

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

**BEFORE HIS LORDSHIP: HON. JUSTICE J. ENOBIE OBANOR**

**HIGH COURT NO. 29**

**DATE: 3/07 /2023**

**SUIT NO: FCT/HC/CV/287/2020**

**BETWEEN:**

**AFRO-ASIA SHELTER INTERNATIONAL LTD.....CLAIMANT**

**AND**

**THE COMPANY FOR HABITAT AND HOUSING  
IN AFRICA  
AFRIQUE).....DEFENDANT**

**(SHELTER-**

**JUDGMENT**

**(DELIVERED BY HON. JUSTICE J. ENOBIE OBANOR)**

By an Amended Statement of Claim filed by the Claimant on the 16<sup>th</sup> day of September, 2021, the Claimant seeks the following reliefs:

1. A DECLARATION that the Defendant is in breach of the Loan Agreement dated 1<sup>st</sup> June, 2016 between their goodselves;
2. SPECIAL DAMAGES
  - a. N1,725,351,245.35k (One Billion, Seven Hundred and Twenty- Five Million, Three Hundred and Fifty-One Thousand, Two Hundred and Forty-Five Naira Thirty-Five kobo)being loss of profit or expected profit:
  - b. N1,000,000 (One Million Naira) the Claimant paid for the survey mapping of the area donated as collateral for the loan;

- c. N3,000,000 (Three Million Naira) legal fees of the Defendant's counsel paid by the Claimant
- d. N50,000,000 (Fifty Million Naira) being money paid by the Claimant to obtain environmental approval and building permit from Niger State Government in respect of the 300 units of 2 & 3 bedroom apartments
- e. US\$33,200 (Thirty Three Thousand Two Hundred Dollars) facilitation fees the Claimant paid to Manfriday-the agent that introduced the transaction - the loan-to it:
- f. US\$136,000 (One Hundred and Thirty Six Thousand Dollars) being the cost of the legal mortgage on the collateral paid by the Claimant.
- g. US\$45,000 (Forty-Five Thousand Dollars) being appraisal fees the Claimant paid to the Defendant:
- h. US\$91,000 (NinetyOne Thousand Dollars) being front end fees the Claimant paid to the Defendant.
- i. An order mandating the defendant to release to or to give to the claimant all the documents the claimant gave or issued to it in respect of the loan agreement and or to issue a Deed of Discharge of the aforesaid Legal Mortgage and or an instrument of rejection of the Power of Attorney aforesaid to the claimant.

### 3. FURTHER SPECIAL DAMAGES

- a. N2,000,000,000.00 (Two Billion Naira) for denying the Claimant the use of its property on or for which it executed a legal mortgage in favour of the Defendant.

### 4. GENERAL DAMAGES

- a. N1,000,000,000.00 (One Billion Naira) general damages.

- 5. 10% post judgment interest on each of the sums of money claimed till satisfaction of the Judgment debt.

In response, the Defendant filed an Amended Statement of Defence on the 23<sup>rd</sup> day of September, 2021.

Thus, parties having duly filed and exchanged pleadings and issues thereby joined, on the 17<sup>th</sup> of January, 2022, the Claimant commenced and opened its case for hearing. One witness, HaffordUdochukwu, testified on behalf of the Claimant as CW1. CW1 deposed to a Witness Statement on Oath on the 16<sup>th</sup> of November, 2021 and a Further Written Statement on Oath on the 4<sup>th</sup> of November, 2021 and both were adopted by him as his evidence in this case. Pursuant to the settlement of documentary evidence by the parties as provided by the Rules of this Court, the following documents were admitted in evidence on behalf of the Claimant: -

1. A sworn Certificate filed on 11<sup>th</sup> November, 2021 – Exhibit A
2. A sworn Certificate filed on 4<sup>th</sup> November, 2021 – Exhibit B
3. A sworn Certificate filed on 4<sup>th</sup> February, 2021 – Exhibit C
4. A photocopy of letter from the Claimant to the Defendant dated 23<sup>rd</sup> July, 2014– Exhibit D.
5. A photocopy of letter from the Claimant to the Defendant accepting the offer dated 26<sup>th</sup> April, 2016 – Exhibit E
6. A Counterpart Copy of Loan Agreement between the Claimant and the Defendant – Exhibit F
7. A copy of a Deed of Legal Mortgage– Exhibit G
8. “CTC” of the Power of Attorney between the Claimant and the Defendant – Exhibit H.
9. Photocopy of a survey map for the carved-out portion of land for the project – Exhibit I.
10. Photocopy of a letter from the Claimant to Mado Construction Company dated 26<sup>th</sup> April, 2016; conveying the award of contract – Exhibit J.
11. Photocopy of a letter dated 17<sup>th</sup> March, 2017 from the Claimant to the Managing Director, Tomando Construction Limited – Exhibit J1.
12. The Agreement between the Claimant and Mado Construction Company – Exhibit K

13. A letter from Ministry of Environment Mineral and Forestry Resources addressed to the Claimant dated 2<sup>nd</sup> November, 2016, conveying approval for the project –Exhibit L
14. Re:\$9,100,000 Loan Facility from Shelter Afrique – Exhibit M.
15. Re: Request for Refunds Transfer – Exhibit N
16. Re: \$9,100,00 Loan Facility from Shelter Afrique – Exhibit O
17. Re: Request for Refunds Transfer – Exhibit P
18. Email from the Defendant to the Claimant dated 14<sup>th</sup> February, 2017 – Exhibit Q.
19. Email from the Defendant’s solicitor to the Claimant dated 22<sup>nd</sup> June, 2016 – Exhibit R.
20. Email from the Defendant to the Claimant dated 16<sup>th</sup> February, 2017 – Exhibit S.
21. Email from the Claimant to the Defendant dated 23<sup>rd</sup> February, 2017 – Exhibit T.
22. A letter from the Defendant to the Claimant dated 28<sup>th</sup> March, 2018 – Exhibit U.
23. A letter from the Claimant to the Defendant dated 3<sup>rd</sup> August, 2017 – Exhibit V.
24. A letter from the Defendant to the Claimant dated 13<sup>th</sup> June, 2018. It is an electronic copy –Exhibit W.
25. A letter from the Claimant to the Defendant dated 20<sup>th</sup> June, 2018 – Exhibit X.
26. A letter from the Claimant to Defendant dated 18<sup>th</sup> August, 2019 – Exhibit Y.
27. 6-page document showing evidence of some transfers from the Claimant to the Defendant of fees – Exhibit Z
28. A letter from the Claimant’s solicitor to the Defendant dated 28<sup>th</sup> October, 2020 exhibit ZA.
29. The Letter addressed to Elizabeth and dated February 8<sup>th</sup>, 2016 is admitted as Exhibit ZB.
30. The one addressed to Olayo and dated February 10<sup>th</sup>, 2016 admitted as Exhibit ZC.

31. The Deed of Charge sent for by April 1<sup>st</sup> 2016 is admitted as Exhibit ZD.
32. Request for letter of undertaking to contractor dated 10<sup>th</sup> May, 2016, is admitted as Exhibit ZE.
33. Request for letter of undertaking to contractor dated 18<sup>th</sup> May, 2016 is admitted as Exhibit ZF
34. The said Guaranty from Wema Bank is admitted as Exhibit ZG.
35. A copy of Guarantee between New Prudent Merchant Bank and company for Habitant and African Shelter Afrique, admitted as Exhibit ZH.
36. Email sent to Alayo on the 1<sup>st</sup> of March, 2017 is admitted as Exhibit Z1; and
37. A letter titled the outcome of Shelter Afrique Board of Directors meeting with respect to Afro-Asia Shelter International Ltd dated October 30<sup>th</sup>, 2018 is admitted as Exhibit ZJ.

During Cross Examination, the following documents were admitted through CW1 on behalf of the Defendant:

- a. A building plan approval dated 17<sup>th</sup> November, 2015 is hereby admitted and marked as Exhibit Zk
- b. Certificate of approval dated 2<sup>nd</sup> November, 2016 is admitted as Exhibit ZL

On the other hand, on the 13<sup>th</sup> of May, 2022, the Defendant opened its case and one Elizabeth Ogonegbu testified as DW1 and adopted her Witness Statement on Oath and Further Witness Statement on Oath filed on the 23<sup>rd</sup> of September, 2021 and the 25<sup>th</sup> of November, 2021, respectively as her oral testimony. The following exhibits were tendered through DW1:

- (a) PHOTOCOPY OF The said offer letter dated 22/4/2014 IS admitted as exhibit ZM
- (b) A letter dated 19<sup>th</sup> of October, 2017 written to Wema Bank by the Claimant exhibit ZN.

- (c) A copy of the full discharge form exhibit ZO.
- (d) An email sent to the Claimant's Lawyer exhibit ZP
- (e) Document titled: "Technical Assistance 2079332 is exhibit 15.

On the 11<sup>th</sup> of October, 2022, the Defendant called a subpoenaed Witness, Usman Ahmed Pai, Registrar, Deed of Mortgage who testified as DW2.

The brief facts and evidence of the Claimant's case as contained in its pleading, witness statement on oath and further affidavit evidence of CW1 is that through a letter of 23<sup>rd</sup> July, 2014, it applied for a loan of 9,200,000USD (Nine Million Two Hundred Thousand United States of America Dollars) from the Defendant to finance its construction of 300 units of 2 and 3 bedrooms apartments at Jibi, Tafa Local Government Area of Niger State. After several negotiations and exchange of correspondences triggered off by the Claimant's application made to the Defendant, the latter approved a product finance facility of 9,100,000USD (Nine Million, One Hundred Thousand United States of America Dollars) for the Claimant and conveyed the approval to the Claimant through its letter of 22<sup>nd</sup> April, 2016 which is admitted in evidence as Exhibit 'D'. The Claimant averred that it accepted the Defendant's offer through its letter of 26<sup>th</sup> April, 2016.

Consequently, from the testimony of the Claimant, the said loan agreement (which is admitted in evidence and marked as Exhibit F) was executed on the 1<sup>st</sup> day of June, 2016 between the Claimant and the Defendant at Transcorp Hilton Abuja.

The Claimant further avers that it complied with the terms or obligations on its part under the loan agreement to perform including the condition precedent to first disbursement. In compliance with the condition precedent, it executed on the 1<sup>st</sup> day of June, 2016 a first ranking legal charge (Deed of Legal Mortgage and a Power of Attorney, Infra on the carved out area of Land) in favour of the Defendant on a Land measuring 7.33 hectares particularly the portion that is delineated and edged red on Survey Plan Number MGVL/12475/001 being a portion of Parcel of Land measuring 107.812 hectares situate at and located at Jibi, Tafa Local Government Area of Niger State, covered by Certificate of Occupancy No:

NG/5L/988 and registered as No.462 at Page 462 in Volume 5 at the Land Registry at Minna, Niger State of Nigeria (Power of Attorney).

The Claimant further averred that it procured or did a survey mapping of the area of the land (supra) donated as collateral for the loan: executed a Deed of Legal Mortgage and a Power of Attorney dated the 1<sup>st</sup> day of June, 2016 respectively between it and the Defendant in respect of its property referred to above and engaged in their legal practitioner to obtain the requisite Governor's consent thereto.

The claimant deposed that it awarded a contract for construction of 300 Housing Units of 2 and 3 bedroom apartments to Tomando Construction Ltd (the Company) and settled the Defendant's Solicitors (Abdulal, Talwo& Co) legal fees of N2,260,000.00. (Two Million, Two Hundred and Sixty Thousand Naira). Abdulal, Taiwo & Co's respective Invoice Numbers 0009701 are pleaded and Plaintiff's sister company -Rock of Ages Properties Lid-evidence of payment of the fees through its instructions of 28<sup>th</sup> July, 2016 and 26<sup>th</sup> August, 2016 to its Bank - First Bank of Nigeria Ltd: paid the Defendant's all of its fees and charges (infra) in respect of the loan.

It is also the averment of the Claimant that after meeting the condition precedent, it made an effective request on the Defendant, within time, for the first disbursement of the loan but the Defendant never responded to the said request to disburse the loan until sometimes in the second week of February, 2017 when it informed the Claimant that it did not meet certain conditions precedent to drawdown.

Upon the Claimant's response showing that it was only the issue of perfection of a legal mortgage on the property donated or used as a collateral for the transaction that had a little delay (being outside its control and being followed up by the Defendant's recommended external solicitors), the Defendant through its email of 14<sup>th</sup> February, 2017 (by its Zachery Munene) requested for re-appraisal of the project (the Defendant Solicitors' email of 22<sup>nd</sup> June, 2016 to the Claimant. In consequence of the request for re-appraisal, the Defendant through its email of 16<sup>th</sup> February 2017 (by its Elizabeth Ogonegbu) requested the Claimant to provide it with certain documents stated therein; and the Claimant responded through its mail of 23<sup>rd</sup> February, 2017.

The Claimant further averred that it is the practice or custom of secured credit transaction or Mercantile custom or practice of Banking or Financial Institutions, in Nigeria, that disbursement(s) of loan or money lent do not wait till the requisite consent to a legal mortgage is obtained. The Claimant still avers that: pursuant to the Loan Agreement it submitted the Deed of Legal Mortgage to the Government of Niger State for perfection or for its consent and through its letter of 16<sup>th</sup> August, 2019 it requested the Defendant to release all the documents it gave or submitted to it. These documents include but not limited to the said Power of Attorney and executed Deed of Legal Mortgage in respect of the land involved at Jibi, Niger State (supra), a Deed of Discharge of Release which will enable it discharge the legal mortgage created therein in the Defendant's favour but the Defendant failed and till date refused to release the documents and thus denied it the use of them in securing alternative funds. Consequently, the Claimant avers that the Defendant is in breach of the loan agreement.

The Defendant on its part filed an Amended Statement of Defence and Counter Claim and presented its case through the testimony of two witnesses. The first witness, Elizabeth Ogonegbu who is the Regional Representative of the Defendant at the Defendant's sub-office in Abuja, filed a Witness Statement on Oath and a Further Witness Statement on Oath and adopted same. The 2<sup>nd</sup> witness was Mr. Usman Pai, the Deeds Registrar at the Niger State Geographic Information System Agency (NIGIS), a subpoenaed witness who testified as DW2.

The brief facts of the Defendant's case is that sometime in 2014, the Claimant approached it requesting for a loan to finance the construction of 300 Housing Units at Jibi, Tafa Local Government Area of Niger State (the "Project"). The Claimant followed this up with a formal application on 23<sup>rd</sup> July, 2014. The Defendant averred that after considering the Claimant's application, it issued an Offer Letter on 22<sup>nd</sup> April, 2016 for the sum of 9,100,000USD (Nine Million, One Hundred Thousand Dollars) subject to execution of a Loan Agreement (the "Offer Letter"). The Defendant further averred that the Offer Letter set out the terms of the loan including the conditions precedent for disbursement of the loan. The Claimant accepted this offer via its letter of 26<sup>th</sup> April, 2016 (Exhibit E) and specifically represented to the Defendant in the Acceptance Letter that it was working on putting finishing touches to the conditions precedent to drawdown and



that all the conditions indicated will be met as there is every need to jump start the Project as soon as possible. Working with the representations from the Claimant, the Defendant proceeded to execute the Loan Agreement envisaged under the Offer Letter. The Loan Agreement was effective from 1<sup>st</sup> June, 2016 and reiterated the conditions precedent that were expressed to the Claimant via the Offer Letter.

The Defendant further averred that by the Loan Agreement, an effective request for first disbursement was to be made within 6 (six) months after the effective date (i.e. 1<sup>st</sup> June, 2016), subject to the Claimant's fulfillment of all the conditions precedent stipulated under section 6.1(a) to 6. 1 (o) of the Loan Agreement, which includes perfection of the security as envisaged under section 4.7 of the Loan Agreement which includes:

- (a) First ranking legal mortgage over the land where the Project is to besituate;
- (b) An all-risk insurance policy covering the entire project;
- (c) professional indemnities for the Claimant's external consultants and in-house team;
- (d) opening of an escrow account to also be used as a Project account to receive the disbursements, safe proceeds from the project and any other project receivables to cover interest charges and principal amount;
- (e) pledge on the escrow account and sale proceeds in favour of the Defendant through a Deed of Assignment of Sale Proceeds;
- (f) Off take guarantee from Trade Union Congress to buy off all the project units in the event that the individual members do not buy;
- (g) Corporate guarantee from the majority shareholder of the Claimant; and
- (h) Bank guarantee from Skye Bank Nigeria Plc with respect to the availability of the equity contribution of the Borrower.

Thus, the Defendant's DW1 averred that the Claimant was expected to fulfil all the conditions precedent and to have made an effective request for the first disbursement on or before 30<sup>th</sup> November, 2016 or be liable for

the payment of a cancellation fee of 2% of any aggregate principal amount cancelled or not drawn down in accordance with the above.

The DW1 further stated that although the Legal Mortgage was executed on 1<sup>st</sup> June, 2016, it was not registered by the Claimant within the 6-months timeline stipulated under the Loan Agreement as the Claimant neither obtained the consent of the Governor of Niger State nor perfected the Deed of Legal Mortgage within the agreed 6 months. According to the Defendant, Power of Attorney was not a requirement under the Loan Agreement. The Claimant also could not obtain the Bank Guarantee from Skye Bank Nigeria PLC.

Again, the DW1 averred that there was no time the Defendant knew that the Governor's consent for the Legal Mortgage will not be obtained within time by the Claimant and that the Survey mapping of the land in question was not a condition precedent under the Loan Agreement because as at the time of the execution of the Loan Agreement, the land had already been surveyed and was clearly referred to in the Loan Agreement as the land with survey plan number MGVU2475/001.

The Defendant admitted knowing that the Claimant awarded a construction contract for the Project to one Tomando Construction Ltd to whom payments were to be made directly. However, the Defendant made it clear to the Claimant via a letter dated 18<sup>th</sup> May, 2016 and further to section 6.1(e) of the Loan Agreement that it shall disburse its funding contribution directly to Tomando Construction Ltd upon fulfilment of all conditions (including the conditions precedent) set out in the Letter of Offer and/or the draft Loan Agreement yet to be signed at the time, and evaluation and certification of works done on site by the Defendant or its independent project manager.

Also, the Defendant averred that the environmental approval obtained by the Claimant from the Niger State Environmental Management Authority and the legal fees paid by the Claimant to Abdulai Taiwo & Co are part of the conditions precedent to first disbursement as set out in section 6 of the Loan Agreement. The Claimant did not however fulfil other conditions precedent within the 6-month timeline under the Loan Agreement.

Contrary to paragraph 4(g) of the Amended Statement of Claim, the Defendant averred that the Claimant did not pay some of the fees and charges in respect of the Loan Agreement. The Claimant has not paid the commitment fees accrued up to 30<sup>th</sup> April, 2018 and amounting to 129,057.25USD (One Hundred and Twenty-nine Thousand, Fifty-Seven United States Dollars and Twenty-Five Cents), the cancellation fees applicable to the transaction pursuant to section 9.4 of the Loan Agreement and the final settlement of the sum of N1,033,000 (One Million, Thirty-Three Thousand Naira) due to the external lawyers, Abdulai Taiwo & Co. The Defendant subsequently settled the balance of the fees due to Abdulai Taiwo & Co. consequent upon the Claimant's failure to comply with the conditions precedent and the expiration of the timeline for such compliance and request for disbursement, the Defendant stated as highlighted above that further participation in the transaction will depend on the outcome of its re-appraisal. The Defendant did not by agreeing to a re-appraisal, waive the fulfilment of any of the conditions precedent as stated in the Loan Agreement, some of which remained unfulfilled by the Claimant even after the re-appraisal was concluded.

The Defendant therefore proposed two options to the Claimant i.e.

- (a) a deferral of the re-appraisal report consideration or
- (b) alternative funding but which options were rejected by the Claimant in its letter of 3<sup>rd</sup> April, 2017.

Also, by the time of the proposed re-appraisal, the foreign currency liquidity challenge, which resulted from the delay by the Claimant in fulfilling the conditions precedent, was so pronounced that the Claimant was unable to secure a FX Payment Guarantee in favour of the Defendant. In response to paragraph 6(b) of the Statement of Claim, the Defendant averred that following the Claimant's refusal to consider the options proposed in the Defendant's letter of 28<sup>th</sup> March, 2017 after the lapse of the Loan Agreement, the Defendant proceeded to conclude the re-appraisal process and after duly considering that the changes that happened within the transaction – both at the macro-economic environment and the project itself were materially significant, the Defendant was not willing to finance the project anymore. This position was communicated to the Claimant via a letter dated 11<sup>th</sup> June, 2018.

Thus, the addendum to the Loan Agreement was never agreed. The Claimant's denial in its letter of 20<sup>th</sup> June, 2018 in response to the Defendant's letter of 19<sup>th</sup> June, 2018 was insincere as it was well aware that it did not fulfil all the conditions precedent to first disbursement. There was no default on the part of the Defendant as these conditions precedent were to be fulfilled by the Claimant. There was also no need to further respond to this letter because the Claimant simply denied the fact that it never fulfilled all conditions precedent to first disbursement as required under the Loan Agreement

Consequently, the Defendant in its letter to the Claimant dated 13<sup>th</sup> June, 2018 communicated its decision to not finance the Project to the Defendant specifically stating that the failure of the Claimant to discharge all conditions precedent to first disbursement within the period provided under the Loan Agreement extinguished the Defendant's obligations to disburse and finance the Project under the Loan Agreement. The Defendant also stated that its obligations under the technically lapsed Loan Agreement and the facility were terminated and effectively cancelled. Without prejudice to the rights of both parties, the Defendant by the same letter invited the Claimant to a face-to-face meeting to discuss an approach that would lead to a mutually amicable conclusion of the relationship including the outstanding obligations associated with the transaction and due from the Claimant to wit, commitment, cancellation and legal fees. According to the Defendant, the proposed agenda of the meeting was (a) debriefing the Claimant on the decision regarding the transaction, (b) discussing the exit arrangement and (c) next steps in actualizing the agreed-upon exit arrangement. Following the Defendant's letter of 13 June 2018, a meeting was held between the parties on 6 August 2018. Subsequent to the meeting and ensuing communications between the parties, the Defendant's Board of Directors met on 18 October 2018 and arrived at certain resolutions for the exit arrangement. The resolutions included offering to waive the commitment fees accrued to 30<sup>th</sup> April 2018 and the cancellation fees. The Defendant also resolved to settle the outstanding legal fees to the external lawyer for the transaction. The Defendant communicated its resolutions and offer to the Claimant via its letter of 30 October 2018 wherein it also requested for a draft of a Deed of Discharge of the collateral to enable the implementation of the Board resolutions.

The Defendant therefore alleged that it is therefore surprising that the Claimant has decided instead to file this suit and make outrageous claims against the Defendant.

At the end, the Defendant counterclaimed against the Claimant as follows:

- (a) A DECLARATION that the Defendant to Counter Claim breached the Loan Agreement between the parties
- (b) The sum of 129,057.25USD (One Hundred and Twenty-Nine Thousand, Fifty-Seven United States Dollars and twenty-five Cents) being the Commitment Fees accrued up to 30<sup>th</sup> April, 2018 under the Loan Agreement
- (c) The sum of 182,000USD (One Hundred and Eighty-Two Thousand United States Dollars) being the Cancellation Fee of the principal amount that could not be drawn under the Loan Agreement.
- (d) The sum of N1,033,000 (One Million, Thirty-Three Thousand Naira) being the amount the Counter Claimant had to pay to Abdulai Taiwo & Co. following the Defendant to Counter Claim's default of the Loan Agreement.
- (e) An order for the payment of cost.

After the close of the Defendant's case and cross-examination of DW1 and DW2, final written addresses were ordered to be filed and served by the parties. Consequently, parties filed their Written Addresses.

### **ISSUES FOR DETERMINATION**

In the Claimant's Written Address filed on the 19<sup>th</sup> day of May, 2023, and settled by Professor J. N. Mbadugha, SAN, four (4) issues were formulated for determination as follows:

- 1. Whether in view of exhibits ZC, ZW, ZM, ZE, and other exhibits timeline for obtainment of Governor's consent was a condition precedent in the loan agreement and the Defendant is estopped from asserting that it is?***

- 2. Whether the Defendant is estopped from asserting or saying that the Claimant delayed in obtaining the Governor's consent if that was the duty of its counsel who had before the instruction advised it that he won't give any timeline for perfection of the legal mortgage?**
- 3. Assuming that issues 1 and 2 are, or either is, answered in the negative is the Defendant in breach of the contract for failure to disburse given that by the existence of the Power of Attorney, Customs/Practice of Secured Credit Transaction, its having benefited from the transaction it would have recovered its money whether the Governor's consent to the Legal Mortgage is delayed or even not obtained?**
- 4. Whether on the state of pleadings and the evidence adduced the Claimant is entitled to the reliefs sought?**

The Defendant on its own part filed its Written Address on the 6<sup>th</sup> day of December, 2022, settled by D. D. Killi Esq, and formulated 4 issues for determination. Three issues were for the main suit and one issue for the Counter Claim. They are as follows:

**On the Claimant's case**

- 1. Can the Defendant be said to have breached the Loan Agreement dated 1<sup>st</sup> June, 2016 between parties when it was the Claimant that failed to fulfil all conditions precedent for disbursement of funds under the Loan Agreement? (covers the Claimant's relief 12 (1))**
- 2. Does the Defendant have any outstanding obligations to (a) release any document having already returned all relevant documents relating to the Loan Agreement to the Claimant, (b) issue a Deed of Discharge for an unregistered Legal Mortgage and (c) issue an instrument of rejection for a Revocable Power of Attorney? [covers the Claimant's relief 12 (2) (i)].**

**3. Whether the Claimant is entitled to any of the damages claimed? [covers the Claimant's reliefs 12 (2a, b, c, d, e, f, g, h) (3a) (4a) and (5).**

**On the Counterclaim**

**Whether the Counter Claimant is entitled to the payment of fees due to it under the Loan Agreement as well as a refund of the legal fees paid to Abdulai Taiwo & Co. following the Defendant's breach of the Loan Agreement between parties (covers the Counter Claimant's reliefs 8a, b, c, d, e).**

I have examined all the issues formulated by both the Claimant and the Defendant. I am of the firm view that a hybrid of the Defendant's and the Claimant's issues can be condensed into the following two (2) issues as follows:

- (1) *Whether the Defendant can be said to have breached the Loan Agreement dated 1<sup>st</sup> June, 2016 between parties taking into consideration the condition precedent thereto and Exhibits ZC, ZW, ZM, ZE, and other exhibits timeline for obtainment of Governor's consent?*
- (2) *Whether the Defendant is in breach of the contract taking into consideration the existence of a Power of Attorney and Customs/Practice of Secured Credit Transaction.*

In determining this suit in line with the above issues formulated, all other issues raised will be addressed thereunder. In order to remain focused, I shall discuss all the legal arguments canvassed by Counsel under the issues formulated by this court before resolving same accordingly.

**ISSUE 1**

***Whether the Defendant can be said to have breached the Loan Agreement dated 1<sup>st</sup> June, 2016 between parties taking into consideration the condition precedent thereto and Exhibits ZC, ZW, ZM, ZE, and other exhibits timeline for obtainment of Governor's consent?***

## **CLAIMANT'S SUBMISSION**

Learned Silk referred this Court to para 6.1(e) of the Loan Agreement (Exhibit F), Exhibits ZB, ZU, ZV and ZW and contended that it shows clearly that the legal services of Abdulai Taiwo & Co. was engaged by the Defendant even though the cost was to be borne by the Claimant. Thus, Learned Senior Counsel argued that in the Attorney-Client relationship, the obligation of the solicitors was clearly owed to the Defendant and not to the Claimant. He further asserts that CW1 testified under cross-examination that in a correspondence between Abdulai Taiwo & Co., the Defendant and the Claimant, Abdulai Taiwo & Co. made it clear that they cannot say how long it will take to complete the perfection of title as follows:

***Cross Examination: it is not correct that Abdulai Taiwo & Co. did not say that perfection of the Legal Mortgage will not be possible within the time line of the Loan agreement?  
CWI: There is correspondence between Abdulai Taiwo, the Defendant and the Claimant makes it clear that they cannot say how long it will take to complete the perfection of the title.***

Learned Senior Counsel further referred this Court to Exhibit ZB, dated 3<sup>rd</sup> of February, 2016 – an email from the solicitors to the Defendant headed in its latter part: "SHELTER AFRIQUE DUE DILIGENCE ON AFRO ASIA SHELTERS INTERNATIONAL LTD" and Exhibit ZU which is an invoice that shows that Messrs Abdulai Taiwo & Co. was engaged by Shelter Afrique and contended that the said exhibits point to the fact that it was Shelter Afrique that was engaging the legal services of Messrs Abdulai, Taiwo & Co. It was also the same Shelter Afrique that they had provided advance information (ahead of the loan) to, stating clearly that the timeline for registration of the Legal Mortgage could not be ascertained. Learned Counsel referred this Court to Abdulai Taiwo & Co., the Defendant's Solicitors email of 3<sup>rd</sup> February, 2016 Exhibit ZB (ZW) and paragraph 2(c) of Exhibit ZJ to support his contention that Abdulai Taiwo & Co were at all material time, the Defendant's Solicitor who handled the drafting and perfection of the Deed of Legal Mortgage.



It is the further submission of the Learned Silk that Exhibit ZM, the Defendant's Offer Letter arose from the basis of Exhibit ZW. Exhibit ZM did not provide any timeline for perfecting the legal mortgage. Therefore, the condition precedent for disbursement was subject to Exhibits ZW and ZM. He submits therefore that it was based on the advice in Exhibit ZW that the requirement for perfecting first ranking legal mortgage had no prescribed timeline in Exhibit ZM.

According to Learned Counsel, it is trite law that parties could have a side agreement that relates to a main contract. This is known as a collateral contract. According to this doctrine, if the representor makes a statement or promise which is intended to induce the representee to enter into a contract, then if the representee enters into that contract in reliance on that promise, the representor will be held bound by his promise. The promise is treated as part of a preliminary or collateral contract. Counsel referred the Court to Nigeria Law of Contract, 2<sup>nd</sup> Edition by Sagay, page 128, para 1513. Consequently, Learned Counsel submits that the evidence of the fact that the Defendant entered into the loan agreement on the basis that the timeline for the registration and perfection of the legal mortgage could not be predetermined is a collateral contract. This is more so given that express representation was shared with the Claimant and the Defendant and the Claimant relied on it. Thus, collateral contract plays a role in interpreting the main contract. He referred the Court to Black's Law Dictionary, 7<sup>th</sup> Edition page 319 and P.S. Atiyah, "An Introduction to the Law of Contract" 80 81, 161 (3<sup>rd</sup> ed. 1981).

Flowing from the above, Learned SAN submits that upon proper construction, Exhibits ZM and ZW being collateral to Exhibit E shows that timeline within which to obtain the Governor's consent is not a condition precedent in the Loan Agreement. This is further fortified by the fact that there is no clause or provision in Exhibit F providing that the legal mortgage must be perfected on or before 6 months. He relied on the case of **CITY OF WESTMINSTER PROPERTY 1934 LIMITED VS. MUDD [1958] 2 ALL ER 733 AT PAGE 742-743 PARAS I-A** and also referred to by Professor Itse Sagay, SAN in page 128 of his Book "Nigerian Law of Contract", 2<sup>nd</sup> Edition.

On the basis of the above, Counsel maintained that by virtue of Exhibit ZW and more particularly the last paragraph of page 2 under reference, it would be abhorrent and unfair and contrary to the applicable principle in respect of collateral contracts for the Defendant to claim that obtaining the Governor's Consent was a condition precedent.

### **DEFENDANT'S SUBMISSION**

On the part of the Defendant, he argued that once a condition precedent is incorporated into an agreement, that condition must be fulfilled before the effect can follow. Learned Counsel relied on the case of **TSOKWA OIL MARKETING CO. V. B.O.N. LTD. (2002) 11 NWLR (PL 777) 163 AT 197 PARA C.**

Consequently, Learned Senior Counsel contended that relying on the evidence on record, the Offer Letter dated 22<sup>nd</sup> April, 2016 (Exhibit ZM) in which some of the terms of the transaction were set out particularly on page 4 of Exhibit ZM, one of the conditions precedents to the first disbursement of the loan amount is stated as 'registration and perfection of the security for the loan'. Another condition precedent is stated to be 'Contractual Undertaking (through a First Demand Guarantee) from Skye Bank Nigeria PLC with respect to availability of the Developer's equity'. The security for the loan agreement is set out on page 2 of Exhibit ZM and one element of the said security is a 'First Ranking Legal Mortgage over the demarcated 18.11 acres (7.33ha)'. According to Learned Counsel, none of these facts are in dispute between the parties. In support of his assertion, Learned Counsel referred this Court to the testimony of CW1 under cross-examination, as follows:

***"Cross Examination: You are aware of the subject matter of this suit which relate to loan transaction?"***

***CW1: Yes***

***Cross Examination: The Claimant approached the Defendant for a Loan?"***

***CW1: Yes***

***Cross Examination. It is as a follow up that another letter was issued to the Claimant?"***

***CW1: Yes***

***Cross Examination: This offer letter set out the condition which the loan shall be granted to the Claimant***

***CW1: Yes***

***Cross Examination: This offer letter, does it include that the loan will be disbursed subject to the fulfillment of certain conditions?***

***CW1: Yes”***

He referred the Court to the Claimant’s letter dated 26<sup>th</sup> April, 2016 (Exhibit E), where the Claimant accepted the offer and stated unequivocally that: ***“we are currently working on putting finishing touches on all conditions precedent to draw down. All conditions so indicated will be met as there is every need to jump start the project as soon as possible.”***

Learned Counsel further cited the Loan Agreement dated 1<sup>st</sup> June, 2016 (Exhibit F) entered into by the parties which according to Counsel explicitly set out the conditions precedent for the disbursement of the loan amount, particularly, Section 6.1 of the Loan Agreement.

Sequel to the above, the Defendant submits that given the express term of the agreement highlighted above, it cannot be reasonably disputed that the perfection/registration of a legal mortgage and a First Demand Guarantee from Skye Bank Plc were part of the conditions precedent to the disbursement of the loan amount to the Claimant yet, the Claimant's position and the premise of the instant suit is that by deciding to not disburse the loan amount to the Claimant without the perfection of the legal mortgage, the Defendant is in breach of the loan agreement. This position (being the very foundation of the Claimant's suit) is unsupported by the facts and evidence before this Honourable Court, which show clearly that the conditions for the perfection of a Legal Mortgage and a First Demand Guarantee from Skye Bank Plc were never met by the Claimant with respect to the Legal Mortgage, that is a form of security that is put in place by a lender to protect its interests against any potential loss in event of the default of a borrower to repay the loan when disbursed.

Therefore, Learned Counsel submits that a lender is well within its right to insist that a security must be in place before disbursement, in the instant

case, the Legal Mortgage. In support, Learned Counsel cited the cases of **ATOLAGBE V. AWUNI (1997) 9 NWLR (PT. 522) 536** and **DADA V SIKUADE (2014) 17 NWLR (PT. 1435) 72 AT 113, PARA G** where the court defined the term "condition precedent" as one that denotes, an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises".

In the light of the above, Learned Counsel contended that in the instant suit, the perfection of the legal mortgage and the procurement of a Skye Bank Guarantee were among the conditions that needed to occur before the Defendant was required to disburse the loan amount to the Claimant. As such, without the occurrence of these events, the Defendant's duty to disburse the loan amount did not arise in any manner whatsoever.

Relying on Section 22 (1) of the Land Use Act 1978, Learned Counsel asserts that for a holder of a statutory right of occupancy to alienate that right of occupancy whether by assignment or mortgage, e.t.c, the consent of the Governor of the relevant state must be obtained. In the instant case, Counsel posits that the consent of the Governor of Niger State was not obtained for the mortgage to be perfected. This fact according to Learned Counsel was admitted by the Claimant in its Amended Statement of Claim. Therefore, facts admitted need no further proof. Counsel referred to the case of **TIJANI JOLASUN V NAPOLEON BAMGBOYE (2010) 18 NWLR (PT. 1225) 285 AT 307 PARAS. A-B 4 16.**

Learned Counsel also referred this court to the testimony of DW2 where he stated that there is no Deed of Legal Mortgage (registered or otherwise) in the Claimant's property file maintained at the Niger State Land Registry otherwise known as the Niger State Geographic Information Systems (NIGIS).

In addition, Learned Senior Counsel submits that the Claimant aware of the weakness of its Claim, brought in a lame excuse that the Defendant was aware that the mortgage could not be perfected within the 6-month time frame stipulated in the Loan Agreement and that the Power of Attorney (Exhibit H) somehow constituted the perfection of the Legal Mortgage required by the Loan Agreement. The Claimant also tried to pass on its responsibility to Abdulai Taiwo & Co, the solicitors for the transaction.

Unfortunately, the Defendant's Counsel concluded that none of these claims hold any water whatsoever because from a simple reading of the Loan Agreement (Exhibit F), it is obvious that the parties understood the timeframe for perfecting the Legal Mortgage to be 6 months and no more and that by Section 4.5.1(a) of the Loan Agreement, the closing date for requesting the first disbursement is six (6) months after the effective date i.e. 1<sup>st</sup> June, 2016, the date of signing the Loan Agreement. Clearly, parties understood that time was of the essence for the Loan Agreement. Learned Counsel buttressed his argument by citing the case of **N.B.C.I. V INTEGRATED GAS (NIG.) LTD. (2005) 4 NWLR (PT. 916) 617 AT 649 PARAS F-H** where the court held that *"Time is said to be of the essence of the contract in the following instances: (a) where the parties have expressly stipulated in their contract that time fixed for performance must be exactly complied with, (b) where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with, for example the purchase of leasehold house required for immediate Occupation, (c) where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time.*

Counsel further argued that the Power Attorney relied upon by the Claimant is not one of the condition precedents under the Loan Agreement nor was it required by the Defendant for the purpose of disbursement of the loan sum at all. The Power of Attorney executed by the Claimant was therefore a complete surplusage on its part and did not in any way whatsoever, supplant the requirement of a perfected legal mortgage. This, according to Learned Counsel was admitted by the Claimant's CW1 during cross-examination on 10<sup>th</sup> February, 2022 when he admitted that the Power of Attorney is not a condition precedent under the Loan Agreement. He also could not point to any documentation and evidence before this Honourable Court where it was stated that a Power of Attorney is a condition precedent to the disbursement of the loan and instead alleged that the need for a Power of Attorney came out of meetings held between the Claimant and the Defendant. However, there is nothing before this Honourable Court to support this statement.

Furthermore, Learned Counsel submits that the law is clear on the bindingness of the terms of a contract between parties. He referred this Honourable Court to the case of **G.T.B. V OGBOJI (2019) 13 NWLR (PT. 1688) 67 AT 84, PARAS C-D**, where the Court of Appeal held that "when there are terms to a contract, parties to the contract must honour their contractual obligations as the terms of the contract are binding on the parties thereto."

It is the further submission of Learned Counsel that the Claimant cannot avoid its responsibilities under the Loan Agreement and try to pass them onto a third party, in the instant case, the law firm of Abdulai Taiwo & Co. who is not a party to the Loan Agreement between the parties (Exhibit F) and is not mentioned in the said agreement at all. The responsibility for fulfilling the conditions precedent therefore rested on the Claimant and never shifted. He referred this Honourable Court to the cases of **FEBSON FITNESS CENTRE V. CAPP H. LTD (2015) 6 NWLR (PT. 1455) 263 AT 280 PARAS B- D** and **A.G. (FED.) V. SODE (1990) 1 NWLR (PT. 128) 500 AT 519, PARAS A-C**.

Also, Learned Counsel contended that Abdulai Taiwo & Co was not the Defendant's lawyer but that of the transaction as selected by the Claimant. This is clear from Exhibit ZC, an email from the Defendant to Abdulai Taiwo & Co. on 10<sup>th</sup> February, 2016, wherein it was stated, *"Dear Olayo, further to your email below SHELTER-AFRIQUE acknowledges the fact that your Office has been chosen by AFRO-ASIA to assist us in the transaction....* It was therefore clear from the beginning according to Counsel that the Claimant selected the lawyers to assist both parties in the transaction. Thus, Abdulai Taiwo & Co. was never the Defendant's lawyer but the transaction lawyer. This point was further reiterated by DW1 under cross-examination on 31<sup>st</sup> May, 2022, as follows:

***"Cross-Examination: Do you still maintain that Abdulai Taiwo and Co is not the Defendant's Lawyer?  
DW1: Absolutely."***

Again, the Defendant's Counsel submits that the Claimant erroneously contended that the Defendant waived the requirements for the perfection of the legal mortgage and the Skye Bank guarantee. Addressing this issue,

Learned Counsel referred the Court to Sections 21 and 22 of the Loan Agreement (Exhibit F) and argued that by the agreement, waivers shall only be effective when reduced in writing and that any amendment in Exhibit F(the agreement) can only be done by an instrument in writing executed by the parties thereto. Further, Section 9.6 of Exhibit F, provides that "the Borrower shall pay SHELTER-AFRIQUE a Waiver fee of an amount equivalent to Ten Thousand United States Dollars (USD 10,000) for any material changes approved by SHELTER-AFRIQUE of any term in this Agreement or following the Borrower's breach of any term of the Loan." Thus, Counsel argued that for the Defendant to have waived the need for the perfection of the Legal Mortgage or to have accepted a Power of Attorney in its stead, or to have accepted another bank guarantee other than the explicitly stated Skye Bank guarantee, it would have had to do so in writing in order to be effective as stated in Section 21 of the Loan Agreement. Further, the Claimant would have had to pay the waiver fee in order to compensate the Defendant for such a change as stipulated by Section 9.6 of the Loan Agreement. Therefore, since none of the above took place, Counsel maintained that it is a reasonable conclusion that no effective waiver occurred and the Claimant's averments to the contrary hold no water in view of the provisions of the Loan Agreement (Exhibit F).

In reaction to the issue of re-appraisal process which the Defendant instituted, Learned Counsel submits that it was not a waiver of the conditions precedent in any manner whatsoever. Thus, he referred to the Defendant's email of 14<sup>th</sup> February, 2017 to the Claimant (Exhibit Q), and contended that it was never stated anywhere in writing that the conditions precedent to loan disbursement had been waived by the Defendant and the Claimant has placed no evidence before this Honourable Court to the contrary. In fact, Counsel insisted that the Defendant made it clear that depending on the outcome of the re-appraisal, an addendum to the Loan Agreement will be prepared before disbursements to the project can commence. To strengthen his argument, Learned Counsel referred the Court to the testimony of CW1 where he admitted that no addendum was prepared and that no waiver happened under cross examination on 10<sup>th</sup> February, 2022 as follows:

***"Cross Examination: Waiver fees was not one of the fees that you paid?"***

***CW1: There was no waiver and as such no waiver fees that will arise.***

***Cross Examination: Was an addendum ever prepared by the parties?***

***CW1: The correspondence and discussions that the two parties had over two years did not lead to an addendum being prepared."***

In this regard, Learned Counsel submits that cross-examination can be used in support of the party who cross-examined. He relied on the case of **WUYA V. JAMAALG. KAFANCHAN (2011) LPELR-9078 (CA)** and **AYOADE V. MIL GOV. OGUN STATE (1993) 8 NWLR (PT. 309) 111 AND F.B.N. PLC V. TSOKWA (2004) 5 NWLR (PT. 866) 271.**

On the whole, Learned Counsel urged this Court to refuse the Claimant's reliefs relating to the breach of the Loan Agreement, same having not been proven before this Honourable Court as required by law.

### **RESOLUTION OF ISSUE 1**

Now, from the submission of Counsel in their respective Written Addresses, there is no dispute that the Defendant issued the Claimant with an Offer Letter, Exhibit ZM. It is also not in dispute that parties signed a Loan Agreement to regulate the transaction between them. However, the point of difference between parties is whether the condition precedent stated that the Legal Mortgage must be perfected within 6 months i.e. the Governor's Consent must be obtained within 6 months before first disbursement. While the Defendant insisted that it is a requirement in the agreement that the Governor's consent must be obtained before disbursement of the loan, the Claimant on its part, maintained that in view of Exhibits ZC, ZW, ZM, ZE among others, the six (6) months for obtaining the Governor's consent is not a condition precedent. In other words, the said exhibits amounted to a collateral Contract between the parties.

It is trite law that parties to a contract are bound by the terms of the agreement entered by them. Thus, where there is dispute between the parties to a Contract, the guide to resolve such dispute is certainly the agreement between the parties. Thus, PER EKANEM, J.C. in **FBN LTD V.**



**OGWEMOH (2023) LPELR-60298(CA) (PP. 27-28 PARAS. F)** puts it succinctly as follows:

***"Parties are bound by the terms of their contract and if any dispute should arise with respect to the contract, the terms of the written document which constitutes their contract are invariably the guide to resolving the dispute. See ABC Transport Co. Ltd v Omotoye (2019) 14 NWLR (Pt. 1692) 197, 213."***

It follows therefore that the duty of the Court is to simply interpret the contract as entered by the parties without more. I rely on the decision of SHUAIBU, J.C.A in **FBN LTD V. OGWEMOH (supra)** where he stated as follows:

***"Parties to an agreement retain the commercial freedom to determine their own terms. Where there is a contract regulating an agreement between the parties, the main duty of the Court is to interpret the contract, to give effect to the wishes of the parties as expressed therein. See NIKA FISHING LTD VS LAVINA CORP. (2008) 16 NWLR (PT.1114) 509. It is also settled that Courts cannot re-write, import into or export out of a contract any term or condition which, the parties did not in their agreement state to be part of what they intended. O.H.M. VS APUGO & SONS LTD (1990) 1 NWLR (PT.192) 652, OLATUNDE VS OBAFEMI AWOLOWO UNIVERSITY (1998) 5 NWLR (PT. 549) 178 and VITAL INVESTMENT LIMITED VS CAP PLC (2022) 4 NWLR (PT.1829) 205."***

The Court in interpreting agreement or statutes has been guided by plethora of judicial cases to accord the plain meaning to agreements where it is unambiguous. On this, PER ADIO, J.S.C in **UBN LTD V. SAX (NIG.) LTD (1994) LPELR-3390(SC) (PP. 18 PARAS. A)** had this to say:

***"I am of the clear view that the provision of the relevant clause in each of the mortgage agreements was clear and unambiguous. When a document is clear, the operative***

***words in it should be given their simple and ordinary grammatical meaning. Further, the general rule is that when the words of any instrument are free from ambiguity in themselves and when the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is always to be construed according to the strict, plain and common meaning of the words themselves."***

Relying on the above foundation which is the position of the law, the job of this Court is simply to look at the agreement entered by parties and give it its plain meaning without more. In doing so, this Court will dispassionately also look at Exhibits ZC, ZW, ZM, ZE and ZB which forms the fulcrum of the Claimant's contention. To achieve this, I shall start by reproducing the salient part of the agreement that is in dispute and calls for the interpretation of this Court.

Prior to the Loan Agreement, the Claimant was given an Offer Letter which is admitted as Exhibit ZM. In the offer letter which was accepted by the Claimant, the following requirements for the security of the Loan was expressly stated as follows:

- (i) First Ranking Legal Mortgage over the demarcated 18.11 acres (7.33 ha):***
- (ii) Corporate Guarantee from A-Z Petroleum Products Ltd- the majority shareholder of the Borrower:***
- (iii) First Demand Guarantee from Skye Bank Nigeria PLC with respect to the availability of the equity from the developer,***
- (iv) Pledge on the Escrow Account and the sale proceeds to be deposited in the same account. To enhance this, the Escrow Account details will be indicated on each Contract of Sale and Letter of Offer which will be approved by Shelter-Afrique to ensure that all buyers are aware that all sales proceeds must pass through the Escrow Account;***

- (v) All-Risk-Insurance cover with Shelter- Afrique's interest duly noted;**
- (vi) Legal opinion by Shelter-Afrique's local legal representatives.**

On Legal fees, the offer letter provides:

***To be borne by the borrower. Advocate to be appointed by Shelter-Afrique:***

Under the subheading "other terms and condition", the offer letter provides:

***... (iv) Disbursement of the loan will be subject to preconditions as may be provided in the Loan Agreement in accordance with Shelter Afrique's policies.***

Under the subheading, "CONDITIONS PRECEDENT TO FIRST DISBURSEMENT" the Offer Letter states as follows:

- *Registration and perfection of the security for the loan:***
- *Opening of an Escrow Account in a bank acceptable to shelter Afrique;***
- *Submission of Contractor's All-Risk Insurance cover will: Shelter Afrique's interest duly noted as loss payee;***
- *Submission of Professional Indemnities for the external building consultants and an Umbrella Professional Indemnity Cover from the developer covering all the in-house technical team;***
- *Contractual Undertaking (through a First Demand Guarantee) from Skye Bank Nigeria PLC with respect to availability of the Developer's equity.***
- *Letter of Comfort from Trade Union Congress undertaking to lobby the members into buying the housing units.***

It is worthy of note that the Offer Letter expressly provided that there will be a loan agreement to be executed by parties and a draft copy of the said Loan Agreement was forwarded to the Claimant for its perusal and comment. This clearly shows that parties were all carried along in the drafting process of the said agreement.

Consequently, on the 1<sup>st</sup> of June, 2016, the parties entered into a Loan Agreement. I will reproduce the salient parts of the Loan Agreement relevant in the determination of this issue. Thus, Section 4.5.1(a) provides:

***Six (6) months after the Effective Date the Borrower shall be required to have made an effective request for the first disbursement for the purpose of Section 12.01 of the General Conditions. (underling mine for the sake of emphasis)***

Then, Section 4.7 provides:

***Security - The Borrower undertakes to secure the Loan primarily through:***

***(a) First ranking Legal Charge on land measuring 7 33 hectares particularly delineated and edged red on survey plan number MGVL//2475/001 being a portion of the parcel of land measuring 107 812 hectares situate and located at JIBI, Tafa, Local Government Area of Niger State covered by Certificate of Occupancy no NG/SL/988 and registered as No. 462 at page 462 in volume 5 at the land registry at Minna, Niger State and granting a Right of Occupancy for a term of 99 years from the 1<sup>st</sup> of January 2014 securing SHELTER AFRIQUE's total exposure of Nine Million, One Hundred Thousand Dollars United States (USD 9,100,000) as at the date of execution and under a Deed of Legal Mortgage of the same date as this Agreement and supported by further security which shall include the following***

***(b) ...***

- (c) ...**
- (d) ...**
- (e) ...**
- (f) ...**
- (g) ...**
- (h) *First Demand Guarantee from Skye Bank Nigeria PLC with respect to the (4) availability of the equity contribution of the Borrower 5 PROCUREMENT The Borrower shall ...***

## **6 CONDITIONS**

### **6.1 Conditions Precedent to First Disbursement**

***The obligation of SHELTER-AFRIQUE to disburse the Loan is subject to the conditions that SHELTER-AFRIQUE receives on or before the disbursement date an executed original copy of each of the following documents listed below in form and substance satisfactory to SHELTER-AFRIQUE as listed below:***

- (a) *The Loan Agreement is duly executed by the authorized representatives of Parties and, it required, stamped and registered by the appropriate authorities in Nigeria:***
- (b) *Perfection of the security package as envisaged and defined under Section 4 7 hereof in favour of SHELTER AFRIQUE.***
- (c) *Execution of an Escrow Agreement between SHELTER-AFRIQUE, the Borrower, and a reputable Bank acceptable to SHELTER-AFRIQUE,***

- (d) Opening of an Escrow Account with a reputable Bank acceptable to SHELTER AFRIQUE to receive sales proceeds and other project receivables towards servicing financial charges and the principal amount,***
- (e) Receipt of a disbursement request from the Borrower, in the form set out in Schedule 1, expressly indicating that payments are to be made directly to the Contractors. The payment will be made into a bank account in the name of the contractors to be advised by the Borrower,***
- (f) Receipt of a Schedule of disbursement for the duration of the Loan,***
- (g) Environmental approval certificate from the Niger State Environmental Management Authority.***
- (h) Requisite Building Permit;***
- (i) Submission of the draft of the sale agreement containing a clause specifying that all the proceeds should be paid in the escrow account;***
- (j) Legal opinion at the cost of the Borrower by SHELTER-AFRIQUE's legal counsel in Nigeria, in the form set out in Schedule II confirming that the Loan Agreement and Security documents have been duly executed and are binding and that there are no legal impediments to prevent the Borrower from implementing the Project on the Subject Land.***
- (k) Legal opinion at its own cost of the Borrower's legal counsel, substantially in the form set out in Schedule III, confirming inter alia the Borrower's representations and warranties and the validity and enforceability of this Agreement;***

***(I) Settlement of legal fees for SHELTER-AFRIQUE's legal counsel in Nigeria,...***

From the wordings of the above agreement, it is expressly written without ambiguity that the perfection/registration of a legal mortgage and a First Demand Guarantee from Skye Bank Plc were part of the conditions precedent to the disbursement of the loan amount to the Claimant (see pages 2 and 3 of the Offer Letter (Exhibit ZM) under the sub-heading "security" particularly, items "i", "iii" and "iv", respectively. See also Section 4.7 of the Loan Agreement. It is clearly stated that the security shall be a First Legal Mortgage over the demarcated 18.11(7.33ha) and a First Demand Guarantee from Skye Bank Plc. This position is supported by the testimony of the Claimant under cross-examination where he stated as follows:

***Cross Examination: The Claimant approached the Defendant for a Loan?***

***CW1: Yes***

***Cross Examination: It is as a follow up that another letter was issued to the Claimant***

***CW1: Yes.***

***Cross Examination: This offer letter set out the condition which the loan shall be granted to the Claimant***

***CW1: Yes.***

***Cross Examination: This offer letter, does it include that the loan will be disbursed subject to the fulfillment of certain conditions?***

***CW1: Yes.***

***Cross Examination: In addition to the pre-condition, the disbursement of the Loan was it stated that certain fees will be payable to the Defendant by the Claimant?***

***CW1: Yes.***

***Cross Examination: This offer Letter, does it include that the loan will be disbursed subject to the fulfilment of certain conditions?***

***CW1: Yes.***

This piece of evidence elicited from the Claimant established the fact that the Claimant was well aware of the terms and conditions in the Offer Letter and the Loan Agreement.

Furthermore, upon a thorough perusal of the Offer Letter and the Loan Agreement entered into by parties, it is explicitly stated at Section 4.5.1(a) of the Loan Agreement that "***Six (6) months after the Effective Date the Borrower shall be required to have made an effective request for the first disbursement for the purpose of Section 12.01 of the General conditions.***" (underling mine for the sake of emphasis).

This provision in the agreement is expressly written. It simply means that the Claimant is expected to request for the first disbursement within 6 months and for him to qualify for such disbursement, the Loan Agreement expressly provides that the Claimant must perfect the legal mortgage and First Demand Guarantee from Skye Bank Plc. See Section 6.1 of the Loan Agreement.

It should be borne in mind as already stated above that "*the law is that written contract agreement freely entered into by the parties is binding on them. A Court of law is equally bound by the terms of any written contract entered into by the parties. Where the intention of the parties to a contract is clearly expressed in a document, a contract agreement; the Court cannot go outside that document to give effect to the intention of the parties. The general principle is that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument, OKONKWO V. C.C.B. (NIG.) PLC. (1997) 6 NWLR (PT.507) PG.48 DALEK (NIG) V. OMPADEC (2007) 7 NWLR (PT.1033) PG.402. U.B.N. LTD. V. OZIGI (1994) 3 NWLR (PT.333) PG.385 AT PG.404. NNEJI V. ZAKHEM CON. (NIG) LTD. (2006) 12 NWLR (PT.994) PG.297 SC. U.B.N. LTD. V. SAX (1994) 8 NWLR (PT.361) PG.402."* PER ADEKEYE, J.S.C IN *BABATUNDE & ANOR V. BANK OF THE NORTH LTD & ORS (2011) LPELR-8249(SC) (PP. 21 PARAS. B).*

However, the Claimant grouse is that paragraph 6.1 of the Loan Agreement, Exhibits ZB, ZU, ZV, and ZW shows clearly that the legal services Abdulai Taiwo & Co. was engaged by the Defendant even though



the cost was to be borne by the Claimant. As such, in the Attorney-Client relationship, the obligation of the solicitors was clearly owed to the Defendant and not to the Claimant. Premised on this position taken by the Claimant, the Claimant buttresses further that by the correspondence between Abdulai Taiwo & Co, the Defendant and the Claimant, the Solicitors made it clear that they cannot say how long it will take to complete the perfection of title. Learned Counsel relied on the answers elicited from CW1 where he said as follows:

***Cross Examination: it is not correct that Abdulai Taiwo & Co did not say that perfection of the Legal Mortgage will not be possible within the time line of the Loan agreement?***

***CW1: There is correspondence between Abdulai Taiwo & Co, the Defendant and the Claimant makes it clear that they cannot say how long it will take to complete the perfection of the title.***

Contrariwise, the Defendant's Counsel argued that the Claimant could not avoid its responsibilities under the Loan Agreement and so tried to pass them onto a third party, in the instant case, the law firm of Abdulai Taiwo & Co., who is not a party to the Loan Agreement between the parties (Exhibit F) and is not mentioned in the said agreement at all. The responsibility for fulfilling the conditions precedent therefore rested on the Claimant and never shifted. He further contended that Abdulai Taiwo & Co was not the Defendant's lawyer but that of the transaction as selected by the Claimant. He relied on Exhibit ZC, an email from the Defendant to Abdulai Taiwo & Co on 10<sup>th</sup> February, 2016 and the testimony of DW1 under cross-examination on 31<sup>st</sup> May, 2022, where he stated:

***"Cross-Examination: Do you still maintain that Abdulai Taiwo and Co is not the Defendant's Lawyer?"***

***DW1: Absolutely."***

Now, I have perused Exhibits ZB, ZU, ZV, ZW and ZC and all other exhibits before this Court vis-a-vis the testimonies of parties before this Court. All the said exhibits were correspondences made before the transaction between the parties was reduced into writing the Loan Agreement which was duly signed by them. For instance, Exhibit ZB, was an email from

OkechukwuAgwu Uche sent on the 8<sup>th</sup> of February, 2016. Exhibit ZW, was also an email from OkechukwuAgwu Uche sent to Elizabeth Ogonegbu (DW1) on the same 8<sup>th</sup> of February, 2016 (same as Exhibit ZB) and another email from Ms. AlayoOgunbiyi to Charles Ike and copied to OkechukwuAgwu Uche with the subject: "SHELTER AFRIQUE DUE DILIGENCE ON AFRO-ASIA SHELTERS INTERNATIONAL LTD" sent on 3<sup>rd</sup> February, 2016. The above-mentioned exhibits were at best correspondences preparatory to the sealing of the agreement by the parties. Therefore, recourse to such email or transactions can only be of help where the terms contained in the Offer Letter and the Loan Agreement which were later made by parties appears unclear. The Offer Letter (Exhibit ZM) accepted by the Claimant was made on the 22<sup>nd</sup> of April, 2016 while the Loan Agreement was made on the 1<sup>st</sup> of June, 2016. Therefore, the correspondences with regards to the role of the Lawyer before the Loan Agreement, which was later put into writing can no longer take the place of the Loan Agreement itself willingly entered and signed by parties. What I am laboring to say is that the Loan Agreement supercedes any prior communication. In other words, the Loan Agreement signifies the *consensus ad idem* of the parties. It represents the point at which the parties' mind met before signing of the agreement between them. Therefore, I agree with Counsel to the Defendant that by the doctrine of the privity of contract, a third party who is not privy to it cannot be made a party. By the doctrine of privity of contract, a contract cannot confer obligation or impose obligation on any party who is not a party to it neither will any party be allowed to use such a third party as a shield for not performing its bid in a contract. Thus, PER ADAH, J.C.A in **LUCK GUARD LTD V. ADARIKU & ORS (PP. 30-31 PARAS. B)** laid down the position of the law as follows:

***"... As a general rule, the doctrine of privity of contract is that a contract cannot confer or impose obligations arising under it on any person except the parties to it. In other words, only the parties to a contract can sue or be sued on the contract, and a stranger to a contract cannot sue or be sued on the contract. The doctrine of privity of contract is all about the sanctity of contract between the parties to it. It does not extend to others from outside. The doctrine will not apply to a non-party to the contract who may have,***

***unwittingly, been dragged into the contract with a view to becoming a shield or scapegoat against the non-performance by one of the parties. See - Febson Fitness Centre v Cappa Holdings Ltd (2014) LPELR - 24055 (CA) and UBA Plc & Anor., v. Jargaba (2007) 11 NWLR (Pt. 1045) 247."***

Furthermore, let me reiterate that the law is trite regarding the bindingness of terms of agreement where parties as in this case, voluntarily enter into an agreement and willingly too endorse the said terms."The agreement must be honoured, Courts of law being Courts of justice and conscience will certainly not allow anything to be read into an express agreement, terms on which parties were not in agreement."See Per BAGE,J.C.A in **WILLAMS V. REGISTRAR OF TITLES, LAGOS STATE & ORS (2016) LPELR-41420(CA) (PP. 19-20 PARAS. F).**

Therefore, parties in this case having codified expressly their agreement, they cannot be allowed to bring in interpretations that will favour them at this stage. They must stick to the agreement entered by them. Not even the eloquent testimony of parties during trial can replace the express content of the document containing their agreement except if the party can show the existence of fraud or misrepresentation which does not exist in the present case and I so hold.

Stemming from the above and in line with the express provision of the agreement entered into by parties, the question that begs for answer is whether the Claimant has fulfilled the condition precedent as provided by the terms and conditions of the agreement which is reproduced above. Without much ado, this Court is of the considered view beyond peradventure that the Claimant is in clear breach of the condition precedent provided by the contract. To make my stand clearer, it is vivid that the Claimant did not provide a first ranking legal mortgage and did not also fulfil the requirement of a First Demand Guarantee from Skye Bank Plc. The agreement states at the risk of prolixity as follows:

***"Six (6) months after the Effective Date the Borrower shall be required to have made an effective request for the first***

***disbursement for the purpose of Section 12.01 of the General conditions.***” (underling mine for the sake of emphasis).

Sequel to the above reproduction, the borrower is expected to make an effective request for the first disbursement upon fulfilment of the general conditions stated in the contract. In the instant case, the Claimant did not and could not make any request because he did not fulfil the condition precedent as contemplated in the agreement. The Claimant all through the transaction did not also provide a First Demand Guarantee from Skye Bank PLC as provided in the agreement between the parties. Against this background, I am of the firm view that the Claimant is in clear breach of the condition precedent which gives the Defendant the right to terminate the agreement as life was snuffed out of the agreement and I so hold.

With due respect to the brilliant submissions of Learned Senior Counsel (which unfortunately, cannot override the position of the law) that there is correspondence (Exhibit B) between Abdulai Taiwo & Co, the Defendant and the Claimant which makes it clear that they cannot say how long it will take to complete the perfection of the Legal Mortgage will not shift the goal post already established by this Court and this Court will not allow any party not even the Claimant, to use a non-party to the agreement entered by them as a shield to avoid or derail from the terms of the contract and I so hold.

Therefore, parties are expected to respect the condition precedent in the Contract that gives life to the agreement entered by them. To consolidate my stand, I will seek refuge in the case of **KAWU V. YUSUFARI (2022) LPELR-58050(CA)(PP. 3-5 PARAS. B-B)** where PER TOBI, J.C.A held thus:

***"By the word 'condition' this means the sale agreement is not a finality until certain event happens. This is the effect of condition precedent in a document. In Burton Resources Ltd & Anor v. First Deepwater Discovery Ltd (2021) LPELR-54429 (CA), this is what this Court said on condition precedent:***

***"Once there is a condition that needs to be satisfied before an agreement will come into force, the general position of***

***the law is that such a condition becomes condition precedent. The non-existence of the condition will be an obstacle to the enforcement of the agreement and will prevent anyone from getting any benefit from the agreement. Condition precedent has been defined as one which delays the vesting of a right until the happening of an event. See Nigercare Development Co., Ltd vs Adamawa State Water Board &Ors (2008) 2-3 S.C (pt. II) 202. The implication of a condition precedent is that none of the parties can benefit from the agreement or claim any right therein without the fulfillment of the condition precedent. In this regard, the Supreme Court case of Tsokwa Oil Marketing Co (Nig.) Ltd vs Bank of the North Ltd (2002) 11 NWLR Ltd (pt. 777) 163 is instructive. The apex Court held thus:***

***"It is trite law that once a condition precedent is incorporated into an agreement, that condition precedent must be fulfilled before the effect can flow. All conditions are (a) conditions precedent i.e. the sine qua non to getting the thing; or conditions subsequent, which keep and continue the thing (ibid). As to when conditions are precedent or subsequent, see 30 Law Journal 686; Porter v. Shephard 6 T.B. 665, Cooper v. London, Brighton & Southern Railway 4 Ex. D88; Barnard v. Faber (1893) 1 Q.B.340, cited WARRANTY; Horrigan v. Horrigan (1904) 1 Ir. R.22, 271 (Stroud's Judicial Dictionary Vol. 1 A-C page 538). See also the case of Nigerian Bank for Commerce and Industry v. Integrated Gas (Nig.) Ltd. (1999) 8 NWLR (pt.613) 119 at 127 G-H wherein Aderemi, J.C.A. held as follows:***

***"By Exhibits F and G, the parties have entered into what, in law, is a conditional contract, the condition precedent must happen before either party becomes bound by the contract. A condition must be fulfilled before the effect can follow." A condition precedent in an agreement as mentioned above is a condition without which occurrence no right under the contract can be donated to any of the parties."***

From the above, I do not see any reason why the Claimant in this case will be crying foul that the Defendant breached the contract between them when he did not fulfil his own side of the obligations in the agreement entered into by them. He has not fulfilled the condition that gives life to the contract and I so hold. Indeed, in the eyes of the law, there is no contract because the minds cannot be said to have met where the conditions both agreed to were not met.

## **ISSUE TWO**

***Whether the Defendant is in breach of the contract taking into consideration the existence of a Power of Attorney and Customs/Practice of Secured Credit Transaction?***

***"A power of attorney is a document usually but not always necessarily under seal where a person seized of an estate in land authorizes another person (the donee) who is called his attorney to do in the stead of the donor anything which the donor can do lawfully, usually, clearly spelt out in the power of attorney. As the name implies, a power of attorney merely warrants, authorizes or donates to the donee the power to do certain acts as specified in the deed (power of attorney) in the stead or on behalf of the donor. It is a document that delegates the power of the donor to the donee to do certain things for and on behalf and in the name of the donor as if the donee were the donor.***

***A power of attorney, is not an instrument that confers, transfers, limits, charges or alienates any title to the donee. Rather, it is a vehicle whereby the acts of the donor could be done by the donee for and in the name of the donor to a third party.***

***Elucidating this position of the Law, this Court see the cases of UDE v. NWARA (1993) 2 NWLR 2 (Pt. 278) 638 SC; SHEHU BALA & ANOR v. SALE HASSAN (2014) LPELR-23997 (CA); KIDS V. ALH TOAFIC MUHAMMAD (2009) LPELR -***

**8196 (CA) and DANTATA V. DAHBOUL & ORS (2016) LPELR-41264(CA) (PP. 15-17 PARAS. E)"**

On the other hand, the nature of a Legal Mortgage is as follows:

***"The nature of a legal mortgage and its legal consequence was correctly stated by the Court of Appeal in: Bank of the North Vs Bello (2000) 7 NWLR (Pt. 664) 244 @ 257 D, where it was held that: "A mortgage is defined as the creation of an interest in a property defeasible (i.e. annullable) upon performing the condition of paying a given sum of money with interest at a certain time. The legal consequence of the above definition is that the owner of the mortgaged property becomes divested of the right to dispose of it until he has secured a release of the property from the mortgagee." Thus, in a legal mortgage, title to the property is transferred to the mortgagee subject to the proviso that the mortgaged property would be re-conveyed by the mortgagor to the mortgagee upon the performance of the conditions stipulated in the mortgage deed and upon payment of the debt at the time stipulated therein. The mortgagor is liable to repay the loan as stipulated, otherwise the mortgaged property is foreclosed. See: Prince Abdul Rasheed Adetono & Anor. Vs Zenith International Bank Plc. (2010) LPELR-8237 (SC) 1 @ 21 A - C: (2011) 18 NWLR (Pt.1279) 627."***

From the above nature and scope of Power of Attorney and a Legal Mortgage, it is unequivocal that the power of attorney obviously, is not an instrument that confers, transfers, limits, charges or alienates any title to the donee. Rather, it is a vehicle whereby the acts of the donor could be done by the donee for and in the name of the donor to a third party. However, in Legal Mortgage, *title to the property is transferred to the mortgagee subject to the proviso that the mortgaged property would be re-conveyed by the mortgagor to the mortgagee upon the performance of the conditions stipulated in the mortgage deed and upon payment of the debt at the time stipulated therein.*

Bearing in mind the above position of the law, it means a Legal Mortgage cannot be executed via a Power of Attorney. However, the Claimant argued as contained in its Statement of Claim and Witness Statement on oath adopted by its Witness that at all material time, both the Defendant and its Lawyer knew there would be a delay in registering the legal mortgage – obtaining the Governor's consent yet, it accepted that condition and, in the circumstance, the Defendant's Lawyer suggested that the Claimant gives or issues the Defendant with a Power of Attorney and to register same as well. The Defendant's Lawyer vetted or prepared the Power of Attorney, the Defendant accepted the Power of Attorney and its registration as well, the Claimant complied with all the condition precedent and none of them was at any material time unfulfilled or remained unfulfilled.

Conversely, the Defendant's Counsel reacted that the Power of Attorney is not one of the condition precedents under the Loan Agreement nor was it required by the Defendant for the purpose of disbursement of the loan sum at all. The Power of Attorney executed by the Claimant was therefore a complete surplusage on its part and did not in any way whatsoever, supplant the requirement of a perfected legal mortgage. According to Learned Counsel, this was admitted by the Claimant's CW1 during cross-examination on 10<sup>th</sup> of February, 2022 when he admitted that the Power of Attorney is not a condition precedent under the Loan Agreement. He also could not point to any documentation and evidence before this Honourable Court where it was stated that a Power of Attorney is a condition precedent to the disbursement of the loan and instead alleged that the need for a Power of Attorney came out of meetings held between the Claimant and the Defendant. However, there is nothing before this Honourable Court to support this statement.

I have keenly perused the agreement entered into by parties. I cannot find any section/paragraph where it was agreed by parties that a Power of Attorney is a condition precedent. I cannot equally see any tangible evidence before this Court that supports the argument of Learned Counsel for the Claimant. I have not seen anything by way of any written agreement by parties that the Defendant agreed that the Power of Attorney can be used in place of the Legal Mortgage contemplated by parties. At a close and thorough view of the purported Power of Attorney (Exhibit H), I cannot see the endorsement of the Defendants. Accordingly,



I see the said Power of Attorney as a document not contemplated by parties and therefore cannot be used to vary the agreement entered by parties. Besides, the Loan Agreement specifically stated that any variation or waiver must be expressly reduced into writing and executed by both parties. In the circumstances, I agree with the reasoning of Learned Counsel for the Defendant that the said Power of Attorney is not supported by any convincing evidence before this Court and this Court cannot act on speculation and I so hold.

Again, Learned Silk raised the issue of practice or custom of securing Loan in Nigeria. According to the Senior Counsel, it is the practice or custom of secured credit transaction or mercantile custom or practice of Banking or Financial institutions, in Nigeria that disbursement(s) of loan or money lent do not wait till the requisite consent to a legal mortgage is obtained. Counsel referred this Court to paragraph 4.1 of the Amended Statement of Claim, Evidence of CW1 in its paragraph 4.1(e) of its Further Witness Statement on Oath and further asserts that the Defendant did not cross-examine CW1 on this which amounts to tacit acceptance. Learned Counsel further referred this court to the cases of **OWOBARE V NEW NIGERIA BANK LTD (1986) 1 SC 61 AT 64 LINE 20; ADEDEJI V NATIONAL BANK OF NIGERIA LIMITED (1989 1 NWLR (PT.96) 212; UGOCHUKWU V. COOPERATIVE AND COMMERCIAL BANK (NIGERIA) LIMITED (1996) 6 NWLR (PT. 456) SC 524** and the case of **AWOJUGBAGBE LIGHT IND. LTD V P.N.CHINUKWE AND NIDB LTD (1995) 4NWLR (Pt. 390) SC 379.**

Relying on the above authorities, Learned Counsel submits that the delay in obtaining or even non-obtainment of the Governor's consent to a Legal Mortgage will not prevent the Defendant from receiving any money it would have disbursed to the Claimant given the Power of Attorney the Claimant donated to the Defendant. Rather the Defendant breached the loan agreement in failing to disburse the money to the Claimant.

I have already determined the place of the Power of Attorney(Exhibit H) above. Now, concerning the issue of the practice or custom of disbursement(s) of loan or money before execution of a legal mortgage by Nigerian Financial institutions, I do not fancy (with due respect to the Learned Silk's contention) the line of reasoning adopted by Claimant's

Counsel's particularly, the cases relied by him. The analogy employed by the Learned Silk in the cases mentioned by him above is distinguishable from the instant suit. In the above-mentioned cases, the financial institutions decided to disburse the loan before the execution of the Legal Mortgage which metamorphosed the Mortgage into an Equitable Mortgage. In the case at hand, the Mortgage agreement is *strictusensu* a legal mortgage expressly provided by the agreement between the parties which the Defendant has not waived and there is nothing to show before this court that the requirement of perfecting the Legal Mortgage has been waived in accordance with the terms of the agreement entered by parties. Therefore, practice and custom in law cannot undermine the express provision of an agreement in the circumstance of this case and I so hold. To further fortify my position, I refer to the dictum of Per ADEKEYE, J.S.C in ***KAYDEE VENTURES LTD V. HON. MINISTER FCT & ORS (2010) LPELR-1681(SC) (PP. 60 PARAS. A)*** where he posits as follows:

***"It is a well established rule that no evidence of custom or practice can override the terms of a written contract, though a contract may be subject to terms that are implied by custom or trade usage, the latter does not apply to the agreement Exhibit B. Leyland (Nig.) Ltd. v. Dizengoff (1990) 2 NWLR pt. 134 pg. 610; British Crane Hire Corporation v. Ipswich Plant Hire Ltd. (1975) A.B. 303."***

Having determined the above, this takes me to the question raised by the Defendant in its legal argument whether the Defendant have any outstanding obligation to release any document having already returned all relevant documents relating to the Loan Agreement to the Claimant.

Learned Counsel submits that a look at the Defendant's Full Discharge Form (Exhibit ZO) clearly shows that the Defendant conducted its internal process for the discharge and release of the documents submitted to it by the Claimant. The said Full Discharge Form was executed by various members of the Defendant company over the course of about 15 (fifteen) days. It was therefore not a routine or simple undertaking. It is easily discernable that the clear intention of the Defendant was to

return the Claimant's documents and not to retain them Which it did on the 14<sup>th</sup> October, 2019 when the documents were sent from the Defendant's office in Kenya to the Claimant's office in Lagos, Nigeria. The said documents were delivered on 16 October 2019 at 10:42 am and signed for by one Yetunde evidenced by the DHL Delivery Notification which is Exhibit ZR before this Honourable Court. Therefore, Learned Counsel contended that it is confounding for the Claimant to insist that the documents were not returned to it when they clearly were and the Defendant has tendered proof of same before this Honourable Court. Since the documents were delivered, they ought to have conducted internal checks to determine where the documents are rather than initiating the instant suit and asking the court to order the doing of an action which has already since been done. He urged this Honourable Court to discountenance the claim that the Claimant's documents were not returned to it.

There is no doubt that the Defendant averred that it requested for the release of its document at paragraph 7 (b) of its Amended Statement of Claim that it requested via a letter of 16<sup>th</sup> August 2019 that the Defendant releases all documents submitted to it but that the Defendant has refused to do so and thus, denied it the use of the said documents to secure alternative funds. It appears that the Claimant letter came before the said documents were delivered on 16 October 2019 at 10:42 am and signed for by one Yetunde evidenced by the DHL Delivery Notification which is Exhibit ZR before this Honourable Court as argued by the Defence. I have perused all the documents. It is clear to me with the evidence of the endorsement of receipt on Exhibit ZR that the said document which the Claimant is requesting for were delivered. The mere denial by Counsel that the said documents were not delivered without showing the Court concrete evidence that Yetunde is not a staff of the company will not change the fact that the said documents were received. Besides, the Claimant did not address this Court on this issue in his Written address. However, that notwithstanding the position of the law is that once a document is delivered by post the burden to proof

that it was not received lies of the addressee. In the instant case, the burden is on the Claimant who has not discharge this burden well enough to convince this Court that he did not received the said documents and I so hold.

I support my stand with the case of **BENIN ELECTRICITY DISTRIBUTION CO. PLC V. ESEALUKA (2013) LPELR-20159(CA)(PP. 21-22 PARAS. D)**where the Court held as follows:

***...It stands to reason that where a document is shown to have emanated from a particular person, the burden is no longer on that person to show that it was received. The presumption is activated when the document is actually shown to have been posted. Then it is presumed that it was received. The presumption of receipt must be rebutted by the addressee." Per OGUNWUMIJU,J.C.A.***

The other issues raised by the Defendant particularly in its issue 2 two on whether the Defendant have any outstanding obligation to issue a Deed of Discharge for an unregistered Legal Mortgage and an instrument of rejection for a Revocable Power of Attorney? Has become academic at this point bearing in mind the decision of this Court stated above.

On the whole, the Claimant having failed to establish its case, the claim of the Claimant therefore lacks the appropriate foot to stand. Accordingly, all reliefs of the Claimant are hereby refused and dismissed for lacking in merit and I so hold.

### **COUNTER CLAIM**

The Defendant annexed its Counterclaim to the Amended Statement of Defence filed on the 3<sup>rd</sup> of September, 2021 against the Claimant in the main suit praying the Court for the following reliefs:

- (a) A DECLARATION that the Defendant to Counter Claim breached the Loan Agreement between the parties.
- (b) The sum of 129,057.25USD (One Hundred and Twenty-Nine Thousand, Fifty-Seven United States Dollars and Twenty-Five

- Cents) being the Commitment Fees accrued up to 30<sup>th</sup> April, 2018 under the Loan Agreement.
- (c) The sum of 182,000USD (One Hundred and Eighty-Two Thousand United States Dollars) being the Cancellation Fee of the principal amount that could not be drawn under the Loan Agreement.
  - (d) The sum of N1,033,000 (One Million, Thirty-Three Thousand Naira) being the amount the Counter Claimant had to pay to Abdulai Taiwo & Co. following the Defendant to Counter Claim's default of the Loan Agreement.
  - (e) An order for the payment of cost.

The Defendant in its Written Address, formulated a sole issue for determination of the Counterclaim as follows:

***Whether the Counter Claimant is entitled to the payment of fees due to it under the Loan Agreement as well as a refund of the legal fees paid to Abdulai Taiwo & Co. following the Defendant's breach of the Loan Agreement between parties?***

The Defendant to the counterclaim on its part did not submit any issue for determination of the Counterclaim but however raised a Preliminary Objection against the jurisdiction of the Court to determine the Counterclaim. It is therefore pertinent to first of all determine the Objection raised by the Defendant to the Counterclaim before deciding the merit or otherwise of the Counterclaim.

Learned Senior Counsel submits on behalf of the Defendant to the Counterclaim that a Counterclaim is an independent or a cross-action and as such all the rules and laws applicable to actions/pleadings vis-à-vis commencement of an action applies to it. He relied on the cases of **OGBONNA V A.G. IMO STATE (1991) 1 NWLR (PT.220) 647 AT675;** **NAL MERCHANT BANK V ONU (2001) FWLR (PT. 33) 245** and Section 95 of the Sheriffs and Civil Process Act.

Relying on Order 8 Rules 3 and 4, Order 52 Rules 13 of the High Court of the Federal Capital Territory(Civil Procedure) Rules, 2018 and the decision of the Supreme Court in **MV ARABELLA V N.A.I.C (2008) 11 NWLR (PT. 1097)182**, he contended that the Counter-Claimant did not seek the leave of this Honourable Court before commencing the Counterclaim, which is a condition precedent to the commencement of a writ outside the jurisdiction of this Court and that the Counter-Claimant did not indicate that his Counterclaim is to be served outside the jurisdiction of this court. He referred the Court to the case of **NWABUEZE & ANOR V JUSTICE OBI-OKOYE (1988) 4 NWLR (PT. 91) 664**.

It is the further argument of Learned Silk that compliance with Section 97 of the Sheriff and Civil Process Act is mandatory and non-compliance renders a Writ non-competent. Counsel commended the Court to the cases of **N.E.P.A V ONAH (1997) 1 NWLR (PT 484) 680 paras B-C**. Therefore, Counsel maintained that this Court lacks the jurisdiction to entertain the Counterclaim of the Defendant for non-obtainment of leave before issuing and serving it on the Claimant who is outside the jurisdiction of this Court.

In response, the Defendant/Counterclaimant referred this Honourable Court to Order 15 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018 and submits that a counterclaim is classified as a pleading along with a statement of defence filed in response to a statement of claim. According to Counsel, although a Counterclaim has the character of a cross action, it is not an originating process under Order 2 of the Rules of this Honourable Court where modes of commencement were listed to be writ of summons, originating summons, originating motion and petition. Therefore, Learned Counsel maintained that a counterclaim does not originate or commence a suit, instead it is a pleading tied to the existence of another case though it can survive even if that case falters. He cited Order 15 Rule 2(1) of the Rules of this Court.

Relying on the above authority, Learned Counsel submits that the Claimant's arguments that a counterclaim amounts to an originating process is unfounded, misconceived and ought to be disregarded. In the same vein, Learned Counsel maintained that the Claimant's arguments that the Counterclaim ought to have been issued and served outside jurisdiction

with leave of court and that failure to do so means that this Honourable Court lacks the jurisdiction to entertain the counterclaim go to no issue and ought to be disregarded by the Court.

Learned Counsel also argued that there is nothing wrong for the Defendant to file its Amended Statement of Defence together with its Counterclaim even though its preliminary objection was dismissed. Besides, the Claimant did not object to the filing of the Counterclaim at the hearing and indeed responded to the same. Assuming there was non-compliance with the Rules of this court in the filing of the Counter Claim, Counsel maintained that the Claimant waived its right to complain and it is too late in the day for it to do so. Therefore, Learned Counsel urged this Honourable Court to hold that the Counterclaim was properly filed.

### **RESOLUTION OF PRELIMINARY OBJECTION**

I have gone through the submissions of Learned Counsel for both parties. Let me start by reproducing the express provision of the law as provided in the Rules of this Court. Order 15 Rule 1(2) of the Rules of this Court provides that:

**(2) A defendant shall file his statement of defence, setoff or counterclaim. If any, not later than 21 days after service on him of the originating process and accompanying documents. A counterclaim shall have the same effect as a cross action so as to allow the court deliver a final judgment in the same proceedings. A set-off must be specifically pleaded.**

Again, Order 17 Rules 6 and 7 provides:

***6 Where any defendant seeks to rely upon any ground as supporting a right of setoff or counter claim he shall in his defence state specifically that he does so by way of supporting a right of set off or counterclaim.***

***7 Where a defendant by his defence sets up any counter claim which raises questions between himself and the***

***claimant along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim stating the names of all persons who, if such counterclaim were to be enforced by cross action would be defendants to the cross action and shall deliver his defence to as many of them as are parties to the action within the period required to deliver it to the claimant.***

From the new Rules of this Court, the Defendant is expected to raise his Counterclaim in his defence. The Rules did not provide that the Counterclaim must be filed separately as argued by Learned Counsel for the Claimant. In a recent case, Per NIMPAR, J.C.A in **AGAN v. KADUNA (2021) LPELR-54204(CA) (Pp. 38-40 paras. E-E)** made it clear that there is no need to waste time on the challenge as to the format of the Counterclaim because by practice it is usually attached to the Statement of Defence even though it is a separate claim. Therefore, the contention of Learned Senior Counsel that the Counterclaim ought to be filed separately and leave of court ought to be sought for issuance and service of same is a gross misconception of the new rules and the cases raised by Learned Silkin support of his argument is not applicable in the instant case given the fact that the Rules of this Court has metamorphosed from the formal position of the law. I am therefore inclined to agree with the argument of the Defence Counsel in that regard. Accordingly, the preliminary objection raised by the Claimant's Counsel in is of no moment and I so hold.

The next question to resolve is whether the Defendant's amendment of its Statement of Defence after its Preliminary Objection was dismissed is endorsed by the law or not.

The position of the law is that the Defendant is allowed to amend its defence where the Claimant files an Amended Statement of Claim. Thus, the Apex Court succinctly puts it as follows:

***"Upon an amendment of the statement of claim, the defendant is at liberty to amend his statement of defence, without leave of the Court in so far only as is necessary to meet the facts introduced by the amendment. This, I***



***venture to think, translates to a right in the defendant to plead afresh to the case made on the amended pleading of the plaintiff..." Per AYOOLA, J.S.C in MOBIL OIL (NIG) PLC V. IAL 36 INC (2000) LPELR-1883(SC) (PP. 14 PARAS. B)***

In the instant case, the Claimant filed an Amended Statement of Claim on the 16<sup>th</sup> day of September, 2021. Then the Defendant on its part, amended its Statement of Defence and counterclaimed against the Claimant. This to my mind is in conformity with the position of the law notwithstanding that it filed same after its Preliminary Objection was dismissed and I so hold. See the case of ***MOBIL OIL (NIG) PLC V. IAL 36 INC (Supra) (PP. 14 PARAS. B)***.

On the whole, the Preliminary Objection raised by Learned Counsel as canvassed above is hereby dismissed for lacking in merit.

Now, the coast is clear to look into the merit or otherwise of the Counterclaim. The Defendant in its Counterclaim averred that the failure of the Defendant to Counterclaim to fulfil some conditions precedent to first disbursement made it impracticable for the Counterclaimant to benefit under the Loan Agreement. It further averred that the failure of the Defendant to Counterclaim to fulfil the said condition precedent was an event of default that entitled the Counter-Claimant to any of the remedies under Section 15 of the Loan Agreement which include the right to terminate the Loan Agreement and to immediate payment of all amounts payable by the Defendant to the Counterclaim.

Again, the Counterclaimant stated that under Section 9.2 of the Loan Agreement, the Defendant to Counterclaim is obliged to pay the Counterclaimant a Commitment Fee of 0.85% per annum of any undisbursed loan balance which shall start to accrue ninety days after the Effective Date. The Counterclaimant further asserts that the Defendant to the Counterclaim failed to fulfill some conditions precedent to first disbursement under the Loan Agreement thereby making it impossible for any draw down under Section 9.4 of the Loan Agreement, which gives the Counterclaimant the right to the payment of a Cancellation Fee of two percent (2%) of any aggregate principal amount cancelled or not drawn down once the loan agreement has been signed.

He further averred that the Commitment Fees accrued up to 30<sup>th</sup> April, 2018 is 129,057.25USD (One Hundred and Twenty-nine Thousand, Fifty seven United States Dollars and twenty-five Cents) while the Cancellation Fee is 182,000USD (One Hundred and Eighty Two Thousand United States Dollars).

He also stated that the Counterclaimant is also entitled to a refund of the sum of N1,033,000 that it had to pay to the external lawyers, Abdulai Taiwo & Co, following the Defendant to Counterclaim's default of the Loan Agreement.

In response, the Claimant(Defendant to Counterclaimant) filed a Reply on the 4<sup>th</sup> of November, 2021 and averred that the Defendant/Counterclaimant is in breach of the Loan Agreement and/or failed to disburse the loan despite the Claimant fulfilling the condition precedent and making effective demand on it to disburse same. That the Defendant/Counterclaimant is not entitled to a commitment fee of 129,057.25USD or any commitment fee whatsoever and none has either accrued or enured to it in any manner whatsoever under the Loan Agreement. That the Defendant/Counterclaimant is not entitled to a cancellation fee of 182,000USD or any cancellation fee whatsoever and none has either accrued or enured to it in any manner whatsoever under the Loan Agreement.

It further deposed that the Defendant/Counterclaimant by its letter of 30<sup>th</sup> October, 2018 has waived any commitment fee and/or cancellation fee whatsoever that it is entitled to or enured to it under the Loan Agreement.

The Defendant to the counterclaim also averred that it does not owe the Defendant's Solicitors any legal fee at all let alone a legal fee of N1,033,000. It paid all the fees legally and genuinely due to the Defendant's Solicitor provided the Solicitor submitted the invoice to it but not fees arising from the Defendant's breach or for which there was no invoice and any outstanding Defendant's Solicitor's fee is on the Defendant's account.

## **RESOLUTION OF COUNTERCLAIM**

It is abecedarian law that a counterclaim is an independent action and the counterclaimant must prove that he is entitled to the order(s) he seeks. Where it is a declaratory relief, the Counterclaimant will only succeed on the strength of his case. The Counterclaimant can only succeed by cogent and satisfactory evidence. See the cases of **ANWOYI & ORS V. SHODEKE & ORS (2006) LPELR-502(SC); KWAJAFFA & ORS V. BANK OF THE NORTH LTD (1998) LPELR-6371(CA); SHMO & ORS V. ABUUL (2020) LPELR-49947(CA) (PP. 41 PARAS. D); ZURMI V. OKONKWO & ANOR (2018) LPELR-46964(CA) (PP. 17-19 PARAS. A); ONWUERINGO V. ADEDAPO (2020) LPELR-52491(CA) (PP. 48-49 PARAS. E).**

In relief 8(a), the Counterclaimant seeks a declaration that the Defendant to Counter Claim breached the Loan Agreement between the parties; 8(b) seeks a claim of the sum of 129,057.25USD (One Hundred and Twenty-Nine Thousand, Fifty-Seven United States Dollars and Twenty-Five Cents) being the Commitment Fees accrued up to 30<sup>th</sup> April, 2018 under the Loan Agreement while in 8(c), he claims the sum of 182,000USD (One Hundred and Eighty-Two Thousand United States Dollars) being the Cancellation Fee of the principal amount that could not be drawn under the Loan Agreement.

Learned Counsel in support of the above reliefs submitted that the Defendant to the Counterclaim did not fulfil the condition precedent under the Loan Agreement to warrant the first disbursement of the loan amount and he also failed to obtain a Skye Bank Guarantee and also failed to perfect the Legal Mortgage. He referred the Court to Section 4.5.1(a) of the Loan Agreement. Therefore, Counsel maintained that it was the failure of the Defendant to the Counterclaimant to fulfil the terms and conditions of the Loan Agreement that led to the Counterclaimant's inability to disburse the Loan. He therefore urged the Court to grant relief 8(a) of the Counterclaim.

With regards to the cancellation, Learned Counsel submits that since the Loan was not disbursed, it is clear that it became due and payable as well in line with the terms of Exhibit F. This cancellation fee has not been paid by the Defendant to the Counterclaim. Accordingly, he urged the Court to

grant reliefs 8(b) and (c) as the Counterclaimant is entitled to same in line with the terms of the Loan Agreement.

As regards the Legal fees, Counsel maintained that it has been shown that a condition precedent to the loan agreement is the settlement of the legal fees by the Defendant to the Counterclaim. However, Learned Counsel posits that upon the termination of the Loan Agreement, there was an outstanding sum of N1,033,000 due to Abdulai Taiwo & Co. which the Defendant to the Counterclaim refused to pay and the Counterclaimant had to pay. He referred the Court to Exhibits ZS, ZT, and ZU before the Court.

The Defendant to the Counterclaim on its part submits that the Counterclaimant did not indicate that he made a demand of the money he is claiming as cancellation fee and solicitor's fee. Therefore, it offends the position of the law that provides for a Claimant in an action for recovery of debt to first make a demand on the Defendant before instituting such action. He relied on the case of **OKECHUKWU V. LEMAN (2022) LPELR-58918 (CA) 1 AT 22-23 PARAS C-D** among others.

Furthermore, Learned Counsel contended that filing of Counterclaim by the Defendant in its Amended Statement of Defence after its preliminary Objection to the jurisdiction of this Court was refused amounts to an abuse of Court process. Therefore, the Counterclaim is an abuse of Court Process. Also, Counsel argued that since the Defendant has represented to the Claimant that it had waived fees arising from the cancellation of the Loan Agreement via Exhibit ZO, it is estopped from claiming those fees in this proceeding. He relied on Section 169 of the Evidence Act, 2011 and the case of **RIVERS STATE V AG AKWA IBOM STATE (2011) ALL FWLR (PT 579) 1023 AT 1054-1055 SC**.

I have painstakingly looked at the Loan Agreement again. There is no doubt that it provided for payment of commitment fees and cancellation fees. However, my attention is drawn to paragraph 22 of the Statement of Defence and the evidence of the Defendant/Counterclaimant's Witness before this Court. In the said paragraph, the Defendant averred as follows:

***Following the Defendant's letter of 13 June 2018, a meeting was held between the parties on 6 August 2018.***

***Subsequent to the meeting and ensuing communications between the parties, the Defendant's Board of Directors met on 18 October 2018 and arrived at certain resolutions for the exit arrangement the resolutions included waiver of the commitment fees accrued to 30 April 2018 and the cancellation fees. The Defendant also resolved to settle the outstanding legal fees to the external lawyer for the transaction.***

From the above averment of the Defendant that it has resolved in its board meeting to waive the commitment fees and cancellation fees forming part of the resolution towards exit arrangement of the agreement, the Defendant will not be allowed at this point to turn around and claim the said cancellation and commitment fees. The counterclaimant cannot approbate and reprobate. I therefore agree with the Learned Silk that the Defendant be estopped from raising such claim. Accordingly, the Counterclaimant has not given this Court cogent reason why it should grant reliefs 8(b) and (c) of the Counterclaim before this Court and I so hold.

On the issue of solicitor's fee, the Defendant furnished this court with exhibits ZS, ZT, and ZU to establish its claim. It is also not in doubt that the Loan Agreement stipulates that the Defendant to the Counterclaim shall bear the cost of the legal services. It was not however stipulated that the Counterclaimant is to pay the said services on behalf of the Claimant. It is therefore, the duty of Counsel to request for the fees of the services rendered as breach of non-payment does not qualify the Counterclaimant who stated that the Solicitor in the transaction was not for the Defendant in the main suit but a solicitor to the transaction. Accordingly, I do not find merit in this relief sought by the Counterclaimant. Accordingly, it is hereby refused. Therefore, the reliefs in the Counterclaim of the Defendant is hereby refused and I so hold.

As for cost of this suit, I make no award as to cost.

Before I drop my pen, I must as a matter of fact commend the industry put in by Learned Counsel on both sides.

That is the Judgment of this court.

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**Hon. Justice J. EnobieObanor**  
**Presiding Judge**

**Appearances**

Prof. J.N. Mbadugha, SAN, for the Claimant appearing with D. I. Onoja and Joseph Ndu.

D.D.Killi Esq, appearing with OkiemuteOhwahwa Esq. for the Defendant.