IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT 45 SITTING IN WUSE ZONE 2, ABUJA
BEFORE HIS LOARDSHIP: THE HON. JUSTICE ELEOJO ENENCHE
DELIVERED ON 7th DAY OF FEBRUARY, 2023

SUIT NO.: FCT/HC/CV/2734/2022

BETWEEN:

COL. SANI BELLO (RTD.)
(Suing through his lawful Attorney JibrilSule) **…… CLAIMANT**

AND

ZEECREST VANTAGE LIMITED……. DEFENDANT

JUDGMENT

By an originating Summons dated 18/08/22, the Claimant, Col. Sani Bello (RTD) suing through lawful Attorney, JibrilSule sought the following reliefs:

1. An order for the recovery of possession of Plot No. 2 Cadastral Zone C01, Karmo District, Abuja FCT covered by certificate of occupancy No. 51euw-b7e9z-507cr-dadeu-10, dated 13th October 2006, property of and belonging to the Claimant.
2. Cost of this action
3. Omnibus prayer.

The Originating Summons was brought upon the grounds that

1. The Claimant herein is the beneficial owner of the property known or described as Plot No. 2 Cadastral Zone C01, Karmo District, Abuja FCT.
2. By an Estate Development Agreement dated 21st March 2018, it was agreed by the Claimant and the Defendant company that the Claimant would yield up possession of the property to the Defendant who would develop the Claimant's property into 88 housing units and 1 green area unit.
3. By virtue of Clauses 1 & 2 under the heading of Duration/Delay/Termination, the tenor of the agreement or the duration of the development was clearly stated to be thirty-six (36) months from the day the agreement was executed by the parties.
4. The Defendant failed, refused or neglected to comply with the term of the agreement as regards the development or delivery of the agreed 88 Units.
5. Following several pleas, requests and appeals, the Claimant acceded to an extension of the completion date by an additional Six months, whereupon an addendum to the original agreement was executed by the parties on 15th July 2021.
6. By virtue of **Clause "A"** under the heading of "***PENALTY FOR DEFAULT"*** in the addendum, the Defendants were granted an additional Six (6) months within which to complete the 88 Housing Units and 1 Green Area Unit on the property, failing which the possession of the said property would yield back automatically to the Claimant.
7. The Defendant Company failed to make any justifiable development action on the property within the time granted and thus the agreement was revoked by operation of the parties' agreement.
8. Despite several written demands by the Claimant, the Defendant has refused all entreaties and appeals to vacate the Claimant's land and yield up possession.

Supporting the Originating Summons is a 24 Paragraphed affidavit deposed to by JibrilSule. The affidavit in essence restated the facts itemized in the grounds save that it introduced the exhibits which the Applicant sought to rely on, being;

Exhibit "A" – The Power of Attorney by which JibrilSule was appointed as the lawful attorney of the Claimant for the purpose of this proceeding.

Exhibit "B" – Certificate of Occupancy evidencing title to the Plot.

Exhibit "C" – The Estate Development Agreement entered into by the parties.

Exhibit "D" – Addendum to the original Estate Developer agreement dated 15th July, 2021.

Exhibit "E" – Proposed Revised Addendum to the original agreement.

Exhibit "F" Series – letters written by the Claimant to the Defendant dated 31st March, 2022, 8th April, 2022 and 5th August, 2022.

Exhibit "G" Series – Photographs of the development on the site as at 5th August 2022.

Further to this and following the Respondent's reaction, the Claimant filed a further and better affidavit dated 7th December, 2022. That affidavit had 21 paragraphs and the same JibrilSule was the deponent.

The Defendant, Zeecrest Ventures Limited fired two salvos. The first was a Notice of Preliminary objection dated 29/08/22. By the notice, the Applicant urged me to terminate this suit in-limine or, stay proceedings pending referral to the FCT, Multi-Door Courthouse for Arbitration. This application was brought upon the grounds that;

i. The time further extended by the Claimant has not expired and this matter is thus pre-mature.
ii. The parties herein contracted to resolve all disputes arising from the contract to the Abuja Multi-Door Courthouse.

Supporting the application is the 14- paragraphed affidavit of ChikeOwohCanic in which it was deposed that there is indeed an addendum to the original contract i.e.,**Exhibit "D**" and that the revision was because the Defendant (herein Applicant) did not meet up with the agreed date of completion. It was also stated that asides **₦120,000,000(One Hundred and Twenty Million Naira)** paid to the Claimant, the Defendant has invested about One Billion Naira in the project. I was again, by virtue of the affidavit referred to **Exhibit "C"** where parties agreed to refer all disputes to the Abuja Multi-Door Courthouse for resolution.

In arguing the objection, a sole issue was formulated simply as whether this suit is not pre-mature.

To argue, it was submitted that a look at the letter of 31st March 2022 written by M.S. Dantoro, Solicitors to the Claimant shows on the face of it that Claimant had approved an extension of time for a further period of 24 Months. Counsel continued in his argument by submitting that, it will be an affront for the same Claimant to file this suit in defiance of his own voluntary agreement as it is trite that parties are not allowed to approbate and reprobate at the same time.

Further, under paragraph 1 of the **Dispute Resolution Clause** at page 16 of **Exhibit C**, parties had elected to refer all disputes to the Abuja Multi-Door Courthouse for resolution. It was argued that there is no evidence to show that parties exhausted their voluntary choice of Arbitration prior to the filing of this action. Citing the cases of ***FELAK CONCEPT LTD VS.A.G. AKIWA IBOM STATE (2019) 8 NWLR (PT 1675) AT 433***and***MAINSTREET BANK CAPITAL LTD VS.NIG. RE (2018) 14 NWLR (PT 1640) AT 423***, I was called to exercise the powers of the Court to stay proceedings and refer the matter to Arbitration as agreed by the partiesab-initio.

In his counter argument, Claimant/Respondent submitted that the Notice of preliminary objection was not supported by an affidavit. It was argued that the

affidavit purportedly attached to the process is titled "Counter Affidavit in opposition to motion on Notice" on which counsel submitted that it was originally drafted as a response to the Claimant's Motion on Notice for interlocutory Injunction. It was further argued that the lack of a motion number on the process rendered it defective.Counsel acknowledged that in some instances, it is possible to file a Notice of preliminary objection without a supporting Affidavit i.e. when the objection is based on points of law but that, as in this case where it is based on facts, there is need to file an affidavit to establish the facts relied on. On this submission counsel relied on the case of ***OKEREKE V. JAMES (2012) 16 NWLR (PT) 1362) 339 AT 348****and****AJE PRINTING (NIG) LTD V. EKITI LGA (2021) 13 NWLR (PT 1794) 27 – 28***.

In submitting that the suit is not pre-mature as postulated by the Defendant/Applicant, it was contended that while Paragraph 1 of the Dispute Resolution Clause of the original Estate Development Agreement **(i.e., Exhibit C)** makes a provision for Arbitration, there is also an addendum to the original Estate Development Agreement i.e. ***Exhibit 'D'*** which was made to replace the Original Agreement and as such, the current operative agreement between parties. It is the argument that the Dispute Resolution Clause of that addendum fundamentally changed the dispute resolution landscape earlier agreed by the parties.

In arguing further, the case of ***BCC TROPICAL NIG LIMITED V. THE GOVERNMENT OF YOBE STATE OF NIGERIA & ANOR (2011) LPECR – 9230 (CA)*** was relied upon to submit that the right to go for Arbitration is a personal right which can be waived by either of the parties to the agreement.

On the 2nd leg of the preliminary objection which made reference to the existence of a further agreement, it was submitted that a letter signed by one party is not sufficient to vary or alter the express terms of an agreement

singed prior by all parties and that in any case, by the letter dated 8th April, 2022 under Exhibit "F" series, the Claimant expressed his intention to take over the property, the effect of which was that, the concession in Exhibit ZV1 if any was terminated.

As it is in line with fine judicial tradition, I shall first deal with the notice of preliminary objection. The first attack on the said notice was directed at the affidavit supporting the application. It is the contention of the Claimant who shall subsequently, for the purpose of the preliminary objection be referred to as Respondent that there is no affidavit supporting the objection to the extent that the affidavit in support is headed ***"Counter affidavit in opposition to motion on notice"***. The pivot of the Respondent's argument is that the court should find that, from the heading, the affidavit was drafted in response to a different process and was not intended for the preliminary objection more so as it was admitted that the process was a reply to the motion on notice for an interlocutory injunction earlier filed by the Respondent.

On this, I am of the view that going by the provision of ***Order 5 Rule 2*** of the Civil Procedure Rules of this court, ***where at any stage in the course of or in connection with any proceedings there has by reason of anything done or left undone been a failure to comply with the requirements as to time , place, manner or form, such failure may be treated as an irregularity and the court may give any direction as he thinks fit to regularize such steps***. There is no doubt that an affidavit in support of a motion points the court in the direction of facts upon which the contentions in the motion are based. Having filed an affidavit which should be one in support though now headed as a counter affidavit, I hold the opinion that this is a mere irregularity as to form as anticipated by ***O5 R 3 CPR***. . In ***MR. G.O. DUKE v. AKPABUYO LOCAL GOVERNMENT (2005)***

LPELR-963(SC) the court held that ***"the term "irregularity" in respect of procedures, is most often construed by the court to denote something not being fundamentally tainting or besmirching a proceeding as to render it invalid or a nullity, id est., it is curable."*** My view is hinged on the fact that going by paragraph 11 of the said affidavit, a fundamental deposition was made which evinced the proposition that parties had agreed in ***"Exhibit C"*** to refer all disputes to the Abuja Multi-Door Courthouse for resolution including arbitral awards". The main thrust of the preliminary objection as can be gleaned from the prayer being a stay of this proceedings with a view to refer same to arbitration, I was not misled as I am sure the Respondent wasn't too that,by the heading of the affidavit which to me is a mere irregularity and which should not invalidate the process. I also commend to parties herein, the case of ***FIRST BANK OF NIGERIA PLC v. ALH. AHMED ILYASU & ORS (2022) LPELR-57169(CA)*** where it was held that there is a distinction between irregularity and incompetence. The Court may condone irregularity, except when it is shown that a miscarriage of justice will occasion. See ***SAUDE Vs. ABDULLAHI (1989) NWLR (Pt 116) 387***. The Court cannot however condone incompetence. I hold on this therefore that the heading of the affidavit is a mere irregularity which should not defeat the basic object of the process.

Now, to the more germane issue of Arbitration raised. On this, there is no need to rehash the argument of the Applicant only to add that the basis of the request for referral to arbitration is the Dispute Resolution Clause contained at page 16 of ***Exhibit C***. For the avoidance of doubt, ***Exhibit "C"*** is the ***Estate Development Agreement between Zeecrest Vantage Limited and Col.***

Sani Bello (RTD). This estate development agreement was the foundation of the business engagement between the parties which culminated in this suit. It is however not in dispute that in the process, there were several interventions between the parties and as related by the Respondent, a new twist was introduced to the Dispute Resolution landscape with the latter addendum to the original estate development agreement attached to the originating application as ***Exhibit "D"***.

Speaking to ***Exhibit "D"***, it is on the face of it an ***"Addendum to Estate Development Agreement between Zeecrest Vantage Limited and Col. Sani Bello (RTD)."***

It is either learned counsel for the Applicant misconceived the meaning of an addendum to a contract or was simply trying to pull wool over the eyes of the court by his copious and persistent reference to the main contract i.e. ***Exhibit "C"*** when even the processes filed acknowledged the existence of Exhibit ***"D"*** which operates as intended by the parties to be an addendum to ***Exhibit "C"***. For the avoidance of doubt, an **addendum** to a contract is an additional document signed and added to the contract that lists the changed terms of the contract. Rather than develop a new contract, Addendums help keep contracts up-to-date when circumstances change between two parties.see***Black's Law Dictionary, 6th Ed***.

The legal effect of an addendum to a contract is found in the established principle of law that a written contract can be varied by an agreement in writing. Put bluntly, the terms of a written contract can be varied by an agreement of the parties in writing. See ***EMMANUEL OWAN TAWO v. AMBASSADOR JA'AFAR A. KOGUNA (2021) LPELR-54885(CA)***, ***JOHN HOLT LTD. V. LAFE (1939) 15 NLR 14 AT 19*** and ***BALIOL (NIG.) LTD. V. NAVCON (NIG.)LTD. (2010) 16 NWLR (PT. 1220) 619 AT 630***.

My consideration of ***Exhibit "D"*** particularly the recital which reads that;

> ***"the parties entered into an estate development agreement (hereinafter referred to as the agreement) on the 21st of March 2018, wherein the agreement provided that the landowner as***

the beneficial owner of the land will provide the parcel of land to the developer and the developer declared that it has the technical and financial ability to develop the plot into units of houses as agreed therein (herein after referred to as the project), on the said parcel of land known as THAT PROPERTY lying and situated at PLOT NO. 2 CADASTRAL ZONE CO1, KARMO DISTRICT, ABUJA- FCT, measuring approximately 3.3 HECTARES with FILE NO.NG.10661, which shall (hereinafter referred to as "The Project site")."

Read in consonance with Article 1 (5) which provides that ***"this addendum is necessary to amend the terms of the agreement in order to clarify and amend certain provisions of the agreement, in the parties mutual interest"*** leaves no one in doubt that parties intended and in fact did modify the terms of ***Exhibit "C"*** by ***Exhibit "D"***. Now in ***Exhibit D***the revised dispute resolution clause provides***"that under DISPUTE RESOLUTION; it is agreed that parties can only invoke the provision of this clause as stipulated in the earlier agreement for matters arising after the takeover of the property by the landowner, i.e., valuation and payment."***

Drawing from the above, I find it apposite to agree with the argument of learned counsel for the Respondent that the dispute resolution clause above which operates to replace the dispute resolution clause in ***Exhibit "C"*** expressly restricts, limits and confines arbitration to matters arising after the takeover of the project and even after takeover, the work of the arbitrator shall be restricted to valuation and payment. In essence therefore, the dispute resolution clause in the addendum which I hereby determine to be the valid and subsisting arbitration clause can only be activated if and when the property is taken over by the land owner. To the extent that there is, as at now no take over, the arbitration clause in ***Exhibit D***remains dormant, ineffective and cannot be activated. I hold further that being one subject to a condition and that condition having not arisen, that arbitration clause cannot be activated and I so hold.

The second arm of the preliminary objection is on the further extension of time alleged by the Applicant. To argue this ground of the objection counsel for the Applicant relied on a letter dated 31st March, 2022 written by M.S. Dantoro, solicitors to the Respondent. It is the contention of learned counsel that on the face of the letter, the Respondent had approved an extension of

time for a further period of 24 months. The letter is attached to the counter affidavit in response to the originating motion as Exhibit Z1 and relying on it, it was submitted that filing a suit in defiance of that letter is an affront on the position of the Applicant as a party should not be allowed to approbate and reprobate.

Following the trail of letters exchanged between the parties, I shall begin with a letter dated 21st March 2022. It is contained in ***Exhibit "F"*** supporting the Originating Summons. That letter was written by M.S. Dantoro and Associates (Solicitors to the Claimant/Respondent) addressed to Zeecrest Vantage Limited i.e.,Applicants to this preliminary objection. In the letter they expressed the desire of the Respondents to take over the plot following the failure of the Applicant to complete the project as agreed. The letter is hereunder reproduced.

21st March, 2022

ZEECREST VANTAGE LIMITED,
No. 5, Awande Close,
Off Ajesa Street,
Aminu Kano Crescent,
Wuse 2,
Abuja.

LETTER OF TAKING OVER
RE- PLOT NO. 2 CADASTRAL ZONE CO1, KARMO DISTRICT ABUJA

Sequel to the Termination of Estate Development clauses and Addendum thereto between your Company ZEECREST VANTAGE LIMITED with RC NO: 980483 (Developer) and Col. Sani Bello (RTD) (Landowner) Rep. by ALh. AminuSani Bello and in line with all previous correspondence to the above Termination terms & conditions.
The landowner hereby TAKE OVER his land hence forth and you are by this letter required to stop any further entry or development on the said land as any of such shall be Trespass except in the event of perfecting the steps towards appointment an taken of inventory stock which shall be with the consent and

further approval of the landowner as Agreed in the Estate Development Agreement and Addendum thereto.

The land owner is no longer interested in any future extension of time after all the incapability and incompetency displayed in the development of the estate and the landas Agreed by the parties to the EDA in line with the following:

1. ***That under DURATION/DELAY/TERMINATION; Clause 1 and 2 be replace by the following:***
   a. ***That the completion and delivering of the project with all the infrastructure, fittings etc. as contained in the Agreement and deliverables as enumerated on the deliverable sheet attached to the agreement shall be within (6) Six Months commencing from the date of signing of this Addendum to the Agreement.***
   b. ***Parties unequivocally agreed that there should be no further extension of time.***
   c. ***That the contract between the Landowner and the Developer automatically terminates (6) six months from the date of signing of this agreement.***
   d. ***That Parties will jointly supervise, appraise progress of work on site monthly bases.***
   e. ***That the Landowner appoints AminuSani-Bello of Defcom Properties Limited to represent him in the supervision of the project works and report to the Landowner accordingly.***

2. ***That under PENALTY FOR DEFAULT; Clauses 1,2,3,4; and 6 be replaced by the following:***
   a. ***That where the Developer has failed to complete the project and deliver same in (6) six months from the date of signing this agreement, (completion meaning that all the units must be in habitable state with complete finishing works, deliverables as enumerated and attached to the said Agreement with all infrastructure and external works in place); the Landowner to the Developer.***

   In view of the above, you are hereby requested to handover all the documents in respect to that land and facilities completed i.e. the 30% you

claim to have completed to the Landowner and the cost implication in line with the Agreement due for refund.

While waiting for your strict adherence to be taken over and termination on the site in request the submission of the estimated valuer report in order to conclude the termination process.

Accept our best regards.

Yours sincerely,

A.R. GIDADO ESQ.
FOR: M.S. DANTORO & ASSOCIATES

Though I have not seen any reply to that letter, it was followed apparently by another letter from the same Respondent's solicitors dated 31st March 2022 which is the letter upon which this ground of the preliminary objection is hinged. It is exhibited as "ZV1" to the counter affidavit in opposition to the originating motion. The letter is also hereunder reproduced in full,

31st March, 2022

ZEECREST VANTAGE LIMITED,
No. 5, Awande Close,
Off Ajesa Street,
Aminu Kano Crescent,
Wuse 2,
Abuja.

LETTER OF REVIEW/COMPASSIONATE EXTENSION OF TIME

RE: TAKING OVER OF PLOT NO. 2 CADASTRAL ZONE CO1 KARMO DISTRICT ABUJA

In line with the instruction of our client (land owner) and sequent to all effort and pleading by your company (Estate Developer) approaches in responds to our last letter dated 21st of March, 2022 TAKING OVER of site in line with

the Estate Development Agreement such as the content and context of your minutes of meeting and all the several stakeholders correspondence and undertaking to the effect that the life span of the Estate Development Agreement and Addendum thereto be further Extended to enable you complete project within the period of Two years additional time.

In view of the outcome of your **meeting dated 25th March, 2022 letter of commitment, non disclosure and funding guarantee,** all by stakeholders and authority concern. The Land Owner hereby accept and grant your request to extend the taking over and termination of Estate Development Agreement for 2 years (24 months) within which you are expected to complete and deliver up possession and hand over the property in habitable final condition as highlighted in project paragraph 2(a-e) in the Estate Development Agreement and Addendum herein to be executed strictly for the extension time.

However, the Land Owners shall not release his title document (C of O) for any mortgage and any further communication, consultation be made and directed to Alh. AminuSani Bello of Defcom Properties Limited, we hope by this final and last extension the project shall be completed as agreed as defaulter to this shall not be entitle to any compensation nor refund.

Accept our best regards.

A.R. GIDADO
For: M.S. DANTORO & ASSOCIATES

Now, following is yet another letter also exhibited in ***Exhibit 'F" Series***supporting the Originating Summons. It is dated 8th April 2022 and that letter reads;

8th April, 2022

ZEECREST VANTAGE LIMITED,
No. 5, Awande Close,

Off Ajesa Street,
Aminu Kano Crescent,
Wuse 2,
Abuja.

Sir,

RE: LETTER OF TAKING OVER OF PLOT NO. 2, CADASTRAL ZONE CO1, KARMO DISTRICT, ABUJA

We are solicitors to Col. Sani Bello (herein after referred to as "Our Client"), and under whose strong directive we write to you.
It's within your knowledge that the initially Estate Development Agreement Clauses and Addendum entered between you and Our Client has been terminated, due to non-compliance to the terms of the agreement. Also, a formal letter dated 21st of March, 2022 informing you of the Client's intention to take over the above plot number.

Although, series of meetings have been heard and possible way out suggested to keep contract sustained, but Our Client is not satisfied with the current wave of events with regards to the development at the plot.

On that ground we are writing to inform you that our Client has fully decided without much ado to reinstate his intention to TAKE OVER his land, and you are hereby estopped from entering the land or carry out further development as such act will amount to trespass.
We also request the submission of the estimated value report carried out on the plot, as we expect your kind cooperation and compliance.

Accept our warm regards.

Yours faithfully,

A.R. GIDADO ESQ
For: M.S Dantoro

Of some emphasis is the 4th paragraph where the writer prolifically stated as follows ***"on that ground we are writing to inform you that our client has***

fully decided without much ado to reinstate his intention to TAKE OVER his land, and you are hereby estopped from entering the land or carry out further development as such act will amount to trespass."

While the letter 31st March 2022 did on the face of it grant some concession, the letter of 8th April 2022 is a clear indication that the concession was withdrawn. Having unilaterally withdrawn the said concession, which was in any case given also unilaterally, it my view that the Respondent is clearly within his rights to bring this action with a view to activate the agreement of the parties and I so hold.

Having so held, all that remains is to add that the preliminary object fails on both grounds and same is hereby dismissed.

In responding to the Originating Summons the Defendant filed a 14 paragraphed affidavit deposed to by ChikeOwoh to which one Exhibit was attached and marked as ***Exhibit ZV1***. The process is dated 6th but filed on the 7th of December 2022. That is the Defendant's second salvo.

The case of the Claimant is already set out in the grounds above. In a nutshell however, the grouse of the Applicant is that he is the beneficial owner of Plot No. 2 Cadastral Zone CO1, Karmo District, Abuja. On the 21st of March 2018 the Claimant and the Defendant Company entered into an Estate Development agreement by which the Defendant shall develop the Claimant's land measuring 3.3 Hectares into ten (10) units of 4 -Bedroom semi-detached duplexes , Ten units of 5 bedroom detached duplexes sixteen units (16) of 3 bedroom semi-detached duplexes, twelve units of 4 bedroom terrace duplexes and forty units of 2-bedroom terrace duplexes totaling 88 units and one green area. It was agreed that the construction shall be completed within thirty-six months but that, the Defendant failed to carry out any reasonable development on the plot within the time scheduled. After pleas by the Defendant for extension of time, the Claimant acceded and by an addendum to the original estate development agreement dated 15th July 2021 an extension of six months was granted. It is the Claimant's case that despite the extension, the Defendant failed and was unable to complete the project.

Conversely, the Defendant on its part contends in summary that true to the contentions of the Claimant, there exists between parties an estate development agreement and also an addendum as submitted by the Claimant. It also maintains that the addendum was reached because the Defendant was

unable to meet up with the agreed date of completion. It is the contention of Defendant that aside the ₦120,000,000 paid to the claimant, over one billion naira has already been invested into the project and that, the defendant's sincere efforts to bring the project to completion was frustrated by rapid inflation and the cost of necessary building materials whose prices rose by more than 300%. It however averred that the claimant had accede to a further extension by 24 months as conveyed in the letter referenced as Exhibit ZV1. In all, I was urged to dismiss the application.

In the written address submitted by the claimant, a sole issue was formulated which was whether the claimant has made out a case deriving of a grant of the reliefs sought in this Originating Summons.

For the defendant, two issues were formulated which is whether the claimant can approbate and reprobate and whether this action is not premature.

I move to formulate and rather answer the question of whether there exists a valid contract between the parties and whether parties are not bound by same.

In ***MR. MBOSOWO A. EKPO v. GUARANTY TRUST BANK PLC & ANOR (2018) LPELR-46079(CA)*** a contract was defined as an agreement between two or more parties which creates reciprocal obligations to do or not to do a particular thing. Thus, for a valid contract to be formed, there must be mutuality of purpose and intention. In other words, the two or more minds must meet at the same point, event, or incident. In others words, They must be saying the same thing at the same time. See also ***ORIENT BANK (NIG) PLC V BILANTE INTERNATIONAL LTD (1997) 8 NWLR***. Flowing from the above it is not disputed by the parties that a contract exists between them as in addition to the cases cited above, the existence of a valid contract was not in contention.This much was admitted in the counter affidavit of the Defendant when it was averred that the Defendants has an Estate Development Contact with the Claimant (Paragraph 3) and further that there is an addendum to that original contract (see paragraph 4 of the counter affidavit). It is the law that whatever fact is admitted needs no further proof, such fact is deemed established. Any admitted facts, or fact not disputed or not specifically denied, need no further proof and will be deemed established. see***MR. MBOSOWO A. EKPO v. GUARANTY TRUST BANK PLC & ANOR (2018) LPELR-46079(CA)***. On this note I find and hold that a valid contract existed between the parties in this case.

This now clears the way for me to look at both documents with the view to decipher the real intention of the parties. On this there are further facts that were admitted and agreed between the parties firstly being the duration of the contract. The duration was for Thirty-Six Months. This is contained in the clause of ***Exhibit "C"*** headed ***"DURATION/ DELAY/ TERMINATION"***and it reads;

> ***"The duration of the project shall be (36) Thirty-Six Months certain commencing from the date of execution of this agreement."***

This fact was alluded to in the affidavit in support of the Originating Summons (paragraph 10) and admitted again in Paragraph 5 of the Counter Affidavit there ChikeOwoh averred that***; "the agreement was revised because the defendant did not meet up with the agreed date of completion"***. So it is apparent again that both parties are ad idem on the fact that the project was not completed as scheduled.

This now led parties to draft an addendum to the original contract. The addendum modified to some extent the original agreement by modifying the Duration/delay/termination clause when parties agreed that;

> ***"the completion and delivering of the project with all the infrastructure, fittings etc. as contained in the agreement and deliverables as enumerated on the deliverable sheet attached to the agreement shall be within (6) six months commencing from the date of signing of this addendum to the agreement."***

The addendum is dated 13th July 2021. It is not in contention that the Defendant was unable to meet up with this revised timeline so, a series of letters followed as contained in ***Exhibit "F" Series***where the Claimant on the 21st of March 2022 wrote to the Defendant taking over the land in keeping with the agreement of parties. From the deposition of parties and going by the letters that followed also, meetings and negotiations were held and the letter of 31st March was written i.e. ***Exhibit "ZV1"***. I had made good reference to that letter in my determination of the preliminary objection and also the letter that followed i.e., the letter of 8th April 2022. I have made known the mind of this court clearly on both letters when I made my determination of the preliminary objection to the effect that if at all an extension was granted by the letter of 21st march 2022, that extension was withdrawn by the letter of

8th April 2022 and that of 4th august 2022 that followed . These letters in ***Exhibit "F"*** series makes it abundantly clear that the Claimant was no longer interested in extending the time for the execution of the project as the express desire of the Claimant was, going by those letters to activate the **PENALTY FOR DEFAULT** clause which provides as follows;

> ***"that where the developer has failed to complete the project and deliver same in (6) months from the date of signing this agreement, (Completion meaning that all the units must be in habitable state with complete finishing works, deliverables as enumerated and attached to the said agreement with all infrastructure and external works in place); the landowner shall automatically takeover the project without any recourse to the developer."***

The law is trite regarding the bindingness of terms of agreement on the parties who made it. Where parties enter into an agreement in writing, they are bound by the terms thereof- ***EMMANUEL OLAMIDE LARMIE v. DATA PROCESSING MAINTENANCE & SERVICES LTD (2005) LPELR-1756(SC)***. This Court, and indeed all other courts have the mandate to enforce agreement freely entered into by parties and as such, I do not see any reason at this time why the terms of the Estate Development Agreement and the addendum thereto should not be enforced. While the Defendant has tried to obviate the terms of the agreement by relying on the letter of 21st March 2022, I have already held in my determination of the preliminary objection that that view cannot hold water following the letter of 8th April 2033 that followed and I so hold.

One more thing and I will be done. Claimant in his opening argument urged me to discountenance the processes filed by the learned counsel for the Defendant on the grounds that he did not file a Memorandum of Appearance.

Order 9 of the Rules of this court makes provision for the entering of appearance by filing a Memorandum of Appearance. The position of the law is that the Memorandum of Appearance is simply to indicate that the suit will be contested. If, therefore, the Defendant fails to enter an appearance, the suit will be treated as undefended and the Claimant may proceed to ask for judgment to be entered in his favour or for the case to be set down for hearing: see: ***BRITISH AMERICAN INSURANCE CO LTD. V. EDEMA-***

SILLO (1993) 2 NWLR (PT.277) 567; and ***ITA V. NYONG (1994) 1 NWLR (PT. 318) 56***.

In the instant case, the Defendant did not file a memorandum of appearance. But the defendant took active part in the proceeding before this Court, being fully represented by Counsel. In other words, the defendant had 'appeared'. By his appearance, the Claimant and indeed the Court had been notified that the suit would be contested. Counsel filed processes which was responded to by the Claimant and the Claimant at that time raised no objection to this when the Defendant had not formally entered appearance pursuant to the Rules of Court.

The current position of the law is to downplay technicalities, and this position cannot be overstated. In my considered opinion, where a party has appeared in person or through Counsel, the spirit and purpose of the Rule is met. There is indication that the suit will be contested. The Claimant and this trial Court are not left in doubt of the fact that the suit would be contested. Discarding the process filed by counsel would mean that it is undefended. A suit cannot be treated as undefended when a party has appeared in the matter and has been heard by the Court, simply because he has been tardy in filing a Memorandum of Appearance. Non-filing of the Memorandum of Appearance in this circumstance cannot vitiate the processes filed by the learned counsel for the Defendant and I so hold. See ***IGWE LINUS NWOBODO v. M. O. NYIAM & ASSOCIATES*.**

That having been said and in the final analysis, I find that parties are bound by the terms of their agreement and accordingly,

1. An order is hereby made for the recovery of possession of Plot No.2 Cadastral Zone CO1, Karmo Distract, Abuja FCT covered by Certificate of Occupancy No. 51EUW-B7E9Z-507CR-DADEU-10, dated 13th October 2006, by the Claimant.
2. In fidelity with the agreement of Parties, **I HEREBY ORDER** that the Claimant and Respondent shall within fourteen (14) days from the date of takeover by the landowner , appoint one expert each to value the work done on the property in order to ascertain the valuation of compensation to be paid to the developer by the land owner.
3. Cost of the action is assessed at ₦500,000:00 (five Hundred thousand naira) in favour of the Claimant.

ELEOJO ENENCHE
7/02/2023
JUDGE

COUNSEL

FOR CLAIMANT :
A.A. Malik SAN with G.M. Ishom, O. Ehanah,A.I. Badamasi, U.O.Umeano(Ms), O.R. Iyere and Edward Ajabe

FOR DEFENDANT:
ChuksUdo-Kalu