

**IN THE HIGH COURT OF JUSTICE OF THE F.C.T.**  
**IN THE ABUJA JUDICIAL DIVISION**  
**HOLDEN AT APO, ABUJA**  
**ON TUESDAY, THE 10<sup>TH</sup> DAY OF JANUARY, 2023**  
**BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA**  
**JUDGE**

**SUIT NO: FCT/HC/CV/3015/2021**

**BETWEEN:**

**ACCESS BANK PLC**

**CLAIMANT**

**AND**

**MICHEAL OLAOLUWA ODUOYE**

**DEFENDANT**

**JUDGMENT**

By an Originating Summons dated the 9<sup>th</sup> day of November 2021 and filed on the 11<sup>th</sup> day of November 2021, the Claimant instituted this action seeking the determination of the following questions:

1. *Whether from all the documentary evidence before this Honorable Court, the Claimant is entitled to the sum of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (₦22,939,292.83K), representing the balance on the principal loan sum and interest granted by the Claimant to the Defendant and secured by the property of the Defendant known as Plot No. 1047, A Close, 46 Crescent, Gwarimpa II Estate, Abuja through a mortgage and deposit of title document with the Claimant.*
2. *Whether having regards to the Defendant's letter of 5<sup>th</sup> July 2018, deposit of the original letter of allocation and deed of assignment*

*and execution of a mortgage facility agreement dated 24<sup>th</sup> July 2018 over Plot No. 1047, A Close, 46 Crescent, Gwarimpa II Estate, Abuja as collateral by the Defendant in favour of the Claimant for the sum of ~~₦~~30,000,000.00 (Thirty Million Naira borrowed by the Defendant, an equitable mortgage has been created in favour of the Claimant by the Defendant.*

- 3. Whether the Claimant is entitled to an Order foreclosing the equitable right of redemption of the Defendant in respect of the property described and situate at Plot No. 1047, A Close, 46 Crescent, Gwarimpa II Estate, Abuja and used as collateral by the Defendant in favor of the Claimant for the sum of Thirty Million Naira (~~₦~~30,000,000.00) borrowed by the Defendant.*
- 4. Whether the Claimant is not entitled to an Order of Judicial sale in respect of the property described as and situate at Plot No. 1047, A Close, 46 Crescent, Gwarimpa II Estate, Abuja used as collateral by the Defendant in favor of the Claimant for the sum of Thirty Million Naira (~~₦~~30,000,000.00) loan by the Defendant which outstanding balance of principal and interest is Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (~~₦~~22,939,292.83K).*

Upon an affirmative determination of the above questions by this Honourable Court, the Claimant seeks the following reliefs:

- 1. A Declaration that from all the documentary evidence placed before this Honorable Court, an equitable mortgage has been created in favour of the Claimant by the Defendant.*
- 2. An Order foreclosing the equitable right of redemption of the Defendant in respect of the property described as and situate at*

*Plot No. 1047, A Close, 46 Crescent, Gwarimpa II Estate, Abuja used as collateral by the Defendant in favor of the Claimant for the sum of Thirty Million Naira (₦30,000,000.00) with outstanding balance of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (₦22,939,292.83K).*

*3. An Order for judicial sale of the property described as and situate at Plot No. 1047 A Close, 46 Crescent, Gwarimpa II Estate, Abuja used as collateral by the Defendant in favor of the Claimant for the sum of Thirty Million Naira (₦30,000,000.00) with outstanding balance of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (₦22,939,292.83K).*

*4. And for such further Orders or other Orders as the Court may deem fit to make in the circumstance of this case.*

The Originating Summons was supported by a 15-paragraph Affidavit with nine exhibits suitably marked and attached. A Written Address also accompanied the Originating Summons.

Briefly, the facts of the case as disclosed in the affidavit in support which was deposed to by one Chinenye Atsenokhali, a manager in the office of the Claimant, was that some time in July 2018, the Defendant made an application to the Claimant for a loan facility of Forty Million Naira (₦40,000,000.00) to be secured by his property described and located at Plot No. 1047 A Close, 46 Crescent, Gwarimpa II Estate, Abuja. After the Claimant had got a valuation report of the property, the Claimant offered to grant mortgage to the Defendant in the sum of Thirty Million Naira (₦30,000,000.00), which the Defendant accepted. Both parties

signed a mortgage agreement to that effect. This led to the Defendant depositing the necessary documents with the Claimant pursuant to the agreement.

It is the case of the Claimant that the loan was for a period of thirty (30) months which commenced from the 2<sup>nd</sup> of August 2018. The deponent averred that after the expiration of the thirty (30) months, the Defendant had refused to pay the balance of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (N22,939,292.83K) which represented the balance of the principal loan and interest. She further averred that the Defendant had written to the Claimant requesting for a waiver of the accumulated interest but the Claimant had rejected the request on the grounds that the Defendant's default started before the Covid-19 period.

In support of the deposition made in the supporting affidavit are **Exhibit AA1** which is a copy of the application for loan dated 5<sup>th</sup> July 2018; **Exhibit AA2** which is a copy of the valuation certificate produced by the estate valuer; **Exhibit AA3** which is a copy of the offer of mortgage and acceptance dated 24<sup>th</sup> July 2018; **Exhibits AA4, AA5 and AA6**, which are a copy of the Letter of Allocation by the Federal Housing Authority, Consent to Assign and Deed of Assignment over the property; **Exhibit AA7**, which is a copy of the Defendant's statement of account; **Exhibit AA8** which is a copy of the Defendant's letter dated 5<sup>th</sup> July 2021 and **Exhibit AA9** which is a copy of the Claimant's reply to the Defendant's request for waiver of accumulated interest.

In the Written Address in support of the Originating Summons, learned Counsel for the Claimant formulated two issues for the Court to determine. These issues are:- *“(1) Whether from the facts and*

*circumstance of this case an equitable mortgage has been created between the Claimant and the Defendant? (2) Whether the Claimant is entitled to the Court foreclosing the Defendant's equitable right of redemption of the property to warrant a judicial sale of the property located at Plot No. 1047 A Close, 46 Crescent, Gwarimpa II Estate, Abuja?"*

In arguing the first issue, learned Counsel for the Applicant submitted that an equitable mortgage is created where title documents is deposited with a bank as a security for a loan. He added that there may never be any written agreement to that effect, as a mere oral agreement accompanied by the deposit of the documents may suffice. Counsel relied on the case of **Yaro v. Arewa Const. Ltd (2007) 17 NWLR (Pt. 1063) 333 at pg 338 Ratio 1**. Learned counsel went on to argue that the Defendant did not only submit the original title documents of his property which was described and situate at Plot No. 1047 A Close, 46 Crescent Gwarimpa II Estate, Abuja to secure the loan of Thirty Million Naira (N30,000,000.00) granted to the Defendant, he also executed a mortgage agreement. Counsel submitted that an equitable mortgage was created by the parties in favor of the Claimant.

In his argument on the second issue, learned Counsel for the Claimant submitted that a mortgagee's right to action against the mortgagor arises once the time fixed for repayment of the loan expires and the debtor is unable to pay. Counsel relied on the case of **A.I.B. Ltd v. V.I.D.S. Ltd (2012) NWLR (Pt. 1328) 1 at pg 6 Ratio 6**. Counsel further argued that the right of foreclosure of the Claimant's mortgagee over the property used as security has since arisen, that is, a right of sale and that parties are bound by their agreement. Counsel relied on the cases of **Gwarso v.**

***Mohammed (2013) 12 NWLR (Pt. 1369) 576 C.A., Aminu Ishola Investment Ltd v. AfriBank Nig. Ltd (2013) NWLR (Pt 1359) at 380 p. 386 Ratio 7, and Chidoka v. F.C.F.C. Ltd (2013) 5 NWLR (Pt. 1346) 144 at p. 149 Ratio 6.***

It was the contention of Counsel that the only remedy available to an equitable mortgagee is to apply to the Court for an order of judicial sale, adding that this is because an equitable mortgage falls short in the eyes of the law in creating a deed of legal mortgage to sell the mortgaged property upon default by the mortgagor without recourse to a Court. Counsel relied on **Order 58 Rule 1 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018** in arguing that this Honorable Court has powers to order the sale of the mortgaged property. He also called in aid the cases of ***UBN Plc v. Taylor (2005) 15 NWLR (Pt. 947) page 27*** and ***Ndaba (Nig.) Ltd v. UBN Plc (2007) 9 NWLR (Pt. 1040) 439 C.A.***

It was finally submitted by the learned Counsel to the Claimant that the standard of proof in civil cases is that of balance of probabilities and that the Claimant has successfully discharged this burden by placing material and cogent facts before this Court showing history of the transaction between the Claimant and the Defendant. He added that the justice of this case demanded that an order be made against the Defendant by foreclosing the Defendant's right to redeem the property used as collateral and/or security for the debt. He asserted that the Defendant, having failed to discharge his debt to the Claimant, the Court had no other choice than to order the foreclosure of the Defendant's right to redeem and also proceed to order for judicial sale of the property used as security for the debt.

The Defendant on the 13<sup>th</sup> of October 2022 filed his 13-paragraph Counter-Affidavit in opposition to the Claimant's suit. The Counter-Affidavit was accompanied with a written address in support. No exhibit was attached to the Counter-Affidavit.

In the Counter-Affidavit which was deposed to by the Defendant himself, the Defendant averred that contrary to paragraph 9 of the affidavit in support of the Originating Summons filed by the Claimant, he had made more payments by way of deductions by the Claimant from the said account, thus leaving the balance of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (~~₦~~22,939,292.83K) as deposed to by the Claimant in his affidavit. He swore that the Claimant technically shielded financial facts that could enable him know the actual principal loan and interest sum on the particular account that was subject to periodic deduction for the repayment of the loan and interest on the loan.

In answer to paragraphs 10, 11 and 12 of the Claimant's affidavit, the Defendant claimed that he wrote a letter to the Claimant sequel to the discussion and assurances by one Onyesom Ugochukwu Igwe Esq., a Solicitor to the Claimant *via* series of phone calls to help negotiate for waiver of interest on the loan by the Claimant. He added that the Claimant refused and failed to avail him with comprehensive facts that could assist him to know his actual indebtedness. Insisting that he was not indebted to the Claimant in the sum of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (~~₦~~22,939,292.83K), the Defendant asserted that he had a defense to the Claimant's action.

In the Written Address in support of the Counter-Affidavit, learned Counsel for the Defendant formulated one issue for this Honorable Court to determine. This issue is:- *“Whether the Defendant has placed before this Honorable Court facts deposed to in his Counter-Affidavit that will avail him a defense on the merit and contentious facts and to warrant this Honorable Court to refuse the grant of all reliefs sought and order that the case be commenced by Writ of Summons, parties should file pleadings and go into trial.”*

In arguing this sole issue, learned Counsel for the Defendant submitted that in deciding whether or not the Claimant’s suit should come within the purview of an Originating Summons, the preoccupation of the Court should be on the question of whether there was a likelihood of dispute as to facts surrounding the suit. Learned counsel submitted that the Claimant’s case does not fall within the context of an Originating Summons as the Defendant had a defense which revolved round the likelihood of a dispute as to facts. It was his case, too, that it would have been appropriate if the suit was commenced by way of a Writ of Summons which would necessarily involve the filing of pleadings and the calling of witnesses. Counsel relied on the cases of ***Standard Cleaning Services Company v. Obafemi Awolowo University Ile-Ife (2011) 14 NWLR (Pt. 1269) 193 at 204-205, 213, Sani v. Kogi State House of Assembly (2019) 4 NWLR (Pt. 1661) pg 172 at 184 paras B-D.***

Learned Counsel for the Defendant further submitted that the Claimant’s **Exhibit AA7** where it was clearly marked “VOID NOT FOR PRESENTATION”, has created conjecture and thus subjecting the entire depositions in the Claimant’s affidavit supporting the Originating Summons to a hostile dispute. He relied on the Supreme Court case of



***Ossai v. Wakwah (2006) 4 NWLR (Pt. 969) pg 208 at 229 paras A-B 235-236 paras H-A.*** Finally, learned Counsel to the Defendant submitted that the suit as presently constructed and constituted had created an atmosphere of hostility that would necessitate that the Defendant be given an opportunity to fully ventilate his defense.

Above is an extensive summary of the case before me. In order to answer the questions raised in the Originating Summons of the Claimant and the Counter-Affidavit of the Defendant, the Court would formulate the following issues to resolve this matter. The issues are as follows: “***(1) Whether from the documentary evidence before this Court, an equitable mortgage does not exist between the Claimant and the Defendant? (2) Whether from the documentary evidence before this court, the Claimant’s right to foreclose the Defendant from redeeming the mortgage and the Claimant’s power of sale have not arisen?***”

**RESOLUTION OF ISSUE ONE:**

***“Whether from the documentary evidence before this Court, an equitable mortgage does not exist between the Claimant and the Defendant?”***

In my attempt to unravel the mystery of the matter before me, it is appropriate to preface the resolution of this issue, and, by extension, this dispute, by a conceptual clarification of a mortgage. A mortgage is a conveyance of title to a property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms. The legal consequence of the above definition is that the owner of the mortgaged property becomes divested of the right to dispose of it until he has

secured a release of the property from the mortgagee. In *Adetona v. Zenith Int'l Bank Plc* (2011) 18 NWLR (Pt. 1279) 627 S.C. at 657 – 658, paras H – A, the Supreme Court per Ngwuta, JSC defines mortgage as “a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty, and that will become void upon payment or performance according to the stipulated terms.”

The law recognizes two types of mortgages. These are legal mortgages and equitable mortgages. A legal mortgage is created when a borrower (the mortgagor) uses a piece of real property as collateral to secure a loan from a lender (the mortgagee). The mortgage is created by the execution of a mortgage document, which sets out the terms of the loan and the rights and obligations of the borrower and the lender. Equitable mortgage, on the other hand, is a type of mortgage in which the borrower provides the lender with the right to sell the property in case of default, rather than physically transferring ownership of the property to the lender. Equitable mortgages can be created in a number of ways which include the mere deposition of title deeds to be used as a security, deposit of title deeds coupled with an agreement to execute a legal mortgage and by way of an equitable charge. See the cases of *Jacobson Eng. Ltd. v. U.B.A. Ltd.* (1993) 3 NWLR (Pt. 283) 586 C.A. at 600, paras D – E; *F.B.N. Plc v. Songonuga* (2007) 3 NWLR (Pt. 1021) 230 C.A. at 262, paras A – D; *Akanmode v. FBN* (2018) LPELR-44456 (CA) at pg. 16, paras A-C, *Hydro Hotoles Ltd v. AMCON* (2020) LPELR-50740 (CA) at pg. 43-50, paras D-B, and *Union Homes Savings & Loans Plc v. Chizea* (2022) (CA) at pg. 32-33, paras C-D.

The deposit of a title deed is the most common method of creating an equitable mortgage. Under this method the mortgagor hands over the original title deed of the property to the mortgagee as security for the loan. The title deed is held by the mortgagee until the loan is fully repaid. In *P.I.P. Ltd. v. Trade Bank (Nig.) Plc (2009) 13 NWLR (Pt. 1159) 577 C.A. at 618, paras E – F*, the Court of Appeal held that “**The deposit of title deeds with a bank as security for a loan creates an equitable mortgage as against legal mortgage which is created by deed transferring the legal estate to the mortgagee.**” See also the case of *UBA Plc v. Musa & Anor (2018) LPELR-45627 (CA) pp 39-41, paras E-C*, where the Court of Appeal per Abiru, JCA held that and I quote:-

**“Additionally, this court deems it pertinent to make a point, though the issue was not raised by the parties. From the entire evidence led before the lower Court, no deed of legal mortgage was executed by the first respondent and the appellant over either the petrol filling station or even over the residential building behind the petrol filling station in actualization of the terms of the overdraft facility granted to the first respondent by Exhibit A. None of the witnesses testified on the existence of such a deed of legal mortgage and none tendered in evidence. Thus, the security held by the Appellant as collateral for the overdraft facility was in reality an agreement to create a legal mortgage and the law is that such an agreement creates only an equitable mortgage in favor of the appellant.”**

In this particular case before me, the Defendant approached the Claimant for a loan facility. The Claimant agreed to grant a loan facility of ₦30,000,000.00 (Thirty Million Naira) only subject to the provision of some sort of security from the Defendant. The Defendant deposited the documents of title to his property known as Plot No. 1047 A Close, 46 Crescent Gwarimpa II Estate, Abuja. The Claimant granted the loan facility of ₦30,000,000.00 (Thirty Million Naira) Only to the Defendant and secured the loan by the documents of title to the Defendant's property afore-described. A collateral is a security used by a lender to secure the repayment of the loan granted to the borrower. In other words, the essence of the collateral used in securing a loan is to enable the mortgagee to recover his money in the event of a default on the part of the mortgagor. The relationship that exists between them in relation to the property used as security is equitable mortgage.

As I have stated earlier the deposit of a title document is one of the methods of creating an equitable mortgage. The repayment period of the loan as agreed by the parties was thirty (30) months commencing from the 2<sup>nd</sup> of August 2018. To all intent and purposes an equitable mortgage exists between the Claimant and the Defendant in respect of the property used to secure the loan. I have no difficulty in arriving at this finding. In view of this therefore, I hereby resolve Issue One in favor of the Claimant.

**RESOLUTION OF ISSUE TWO:**

***“Whether from the documentary evidence before this court, the Claimant's right to foreclose the mortgage from redeeming the mortgage and the Claimant's power of sale has not arisen?”***

It is trite that a mortgage can be foreclosed from redemption if the mortgagor defaults on the loan and the mortgagee decides to take possession of the property that was used as collateral for the mortgage. This is one of the rights of a mortgagee in a mortgage. Foreclosure typically occurs after the mortgagor has failed to make the required mortgage payment after the due date has elapsed and the mortgagee has exhausted all means of collecting the debt. This specific process of foreclosing the mortgage will depend on the terms of the mortgage agreement. See the case of **A.I.B. Ltd v. Lee Industries Ltd & Anor (2003) LPELR-9171 (CA) at pg 40, paras A-G**, where the Court of Appeal per Augie, JCA (as he then was, later, JSC), held that and I quote:-

***“To start with, it is settled law that a mortgagee’s power of sale or foreclosure cannot be affected merely because the amount due under the mortgage agreement is in dispute. See also the case of OMDIJI v. FMB 13 NWLR (Pt. 731) at page 646. The law is that a mortgagee will not be restrained nor can power for foreclosure be affected by exercise of his power of sale merely because the amount due is in dispute or the mortgagor has commenced a redemption action in court. See the case of Intercity Bank Plc v. F. & F. F. Nig. Ltd (2001) 17 NWLR (Pt. 742) 347.”***

In an equitable mortgage, the power of sale arises when the mortgagor defaults on the loan and the mortgagee seeks to recover. This can be done by selling the property that was used as collateral for the loan. In order to exercise the power of sale, the mortgagee must first give the mortgagor notice of the default and opportunity to cure the default by

making the overdue payments. After the notice has been served and the mortgagor continues in default, the mortgagee can approach the Court for an order of foreclosure of the mortgagor's right of redemption. In ***FCMB v. ATS Abatcha (Nig.) Ltd & Ors (2017) LPELR-43452(CA) at 42 paras. C***, the Court of Appeal per Abiru, JCA defined foreclosure as "***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.***" Pursuant to this Court Order, the mortgagee may subsequently exercise all powers of a legal mortgagee. The power of sale is sequel to the order of foreclosure and, since it is an equitable mortgage, the order of Court is required.

The Court of Appeal, in the case of ***Access Bank Plc v. Alabaminu International Ltd & Ors (2016) LPELR-41605(CA) at 63 – 64, paras. D*** explained the process concisely when it held per Abiru, JCA that:-

***"An order of foreclosure is one of the remedies available to an equitable mortgagee on the default of an equitable mortgagor - Ogundiani Vs Araba (1978) 6-7 SC 55 and Federal Mortgage Bank of Nigeria Vs Adesokan (2000) 11 NWLR (Pt 677) 108. 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."***

In relation to this Issue, I note that the Claimant granted a loan facility of ₦30,000,000.00 (Thirty Million Naira) only to the Defendant. The tenure of the facility is thirty (30) months beginning from the 2<sup>nd</sup> of August, 2018. The Defendant, pursuant to the terms of the loan agreement ought to have liquidated the principal loan sum as well as the interest on or before the 2<sup>nd</sup> of February, 2021. The due date having elapsed with the Defendant remaining in default of the terms of the mortgage arrangement, the power of sale inherent in the Claimant has arisen. The option left for the Claimant is to approach the Court for orders of foreclosure and sale of the mortgaged property. In ***Dareng v. F.B.N (2020) LCN/14775(CA) at 46 – 47, paras. E – D***, the Court of Appeal per Ugo, JCA held that “***...following the expiration of the tenor of the said Restructure Agreement (Exhibit 11) on 28/5/2017, First Bank's right to sue for foreclosure of the equitable mortgage arose automatically. That much the apex Court in the very same case of Ogundiani v. Araba (1978) LPELR-2330 (SC), (1978) 6-7 S.C. 55 cited by Mr. Omachi for Mr. Dareng made clear when it (Idigbe, J.S.C.) said at p.24 LPELR that: "It should be borne in mind that the general rule is that foreclosure (and not sale) is the proper remedy of the equitable mortgagee (see James v. James (1873) L.R. 16 E.153 citing with approval Pryce v. Bury at 154), and when an equitable mortgagee by deposit of title deeds and agreement to give a legal mortgage if called upon to do so takes foreclosure proceedings to enforce his security, the Court usually decrees that in default of payment due under the mortgage the mortgagor is trustee of the legal estate for the mortgagee and that he must convey that estate to him. (See Marshall v. Shrewsbury (1875) 10 Ch. App. 250 @ 254)."***”

I have taken note of the depositions in the Counter-Affidavit of the Defendant. According to the Defendant, the Claimant ought to have commenced this suit by way of a Writ of Summons instead of by way of Originating Summons because, according to him, he has a defence on the merit. This submission is strange for a number of reasons. First, the Rules of this Court are clear on the mode of commencement of actions of this nature. The rules of this court are quite clear on the mode of commencement of actions of this nature. Order 58 Rule 1 of the High Court of the Federal Capital Territory Abuja, (Civil Procedure) Rules, 2018 states that:-

***Any mortgagor or mortgagee, 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 the nature or kind following as may be specified in the summons, and as the circumstances of the case may require; that is***

***(a) Payment of moneys 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;***

***(e) Redemption;***

***(f) Reconveyance; and***

***(g) Delivery of possession by the mortgagee.***

See ***Fasheun Motors Ltd. v. U.B.A. Ltd. (2000) 1 NWLR (Pt. 640) 190***, where the Court of Appeal discountenanced a similar objection by the Defendant in that suit and held that Order 56 Rule 6 of the Lagos State (Civil Procedure) Rules, 1994 (which is *in pari materia* with Order 58 of the Rules of this Court, 2018) was the appropriate mode of commencement of action in situations like this. In his concurring Judgment, Oguntade, J.C.A. (as he then was, later, JSC) held ***at page 199, paras. G – H*** that: "***The use of originating summons in suit No. ID/298/94 is authorised by Order 56 rule 6 of the Lagos High Court Civil Procedure Rules, 1994 (formerly Order 44 rule 6 of the 1972 Rules). Furthermore, it was open to the lower court to order the filing of pleadings if it saw the need for it. It seems to me that this appeal is a ploy by the appellant to waste time. It is a worthless appeal.***" Contributing to the Judgment, Nzeako, J.C.A. ***at page 200, para. A*** held thus: "***The commencement of action by originating summons where special statutory provisions permit it or where the facts may not be in dispute is well known in the High Court of Lagos State since the enactment of the High Court of Lagos State Civil Procedure Rules 1972 and also in those States of the Federation where the Uniform Rules were adopted.***"

In *Kwara State Government & Others v. Guthrie Nigeria Limited (2022) 13 NWLR (Pt. 1846) 189 at 207, paras A - C*, the Supreme Court held *inter alia* that **“Where any law or rule of court provides specifically for the commencement of a particular action in a particular way, a party is bound to commence the action in the way prescribed, and the court is bound to give enforcement to it.”** The Rules of this Court provides that suits of this nature must be commenced by way of Originating Summons. What is required of the Defendant is to state his defence to the Claimant’s action by adducing his evidence in his Counter-Affidavit and not to tell the Court that he has a defense to the action which he can disclose only when the suit is commenced by way of Writ of Summons.

Second, the Defendant’s reason for urging the Court to order parties to file pleadings is because, according to him, he is challenging the amount due as outstanding on the loan. Again, the Defendant and his Counsel appear to be laboring under a misapprehension of the law. The law is settled that dispute on the amount due from the mortgagor to the mortgagee does not affect the mortgagee’s right of redemption. In *Omidiji v. F.M.B. (2001) 13 NWLR (Pt. 731) 646 CA at 669, paras C – F*, the Court of Appeal held that **“The mortgagee's power of sale or foreclosure cannot be affected merely because the amount due under the mortgage agreement is in dispute. In the instant case, the appellant's complaint that because the 1st respondent was not sure of the amount due to it before it proceeded to exercise the power of sale and therefore the auction sale should be set aside lacks substance and is devoid of merit.”** This settled position of the law has been reiterated in a number of authorities which include *B.O.N. Ltd. v. Akintoye (1999) 12 NWLR (Pt. 631) 392 C.A. at 405, paras B – C;*

***A.I.B. Ltd. v. Lee & Tee Ind. Ltd. (2003) 7 NWLR (Pt. 819) 366 C.A. at 400 – 4001, paras G – D; Intercity Bank Plc. v. Feeds & Food Farm (Nig.) Ltd. & 2 Others (2001) 17 NWLR (Pt. 742) 347 C.A. at 361, paras. B – C; 361 – 362, paras. G-C; 362, para. H*** among others.

As I have iterated earlier in this judgment, the consequences of default by the mortgagor in the terms of the agreement is the accrual of the equitable rights to the mortgagee. These equitable rights include the right of foreclosure of the mortgagor's right of redemption and the accrual of the mortgagee's power of sale. In ***F.M.B.N. v. Adesokan (2000) 11 NWLR (Pt. 677) 108 C.A. at 120, paras C – E*** the Court of Appeal provides an insight where it held that "***The legal consequence of an equitable mortgage created with an intention - overt or constructive - to create a legal mortgage gives the equitable mortgagee an immediate power of sale, foreclosure and all other remedies open to a legal mortgagee, once the equitable mortgagor defaults.***" Explaining further at paragraphs D - F, the Court, per Okunola, JCA, citing the Supreme Court case of ***Ogundiani v. Araba (1978) 6/7 SC 55 at 74-75***, held that

***"The equitable Mortgage created with an intention to create a legal Mortgage entitles the equitable Mortgagee to something more than a mere right to payment out of property or premises mortgaged, under the general principles his remedies correspond as nearly as possible with those of the legal mortgagee because equity regards as done that which ought to be done, one of the consequences in-built in equitable Mortgages in case of failure of the plaintiffs/respondents to repay the***

***instalments of the Mortgages is the sale of security with the right of the equitable Mortgagee to obtain an order of court to convey a legal interest to the buyer after the sale.”***

In ***Intercity Bank Plc. v. Feeds & Food Farm (Nig.) Ltd. (2001) supra***, the Court per Rabiun Danlami Mohammed, JCA in the lead judgment, while referring to Halsbury’s Laws of England, Fourth Edition, held at page 361, para C that **“A mortgagee will be restrained from exercising his power of sale if the mortgagor pays the amount claimed in court.”** In his concurring Judgment, Mahmud Muhammad, JCA (as he then was, later, JSC) citing the case of ***Nigerian Housing Development Society Ltd. v. Yaya Mumuni (1977) NSCC Vol. II pages 65 at page 73*** held at 361-362, paras. H – A that **“The appellant can only be restrained from exercising its power of sale if the respondents have paid into court the amount claimed by the appellant. The respondents did not pay the amount claimed into court.”** in his concurring Judgment, Omuogbo, JCA considered the cases of ***Okonkwo v. Cooperative and Commerce Bank Nig. Plc (1997) 6 NWLR (Pt. 507) 590, Ihekwoaba v. ACB Ltd. (1998) 10 NWLR (Pt. 571) 590 CA; BON & Zakari Gombe v. Haruna Aiyu (1999) 7 NWLR (Pt. 612) at 621*** in putting a touch of finality on the subject when he held tersely **at page 365 para D** that **“In order to stop the power of sale of mortgaged property the amount owed must be paid in full.”**

In view of the foregoing, therefore, I have no hesitation in resolving Issue 2 in favour of the Claimant. Having resolved the two issues I have formulated in favour of the Claimant, my ineluctable finding is that the suit of the Claimant is meritorious. Conversely, it is my considered view and I so hold, that the defence which the Defendant has set up to the

suit of the Claimant is untenable. It is like a house which is built on the sand; it must fall. Accordingly, I hereby answer the four questions formulated for determination in the Originating Summons in the affirmative. The Rules of this Court, 2018, however, in Order 58 Rule 3 empowers the Court to give special directions. Specifically, the Rule provides that “***The court may give any special directions concerning the execution of the judgment, or the service to persons not parties to the cause or matter as he deems fit.***” Consequently, the reliefs sought herein are hereby granted as follows:-

1. **THAT indeed an equitable mortgage was created in favour of the Claimant by the Defendant over the property known as, lying at and situate at Plot No. 1047, A Close, 46 Crescent, Gwarimpa II Estate, Abuja which the Defendant used to secure the loan facility of ₦30,000,000.00 (Thirty Million Naira) only from the Claimant when the Defendant deposited the title documents of the property with the Claimant as security for the loan.**
2. **THAT in the absence of any evidence to the contrary from the Defendant, the sum outstanding on this loan facility and which sum is due to the Claimant from the Defendant is Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (₦22,939,292.83K).**
3. **THAT an Order of this Honourable Court is hereby made foreclosing the equitable right of redemption of the Defendant in respect of the property described as and situate at Plot No. 1047, A Close, 46 Crescent, Gwarimpa II Estate, Abuja used as collateral by the Defendant in favor of the Claimant for the**

sum of Thirty Million Naira (₦30,000,000.00) with outstanding balance of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (₦22,939,292.83K).

4. THAT an Order of this Honourable Court is hereby made for the judicial sale of the property described as and situate at Plot No. 1047 A Close, 46 Crescent, Gwarimpa II Estate, Abuja used as collateral by the Defendant to secure the loan facility of Thirty Million Naira (₦30,000,000.00) which the Claimant granted the Defendant and which the sum of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (₦22,939,292.83K) is outstanding and due to the Claimant from the Defendant.
5. THAT, pursuant to the powers vested in this Honourable Court by Order 58 Rule 3 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018, it is hereby ordered that Reliefs Numbers 3 and 4 granted above shall not take effect until after six months from the date of delivery of this Judgment. The Defendant is hereby ordered to pay the outstanding sum of Twenty-Two Million, Nine Hundred and Thirty-Nine Thousand, Two Hundred and Ninety-Two Naira, Eighty-Three Kobo (₦22,939,292.83K) into an interest-yielding account of the High Court of the Federal Capital Territory, Abuja within this period of six months. Upon failure of the Defendant to pay the outstanding sum stated above into an interest-yielding account of this Court as

**stated, the Claimant shall proceed to enforce Reliefs Numbers 3 and 4 granted above.**

This is the Judgment of this Court delivered today, the 10<sup>th</sup> of January, 2023.

**HON. JUSTICE A. H. MUSA  
JUDGE  
10/01/2023**

**APPEARANCES:**

**FOR THE CLAIMANT:**

**FOR THE DEFENDANT:**