with it. The Defendant was one of its customers
5. Sometime in 2011, the Defendant applied to the claimant for National Housing Fund (NHF) loan of N8,000,000.00 (Eight Million Naira) to enable him purchase a 2-bedroom detached bungalow at Kings Court Estate, Phase 1, Dakbiyu District at Abuja
6. With the NHF application form obtained from the Claimant by the defendant, the claimant processed the application and subsequently approved the facility. The claimant issued to the Defendant a letter dated 13/07/2011 offering him anNHF loan of N8, 000,000.00. Letter of offer attached as Exhibit STA2
7. Under the National Housing Fund Scheme policy (NHF) of the Federal Government of Nigeria anchored by the Federal Mortgage Bank, the Federal Mortgage Bank provides the fund which is given to the primary mortgage bank who in turn gives it as NHF mortgage loan to deserving customers/applicants.
8. Under the memorandum of understanding signed between the claimant and the Federal Mortgage Bank, the mortgage facility repayment is undertaken by the primary mortgage bank and or its successors in title as in the instant case, where stallion microfinance bank limited has taken over from stallion home savings and loans limited, as it would not matter to the Federal Mortgage Bank whether or

not the customer (beneficiary of the loan) repays the mortgage loan to the grantor and so; the claimant has an obligation to ensure that the Defendant and indeed each beneficiary of the NHF mortgage loan repays the facility promptly without failure as it would be held responsible for payment of the facility. To ensure a seamless repayment process, the claimant maintains an understanding with its customers including the Defendant herein to ensure that his monthly repayment contribution gets to it on or before the end of each month in order to make it easier for the claimant to remit the payment to the Federal Mortgage Bank of Nigeria as the Bank does not engage in customer beneficiaries.

9. Any mortgage payment due to the Federal Mortgage Bank as NHF mortgage facilities repayment not received by the Federal Mortgage Bank as and when due or received late, attracts penalty interest payable by the claimant
10. Following the acceptance of the offer facility by the defendant, the loan was disbursed to enable him purchase the property. In the final letter of offer which was accepted by him, the defendant covenanted not to mortgage, pledge or subject the property to any lien or encumbrance so long as there remains any outstanding payment to be made on the facility
11. The Defendant also covenanted to repay the entire facility with accrued interest by monthly payment of N48,560.37 for a period of 29 years.
12. By the letter of Final offer dated 13th July, 2011 the defendant is obligated to repay the facility within a tenor of 29 years vide monthly installment without fail and in case of default of payment for 3 consecutive months; the claimant may resort to exercise its right under the extant agreement to foreclose his legal interest in the property. The claimant wrote a letter to the defendant on 12th June, 2019 to demand payment of his outstanding loan EXHIBIT STA3.
13. Following the disbursement of the approved N8,000,000.00 NHF loan to Sparklight Property Development Company Limited, developers of Kings Court Estate, Abuja as instructed by the Defendant, the Defendant was allocated block 37 (2-bedroom detached bungalow) at Kings Court Estate, Phase 1, Dakbiryu District Abuja. Since the said payment was made and the defendant got allocation of the apartment and moved therein, he has neglected to repay his mortgage loan as and when due.
14. As at 23rd January, 2020 the Defendant had an outstanding balance of N7,030,016.50 on his NHF Mortgage account and N1,144,854.39 as at 31st January, 2020 on his loan repayment account as a result of deliberate nonpayment of monthly dues and accumulated interest charges. Both outstanding balances as at January 31st, 2020 being N8, 174,870.50 (Eight Million, One Hundred and Seventy-Four Thousand, Eight Hundred and Seventy Naira, fifty Kobo). The two statements of accounts are herewith annexed and marked as Exhibits STA4 and STA5 respectively.

In the applicant's written address, Adekola Mustapha Esq. as he then was submitted two issues for determination, to wit:

1. **"Whether the claimant is not entitled to an order of foreclosure of the defendant mortgage property on account of defendant persistent failure to pay the mortgage loan."**
2. **If the answer to question one is in the affirmative; "whether the claimant is not entitled to an order directing the Defendant to give vacant possession of the property forthwith."**

Claimant's case is that the Defendant was indebted to it having defaulted in paying the mortgage loan and in contravention of the letter of offer of facility. Relying on **Order 58** of the **FCT High Court Civil Procedure Rules 2018** which provides the procedure a mortgagor or mortgagee may pursue to redeem or foreclose a legal or equitable mortgage. Which could be;

- a. Payment of money secured by the mortgage or charge.
- b. Sale.
- c. Foreclosure.
- d. Delivery of possession whether before or after foreclosure to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property.

The Defendant having defaulted in payment of the mortgage loan since September 2017. Defendant is living in the property taken on mortgage without paying his mortgage debt

Counsel to the Claimant argued that Parties to a contract are bound by the terms of the contract. The court must respect the sanctity of the contract. **Idufuekovs. Pfizer Products Limited (2004) 12 NWLR (Pt.1420) 96; U.B.N Ltd vs. B.U Umeh& Sons Ltd (1996) 1 NWLR (Pt.426) 565 37**

Counsel submitted that the court cannot compel a mortgagee to part with his security unless he has received his money. This is so even though the mortgagor and all persons having interest in the equity of redemption are entitled to redeem the mortgage. See case of **Yaro vs. Arewa Construction Limited (2007) 17 NWLR (Pt.1063) 333 at 370 – 371 and Barclays Bank of Nigeria Ltd vs. Ashiru.**

Counsel further submitted that the claimant is entitled to foreclose the mortgage and recover possession of the property which is the security for the mortgage upon default by the Defendant after having served on him a letter of demand vide Exhibit STA3.

Counsel posited that a mortgagee must necessarily realize its security unless he has fully received his money in addition to any other cost due to him in the transaction.

The claimant further contended that it is entitled to payment of damages in addition to the foreclosure orders. Relying on **Osemwenjie vs. J.S.C Edo State (2015) 5 NWLR (Pt.1453) 508 at 533.**

This court adopts the issues as formulated by the Claimant counsel to determine this suit;

1. **"Whether the claimant is not entitled to an order of foreclosure of the defendant mortgage property on account of defendant persistent failure to pay the mortgage loan."**
2. **"If the answer to question one is in the affirmative; whether the claimant is not entitled to an order directing the Defendant to give vacant possession of the property forthwith."**

DECISION OF THE COURT:

The Defendant did not appear before this court neither did they file a Counter Affidavit as required by the rules of this court. In the circumstance of this case, where the Defendants failed and neglected to file any counter process in opposition to the evidence adduced by the Claimant, the case of the Claimant remains unchallenged, uncontroverted and not rebuttable. See the case of: **ASAFI SEA FOOD V. ALRAINE [NIG] LTD [2002] NWLR [PT.781] 353**

Where evidence is uncontroverted, the onus of proof is satisfied on a minimal proof since there is nothing on the other side of the scale see **BURAIMOH V BAMGBOSE (1989) 2 NWLR (PT 109) 352.**

In **CHIEF MAURICE UDO IDUNG & ANOR v. THE COMMISSIONER OF POLICE & ORS (2017) LPELR-42333(CA);**

"It is well known in law that failure of a party to challenge or controvert depositions in the affidavit of his opponent by filing a counter-affidavit, reply or further and better affidavit is deemed to have accepted the facts deposed in the affidavit. AYoola VS. BARUWA (1999) 11 NWLR (PT. 628) 595; COMPTROLLER, NIGERIA

PRISON SERVICE V. ADEKANYE (1999) 10 NWLR (PT. 623) 400. When an affidavit is unchallenged, the trial Court is at liberty to accept it as true and correct." Per ADAH, JCA (Pp. 22-23, paras. E-A)

However, this court before it arrives at its decision must still consider the evidence of the Claimant irrespective of the fact that the Respondent failed to file his defence to the Originating summons. The burden still rests on the Claimant to prove his case even though the requirement is minimal proof.

A Claimant must succeed upon the strength of his case and not on the weakness of the defence, although he is entitled to rely on evidence revealed in such weakness to strengthen his case. See ***OTUNBA ABDULLATEEF OWOYEMI V PRINCE OLADELE ADEKOYA 2013 12 SCNJ 131.***

In **REV. POLYCARP MATHEW ODIONG v. ASSISTANT INSPECTOR GENERAL OF POLICE, ZONE 6, CALABAR (2013) LPELR-20698(CA) (P. 42, paras. A-D);**

"Although the facts deposed to by an applicant are not challenged by a respondent, the Court still has a duty to consider and weigh the affidavit evidence before it in order to ensure that they can ground the Order sought by the applicant. An unchallenged affidavit which contains obvious falsehood or is self -contradictory cannot sustain the case of the applicant. In other words the evidence contained in the unchallenged affidavit must be cogent and strong enough to sustain the case of the applicant. See: Ogojeifo vs. Ogojeifo (2006) 1 S. C. (PT.1) 157."

The case of the Claimant in a nutshell is that, based on the understanding they had with the Defendant, the Defendant obtained through the claimant an (NHF) loan of N8,000,000.00 (Eight Million Naira) to enable him purchase a 2 bedroom detached bungalow at Kings Court Estate, Phase 1, Dakbiyu District Abuja Kings court estate, Dakbiyu District, Abuja. Under the National Housing Fund Scheme policy of the Federal Government of Nigeria anchored by the Federal Mortgage Bank, the Federal Mortgage Bank provides the fund which is given to the primary mortgage bank who in turn gives it as NHF mortgage loan to deserving customers/applicants.

In **SUBERU V A.I.S.L LTD (2007) 10 NWLR (PT 1043) 590** the court of appeal defined a mortgage as;

'A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or discharge of some other obligation for which it is given. The security is redeemable on payment or discharge of such debt or obligation, any provision to the contrary notwithstanding'

A mortgage may be legal or equitable. The sole purpose of the mortgage as against other similar transactions is that interest in the property transferred by the borrower to the lender is subject to a proviso for redemption upon repayment of the loan.

In this suit, the Federal Mortgage Bank provides long term credit facility to primary mortgage institutions (PMIs) in Nigeria under **section 5** of the **FEDERAL MORTGAGE BANK OF NIGERIA ACT, CAP F16 LFN 2004**. The bank collects, manages and administers the National Housing Fund (NHF). See **FMBN V LAGOS STATE GOVT (2010) 5 NWLR (PT 1188) 570 AT 594**.

The claimant was a PMI prior to its change of name under EXHIBIT STA1 by virtue of paragraphs 4-7 of claimant's affidavit in support of its Originating Summons, the Claimant is under an obligation to the Federal Mortgage Bank to repay the loans from beneficiary customers under the NHF scheme.

In the instant case, it is a legal mortgage and this court is called upon to determine the right of foreclosure by the mortgagee.

ADETONO & ANOR. V. ZENITH INTL BANK PLC (2011) LPELR-8237(SC) (PP. 21 PARAS. A)

"In other words in a proper mortgage the title to the property must have been transferred to the mortgagee, subject to the proviso of the mortgaged property being reconveyed by the mortgagee to mortgagor upon performing the condition stipulated in the mortgage deed and invariably upon payment of the debt at the time so stipulated in the Deed of Mortgage. The mortgagor is liable to repay the loan as stipulated otherwise the mortgaged property is foreclosed. It is settled that by a legal

mortgage the mortgagee becomes the legal owner of the property although the mortgagor may be left in actual possession/occupation of the mortgaged property but because the mortgagee is entitled to enter into possession immediately upon the execution of the mortgage he has a right to immediate possession. In this position the mortgagee wields enormous rights over the mortgaged property." Per CHUKWUMA-ENEH, J.S.C in Adetono& Anor. v. Zenith INTL Bank Plc (2011) LPELR-8237(SC) (Pp. 21 Paras. A)

Exhibit STA2 captures the terms of the Guarantors agreement between the parties as follows:

July 13, 2011

SEUN ADEOJO

37 Kings Court Estate

Dakibiyu

Abuja

12058

Dear Sir,

FINAL OFFER OF NATIONAL HOUSING FUND (NHF) LOAN OF N8, 000,000.00

We are pleased to convey approval of your request for a Mortgage Loan of N8, 000,000.00 under the National Housing Fund (NHF) Loan Scheme subject to the following terms and conditions:

Lender:	FMBN/Stallion Home Savings and Loan Limited
Borrower:	SEUN ADEOJO
Facility:	NHF Loan
Amount:	N8, 000,000.00 (Eight Million Naira) only
Tenor:	29 years
Purpose:	To purchase a 2 Bedroom Detached Bungalow at Block 37, Kings Court Estate, Phase 1, Jabi, Abuja
Interest:	6% per annum payable monthly in Advance
Fees & Charges:	FMBN Service Charge: 0.25% flat i.e. N20,000 (payable upfront)

SHSL Admin Charges: 2.5% flat i.e. N200,000 (payable upfront)
Insurance Premium: 0.25% flat, payable upfront annually
Search Fee: N10,000:00 (Payable upfront to FMBN)
Bank Guarantee: 2% flat i.e N160,000.00 (payable upfront)
Legal Fee: Mandatory deposit of N250,000 deposit for perfection of Legal Mortgage and Consent to Assign to FMBN
Repayment: Monthly repayment of N48,560.37 effective upon disbursement of loan by FMBN
Security: Legal Mortgage over Property of Borrower located at Kings Court Estate, Phase 1,Jabi
Maturity: 29 Years from date of disbursement
Covenants:

a. Lender's Consent:

The borrower undertakes that during the tenure of the facility and in as much as there is an outstanding indebtedness on the loan, he/she shall not sell mortgage, pledge or subject to any lien or encumbrance the subject property used as security for this facility without the prior knowledge or consent of the mortgagee.

b. Event of Default:

Without prejudice to the Lender's right to demand payment of outstanding amounts under the facility at any time, the occurrence of any of the following events shall cause all outstanding amounts under the facility to become immediately repayable to the lender:

- (i) If the borrower fails to settle when due any outstanding amount owed to and advised by the Lender, or**
- (ii) If the borrower defaults in the performance or observance of any other term, condition or covenant as stated herein, or**
- (iii) If a distress or execution is levied upon or issued against the borrower's property and is not discharged within five (5) days; or**

- (iv) **If a trespasser takes possession or a Receiver is appointed over all or any part of the borrower's property(ies), undertaking and/or assets, or**
- (v) **If the borrower is unable to pay any of his/her debts as and when due.**

The foregoing is deemed to have occurred in the event of borrower's failure to honour the statutory 14-day demand notice.

c. Penalty:

Failure to promptly pay the monthly loan repayment as at when due, attracts penal interest rate of 3 % flat per month until your account is regularized.

d. Default Clause:

Upon default for three (3) consecutive months, the mortgagee shall exercise its statutory power of sale or foreclosure on the property without recourse to the court.

Waiver:

No failure or delay by the Lender in exercising any remedy, power or right hereunder, shall operate as a waiver or impairment hereof, nor shall it affect or impair any such remedies, powers or rights in respect of any other subsequent default.

Kindly signify your understanding and acceptance of the above stated terms and conditions by signifying the attached duplicate copy of this letter and thereafter return same to us."

I have painstakingly reproduced the final offer of the parties to reveal the nature of the NHF scheme vis-à-vis its terms and conditions.

Exhibit STA3 is clear and is in consonance with the offer letter accepted by the Defendant wherein upon a default in fulfilling the terms and conditions as captured in the offer letter, the mortgagee shall issue a demand notice.

"We hereby use this medium to demand for the repayment of the outstanding monthly loan repayment balance of Eight Hundred and Twenty Thousand, Five Hundred and Twenty-Six Naira. Six Hundred and Forty-One Thousand Eight Naira and Ninety-Two Kobo Only (N641,008.92) in your account as at 12th June, 2019.

It is to be stressed here that your account has been in arrears for some time and has to be made good.

Consequently, you hereby required to pay the balance outstanding monthly loan repayment on your account within 21 days of the receipt of this letter failure which we will be compelled to commence foreclosure process on your property."

This court respects the sanctity of contract as it is sacrosanct. The exhibit STA2 had laid down the procedure for repayment of the debt owed the Claimant.

It is trite that parties are bound by the terms of their agreement which they entered into.

In the case of ***OKONKWO V CCB (NIG.) PLC (2003) 8NWLR (PT. 822) P. 382 PARAS D-E*** the court put it succinctly:

"It is trite law that persons of full age and sound mind are bound by an agreement lawfully entered into by them."

Emphasis Mine

In the case of ***JADESIMI V EGBE (2003) 10 NWLR (PART 827) P. 30 PARAS. H-A, P. 31 PARAS E-G*** the Court held thus;

"... I will apply the doctrine of equity "pacta sunt servanda" which means that agreements voluntarily entered into must be honoured in good faith for equity will not allow the law to be used as an engine of fraud. See Hart v T.S.K.J. (Nig) Ltd (1998) 12 NWLR (part 578) 372..."

Emphasis Mine

In the case of ***N.I.C.N V Power Ind. Eng. Co. ltd (1986) 1NWLR (Part 14) 1 at 29, Aniagolu J.S.C*** had this to say;

"Equity as we all know, inclines itself to conscience, reason and good faith and implies, system of law disposed to a just regulation of mutual rights and duties of men, in a civilised society.

Hence, in Earl of Oxford's case (1615), REP CHD, 20 Digest (Rep) 252 it is stated thus:

"Equity looks at the intent rather than the form and will impute an intention to fulfil that the appellant, far from scuttling away from its valid obligation to the respondent, will fulfil its agreement entered in January 1978, to indemnify the respondent from its loss."

Emphasis Mine

The Supreme Court in the case of ***JFS INV. LTD V BRAWAL LINE LTD. (2010) 12 SC (PT 1) P. 110 @ P. 162 PARAS 5 -15*** had this to say on the point;

"... where the terms of the contract are clear and unambiguous the duty of the court is to give effect to them and on no account rewrite the contract for the Parties. In the absence of fraud, duress, misrepresentation, the parties are bound by the terms of the contract they freely entered into".

Emphasis Mine

The onus was on the Claimant to prove by credible evidence this claim and discharge the burden. In light of the foregoing, I hold that the defendant has not discharged the evidential burden placed on him by virtue of **Sections 131, 132 and 133** of the **Evidence Act, 2011** as amended.

In ***INEME v. INEC & ORS CITATION: (2013) LPELR-21415(CA) @ PER OTISI, J.C.A. @ Pp. 19-21, Paras. F-C;***

"The Appellant has rightly submitted that the burden of proof lies on him who asserts. In civil cases, while the general burden of proof in the

sense of establishing his case lies on the plaintiff, such a burden is not static. There may be instances in which, on the state of the pleadings, the burden of proof lies on the defendant. As the case progresses, it may become the duty of the defendant to call evidence in proof or rebuttal of some particular point which may arise in the case. See; Section 131, 132, 133, and 136 of the Evidence Act 2011, which provide thus:

131.

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

132. *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

133.

(1) In civil cases the burden of first proving existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

(2) If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.

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(1) The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other.

(2) In considering the amount of evidence necessary to shift the burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively

The burden of proof shifted from the Claimant to the Defendant because the Claimant asserted by proving with documentary and affidavit evidence that the Defendant had breached the terms of Exhibit STA2.

It is undisputed that there is an agreement between both parties and the terms of that agreement Exhibit STA2 is before this court. The terms of this agreement afforded this court opportunity to ascertain the existence of a breach of contract.

In **FCMB V. ATS ABATCHA (NIG) LTD & ORS (2017) LPELR-43452(CA) (PP. 42 PARAS. C)** the Appellate Court held;

"Foreclosure is an action asking that the equity of redemption of the mortgagor and all persons claiming through him, including subsequent encumbrances be extinguished so as to vest the mortgaged property absolutely in the mortgagee -Ihekwoaba Vs African Continental Bank Limited (1998) 10 NWLR (Pt 571) 590 at 618F." Per ABIRU,J.C.A in FCMB v. ATS Abatcha (Nig) Ltd &Ors (2017) LPELR-43452(CA) (Pp. 42 Paras. C)

In **ACCESS BANK PLC V. ALBABAMINU INTERNATIONAL LTD & ORS (2016) LPELR-41605(CA) (PP. 63-64 PARAS. D)** the court held;

"An order of foreclosure of a mortgage is usually made upon the proved default of the mortgagor to observe the mortgage terms - Afribank (Nigeria) Plc Vs Alade (2000) 13 NWLR (Pt 685) 591 at 601E. Thus, for an order of foreclosure to be made, a mortgagee must prove that a debt has arisen and that the mortgagor has failed to observe the terms of the mortgage."

I find that the evidence of the Claimant remains unchallenged and uncontroverted, I accept same as true. I hereby determine the **issue 1** in favour of the Claimant as against the defendant.

On Issue 2 having answered issue 1 in the affirmative; **"whether the claimant is not entitled to an order directing the Defendant to give vacant possession of the property forthwith."**

The Default clause in Exhibit STA2 calls for the mortgagee to exercise its statutory power of sale or foreclosure on the property without recourse to the court.

In the instant case, the claimant approached the court to exercise its power of foreclosure. This court having found the Defendant in default of the NHF.

Order 58 of the FT High Court Civil Procedure Rules 2018 provides as follows:

58 (1) Any mortgagee or mortgagor, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage whether legal or equitable, may take out an originating summons for such relief of thenature or kind following as may be the summons be specified, and as the circumstances of the case may require that is

a) Payment of money secured by the mortgage or charge

b) Sale

c) Foreclosure

d) Delivery of possession whether before or after foreclosure to the mortgage or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property.

Therefore, the claimant has proven his entitlement to foreclosure and possession of the mortgaged property. I enter judgment in favour of the claimant and against the Defendant.

The Claimant is hereby entitled to all reliefs as claimed.

- a. AN ORDER is hereby made of foreclosure of the defendant's mortgage property (2 bedroom Detached Bungalow at Block 37 Phase 1, Kings Court Estate, Dakbiyu District Abuja) on account of default to pay the mortgage loan.**
- b. AN ORDER is hereby made directing the Defendant to deliver possession of the 2 bedroom Detached Bungalow at Block 37 Phase 1, Kings Court Estate, Dakbiyu District Abuja forthwith.**
- c. The sum of N2,000,000 is awarded as General Damages**

**HON. JUSTICE NJIDEKA KENECHUKWU
NWOSU-IHEME
[JUDGE]**

Appearance of Counsel:

1. A. AYOPEMI for the Claimant.
2. Defendant was absent and unrepresented.