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

ON THE 24TH DAY OF NOVEMBER, 2023
BEFORE THEIR LORDSHIPS:

1. **HON. JUSTICE J. ENOBIE OBANOR (PRESIDING JUDGE)**
2. **HON. JUSTICE B. DOGONYARO (HON. JUDGE)**

APPEAL NO: CA/ABJ/CV/66/2022
SUIT NO: CV/66/2020

BETWEEN:

ALHAJI BELLO HARUNA .....APPELLANT

AND

1. URBAN EMIRATE LTD } **RESPONDENTS**
2. ADEMOLABASTEE WASIU

JUDGMENT

This appeal is against the judgment of the District Court, Wuse Zone 2,Abuja Division sitting in Abuja delivered on the 11thday of April, 2022, by His Worship, Hon. Njideka I. Duru (as she then was)wherein the Court below entered judgment in favour of the 1stRespondents. Piqued by the decision, the Appellants filed a Notice of Appeal on the 11thof May, 2022 setting out 7grounds of Appeal.

Facts relevant to this appeal can be briefly presented in the following way. The 1st Respondent who was the Claimant at the lower Court instituted the action leading to the instant Appeal via a Plaint filed on the 3rd of August, 2020 seeking the following reliefs:

1. A DECLARATION that the 1st Defendant has breached the terms and conditions of the Land Development Contract Agreement dated 21st January, 2020 between the 1st Defendant and the Plaintiff for the Development of Plot 12, Block X11 Federal Government Layout,

Gwarinpa Site and Services Estate Gwarinpa Abuja and thereby terminated the contract by his conduct.

2. AN ORDER OF THIS HONOURABLE COURT directing the 1st and 2nd Defendants to jointly and severally pay the Plaintiff the sum of N2,500,000 00 (Two Million Five Hundred Thousand Naira only) being the Agency Fee paid by the Plaintiff to the 2nd Defendant on the instructions of the 1st Defendant.
3. AN ORDER OF THIS HONOURABLE COURT directing the 1stDefendant to pay the Plaintiff the sum of N1,250,000.00 (One Million, Two Hundred and Fifty Thousand Naira only) being the cost of Architectural, Structural, Electrical and Mechanical Drawings and Designs incurred by the Plaintiff in the course of performing the said contract.
4. AN ORDER OF THIS HONOURABLE COURT directing the 1st Defendant to pay the Plaintiff the sum of N150,000.00 (One Hundred and Fifty Thousand Naira only) being the cost of Legal Search incurred by the Plaintiff in the course of performing the said contract.
5. AN ORDER OF THIS HONOURABLE COURT directing the Defendant to pay the Plaintiff the sum of N1,000,000.00 (One Million Naira only) as general damages for the inconveniences caused to the Plaintiff by the termination of the contract by the 1stDefendant
6. AN ORDER OF THIS HONOURABLE COURT directing the 1st and 2nd Defendants to pay the Plaintiff 10% interest on the Judgment sum from the date of Judgment till when the judgment sum is fully paid.

In reaction, the 1stDefendant, the Appellant in this Appeal denied liability of the reliefs/claim of the 1st Respondent/Claimant on the 2nd day of November, 2020 when the Matter came up for mention. On the 14th of December, 2021 the 2nd Defendant who is now the 2nd Respondent also denied liability. See pages 94-95 of the Record of Appeal.

After hearing, The Trial Court delivered its Judgment on the 12th of April, 2022 in favour of the 1st Respondent against the Appellant for being in breach of the contract entered between them and further ordered him to pay the particulars of Claim set out un the 1st Respondent's Claim. Dissatisfied, the Appellant filed a Notice of Appeal before this Court on the 11th of May, 2022 setting out 8 grounds of Appeal which are hereunder reproduced as follows (with their particulars):

GROUND 1

The learned trial District Judge erred in law when he relied on hearsay evidence to find that the 1st Defendant had instructed the Plaintiff to pay the Defendant the sum of N2,500,000.00 (Two Million Five Hundred Thousand Naira) contrary to the provisions of the Land Development Agreement (Exh P1) and such error occasioned a miscarriage of justice

PARTICULARS OF ERROR

(a) Hearsay evidence is inadmissible to prove a fact or a matter

(b) The court admitted and relied on the hearsay testimony of the Ahmed RutaOhida Suleiman (PW 1) to the effect that the 1 Defendant instructed Abubakar Habib to inform the Plaintiff to pay N2000000 00 (I wo Million Five Hundred Thousand Naira) to the Defendant contrary to the provisions of the Land Development Agreement

GROUND 2

The learned trial District Judge erred in Law when he failed to hold that the Plaintiff first breached the terms of the Land Development Agreement when it paid the sum of N2 500,000.00 Two Million Five Hundred Thousand) to the gel Defendant contrary to the provisions of the said Agreement and such error occasioned a miscarriage of justice

PARTICULARS OF ERROR

(a) Parties to a contract are bound by their agreements

(b) Paragraph 2(8) of the Land Development Agreement (Esh P1) provides that the Developer shall on behalf of the Landowner pay the agency tee of N2,500,000.00 (Two Million Five Hundred Thousand Naira) to the Agents/Broker within to months from the commencement of the work at the site.

(c) In contravention of the provisions of the Land Development Agreement (Exh P1), the Plaintiff paid the Agents/ Brokers the agent fee in the sum of N2, 500,000.00 (Two Million Five Hundred Thousand Naira) before work commenced on the site.

GROUND 3 The learned trial District Judge erred in Law when he placed reliance on the oral testimony of Ahmed Rufai Ohida Suleiman (PW1) and ordered the 1 Defendant to pay the sum of N1, 250,000.00 (One Million Two Hundred and Fifty Thousand Naira) to the Plaintiff being cost of Architectural, Structural, Electrical, and Mechanical

Drawings and Designs pleaded but not brought before the court by the Plaintiff and such error occasioned a miscarriage of justice.

PARTICULARS OF ERROR VISION

(a) The Plaintiff pleaded Architectural, Structural, Electrical, and Mechanical Drawings and Designs:

(b) That the Defendant denied the existence of the sand. Architectural, Structural, Electrical, and Mechanical Drawings and Designs

(c) Section 128 of the Evidence Act provides that no evidence may be given in respect of a document except the document itself

(d) The Plaintiff failed to produce the said Architectural, Structural, Electrical and Mechanical Drawings and Designs before the court and the Court admitted oral evidence in proof of the existence of such document

GROUND 4

The learned trial District Judge erred in Law when he ordered the 1st Defendant to pay the Plaintiff the sum of N2, 500,000.00 (Two Million Five Hundred Thousand Naira) being Agency Fee paid by the Plaintiff to the Defendant purportedly on the instructions of the 1st Defendant contrary to the provisions of the Land Development Agreement (Exh P1) and such error occasioned a miscarriage of justice.

PARTICULARS OF ERROR

(a) The Plaintiff in contravention of the provisions of the Land Development Agreement (Exh P1) paid the sum of N2, 500,000.00 (Two Million Five Hundred Thousand Naira) to the 2 Defendant

(b) The Lower Court in its judgment ordered the 1 Defendant to pay the Plaintiff the sum of N. 500,000.00 (Two Million Five Hundred Thousand Naira) being Agency Fee paid by the Plaintiff to the 2 Defendant purportedly on the instructions of the 1 Defendant contrary to the provisions of the Land Development Agreement

(c) The Plaintiff cannot benefit from its own wrong

GROUND 5

The learned trial District Judge erred in Law when he amended the Land Development Agreement (Exh P1) contrary to the provisions of the said Agreement and such error occasioned a miscarriage of justice

PARTICULARS OF ERROR

(a) Paragraph 11 of the Land Development Agreement (Esh P1) provides that the Agreement provides that no amendment or modification of the agreement shall be effective against the parties unless same is in writing and signed by all the parties.

(b) No signed document amending the Land Development Agreement (Exh P1) was ever tendered or admitted in evidence

(c) The Court admitted an Amendment of Paragraph 2:3) of the Agreement contrary to Paragraph 11 by admitting oral testimony amending the sand Paragraph.

GROUND 6

The learned trial District Judge erred in Law when he gave effect to the Land Development Agreement (Esh Pi) before its commenentent

PARTICULARS OF ERROR

(a) Paragraph (1) of the Land Development Agreement provides that the parties will agree on the proposed Architectural design before the commencement of the Agreement

(b) Ahmed Rufai Ohida Suleiman (PW1) testified under Cross Examination that the parties had not agreed on the drawings for the Development of the land

GROUND 7

The Judgment is against the weight of evidence

RELIEFS SOUGHT:

An order allowing this Appeal and setting aside the judgment of the learned trial Judge delivered on the 11th day of April, 2022

ISSUES FOR DETERMINATION

The Appellant's brief of argument settled by Bappah Michika IdrisEsq, distilled the following issues for determination of the appeal thus:-

1. ***Whether hearsay evidence is admissible to prove a fact in issue (Formulated from Ground 1 of the Notice of Appeal).***
2. ***Whether it is the duty of the Court to give effect to Contracts freely entered between Parties (Formulated from Grounds 2,5 and 6 of the Notice of Appeal).***
3. ***Whether the Party relying on a document is by law required to produce the document for the examination of the Court (Formulated from Grounds of the Record of Appeal).***
4. ***Whether Plaintiff discharged its burden of proof (Formulated from Issue 7 of the Notice of Appeal).***

The 1st Respondent'sBrief of Argument settled bySekopZumka, Esq formulated 3 issues for determination of this appeal thus:-

1. ***Whether the evidence of PW1 regarding the conversation he had with the representative of the Appellant constitutes hearsay evidence (distilled from ground 1 of the notice of appeal)***
2. ***Whether the trial Court was not right when it ordered the Appellant to pay the 1st Respondent the cost of the agency fee paid by the 1st Respondent to the 2nd Respondent (Distilled from Ground 2, 4, 5 and 6 of the Notice of Appeal)***
3. ***Whether the trial Court was not right when it relied on the Receipt of payment (Exhibit P4) to order the Appellant to pay the " Respondent the cost of Architectural, Structural, Mechanical and Electrical drawings incurred by the 1st Respondent (Distilled from Ground 3 of the Notice of Appeal)***

The 2nd Respondent's filed its Brief of Argument on the 10th January, 2023 settled by Ezekiel O. IdokoEsq, and distilled two issues for determination as follows:

1. **Whether the Land Development Agreement executed by the Appellant is binding on the 2nd Respondent as to prevent 1st Respondent from paying the 2nd respondent commission duly earned (distilled from grounds 2,4,5 and 6 of the Notice of Appeal).**
2. **Whether from the evidence before the Trial Court, the 2nd Respondent is entitled to be paid agent fee (distilled from grounds 2, 4 and 7).**

We have painstakingly gone through the issues for determination canvased by all the parties. We find the 1st three issues formulated by the Appellant concise enough to encompass the other issues distilled by the 1st and 2nd Respondent as well as the 4th issues presented by the Appellant. Accordingly, this Court will resolve the said issues thematically as follows:

ARGUMENTS OF COUNSEL ON ISSUE ONE

Whether Hearsay Evidence is Admissible to Prove A Fact in Issue (Formulated From Ground 1 Of The Notice Of Appeal)

Arguing issue one, Learned Counsel for the Appellant relied on Section 37 and 38 of the Evidence Act 2011 and submits that the admission of hearsay evidence is expressly forbidden except as provided by the Act. He further relied on the case of **OLALEKAN V. STATE reported as (2001) LPELR-2561 (SC) Pp.34-35, Paras. E-A).**

To further buttress his argument, Learned Counsel referred the Court to the evidence of PW1 where he stated in Examination In Chief at Page 96 of the Record of Appeal that one Abubakar Habib, a representative of the 1st Defendant/Appellant had insisted on the payment of the Agency Fees to the 2nd Defendant/2nd Respondent upon signing of the Land Development Agreement contrary the agreement of the parties. According to Learned Counsel the said statement is in proof of paragraphs 11 and 12 of the Plaint found at pages 5-9 of the Record of Appeal, particularly at page 6. Further, Counsel argued that the

averments made by the Plaintiff/1st Respondent/Claimant in Paragraphs 12 and 13 of the Plaint to the effect that the Defendant through his representative insisted on the payment of the Agency fees to the 2nd Defendant/gad Respondent is an averment which requires to be proved by the Plaintiff/1st Respondent/Claimant. However, in proof of this fact, PW1 offered testimony to the effect that one Abubakar Habib, a representative of the Defendant/Appellant had on the instructions of Defendant/Appellant insisted on the payment of the Agency Fees to the 2nd Defendant/2nd Respondent upon signing of the Land Development Agreement contrary the agreement of the parties. The said testimony according to Counsel is inadmissible in Law as same constitutes Hearsay. By that that testimony, PW1 is seeking to establish the fact that the Defendant/Appellant instructed his representative to insist on the payment of Agency fees without calling the said representative as a witness to establish the fact of the said instruction. Learned Counsel called to his aid the case of **OJO V. GHARORO & ORS (2006) LPELR-2983(SC)**to support hiscontention.

On the part of the 1st Respondent,Learned Counsel for the 1st Respondent submits that the evidence of Ahmed Rufai Ohida Suleiman (PW1) is a narrative of his conversation with Abubakar Habib, the representative of the Appellant. In other words, the evidence being challenged is the evidence of what the PW1 knows personally and not what he was told by a third party. Counsel referred the Court to the testimony of the PW1

Learned Counsel contendedfurther that the 1st Respondent led evidence at the trial Court and showed that Mr Abubakar Habib, Bar. FejiroUrefe and Architect Hamza, were introduced to it at different times by the Appellant, as his representatives regarding the performance of the Agreement (he referred to page 98 of the Record of Appeal). According to Counsel, at all material time before the institution of the suit at the trial Court, the 1st Respondent had been liaising with the said representatives with respect to the performance of the Agreement. Both the Appellant and the 2nd Respondent conceded to this fact under cross examination (See pages 108 and 112 of the Record of Appeal). He referred this Court to 108 of the record of appeal where the pw1 was cross examined.

Consequently, Learned Counsel submits that what the PW1 informed the trial Court in his evidence in chief is clearly direct evidence of his conversation with Abubakar Habib and it is only Abubakar Habib that can challenge the veracity of the direct evidence of PW1 on what he heard. Counsel placed reliance on Sections 125 and 126 of the Evidence Act and the case of **OMO V. JUDICIAL SERVICE COMMISSION DELTA STATE (2000)12 NWLR (PT 682) P444 AT 460 PARA G**.

Conclusively on issue one, Learned Counsel urged this Court to discountenance the statutory and judicial authorities cited and relied upon by the Appellant on this issue as same are completely irrelevant and not helpful for the just determination of this Appeal.

RESOLUTION OF ISSUE 1

In order to resolve this issue, it is pertinent to start by defining the term hearsay. Section 37 of the Evidence Act, 2011 clearly defined what constitutes hearsay evidence as follows:

> **Hearsay means a statement -**
>
> **(a) Oral or written made otherwise than by a witness in for a proceeding: or**
>
> **(b) Contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.**

According to Black's Law Dictionary, 9th Edition at page 790, hearsay is defined thus:

> **Traditionally, testimony that is given by a witness who relates not what he or she knows personally but what others have said and that is therefore dependent on the credibility of someone other than the witness, such testimony is generally inadmissible under the rules of evidence.**

Per Kekere-Ekun JSC in the case of **MOHAMMED V. A-G, FED (2020) LPELR-52526(SC) (PP. 27-28 PARAS. F)** restated the above

position of the law and further elucidated what constituted hearsay evidence as follows:

> **"... In the locus classicus, Subramaniam Vs Prosecutor (1965) 1 WLR 965, it was held:**
>
> **"Evidence of a statement made to a witness called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."See also: Utteh Vs The State (1992) 2 NWLR (Pt. 223) 287; (1992) LPELR-6239 (SC) @ 11 C -E; Arogundade Vs The State (2009) 6 NWLR (Pt. 1136) 165; FRN Vs Usman (2012) LPELR-7818 (SC) (a) 19 - 20 F - C."**

From the above analysis therefore, hearsay testimony is inadmissible in evidence, much as the evidence tends to establish the truth of what the witnesses were told, except it is proved that the exceptions under Section 39 of the Evidence Act exist.See also **KALA vs. POTISKUM (1998) LPELR (1648) 1 at 15-16, OBINWUNNE vs. TABANSI-OKOYE (2006) 8 NWLR (PT 981) 104 at 118 and AIR FRANCE vs. OLUNDEGUN (2017) LPELR (44951) 1 at 17-18.**

Now, I have thoroughly read and understood the testimony of PW1 under contention. For the sake of clarity, I will reproduce same hereunder as follows:

...After signing the agreement in the presence of both our counsel and that of the 1st defendant, we contacted EZ.K Attorneys to carry out a Manual Legal Search on the property. A sum of N150,000.00 was paid, after the manual search we were satisfied with the genuinety of land and the 1st defendant therefore has representatives, Abubakar Habib insisted that we pay a part payment of the agency fees which is N2,500,000 to the 2nd defendant Same was paid to the FCMB account of the 2nd defendant in 2 instalments from my personal account on behalf of the plaintiff. After this, in the agreement it was agreed that we would take vacant possession of the plot on 31/3/2020 This date was given the 1st defendant would have enough time to evacuate the tenant on the property. During this, the 1st defendant made us to know that he is a civil servant and would not be

readily available for the execution of the contract and as such his representative for the execution of the contract would be Mr. Abubakar Habib and Barr FegiroUrefo. We have been in communication with his representative while we were going about, all the necessary dealing for the contract During this period, Strong & Bold Ltd carry out our Architectural Structural, Mechanical & Electrical aspect of the project and a sum of N1, 350, 000 was paid for that job Sometime in January, 2020 Mr. Abubakar met with us and introduced one Arch. Hamza as the technical person to liaise with us on the same project, we met with him and he made some construction…

The lower court in its judgments as captured at page 119 of the Record of Appeal posits thus

> **"Counsel submitted further that the 1st Defendant never gave instructions to claimant to pay the N2, 500,000.00 but failed to contend that the said order came from the 1st Defendants Representatives who by the way were duly appointed by the 1stDefendant, it is therefore safe to hold that if the representatives gave such order it means it came from 1st Defendant whose interest they were engaged to protect" "It is also surprising and should I say strange that none of the representatives were called to testify as witnesses for the Defendant …**
>
> **I must state that terminating the contract without communicating to plaintiff is a breach of the contract he entered into. The payment inissue is enshrined in Exh P1, that he paid at anytime whether early or within or before the time is not sufficient enough to terminate Exh P1 because according to PW1, he was instructed by representatives of the 1st Defendant to pay that to the agent as proof of capacity**

The Appellant however vehemently asserts the trial court erred by admitting the testimony of the PW1 which according to him was a hearsay in arriving at its findings.

I have already defined and stated the position of the law on hearsay. To resolve this issue, let me ask some pertinent questions?Who is **Abubakar Habib referred to in the testimony of the PW1.**He was referred to as the representative of the Appellant. It is deducible from

the testimony of the DW1, the Appellantduring cross examination that he acknowledged**Abubakar Habib**as his representative.

Q-Do you know Abubakar Habib?

A-yes I do he is one of my representative

From the above, the safe conclusion to arrive at is the fact that the instruction given by Abubakar who the appellant acknowledge as his personal representative to PW1, to the effect thatthe Defendant instructed the claimant to pay the sum of N2, 500,000.00 cannot be deemed as inadmissible hearsay. I therefore agree with the position of the Learned Trial Court that it is therefore safe to hold that if the representatives gave such order it means it came from 1st the Defendant whose interest they were engaged to protect. It behoves therefore on the Appellant to proof otherwise which he failed to do. Accordingly, this issue is hereby resolved in favour of the 1st Respondent.

ISSUE TWO

Whether it is the duty of the Court to give effect to Contracts freely entered between Parties (Formulated from Grounds 2,5 and 6 of the Notice of Appeal).

On issue two, Learned Counsel argued that the Learned lower court erred when it failed to give effect to the provisions of the Land Development Agreement in Paragraph 2(3) which provides that the sum of N2, 500,000.00 shall be paid by the Developer on behalf of the Land Owner to the Agents/Brokers within 15 months from the Commencement of Work at the site. However, Counsel posits that the Developer paid the said sum before work commenced on the site contrary to the provisions of the Land Development Agreement and the Lower Court held that same was not a breach of the Agreement.

Learned Counsel also contended thatthe Lower Court erred in its Judgment where it ordered the Appellant/2nd Defendant to pay the 1st Respondent/Claimant the sum of N2, 500,000 00 being Agency Fees paid by the 1st Respondent/Claimant to the 2nd Respondent/2nd Defendant which means that the 1st Respondent is benefiting from its own breach of the Land Development Agreement.

He further submits that by the provisions of Paragraph 14 of the Land Development Agreement, no amendment or modification of the Agreement shall have effect unless it is in writing and signed by both parties. According to Learned Counsel the Lower Court allowed the 1st Respondent/Claimant amend/modify the Land Development Agreement by holding that the payment made by the 1st Respondent/Claimant to the 2nd Respondent/2nd Defendant in contravention of the provisions of the agreement without a written and signed amendment was not a breach of the agreement.

Counsel also argued thatby the provisions of Article 4(1) of the Land Development Agreement, the Parties will agree to the Architectural designs before the commencement of this Agreement butthe Lower Court even after receiving evidence that the Parties had not agreed on the Architectural Designs, gave effect to the provisions of the said Agreement and passed judgment using same.

On the whole, Counsel submits that the law is that Parties are bound by the terms of their contracts and it is the duty of a Court to give effect to contracts freely entered into by parties. According to Counsel the lower Court failed to give effect of the agreement entered into by parties and he urged this Court to so hold.He relied on the case of**AHMED & ORS V. CBN (2012) LPELR-9341(SC) P. 19 Paras C-D.**

At the turn of the 1st Respondent Counsel, he contended that the payment of Agency Fee in this case is within the contemplation of the parties in their agreement. He further submits that considering the facts and circumstances of this Appeal, part payment of the agency fee cannot be remotely considered as a breach of the Land Development Agreement. He urged this court to so hold

Learned Senior Counsel contended it is in evidence that the 2nd Respondent was the Agent who brought the Appellant and 1st Respondent together upon which Exhibit P1 was executed. It is also in evidence that the fee to be paid the 2nd Defendant as Agent was N5,000,000.00 (Five Million Naira only) to be shared equally between the Plaintiff and the 1st Defendant (See pages 110 and 111 of the Record of Appeal). By the agreement of the parties, it was the part of the agency fee to be paid by the Appellant that was differed to 15 Months from the commencement of construction at the site. The 1st

Respondent was to pay it on behalf of the Appellant and to later deduct it from the percentage share to accrue to the Appellant from the project. Counsel referred this Court toParagraph 2(3) of the Agreement that clearly shows the intention of parties on the above.

Contrary to ground six of the Notice of Appeal and the Appellant's Brief of Argument, the 1st Respondent Counsel referred this Court to paragraph 16 and 13 of the Land agreement and submits that by the combine reading the said paragraphs, the intention of the parties regarding the effective date of the commencement of the agreement is clear.

He further argued that the Parties Executed Exhibit P1 on 21st January 2021, therefore, Paragraph 4 is intended to compliment Paragraph 1. It is never the intention of the parties that it is a condition precedent for the effective date of the commencement of the agreement, especially when paragraph 13 clearly stated that the Agreement shall be effective and enforceable upon execution by the parties. He urged this Court to so hold.

The 2nd Respondent on its part simply asserts that it will amount to a case of shaving a man's har without his permission and determining a man's fate in his absence had the Trial Court held the Land Development agreement binding on the 2nd Respondent not being privy to the said Agreement. He relied on the cases of **C.R.S.W.B. V N.C ENG LTD (2006) 13 NWLR (PT 998) 589 CA**and **BASINCO MOTORS LTD V WOWEMANN-LINE AND ARROW (2009)NSCQR 284 AT P. 314.**

He further submits that it is not in doubt that the 2nd Respondent had oral agreement with both the Appellant and the 1st Respondent as supported by the 2nd Respondent's evidence in Chief and Appellant under Cross examination by 2nd Respondent as shown in pages 94-114, 104 and 111 of the Records.

RESOLUTION OF ISSUE 2

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.Ain**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. We 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."***

In resolving the present issue, we had a recourse to the Land agreement between the parties which was tendered as exhibit at the trial Court. we shall reproduce the salient part of the agreement under contention. Thus, Article 2(3) of the agreement states as follows:

> **The developer shall on behalf of the landlord pay the agency fee of N2, 500,000.00(Two Million Five Hundred Thousand Naira only) to the Agent/Broker, which shall be paid within the period of 15 months from the commencement of the work at the site. The said agency fee shall be refunded to the developer from 40% share of**

the Landowner, realised from the sale of the sixth unit of house stated therein.

It is however the complaint of the Appellant thatthe payment of the sum of N2,500,000.00 (Two Million Five Hundred Thousand Naira only) to an agent before the commencement of the project which ought to be paid within 15 months of commencement amounts to a violation of the Land Agreement entered into by the parties. Counsel further argued thatby the provisions of Article 4(1) of the Land Development Agreement, the Parties will agree to the Architectural designs before the commencement of this Agreement butthe Lower Court even after receiving evidence that the Parties had not agreed on the Architectural Designs, gave effect to the provisions of the said Agreement and passed judgment using same.

Conversely, the 1st Respondent argued that part payment of the agency fee cannot be remotely considered as a breach of the Land Development Agreement. He also insisted that by the provision of paragraph 13 and 16 of the Land Agreement made the effective date for the Memorandum of understanding upon execution.

The Trial Court in its Judgment posited as follows:

I dare to state that assuming the said money was paid before the commencement of work as aged in EXH P1 was that enough for the 1" defendant to unilaterally terminate the contract?

Defendant has through its sole witness strived to convince the court that by claimant's payment of the agency fee it had breached the provision of paragraph 2 (3) of EXH P1 and defendant had terminated the contract for that act, I am not persuaded by such contention. As shown by EXH P2, p3 and oral testimony of PW1, several letters were sent to 1st defendant.He was in receipt of all the letters from plaintiff but made no response to any of such letter of update. In VASWANI VS JOHNSON (2002) 11 NWLR PT 582 it was held thus: In business and mercantile transaction where in the ordinary cause of business a party states in a letter to another that he has agreed to do certain things the party who receives that letter must answer if he means to dispute the facts that he did not agree Where there is

silence in the circumstance in which a reply is obviously expected, an irrebuttable presumption of admission by conduct or representation is raise Applying the forgoing in the instant case the court holds that defendant having received EXH P2 and p7 and particularly in view of assertion in paragraph 11 and 12 of the plaintiff claim should have written to plaintiff stating his stand as regards the payment of the agency fees Again, I must state that terminating the contract without communicating to plaintiff is a breach of the contract he entered into. The payment in issue is enshrined in EXH P1, that he paid at any time whether early or within or before the time not sufficient enough to terminate EXH P1. Because according to PW1, he was instructed by representatives of the 1st defendant to pay that to the agent, as a proof of capacity to do the job.

The main issue in the contract as can be distilled from EXH PI, is execution, of the contract which takes effect from site possession being given to pw1 (plaintiff) and commencement of the actual execution of the contract, which from the testimony before this court was not given to plaintiff….

Weagree with the view of the Learned Trial Court that the Appellant cannot at this stage having instructed his representative whom he has not denied during Cross examination cannot at this stage contend that he did not instruct his agent to instruct the 1st Respondent to make such payment in dispute. His argument that the payment was made prior to 15 months before the commencement of the contract cannot absolve him. Besides, as properly evaluated by the Learned Trial Court, the Appellant refusal to respondent to exhibits P…

ISSUE THREE

Whether the Party relying on a document is by law required to produce the document for the examination of the Court? (Formulated from Ground 3 of the Record of Appeal)

It is the submission of Learned Counsel for the Appellant on this issue that the Lower Court was in grave error when it relied on the oral

evidence of PW1 in proof of the existence of Architectural, Structural, Electrical and Mechanical Drawings and Designs not brought before the court by the party claiming its existence. On this, he relied on the case of **NDUUL V. WAYO & ORS (2018) LPELR- 45151 (SC) Pp. 51-53 Paras A-B**.

Learned Counsel further submits that the burden of establishing the existence of the Architectural, Structural, Electrical and Mechanical Drawings and Designs lies squarely on the 1st Respondent/Claimant and that burden only shifts to the Appellant/1st Defendant in rebuttal when same has been established by the opposing party. In proof of the existence of the Architectural, Structural, Electrical and Mechanical Drawings and Designs, the 1st Respondent/Claimant offered oral testimony at page 97 of the Record of Appeal to the effect that they paid for the said designs and that same was sent to the Architect of the Appellant/1st Defendant who acknowledged same and made inputs. He also argued that the 1stRespondent/Claimant never produced the said Architectural, Structural, Electrical and Mechanical Drawings and Designs neither did they produce the alleged acknowledgement of receipt of same by the Architect of the Appellant/1st Defendant in court. According to Learned Counsel, this offends Section 128(1) of the Evidence Act, 2011.

In conclusion, Learned Counsel urged this Court to allow the Appeal and set aside the Judgment of the Lower Court.

Debunking the Argument of the Appellant, Learned Counsel for the 1st Respondent submits that the parties by Exhibit P1 agreed in Clause 1(ii) of the Agreementthat the Developer will present to the Landowner the Site Plan and design of the proposed estate which shall be deemed mutually agreed between the Parties upon the Execution of this Agreement. The 1stRespondent contended that it has led credible evidence before the trial court on how it liaised with Architect Hamza on the technical aspect of executing the project (see page 98 of the Record of Appeal). The Appellant in his evidence-in-chief admitted that he introduced the said Architect Hamza as one of his representatives in the project (see page 107 of the Record of Appeal) but he did not deem it necessary to call him to testify before this Court to deny or controvert the claim of the 1st Respondent in regards to the architectural drawings given to him by the Plaintiff.

In addition, Counsel submits that it is also in evidence that the 1st Respondent also forwarded the site plan and the Architectural Drawings to the 1st Defendant vide Exhibit P7. He referred the Court to pages 40 of the Record of Appeal. Again, he also maintained that although the Appellant acknowledged receipt of Exhibit P7 (see pages 108 of the Record of Appeal), he did not at any time reply the letter so as to debunk the 1st Respondent's claim. In any case, in his evidence in the Record of Appeal before this Court, he did not state that he did not receive the architectural drawings. He further asserts that it is in evidence that the Plaintiff engaged the services of Strong & Bold who prepared the Architectural, Structural, Electrical and Mechanical Drawings of the project and paid the sum of N1,250,000 00 (One Million, Two Hundred and Fifty Thousand Naira) only as the cost of the Architectural, Structural, Electrical and Mechanical Drawings. According to Counsel, the Cash Receipt issued for the said drawings was admitted in evidence as Exhibit P4. He referred the Court to pages 24 and 98 of the Record of Appeal.

Counsel further submitsthat after all, it is not the content of the architectural drawings that is in issue before the trial court or even before this Court. What is in issue is the amount of money paid by the Plaintiff for the services in respect of the architectural drawing which is duly supportedby the contents of Exhibits P4 and P7 which are already in evidence before this Court.

Counsel therefore submits that the action of the Appellant who unjustifiably and unilaterally terminated the contract has caused the 1st Respondent to suffer the loss of N1,250,000,00 (One Million Two Hundred and Fifty Thousand Naira) only being the cost of Architectural, Structural, Electrical and Mechanical Drawings and Design incurred by the 1st Respondent in the course of performing the contract. Therefore, he urged this Court to hold that the Trial Court was right when it relied on Exhibit P4 to order the Appellant to pay the 1st Respondent the cost of Architectural, Structural, Mechanical and Electrical drawings incurred by the 1stRespondent.

In the light of the foregoing arguments/submissions, Counsel urged this court to dismiss the Appeal as lacking in merit and award substantial cost against the Appellant and in favour of the 1st Respondent.

RESOLUTION OF ISSUE 3

On this issue, the main grouse of the Appellant is that the 1st Respondent pleaded Architectural, Structural, Electrical, and Mechanical Drawings and Designs. He posited that the Appellant having denied the existence of the said Architectural,Structural, Electrical, and Mechanical Drawings and Designs and the 1st Respondent having failed to produce the said drawings before the Court, the Trial Court therefore erred when it admitted the oral evidenceof the 1st Respondent. He relied on Section 128 of the Evidence Act.

Conversely, the 1stRespondent contended that it has led credible evidence before the Trial Court on how it liaised with Architect Hamza who the Appellant admitted was his representative on the technical aspect of executing the project.He posits that the Appellant did not on its part deem it necessary to call Architect Hamza who was given the said Architectural drawings to deny or controvert the claim of the 1st Respondent in regards to the architectural drawings given to him by the Plaintiff.

Furthermore, he submits that Learned Counsel maintained that although the Appellant acknowledged receipt of Exhibit P6,which indicated that the Architectural drawings were given to his representative,the Appellant did not at any time reply the letter so as to debunk the 1st Respondent's claim.

Now, Section 128 of the Evidence Act provides thus:

> **"When a judgment of a Court or any other judicial or official proceeding, contract or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under this Act, nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence."**

Note that the purport of Section 128 of the Evidence Act is to dissuade the use of oral evidence to vary or alter the content of documentary evidence. See the case of **AKINBILEJE & ORS V. OGUNTOBADE & ORS (2013) LPELR-21965(CA)**. There is no doubt that the law is settled that oral evidence cannot be used to vary the content of a document or in place of a documentary evidence.

In the instant case, the 1st Respondent averred that he paid the sum of N1,250,000,00 (One Million Two Hundred and Fifty Thousand Naira) only being the cost of Architectural, Structural, Electrical and Mechanical Drawings and Design incurred by the 1st Respondent in the course of performing the contract between him and the Appellant. He tendered receipt evidencing the said payments. He also testified that the said Architectural drawings were given toone Architect Hamza who the Appellant in his evidence before the Trial Court admitted to being his representative. By Exhibit P6 which is tendered before the Court, the 1st Respondent informed the Appellant of this fact but the Appellant did not respond. In the circumstances, we do not see the applicability of Section 128 in the instant case. Appellant's Counsel submission in this regard is highly misconceived. As far as this Court is concerned, the 1st Respondent has discharged its onus of proving the fact that it expended the sum of N1,250,000,00 (One Million Two Hundred and Fifty Thousand Naira) only being the cost of Architectural, Structural, Electrical and Mechanical drawings. The onus is therefore on the Appellant to prove otherwise either by calling evidence in prove that the said Architectural drawings were not given to his representative, Architect Hamza or that the 1st Respondent did not pay the alleged sum. In the absence of evidence by the Appellant to deflate the concrete evidence put forward by the 1stRespondent, we do not see any cogent reason or evidence before the Trial Court to decide in favour of the Appellant. Therefore, we are inclined to wholeheartedly, accept the view of the 1st Respondent that the failure of the Appellant to reply the letter of the 1st Respondent, Exhibit P6, amounts to presumption of admission by conduct. See the case of **VASWANI V. JOHNSON (2002) 11 NWLR PT 582** and **ALIBRO TRANSPORT SERVICES LTD & ANOR V. ACCESS BANK PLC (2023) LPELR-60432(CA) (PP. 41-42 PARAS. F-F)**.

In the light of the above analysis, this issue is resolved in favour of the 1stRespondent.

Finally,we agree with the conclusion reached by the Trial Court. Therefore, this appeal is devoid of any merit, fails and is hereby dismissed.

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HON. JUSTICE J ENOBIE HON. JUSTICE B. DOGONYARO OBANOR

(PRESIDING JUDGE) (HON. JUDGE)