

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT JABI, ABUJA**

THIS MONDAY, THE 26TH DAY OF JUNE, 2023.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CV/2529/2021

BETWEEN:

ADELEKE ONI

(SUING THROUGH HIS ATTORNEY,
ISAH OKWONU)

}

.....CLAIMANT

AND

IHS NIGERIA LIMITED DEFENDANT

JUDGMENT

By a Writ of Summons and Statement of Claim dated 30th September, 2021 and filed some date at the Courts, Registry, the Claimant prayed for the following Reliefs:

- i. A DECLARATION that the Clamant is the true, lawful, bonafide and beneficial owner of a parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT.**
- ii. A DECLARATION that the Defendant is in the acts of multiple trespass to the Claimant's parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT, by its unlawful entry and remaining in the occupation and continuous use of the Claimant's parcel of land, since October, 2016, till date.**

- iii. **AN ORDER** directing the Defendant to immediately cease any further acts of trespass on the Claimant's parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT.
- iv. **AN ORDER OF PERPETUAL INJUNCTION** restraining the Defendant or its agent(s), assign(s), privies, successor-in-title and/or whosoever acting for and/or on its behalf, from committing any further acts of trespass on the Claimant's parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT.
- v. **AN ORDER** warding the sum of Sixty-Five Million Naira (N65,000,000) only, as general damages against the Defendant for its multiple acts of trespass to the Claimant's parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT.
- vi. **AN ORDER** awarding interest of five percent (5%) per day accruable on the judgment sum from the day judgment is delivered until the entire judgment sum is entirely liquidated."

The Defendant filed a Statement of Defence dated 4th January, 2022 and also filed same date and set up a counter-claim against Claimant as follows:

- a) **A Declaration that the Claimant and his successors in title are bound by the deed of assignment executed on the 12th day of January 2018 between Mr. Isah Okwonu and the Defendant.**
- b) **A Declaration that the Defendant is entitled to the residual interest/ownership and use of the subject matter of this suit, measuring 15 Metres X 15 Metes, specifically located at Lat 09.15583 and Long 007.31474, within Plot No. A179, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja FCT.**
- c) **A Declaration that the Claimant and his successors in title are estopped from rescinding the sale of the subject matter of this suit, measuring 15 Metres X 15 Metres, specifically located at Lat 09.15583 and Long**

007.31474, within Plot No. A179, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, F.C.T.

- d) A Declaration that the Claims of the Claimant are fraudulent, an abuse of Court process, frivolous and on a voyage of patronage.
- e) An Order of Court awarding exemplary and general damages of N10,000,000.00 (Ten Million Naira Only), in favour of the Defendant/Counterclaimant against the Claimant, for the fraudulent attempt at rescinding the sale of the subject matter and deliberately abuse the processes of court.
- f) An Order of court directing the Claimant, to pay 10% interest per annum on the exemplary and general damages of N10,000,000.00(Ten Million Naira Only).
- g) The cost of this suit.”

In Response, the Claimant filed a Reply to the defence and defence to the counter-claim dated 19th January, 2022 and filed also on the same date.

Hearing then commenced. In proof of his case, the Claimant called only one witness, Isah Okwonu, the attorney of Claimant who testified as PW1. He deposed to a witness statement on oath dated 30th September, 2021 which he adopted at the hearing and tendered in evidence the following documents:

1. Conveyance of Provisional Approval in respect of Plot A179 of about 550 Square meters at Kubwa II Annex (Gbazango West) Layout by Bwari Area Council in the name of Adeleke Oni dated 6th February, 2004 was admitted in evidence as **Exhibit P1**.
2. Regularisation of land titles and documents of FCT Area Councils acknowledgment dated 8th March, 2016 was admitted as **Exhibit P2**.
3. Copy of payment receipt for recertification issued by AGIS in the sum of N5,000 was admitted as **Exhibit P3**.
4. Irrevocable Power of attorney between Adeleke Oni (Donor) and Isah Okwonu (Donee) dated 25th May, 2006 was admitted in evidence as **Exhibit P4**.

5. Four copies of Digital photographs together with the certificate of compliance were admitted as **Exhibits P5(1)-(4)**.

The PW1 was then cross examined by counsel to the Defendant and with his evidence the Claimant closed his case.

The Defendant on its part also called only one witness. Usaini Usman, Regional legal counsel of Defendant testified as DW1.

He deposed to a witness statement dated 14th January, 2022 which he adopted at the hearing. He tendered in evidence the following documents:

- 1) Purchase Receipt issued by one Isah Okwonu dated 12th January, 2017 was admitted as **Exhibit D1**.
- 2) Deed of Assignment between Isha Okwonu (Assignor) and HIS Nigeria Ltd (Assignee) dated 12th January, 2017 was admitted as **Exhibit D2**.
- 3) Certified True Copy (C.T.C) of Record of Proceedings in Appeal No: CA/ABJ/CV/228/2022 between **HIS Nig LTD (Appellant) V. Isah Okwonu, Tony Field and Tommy (Respondents)** was admitted as **Exhibit D3**.

DW1 was then cross examined by counsel to the Claimant and with his evidence, the Defendant then closed its case.

At the close of evidence, parties filed and exchanged final written addresses. The final address of Defendant is dated 21st June, 2022 and filed on 18th August, 2022. In the address, three issues were raised as arising for determination, with the 1st issue categorised as a preliminary issue. The issues are as follows:

1. **Whether the suit is competent upon the failure of the Claimant to establish his existence and identity.**
2. **Whether the Claimant is entitled to the Reliefs sought and**
3. **Whether the Defendant is not entitled to the Reliefs claimed.**

The Claimant in his address adopted the issues as identified by Defendant above and proffered arguments and or submissions on same.

I have given a careful and insightful consideration to the issues as distilled by parties. On the pleadings which defines or streamlines the issues and facts in

dispute, the key fundamental issue is whether the Claimant through his attorney transferred interest over a part of **Plot No. A179** situate at Kubwa II Annex (Gbazango West) to the Defendant.

The question of identity of Claimant and whether he is a businessman residing in Ibadan as pleaded in paragraph 1 is largely peripheral and has nothing to do with the dispute. On the pleadings and evidence, the case of Claimant is that he is the owner of the Plot No. A179 and appointed Isah Okwonu, PW1 as his attorney vide an irrevocable power of attorney tendered as **Exhibit P4** in evidence. On the other side of the aisle, the Defendant's case again on the pleadings and is that this same attorney, PW1 held himself out as owner, successor in title to one Adeleke Oni and using the irrevocable power of attorney granted by the said Adeleke Oni vide **Exhibit P4** sold a part of Plot A179 to them.

It is therefore clear that the question of identity of Claimant raised as a preliminary issue by Defendant; on the basis of the pleadings and evidence does not define the critical issue in dispute in this case at all in the sense that they do not go to the substance of the matter calling for a decision. No party is at liberty to expand the remit of any grievance beyond the real and critical issues streamlined on the pleadings. The primary function of pleadings it must be underscored is to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. The pleadings is therefore designed to bring the parties to an issue which the court will adjudicate between them. See **Kyari V. Alkali (2001)11 NWLR (pt724)412 at 433-434 H-A**

In the circumstances, **Issue 1** described as preliminary issue clearly is a non-issue and its premise cannot really be situated within the real issues in dispute and accordingly it shall be discountenanced.

The key claim or contested issue is the ownership of **Plot A179**. The Claimant claims ownership of the entire plot while Defendant contends that a part of it was sold to them by the attorney of Claimant which he denied. The Claimant through his attorney seeks a pronouncement affirming his ownership of the entire plot No. A179 while within the same factual construct, the Defendant has situated its counter-claim seeking a pronouncement on the validity of the sale of part of **plot A179**.

All these contested issues are a direct function of whether the parties have succeeded in discharging the burden of proof placed on them by law in proof of these contending assertions within the required legal threshold.

Flowing from the above, there is thus **a claim** by plaintiff and **counter-claim** by the defendant. It is trite law that for all intents and purposes, a counter claim is a separate, independent and distinct action and the counter claimant like the plaintiff in an action, must prove his case against the person counter claimed before obtaining judgment. See **Jeric Nig. Ltd V Union Bank (2007) 7 WRN 1 at 18; Shettimari V Nwokoye (1991) 9 NWLR (pt.213) 66 at 71.**

In view of this settled state of the law, both the Plaintiff and Defendant/Counter-Claimant have the burden of proving their claim and counter-claim respectively. This being so, the issues **ordinarily** and **logically** that should arise for determination in this case flowing from the pleadings which has defined the issues in dispute are as follows:

- 1. Whether the Claimant has established on a preponderance of evidence that he is entitled to all or any of the Reliefs claimed and**
- 2. Whether the Defendant/Counter-claimant has equally established on a preponderance of evidence his entitlement to any or all of the Relief claimed?**

I used the phrase “**ordinarily**” because this case presents or has peculiar jurisdictional challenges which may ultimately prevent the resolution of this case on the basis of the above issues flowing from the pleadings.

It is therefore critical as a fundamental preliminary point that the point is addressed.

Now from the pleadings of parties, it would appear that aspects of this case, if not the entire case was subject of a court action and judgment of a court of coordinate jurisdiction and which is now subject of a pending appeal at the Superior Court of Appeal. The Record of Appeal in the case was admitted as **Exhibit D3**. I will refer to it in some detail in the course of this Judgment.

Parties in this case no doubt are fully aware of this case, even if the implication and how it impacts the case may not be fully appreciated. Now in paragraphs 23-26 of

the Defendant counter-claim against the Plaintiff in this case, they pleaded as follows:

- 23. The Defendant/Counter-claimant avers that the Claimant case is an abuse of court process, having instituted Suit No: FCT/HC/CV/583/2018 against the Defendant, seeking inter alia, the same reliefs as in this case, for trespass.**
- 24. That judgment in the said Suit No: FCT/HC/CV/583/2018 was delivered dismissing the suit of Mr. Isah Okwonu therein but the counter-claim of the Defendant was not considered, hence an appeal against the said judgment is currently pending before the Court of Appeal. Defendant hereby pleads and shall rely on the appeal processes.**
- 25. That the instant suit is an abuse of the processes of court, having been filed while the live issues between the parties are pending at the Court of Appeal.**
- 26. The Defendant/Counter-claimant avers that instant suit is fraudulent, frivolous, vexatious, baseless, on a voyage of patronage and an abuse of court process, and same should be refused with very exemplary costs.”**

The above paragraphs clearly in succinct terms projects the potential challenges the said case on appeal poses to the present action. The counter-claimant also contends that the case of Plaintiff constitutes an abuse of process and also situates these challenges.

In response to the above, the Claimant in his reply to the statement of defence and defence to the counter-claim joined issues with the Defendant and pleaded as follows:

- 14. The Claimant/Defendant to Counter-claim avers, in more specific denial of paragraph 22 of the Counter-claim, that the Claimant in the instant case has never instituted any case nor has he ever been designated as a Claimant in any other case in respect of the same subject matter of this Suit against the Defendant, before and after the commencement of this suit.**

15. **The Claimant/Defendant to Counter-claim avers that the claimant in Suit No: FCT/HC/CV/583/2018 is totally different from the Claimant in the instant case.**
16. **The Claimant/Defendant to Counter-claim denies paragraph 24 of the Counter-claim in its entirety and shall put the Defendant/Counter-claimant to the strictest proof of same at the hearing of this Suit.**
17. **The Claimant/Defendant to Counter-Claim avers that the case in Suit No: FCT/HC/CV/583/2018 was not dismissed but struck. The Certified True Copy (CTC) of the decision of the High Court of the Federal Capital Territory, Abuja, Coram: Honourable Justice Babangida Hassan, in Suit No: FCT/HC/CV/583/2018, is hereby pleaded.**
18. **The Claimant/Defendant to Counter-claim denies paragraph 25 of the Counter-claim in its entirety and shall put the Defendant/Counter-claimant to the strictest proof of same at the hearing of this Suit.**
19. **The Claimant/Defendant to Counter-Claim avers that there is no Appeal pending anywhere between the parties in the instant case.**

The above defence is again clear and calls or puts into question the remit of the case now on appeal. As stated earlier, the entire Records of Appeal of the case was admitted as **Exhibit D3**.

We must therefore take our bearing from the record and situate its remit or clear parameters. In doing so, the point must be made clear, that this court is not a Court of Appeal and it will thus be overtly presumptuous and wrong to assume that this court is looking into the merit or propriety of what occurred in the said case. I have no such jurisdictional powers or mandate. That is a job exclusively for the law lords at the Superior Court of Appeal. Reference to the record is been done here to situate the nexus, if any, with the present action and determining whether the subject matter forming the cause of action in both the claim and the counter-claimant have already been heard and or determined by a court of coordinate jurisdiction. No more.

Now by **Exhibit D3** vide pages 14-15 of the Record, the attorney in this case, Isah Okwonu in FCT/HC/CV/583/2018 sued for himself as Claimant and prayed for the following Reliefs against the present Defendant (who was 1st Defendant in the case and two others) as follows:

- (i) A DECLARATION that the Claimant is the true, lawful, bonafide and beneficial owner of a parcel of land known and situate at Plot No: A179, Annex III, Gbazango West, behind new market (red bricks) measuring an area of 15 meters X 15 meters, with Lat: 09.15583 and Long: 007.31474, Kubwa, Abuja, FCT.
- (ii) A DECLARATION that the 1st Defendant is in breach of the Land Sale Agreement executed on the 24th day of October, 2016, between its agent, the 2nd Defendant, and the Claimant, by its neglect, failure and/or refusal to pay the balance sum of One Million Naira (N1, 000, 000) only, on or before the deadline of 3rd day of July, 2018.
- (iii) A DECLARATION that the Land Sale Agreement executed on the 24th day of October, 2016, between the Claimant and the 2nd Defendant, is null, void and of no effect whatsoever.
- (iv) A DECLARATION that the 1st Defendant is in the acts of multiple trespass by remaining in the occupation and use of the Claimant's parcel of land.
- (v) AN ORDER directing the 1st Defendant to cease any further act(s) of trespass on the Claimant's parcel of land known and situate at Plot No: A179, Annex III, Gbazango West, behind new market (red bricks) measuring an area of 15 meters X 15 meters, with Lat: 09.15583 and Long: 007.34147, Kubwa, FCT, and vacate same forthwith.
- (vi) AN ORDER OF PERPETUAL INJUNCTIONA restraining the 1st Defendant, its agent(s), assign(s), privies, successors-in-title and/or whosoever acting for and/or on its behalf, from committing any further act(s) of trespass on the Claimant's parcel of land.
- (vii) AN ORDER ejecting or evicting the 1st Defendant from the Claimant's parcel of land known and situate at Plot No: A179, Annex III, Gbazango West, behind new market (red bricks) measuring an area of 15 meters X 15 meters, with Lat: 09.15583 and Long: 007.34147, Kubwa, FCT.
- (viii) A DECLARATION that the 1st and 2nd Defendants are jointly and severally liable for the criminal acts of conspiracy and fraud.

(ix) Sixty Five Million Naira (N65, 000, 000) only, as general, aggravated and punitive damages for the 1st Defendant's multiple act(s) of trespass on the Claimant's parcel of land.

(x) Interest of ten percent (10%) per annum on the entire judgment sum from the day judgment is delivered until the judgment sum is entirely liquidated.

Let me state that in the above case, the name of the 3rd Defendant was subsequently struck out at page 515 of the record while the 2nd Defendant did not appear or contest the case. The case essentially was a contest between the same parties as in the extant case; the only difference been the designation of the Claimant which is different in the two cases.

I won't say much on these Reliefs above but it is obvious and I say this advisedly that the case presented by the Claimant in the earlier case situates essentially critical elements of the case before me. The only difference as stated earlier is that in the earlier case Isah Okwonu sued for himself as attorney of Adeleke Oni but in the case before me, Adeleke Oni is suing through Isah Okwonu, his attorney.

The 1st Defendant in **CV/583/18** (and Defendant in the case before me) filed a 1st Defendant's further Amended Statement of defence and set up a counter-claim against claimant at **page 343 of the record** as follows:

- a. A declaration that 1st Defendant/Counter-claimant is entitled to the ownership and use of the plot subject matter of this suit, measuring 15 meters X 15 meters specifically located at Lat 09.15583 and Long 007.31474, via the deed of assignment executed on the 12th day of January, 2018.**
- b. A declaration that he claims of the Claimant are fraudulent, frivolous, vexatious, baseless and on a voyage of patronage, having been paid in full, the agreed price for the land subject matter of this suit by the 2nd defendant.**
- c. An Order of court awarding exemplary and general damages of N10, 000, 000.00 (Ten Million Naira only) in favour of the 1st defendant/counter-claimant against the Claimant, for the embarrassment, economic loss, attempt to smear the 1st Defendant's image, dent her goodwill and deliberately abuse the processes of court.**

d. An Order of court directing the Claimant, to pay 10% interest per annum on the exemplary and general damages of N10, 000, 000.00 (Ten Million naira) from the date of judgment until liquidation.

e. The cost of this suit.

The above claims of the 1st Defendant (now the Defendant in this case) is again clear and unambiguous. The central dispute streamlined above relates to the sale and ownership of plot No. A179 or a part of it by Claimant and his attorney which is equally the fundamental pivot or crux of the dispute in the extant case before me.

It is also important to state that the dispute or case was essentially fought between the same parties in both cases and on the bases of similar facts. The only difference as stated earlier is that the attorney sued in his name and as lawful attorney of Adeleke Oni but in the case before me, the original allottee Adeleke Oni is suing through the same attorney.

The case CV/483/18 was fully ventilated before my learned brother **Justice Babangida Hassan** vide pages 495-520 of the record where both Plaintiff and Defendant/counter-claimant led evidence in proof of their respective claims and adopted their final written addresses.

The **Judgment** in the action delivered on 20th September, 2021 can be found on pages 521-558 of the record and the learned trial judge referred to the claim and counter-claim in his Judgment. The court in the judgment finally struck out the action due to the Plaintiff's lack of locus standi.

The **Appellant** and **Defendant in the case before me** was dissatisfied with the decision and appealed. The grounds of appeal at **pages 559-561** and the Reliefs sought are as follows:

GROUND 1

The learned trial Judge erred in law when he failed in his duty to determine the Counter-claim of the Appellant at the trial court.

PARTICULARS OF ERROR

- i. The Law is trite that a Counter-Claim, for all intent and purposes is a distinct action from that of the substantive suit. A trial court confronted with both main and counterclaims must give separate**

judgment on each of the claims as each of such claim is independent of one another, see *Oroja V Adeniyi* (2017) LPELR-41982 (SC).

- ii. The Appellant filed a Further Amended Statement of Defence/Counter Claim dated 17th June 2021 which was not found to be incompetent by the trial court.
- iii. That the learned trial court in his Judgment failed to determine, the Counter Claim of the Appellant, thereby occasioning a miscarriage of justice.
- iv. It is settled law that the trial court has a duty to consider and make pronouncements on a counterclaim same being an independent claim and the fate of a counterclaim does not depend on the outcome of the substantive claim, a counterclaim may still proceed even if the substantive action has been struck out, withdrawn and/or dismissed. See *Eguma V Edem* (2016) LPELR-41240 (CA).

GROUND 2

The learned trial Judge in law when upon conclusion of evidence he merely struck out Suit No: CV/583/2018 instead of ordering a dismissal thereof.

PARTICULARS OF ERROR

- i. The Appellant and the 1st Respondent upon joining issues vide their respective pleadings went further to give evidence in support of their claims at the trial court.
- ii. The trial court commenced and concluded trial in SUIT NO: CV/583/2018.
- iii. The trial court at the determination of the 1st Respondent's suit on the merit, struck out his claim as opposed to dismissing same.
- iv. It is well settled law, as held in *Odun V Chinwo* (1978) 6-7 SC 251 and *EFETI ROROJE & ORS V. OKPALEFE II & ORS* (1991) LPELR-1024 (SC), (P.22, paras. A-B), that where a Plaintiff has failed to prove his claim against the Defendant, after trial on the merits the court is entitled to dismiss the action.

GROUND 3

The learned trial Judge erred in law when he failed to determine all issues as raised by the Appellant.

PARTICULARS OF ERROR

- i. The law is trite that a Court is meant to determine all issues raised by parties to the said suit.
- ii. The Appellant raised several weighty issues of law for the learned trial court to determine, vide its Final Written Address, but the learned trial court neglected and/or failed to determine those issues.

GROUND 4

The decision of the learned trial court was against the weight of evidence before it.

RELIEFS SOUGHT

- a. An Order of this Honourable Court allowing this appeal and setting aside the judgment of the trial court delivered on the 20th day of September 2021.
- b. An Order of court granting the Appellant's Counterclaims in Suit No: FCT/HC/CV/583/2018.

The above grounds of appeal and the Reliefs sought are clear.

Ground 1 is a clear challenge on the alleged failure of the learned trial judge to determine the counter claim of the Defendant being an independent and distinct course of action and having heard the evidence of parties. **Grounds 2 and 3** accentuated the complaint in ground one on the alleged failure of the learned trial judge to determine all issues presented before him and the propriety of the order striking out the Plaintiff's case instead of dismissing it. **Ground 4** of the Notice is simply that the Judgment is against the weight of evidence.

In the Reliefs sought, the Appellant (defendant in this case) prayed for the Judgment of 20th September, 2021 to be **set aside** and the **Counter-claims in the suit be granted**.

As stated earlier, this Appeal as indicated by the Appellant (Defendant in the case before me) is still pending. It is logical to hold that if the appeal is still pending and the Defendant wants the counter-claim relating to the ownership of the disputed plot No. A179 to be granted by the Court of Appeal, then it would really be an exercise in futility to pray for essentially the same Reliefs relating to the ownership of the same plot A179 in this court when the same issue is subject of appeal at the Court of Appeal.

I had earlier reproduced the counter-claim in the case before me and the counter-claim in suit CV/583/2018. At the risk of prolixity, despite the expansion of the Reliefs in the case before me, the critical subject matter of the case on which all other reliefs in the two counter-claims are predicated is the ownership of the same disputed plot. At the risk of prolixity, in the counter-claim of Defendant in CV/583/2018, they claimed the following Reliefs as follows:

- (a) A declaration that 1st Defendant counter-claim is entitled to the ownership and use of the plot subject matter of this suit measuring is meters x is meters, specifically located at Lat 09.15580 and long 007.31474 via the deed of assignment executed on the 12th day of January, 2018.**
- (b) A declaration that he claims of the Claimant are fraudulent, frivolous, vexatious, baseless and on a voyage of patronage, having been paid in full, the agreed price for the land subject matter of this suit by the 2nd defendant.**
- (c) An Order of court awarding exemplary and general damages of N10, 000, 000.00 (Ten Million Naira only) in favour of the 1st defendant/counter-claimant against the Claimant, for the embarrassment, economic loss, attempt to smear the 1st Defendant's image, dent her goodwill and deliberately abuse the processes of court.**
- (d) An Order of court directing the Claimant, to pay 10% interest per annum on the exemplary and general damages of N10, 000, 000.00 (Ten Million naira) from the date of judgment until liquidation.**
- (e) The cost of this suit.**

In the case before me in CV/234/2022 the Defendant essentially make the same claims but framed differently as follows:

- a) **A Declaration that the Claimant and his successors in title are bound by the deed of assignment executed on the 12th day of January 2018 between Mr. Isah Okwonu and the Defendant.**
- b) **A Declaration that the Defendant is entitled to the residual interest/ownership and use of the subject matter of this suit, measuring 15 Metres X 15 Metres, specifically located at Lat 09.15583 and Long 007.31474, within Plot No. A179, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja FCT.**
- c) **A Declaration that the Claimant and his successors in title are estopped from rescinding the sale of the subject matter of this suit, measuring 15 Metres X 15 Metres, specifically located at Lat 09.15583 and Long 007.31474, within Plot No. A179, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, F.C.T.**
- d) **A Declaration that the Claims of the Claimant are fraudulent, an abuse of Court process, frivolous and on a voyage of patronage.**
- e) **An Order of Court awarding exemplary and general damages of N10,000,000.00 (Ten Million Naira Only), in favour of the Defendant/Counterclaimant against the Claimant, for the fraudulent attempt at rescinding the sale of the subject matter and deliberately abuse the processes of court.**
- f) **An Order of court directing the Claimant, to pay 10% interest per annum on the exemplary and general damages of N10,000,000.00(Ten Million Naira Only).**

It is clear that despite the subtle and not so subtle changes, the above counter-claim projects the same case or complaint now pending on appeal and therefore an attempt by counter-claimant to essentially relitigate the same issues adjudicated upon by a competent court but which they contend no decision was given which is the basis of the appeal. Indeed the **Defendant wants the counter-claim to be granted on appeal**. I cannot really see my way through how the subtle changes in the Reliefs sought in the extant case and the fragmentation of the Reliefs to give some semblance of propriety changes the character or the remit of the complaint in both cases. They are the same in substance. If this court were to be lured into

making pronouncements on the Reliefs sought in the present action, there is really no doubt that the court will be unwittingly sitting as a Court of Appeal and making pronouncement which may conflict with the decision of the Superior Court of Appeal which is pending. If the court for example grants the Reliefs sought in the Counter-Claim and the Court of Appeal find that the appeal on the grant of the counter-claim fails, the confusion that will engender can only be imagined.

On the other hand, If the appeal succeeds, it means there will now be orders from two courts on the same cause of action, one from a superior court and the other, an inferior court. That situation cannot be acceptable or tolerated. Cases like the extant counter-claim only creates confusion and makes a parody or mockery of the courts, the judicial process and/or the administration of justice.

On the whole, it is clear that the subject matter and Reliefs sought in the extant counter-claim is subject of a pending appeal vide **Exhibit D3**. This court must be circumspect and necessarily defer to the Court of Appeal.

This court accordingly will decline to revisit the issues dealt with by my learned brother in CV/583/18 and now subject of pending appeal at the Court of Appeal. **Issue (2)** raised clearly as demonstrated at length cannot be enquired into and the proper order will be to strike out the counter-claim.

Now we are left with issue 1 relating to the substantive action. From the notice of appeal earlier highlighted, it appears clear that the Appellant did not challenge the correctness or otherwise of the decision of the learned trial judge that the Plaintiff had no locus standi. The complaint with respect to the decision as discerned from Ground (2) relates to the appropriate orders that ought to have been made by the trial judge to wit: whether to strike out or dismiss the case. The trial judge struck out the case while the Appellant contends that the order to be made is that of dismissal.

In the said decision of the court at page 558 of the Record, the court situated the reason for finding that the Plaintiff had no locus standi in the following terms:

“In the instant case, the Claimant in his writ indicated that “Isah Okwonu (suing as his true and lawful attorney of Adeleke Oni) while it should have been Adeleke Oni (suing through his attorney Isah Okwonu).”

It is obvious that following the above decision, the Plaintiff now instituted this action and on terms as indicated earlier on. In this case, there is no challenge to the standing of the Plaintiff to institute this action. There is equally nothing pending

on appeal that directly impacts this case in a negative sense in terms of presenting a feature preventing the court from exercising jurisdiction to determine question posed by the first issue raised. I really cannot situate any abuse of process in the circumstances.

The point must be made clear that a power of attorney donated by Adeleke Oni to Isah Okwonu and tendered as **Exhibit P4** is not an instrument that transfers or alienates any landed property. While it is conceded that it is often erroneously used or utilised as such, it is merely an instrument delegating powers to the Donee to stand in position of the Donor and to do the things he could do. I cannot put it any better than to quote, *Ipsissima verba*, the useful words of Pats Acholonu (JCA) (as he then was and of blessed memory) in **Ndukauba v. Kolomo (2001) 12 N.W.L.R. (pt 726) 117 at 127 par F.G**, where he stated as follows:

“It is erroneously believed in not very enlightened circles particularly amongst the generality of Nigerians that a Power of Attorney is as good as a lease or an assignment. It is not whether or not coupled with an interest. It may eventually lead to execution of an instrument for the complete alienation of land after the consent of the requisite authority has been obtained.”

In the same vein, let me add that even before the pronouncement above, the Supreme Court in **Ude V. Nwara (1993)2 N.W.L.R (pt.278)638 at 644** instructively stated as follows:

“A power of attorney merely warrants and authorizes the donee to do certain acts instead of the donor and so it is not an instrument which confers, transfers, limits charges or alienates any title to the donee, rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party. So even if it authorises the donee to do any of these acts to any person including himself, the mere issuance of such a power is not per se an alienation or parting with possession. So far as it is categorized as a document of delegation, it is only after, by virtue of the Power of Attorney, the donee leases or conveys the property, the subject of the power, to any person including himself that there is alienation.”

Similarly in **Ezeigwe V Awudu (2008) 11 NWLR (pt.1097) 158**, the Supreme Court per Onnoghen JSC (as he then was) stated as follows:

“Even if Exhibit A could be relied upon, it does not deprive the respondent of her title to the property; the document being nothing other than an irrevocable Power of Attorney – not a conveyance. In fact Exhibit “A” being an irrevocable Power of Attorney allegedly donated by the Respondent to the Appellant is a clear evidence or confirmation of the fact that title to the land in dispute resides in the Respondent, the donor of that power. The only document that could have proved any passing of that title to the Appellant would have been a conveyance or an assignment, none of which was said to have existed nor tendered in evidence in the case.”

The power of attorney here clearly only authorizes the donee to carry certain acts on behalf of the donor and is not an instrument of transfer of title.

Having defined the legal import of the Power of Attorney at the earliest opportunity, we now evaluate the evidence to situate whether the Claimant has led credible evidence in proof of his claims. While the Court will not be making any direct pronouncements on the Reliefs sought in the Counter-Claim, it is nonetheless clear that the defence and counter-claim projects the entirety of the defence of Counter-Claimant and to do justice to its defence, the processes they filed must necessarily be wholly considered. That appears to be a fair way to deal with the case of Claimant and the defence projected by the defendant.

Now in this case, the Claimant filed an eleven (11) paragraphs statement of claim and a twenty one (21) paragraphs Reply to defence and defence to counter-claim which forms part of the Record of Court. The evidence of his attorney and sole witness is largely within the structure of the claim and Reply and defence to the Courter-Claim of Defendant.

The Defendant on its part filed a twenty seven (27) paragraphs Statement of Defence and Counter-Claim which also forms part of the Record of Court. The evidence of their sole witness is similarly largely within the body of facts averred in their pleadings.

I shall in the course of this Judgment refer to specific paragraphs of the pleadings, where necessary, to underscore any relevant point. Indeed in this judgment I will deliberately and in extenso refer to the above pleadings of parties as it has clearly streamlined or delineated the issues subject of the extant inquiry. The importance of parties' pleadings need not be over-emphasised because the attention of court as well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings and ultimately the quality and probative value of the evidence led in support.

Before going into the merits, let me state some relevant principles that will guide our evaluation of evidence. It is settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See **Section 131(1) Evidence Act**. By the provision of **Section 132 Evidence Act**, 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, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations.

1. The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;

2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act**. It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

Being a matter involving disputation as to title to land, it is also important to situate the **five independent** ways of proving title to land as expounded by the Supreme Court in **Idundun V Okumagba (1976) 9 – 10 SC 221** as follows:

1. Title may be established by traditional evidence. This usually involves tracing the claimant's title to the original settler on the land in dispute.
2. A claimant may prove ownership of the land in dispute by production of documents of title. A right of occupancy evidenced by a certificate of occupancy affords a good example.
3. Title may be proved by acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant an inference that the claimant is the true owner of the disputed land. Such acts include farming on the whole or part of the land in dispute or selling, leasing and renting out a portion or all of the land in dispute.

4. A claimant may rely on acts of long possession and enjoyment of land as raising a presumption of ownership (in his or her favour) under **Section 146 of the Evidence Act**. This presumption is rebuttable by contrary evidence, such as evidence of a more traditional history or title documents that clearly fix ownership in the defendant.
5. A claimant may prove title to a disputed land by showing that he or she is in undisturbed or undisputed possession of an adjacent or connected land and the circumstances render it probable that as owner of such contiguous land he or she is also the owner of the land in dispute. This fifth method, like the fourth, is also premised on **Section 146 of the Evidence Act**.

See **Thompson V Arowolo (2003) 4 SC (pt.2) 108 at 155-156; Ngene V Igbo (2000) 4 NWLR (pt.651) 131**. These methods of proof operate both cumulatively and alternatively such that a party seeking a declaration of title to land is not bound to plead and prove more than one root of title to succeed but he is eminently entitled to rely on more than one root of title. See **Ezukwu V Ukachukwu (2004) 17 NWLR (pt.902) 227 at 252**.

It is also important to note at the onset that some of the critical reliefs sought in the substantive claim are **declaratory** in nature. This being so, it is critical to state that declarations in law are in the nature of special claims or reliefs to which the ordinary rules of pleadings particularly on admissions have no application. It is therefore incumbent on the party claiming the declaration to satisfy the court by credible evidence that he is entitled to the declaration. See **Vincent Bello V. Magnus Eweka (1981) 1 SC 101 at 182; Sorungbe V. Omotunwase (1988) 3 N.S.C.C (vol.10) 252 at 262**. The point is that it would be futile when a declaratory relief is sought to seek refuge on the stance or position of parties in their pleadings. The court must be put in a commanding position by credible and convincing evidence at the hearing of the claimants' entitlement to the declaratory relief(s).

The above principles identified in some detail, provides broad legal and factual template as we shortly commence the inquiry into the contrasting claims of parties.

In resolving the present dispute, it is necessary to situate certain critical operational facts from the pleadings and evidence led. In paragraphs 3 and 4 of the Statement of Claim, the Claimant pleaded as follows:

3. **The Claimant avers that he is the true, lawful, *bona fide* and beneficial owner of a parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT. The documents of title to the Claimant's parcel of land comprising of Conveyance of Provisional Approval dated 6th February, 2004, Abuja Geographic Information System (AGIS) receipt of payment for recertification dated 24th February, 2016, and Acknowledgment for Regularization of Land Title and Documents of FCT Area Councils dated 8th March, 2016, are hereby pleaded.**

4. **The Claimant avers that he appointed Isah Okwonu as his Attorney via an Irrevocable Power of Attorney dated the 25th day of May, 2006, in respect of his parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT. The said Irrevocable Power of Attorney is hereby specifically pleaded for the purpose of showing the transaction and evidence of receipt of payment of consideration between the Claimant and his Attorney as well as the Attorney's authority to represent the Claimant in this case."**

In evidence, PW1 tendered in evidence the conveyance of provisional allocation in respect of Plot A179 of about 550 Square Meters at Kubwa Annex (Gbazango West) Layout by Bwari Area Council dated 6th February, 2004 to Adeleke Oni, the Claimant which was admitted as **Exhibit P1**. The evidence to situate this allocation of Plot A179 was not in anyway challenged or impugned in evidence by Defendant. The Claimant has thus founded his title to Plot A179 on production of title document issued vide **Exhibit P1**.

Again on the pleadings and evidence which was not impugned, PW1 averred that the Claimant appointed him as attorney through an irrevocable power of attorney vide **Exhibit P4** in respect of the said parcel of land or Plot A179. I had earlier

explained the legal import of a Power of Attorney. The remit of the powers as encapsulated in **Exhibit P4** are clear. I will return to this exhibit again later on.

The Defendant as already alluded to, did not materially challenge or controvert during cross-examination this allocation to Claimant of Plot A179 and the appointment of PW1 as his attorney.

In law, where a witness such as PW1 is unchallenged upon a particular matter or issue, the effect is infact acceptance of the truth of the evidence of that witness. Indeed where a witness is unchallenged under cross-examination, the court is not only entitled to act on or accept such evidence, but it is infact bound to do so provided that such evidence by its nature is not incredible. See **Gaji V. Paye (2003)8 N.W.L.R (pt.823)583 at 605 AC; Oforlete V. State (2000)12 NWLR (pt.681)415 at 436 B-C.**

On the whole, on the bases of the unchallenged and unrebutted evidence led by the Plaintiff, I find and hold that Claimant was allocated Plot A179 vide **Exhibit P1** and he appointed PW1, Isah Okwonu as his attorney in respect of this plot of land vide the irremovable power of attorney admitted as **Exhibit P4**. Indeed under cross-examination, **the attorney or PW1 stated that he actually bought the land from Claimant in 2006.** Again, on the evidence, nothing was put forward to controvert or challenge this assertion.

This now leads us to the **crux of this dispute** with respect to whether acting on this power of attorney, PW1 transferred part of Plot A179 to the Defendant. The Defendant in paragraphs 4-8 of its defence and in paragraphs 13-20 of the Counter-Claim avers that the Claimant's attorney held himself out as owner and successor in title to Adeleke Oni and in that capacity sold a part of Plot A179 measuring 15x15 for consideration in the sum of N8,500,000 for purpose of installing a telecommunication mast. They were handed possession and they built and have been in possession and operating on the plot without any disturbance or interruption until Claimant instituted this suit. Let us perhaps properly situate the case as made out by the Defendant in paragraphs 4-10 of the defence and more particularly accentuated in the following paragraphs of the Counter-claim thus:

13. That sometime in 2016, the Defendant/Counter-claimant contacted Tonyfield and Tommy Limited (hereinafter referred to as the Defendant's agent) to purchase a valid piece of land measuring 15 metres x 15 metres specifically for the purpose of installing Telecommunication mast.
14. The Defendant/Counterclaimant further avers that based on the above instructions, its agent located a piece/parcel of land situate at Plot No. A179, Annex III, Gbazango West, Behind New Market, Kubwa, Abuja.
15. That upon inquiry, the Defendant's agent was referred to the Claimant's Attorney, Mr. Isah Okwonu, who held himself out as beneficial owner of the premises and claimed he purchased the property from one Adeleke Oni. In proof of his purchase, he gave copies of documents to the Defendant's agent i.e title documents in the name of one Adeleke Oni and Irrevocable Power of Attorney transferring interest from Adeleke Oni to Isah Okwonu. The Defendant/Counterclaimant hereby pleads and shall rely on copies of the title documents at trial, notice is hereby given to the Claimant and his Attorney to produce the original copies of the said documents.
- 17 The Defendant/Counterclaimant avers that, its agent informed same consideration was paid to the tune of N8,500,000(Eight Million, Five Hundred Thousand Naira Only), being the agreed amount for the outright purchase of a portion of the subject matter measuring 15 metres x 15 Metres.
- 18 Mr. Isah Okwonu, acting as the beneficial title holder, issued a purchase receipt for the N8,500,000(Eight Million, Five Hundred Thousand Naira) only, he received as purchase price for the portion of land measuring 15 metres x 15 metres. The Defendant/counterclaimant hereby pleads and shall at the trial of this case rely on the purchase receipt dated the 12th day of January, 2017.
- 19 The Defendant/counterclaimant avers that upon confirming receipt of the said payment, the Claimant's Attorney, Mr. Isah Okwonu, executed a deed

of assignment on the same day and granted the Defendant/counterclaimant access to the said site vide letter of 12th January, 2018. The Defendant/Counterclaimant hereby pleads and shall at trial of this suit rely on the deed of assignment, in proof of the transaction.

20 The Defendant/Counterclaimant further avers that having satisfied the requirements of purchasing the said plot and upon being granted access by the Claimant's Attorney, the Defendant's agent moved on to the plot to commence construction and finally started operation on the plot without any disturbance or interruption.

The Claimant in Response to these averments filed a defence in Response or Reply and pleaded as follows:

- 3. The Claimant/Defendant to Counter-Claim denies paragraph 13 of the Counter-Claim in its entirety and shall put the Defendant/Counter-Claimant to the strictest proof of same at the hearing of this suit.**
- 4. The Claimant/Defendant to Counter-Claim denies paragraph 14 of the Counter-Claim in its entirety and shall put the Defendant/Counter-Claimant to the strictest proof of same at the hearing of this suit.**
- 5. The Claimant/Defendant to Counter-Claim denies paragraph 15 of the Counter-Claim in its entirety and shall put the Defendant/Counter-Claimant to the strictest proof of same at the hearing of this suit.**
- 7 The Claimant/Defendant to Counter-Claim denies paragraph 17 of the Counter-Claim in its entirety and shall put the Defendant/Counter-Claimant to the strictest proof of same at the hearing of this suit.**
- 8 The Claimant/Defendant to Counter-Claim avers, further to paragraph 8 above, that neither he nor his Attorney, Isah Okwonu, has ever been paid the sum of Eight Million Five Hundred Thousand Nair (N8,500,000) by the Defendant or any of its purported agent.**

10. The Claimant/Defendant to Counter-Claim denies paragraph 19 of the Counter- Claim in its entirety and shall put the Defendant/Counter-Claimant to the strictest proof of same at the hearing of this suit.

11. The Claimant/Defendant to Counter-Claim denies paragraph 20 of the Counter-Claim in its entirety and shall put the Defendant/Counter-Claimant to the strictest proof of same at the hearing of this suit.

The above averments in the Reply of Claimant, apart from paragraph 8 above, relating to payment for the part of the plot which I will shortly deal with, are all essentially general denials relating to key elements of the transaction the Defendant streamlined in the defence and counter-claim which I have stated above.

The law is settled that regarding essential and material allegations, a general denial as projected above in the Reply ought not to be adopted; essential allegations should be specifically traversed. See **Adesanya V. Otuewu (1993)1 N.W.L.R (pt.270)414 at 455 G-H.**

In order to raise any issue of fact, there must be a proper traverse; and a traverse must be made either by a denial or non-admission, either expressly or by necessary implication. So that, if a Defendant refuses to admit a particular allegation in the statement of claim or counter-claim as in this case, he must state so specifically; and he does not do this satisfactorily by pleading thus: **“Defendant is not in a position to admit or deny... and will at the trial put the Plaintiff to proof.”** A plea that Defendant **“puts Plaintiff to proof”** amounts to insufficient denial; equally a plea that **“the Defendant does not admit the correctness (of a particular allegation in the statement of claim)”** is also an insufficient denial. See **Ekwular V. Obasi (1990)2 N.W.L.R (pt.131)231 at 251B; C-D.**

Now it is true that what is essential and material will depend on the real question for determination in a particular matter or litigation. See **Eke V. Okwuranyin (2001)12 N.W.L.R (pt.726)181 at 203 C-E; 205 D-E.**

In this case, the Defendant and Counter-Claimant in paragraphs 4-9 of the Defence and particularly in paragraphs 13, 15, 19 and 20 of the Counter-Claim on matters critical to the transaction relating to the sale of part of Plot A179 averred facts

relating to the sale of the land by PW1, preparation of a deed of assignment situating the transfer of interest, the grant of possession and the fact that they have since moved to the plot, commenced construction and have started operations on the plot without any disturbance or interruption.

The Claimant as stated above in response to these critical averments which go to the gist of the grievance only made general denials which in law are insufficient. At the risk of sounding prolix, a denial of a material allegation of fact must not be general nor evasive. Every allegation of fact if not denied specifically or by necessary implication shall be taken as established at the hearing. See **Oshodi V. Eyifunmi (2000)13 N.W.L.R (pt.684)298 at 337B.**

Now even if for the sake of argument, it is accepted that there was a proper traverse in this case, let us now evaluate the evidence led to situate whether the Defendant made out a case to support the averments led. In this case, the Defendant proffered evidence to the effect that the PW1 held himself out as beneficial owner and in that capacity dealt with their agent and sold a portion of Plot A179 measuring 15 meters x 15 meters situate at Gbazango West, Kubwa FCT to them for consideration in the sum of N8,500,000 (Eight Million, Five Hundred Thousand Naira). The purchase receipt issued by Claimant to Defendant was tendered in evidence as **Exhibit D1**. It is dated 12th January, 2017 and signed by the PW1.

The attorney or PW1 equally executed a deed of assignment in favour of the Defendant with respect to the said portion of land on Plot No. A179 vide **Exhibit D2**.

The Defendant then averred that they were handed over possession and have since occupied the said portion of land and built it up including a telecommunication mast. Now the purchase receipt vide **Exhibit D1** situates that the PW1 or attorney describes himself as the beneficial owner of “**the property on the parcel of land 15m x15m at plot 179 Annex Gbazango West Kubwa FCT**” and he also acknowledged receipt of the sum of N8,500,000 from IHS Ltd (the Defendant) being full and final payment for the purchase of the property.

Exhibit D2, the Deed of Assignment where PW1 was the assignor provided in the recital as follows:

“WHEREAS:

- 1. The Assignor is seized of all that property at Plot No A179, Anex Gbazango West Kubwa, FCT Abuja.**
- 2. The Assignor has been in common possession of the said property and exercised various acts of ownership.**
- 3. The Assignor has now agreed to assign to the Assignee free from all encumbrances his entire interest in a portion of the aforesaid property measuring 15 Meters by 15 Meters more particularly described in the schedule hereto.**

NOW THIS DEED WITNESSES AS FOLLOWS:

In pursuance of the said agreement and in consideration of the sum of Eight Million, Five Hundred Thousand Naira (N8, 500, 000) Only paid by the Assignee to the Assignor (the receipt whereof the Assignor hereby acknowledges) the Assignor HEREBY ASSIGNS into the Assignee his entire interest in a portion of the property situate and lying at Plot No A179, Anex Gbazango West, Kubwa, FCT Abuja State measuring 15 Meters by 15 Meters to hold unto the Assignee for such rights and interest as the Assignee is entitled to under the said parcel of land.”

In the Schedule to the deed, the plot sold and the coordinates situating were the land can be located was described as follows:

“ALL THAT piece or parcel of land at Plot No A179, Anex Gbazango West Kubwa, FCT Abuja comprising an area of approximately 15 metres by 15 metres with coordinates 09.15583 North and 007.31474 East more particularly delineated and verged RED on Survey Plan No dated the day of 200... annexed to this Deed.”

Now these documents said to have been presented by Claimant’s attorney situates critical elements of the transaction to wit, the sale and or transfer between parties over a defined plot and the consideration paid and received.

These documents evidencing this transaction between parties were not in any way challenged or impugned by the Claimant during cross-examination. It is really strange that the Claimant and or his attorney who had all the opportunity refused or elected not to cross-examine DW1 with respect to these documents said to have been issued by PW1. In law, as alluded to earlier on, it is not proper for a Defendant, here the Claimant and Defendant to the Counter-claim not to cross-examine a witness on a material point, in this cases the documents evidencing sale. As stated earlier, the affect of failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness. See **Gaji V. Paye (supra)**.

As a logical corollary, the failure of Claimant to cross examine Defendant's witness on the trajectory of the narrative relative to the issuance of these documents appears to me a tacit acceptance of the truth of the transaction between parties.

Indeed on the evidence, the PW1 appears by his evidence to corroborate critical aspects of this narrative. Firstly, under cross-examination, he agreed that he indeed bought the plot No. 179 from the Claimant Adeleke Oni as far back as 2006. This then confirms aspects of the purchase receipt that indeed the PW1 held himself out as beneficial owner when he sold part of plot No.179. It is equally to be noted that on the evidence, the irrevocable, power of attorney executed between the original owner or allottee, Adeleke Oni and PW1 vide **Exhibit P4** granted PW1 clear and wide powers to deal with the said plot No.179 including powers of **“transfer, lease or deal with the property in such manner as the Donee (PW1) may think proper and for his own purpose.”** See **Clause 6**. PW1 equally by **Clause 5** of the Power of Attorney has powers to also **“dispose off or otherwise enforce any power of sale and obtain any benefit or interest in the property.”**

Now in evidence, PW1 may have stated that he did not enter into any land sale agreement with TonyField and Tommy, Ltd the Defendant's agents, but PW1 agreed under cross-examination that he actually met with them and they told him they wanted to buy the land and that they discussed and that they actually brought him a form which he filled and that they informed him that they were going to conduct a search to determine the authenticity of the land.

PW1 said that the Defendant's agent came back after the search and they told him they were satisfied and that they then negotiated the price and that he was given part payment and that since then he had not seen the Defendant's agents.

The narrative of PW1 here clearly raises more questions than answers. In the entirety of his original pleadings and his Reply to the defence and defence to the counter-claim, no where did PW1 make any allusions to having dealt at anytime with the Defendant's agents where they discussed the sale of his property and that steps were taken to confirm the genuineness of his plot and part consideration paid to him.

PW1 cannot therefore pretend or claim that he never dealt with Defendant and their agents as is now been projected relating to the sale of the property. It is equally telling that he himself conceded that he signed a document allowing Defendant's agents confirm the genuineness of his plot and the agents came back and told him they were satisfied and payments made.

Now if part payment was made to PW1 as alleged for the plot, how much was paid to him? The PW1 for reasons that are not clear refused to disclose how much was paid to him. If it was indeed part payment, where is the evidence situating this part payment? Does the PW1 want the court to believe that PW1 accepted payment for his land without any evidence? Does PW1 want the court to believe that after the Defendant's agent made the alleged "**part payment,**" they simply disappeared into thin air? Does the PW1 really want the court to believe that after he got part payment, nothing again happened and he kept the money to himself without giving anything in return?

The narrative of PW1 sounds incredible and not worthy of credit. This is a party who projects that he had no dealings with Defendant and their agents but under cross-examination contradicted himself by situating an elaborate engagement with Defendant's agents over sale of his plot and even collected part payment which he has kept till date without giving anything in return. Credible evidence in this connection means evidence worthy of belief and for evidence to be worthy of belief or credit, it must not only proceed from a credible source, it must be credible in itself in the sense that it should be credible, reasonable and probable in view of

the entire circumstances. See **Agbi V. Audu Ogbeh (2006)11 N.W.L.R (pt.990)65 at 116 par E.**

The evidence of PW1 completely lacks credibility. Where the evidence of a witness such as PW1 is so skewed and appears as an affront to reason and intelligence, no credibility ought to be accorded it. See **Fatunbi V. Olunloye (2004)12 N.W.L.R (pt.881)229 at 247.**

Again what is interesting about the case of Claimant is that PW1 who in evidence stated that he bought the Plot No. A179 since 2006 from Claimant, Adeleke Oni has however in his pleadings particularly the Statement of Claim and the Reply to Defence and Defence to the Counter-claim proffered an ambivalent and rather contradictory position which conflicts with the position given in evidence during cross-examination. In the pleadings highlighted above, the case projected was that neither claimant or the attorney PW1 dealt with Defendant or their agent, whereas it is clear on the evidence that PW1 became the beneficial owner as far back as 2006 when he bought from Adeleke Oni, the original allottee. Yes title may have not been legally transferred to PW1 through exchange of legal conveyance but in real practical terms, PW1 has been in charge and total control since 2006. It would appear that the absence of a conveyance between Adeleke Oni and PW1 is now being used surreptitiously to fight this case.

The resort to defining the dispute as if the Claimant, Adeleke Oni was in the picture clearly is an attempt to mislead and to pool wool across the face of the court. The evidence of PW1 himself corroborates and confirms unequivocally that the Claimant has had no say or role in dealings related to the property since 2006.

A witness or PW1 who sets out deliberately to mislead the court by lying on oath, either by denying facts known to him or misrepresenting facts upon which he is questioned, until forced to retract his evidence or contradict himself by whatever means, cannot be relied upon because he has from his performance destroyed any rational basis for accepting his evidence in part or in total based on credibility. See **Oguntayo V. Adebutu (1997)12 N.W.L.R (pt.531)81 at 94 A-B.**

To further undermine the case of Plaintiff or PW1, it is curious that if Defendant entered his land in 2016 and built up the place, why did it take him till 2021 to file

the extant action? By **Exhibits P5 (1-4)** tendered by him, it shows the huge telecommunication mast on the portion of the plot and the fact that it was built up already. If PW1 was aware, why did he not take immediate steps to abate the actions of Defendant? There is really more to the narrative of PW1.

I incline to the view that it is because he had a transactional dealings with Defendant and or their agent with consideration paid that he chose to as it were kept quiet or refuse to enforce the rights sought to be enforced now. If at all there was any right to be enforced, I am in full agreement with Defendants that the PW1 has slept on his right(s), if any.

On the facts and evidence, the PW1 actively participated and sold part of Plot A179 to Defendant and sat by and saw them develop the part he sold to them and put same to use only to now seek to assert his rights in a manner that borders on dishonesty. In law, a man is not to be deprived of his legal rights unless he has acted, as PW1 has done in this case, in such a way as would make it fraudulent for him to set up those rights. See **Okereke V. Nwonkwo (2003)9 N.W.L.R (pt.826)592 at 617-618 H-A; 632 C-D.**

The Claimant or PW1 clearly is estopped in this rather belated and attempt to assert any rights over the disputed plot. By virtue of **Section 169 of the Evidence Act**, where one person has either by virtue of an existing court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing.

The action of Claimant and most especially PW1 has obliterated any claims of rights over the disputed part of Plot A179. Even if the court has found that the defendant/counter-claimant did not satisfactorily prove full payment of consideration, the matter won't end there and that would not necessarily vitiate the validity of the agreement of parties. The law is settled that in a contract for the sale of land and by extension landed property, the agreement to sell is concluded when the parties, the subject matter, the nature of the transaction and the consideration are agreed upon and that the possibility of a default would not make

the contract invalid, incomplete or nonexistent as in this case. See **Biyo V Aku (1996)1 N.W.L.R (pt.422)1; UBN Plc V. Erighbuem (2003)FWLR (pt.180)1365; Doherty V. Ighodaro (1997)11 NWLR (pt.530)694.**

On the whole, I am in no doubt by the confluence of facts in this case that the Defendant has clearly established that it has a sale transaction with Claimant's attorney for the sale of a portion of plot A179 as described in the schedule to the Deed of Assignment vide Exhibit D5 executed between parties. The sale on the evidence was completed; possession handed over and they have since been in possession and have in fact built up the portion of land sold to them.

Indeed, the Deed of Assignment executed by PW1 vide **Exhibit D2** was coupled clearly with possession. It is true that the deed of assignment may have not been registered but in law that is not fatal. The principle is settled that the non registration of the Deed of Assignment affects only the legal or statutory title, not the equitable one. The legal title may be imperfect but the equitable title of the owner is available. See **Nonkom V Odili (2010) 2 NWLR (pt.1179) 419 at 441 D-H.** Put another way, where a registrable instrument is not registered but is coupled with taking immediate possession, such instrument may be used to prove equitable title or interest in the property.

The law is indeed settled that where a purchaser of land or lessee is in possession of land by virtue of a registrable instrument such as Exhibit D2 which has not been registered and has paid purchase price or rent, to the vendor, the purchaser has acquired equitable interest which is as good as the legal estate and can only be defeated by a purchaser for value without notice. See **Nsiegbe V Mgbehemena (1996) 1 NWLR (pt.426) 607 at 622.**

The Claimant who gave PW1 clear powers vide **Exhibit P4** to deal with the land and who then acted clearly pursuant to those powers cannot now in good conscience seek to renege from the agreement entered into by his attorney to the prejudice of innocent third parties.

For obvious reasons, on the consideration of this case of Plaintiff, I have not factored the contents of **Exhibit D3**, the record of proceedings in suit CV/583/2018 in any detail but a cursory perusal will only further reveal the duplicitous role of

PW1 as he and the Claimant unfairly attempt to renege from an agreement on sale of their land after having enjoyed the benefit(s) in terms of receipt of the consideration and handing over possession. The hallowed confines of the courts must not be allowed to be used to achieve such ignoble goals. I leave it at that.

The above findings provides both factual and legal template to determine whether the Reliefs sought by Claimant are availing.

Relief (1) prays for a **Declaration that the Clamant is the true, lawful, bonafide and beneficial owner of a parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT.**

On the basis of the clear findings with respect to a clear sale of part of plot No. A179 to the Defendant by the Plaintiff through his attorney, the factual and legal premise of this Relief is clearly compromised. The Plaintiff through his attorney cannot having sold a part of the plot be claiming the entire plot A179. Relief (1) cannot be availing in the circumstances.

Relief (2) is for a **declaration that the Defendant is in the acts of multiple trespass to the Claimant's parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT, by its unlawful entry and remaining in the occupation and continuous use of the Claimant's parcel of land, since October, 2016, till date.**

In law, trespass is any infraction of a right of possession into the land of another be it ever so minute without the consent of that owner is an act of trespass actionable without any proof of damages. See **Ajibulu V. Ajayi (2004) 11 N.W.L. R (pt 885) 458 at 475.**

The claim for trespass is therefore rooted in **exclusive possession**. All a party needs to prove or show in order to succeed is to show that he is the owner or that he has exclusive possession.

Now in this case on the evidence, I found that the Plaintiff through his attorney sold a part of Plot A179. The receipt of sale; the admission by PW1 that he was paid a consideration by Defendant's attorney; the preparation of the deed of assignment and the handover of possession and the construction carried out by the Defendant unequivocally show they had always been in possession of a part of the

plot A179 sold to them. There is no clear evidence before the court that the Defendant went beyond the portion of the land sold to them and accordingly trespass cannot be availing in the circumstances.

With the failure of Relief (ii), Relief (iii) praying the Defendant to immediately cease any further acts of trespass on the Claimant's parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT cannot be **availing**.

There is really no valid, factual or legal basis to deny the defendant the rights which enures to them by virtue of the sale of part of Plot A179 to them by Plaintiff and his attorney. With the failure of **Reliefs (i-iii)**, **Relief (iv)** praying for an Order of perpetual injunction restraining the Defendant or its agent(s), assign(s), privies, successor-in-title and/or whosoever acting for and/or on its behalf, from committing any further acts of trespass on the Claimant's parcel of land known as Plot No. A179, measuring an area of about 550 Square Meters, situate at Kubwa II Annex (Gbazango West) Layout, Bwari Area Council, Abuja, FCT, clearly is not availing and fails.

Similarly with the failure of Reliefs for trespass vide Reliefs (ii) and (iii), **Relief (v)** for damages for trespass clearly lacks basis and fails too.

With the failure of **Reliefs (i-v)**, the final **Relief (vi)** for interest equally must fail. The law is once the principal is taken away, the adjunct must fail.

On the whole, the **Reliefs sought by the plaintiff are all not availing**.

Now with Respect to the Counter-claim, I had stated that the appeal now pending at the Court of Appeal on the same subject matter and Reliefs subject of the extant counter-claim has clearly created a jurisdictional challenge that prevents the court from determining and making a pronouncements on the Reliefs. This court must necessarily defer to the Superior Court of Appeal as already demonstrated. The proper Order to make is to simply strike out the counter-claim.

In the final analysis and for the avoidance of doubt, I accordingly make the final Orders:

ON PLAINTIFF'S CLAIMS:

The Plaintiff's claims fails in its entirety and it is accordingly dismissed.

ON DEFENDANTS COUNTER-CLAIM:

The Defendants counter-claim is hereby struck out.



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Hon. Justice A.I. Kutigi

Appearances:

1. *Peter Patrick Esq., for the Claimant.*
2. *M.J. Haruna, Esq., with I.G. Udoka for the Defendant.*