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

**APPEAL NO: CVA/355/2022**
**SUIT NO: AB/SDC/CV/49/2017**

**BETWEEN:**

**NOFAX INTERNATIONAL CONSTRUCTIONCOMPANY LTD.....APPELLANT**

**AND**

**MRS NGOZI O. IKE.....RESPONDENT**

**JUDGMENT**
**DELIVERED BY HON JUSTICE J. ENOBIE OBANOR**

This is an Appeal against the decision of His Worship, Musa I. Jobbo,of Senior District Court, FCT-Abuja in Suit No: AB/SDC/CV/49/2017 challenging the award of the sum N892,603.05k (Eight Hundred and Ninety-Two Thousand, Six Hundred and Three Naira, Five Kobo) as special damages and failure of the Learned TrialJudge to enter judgment for the Appellant (Defendant/Counter Claimant at the Trial Court) on its claim for management and maintenance fees for Plots 91A and 91B from the Respondent (Plaintiff at the at the Trial Court).

The Respondent as Claimant in the Court Below by an Amended Plaint filed on 12th of May, 2022 and contained at pages 20 to 25 of the Records, claimed the following reliefs against the Defendant/Appellant:

1. AN ORDER of this Honourable Court mandating the Defendant to pay to the Plaintiff the sum of Eight Hundred and Ninety-Seven Thousand, Six Hundred and Three Naira, Five Kobo (N897,603.05) as special damages being the amount expended by the Plaintiff in painting, ceiling, wall tiling, floor tiling and installation of shower tray in all that piece of property described as Plot 77, Golden Spring Estate, Duboyi-Abuja.

2. AN ORDER of this Honourable Court mandating the Defendant to pay to the Plaintiff the sum of Two Hundred and Thirty Six Thousand, Five Hundred and Sixty Two Naira, Fifty Kobo (N236,562.50) as special damages being the cost of six doors purchased and fixed three for each, and as contribution for electrical installation of houses in the Estate along the perimeter fence as agreed and approved by the Defendant, on all that property described as Plots 91A and 91B, Golden Spring Estate, Duboyi-Abuja.
3. AN ORDER of this Honourable Court awarding the sum of Three Hundred Thousand Naira (N300,000 00) in favour of the Plaintiff against the Defendant as general damages.
4. AN ORDER of this Honourable Court awarding the sum of One Hundred Thousand Naira (N100,000.00) in favour of the Plaintiff against the Defendant as cost of this suit
5. AN ORDER of this Honourable Court compelling the Defendant to deliver to the Plaintiff receipt for payment of Value Added Tax (VAT) from the Federal Inland Revenue Service (FIRS) or refund the sum of Eight Hundred Thousand Naira (N800,000) paid to the Defendant by the Plaintiff as VAT for onward payment to FIRS in respect of Plot 77, Golden Spring Estate, Duboyi, Abuja and the sum of Two Hundred and Ninety Thousand Naira (N290,000.00) paid in respect of Plot 91A and the sum of Two Hundred and Ninety Thousand (N290,000.00) paid in respect of Plot 91B.

In response, the Defendant did not file a Statement of Defence but filed a Counterclaim against the Appellant as follows:

1. An order of this Court dismissing the case of the Plaintiff.
2. An order of this Court compelling the Plaintiff to pay the Counter-claimant the sum of N1,892,459 (One Million, Eight Hundred and Ninety-Two Thousand, Four Hundred and Fifty-Nine Naira) being the outstanding balance of managementand maintenance fees on Plots 77; 91a and 91b from 2009 till date in accordance with the parties' agreement.
3. An order of this Court awarding general damages of Five Hundred Thousand Naira Only (N500,000) against the Plaintiff/Defendant to Counter-Claim.
4. An order of cost of N200,000 against the Plaintiff/Defendant to Counter-claim.

In reaction, the Claimant/Defendant to counter-claim filed a Counter Affidavit of 7 paragraphs on the 21st day of December, 2022.

After hearing and adoption of Final Written Addresses by parties, the Trial Court in its Judgment delivered on the 3rd of November, 2022 awarded in favour of the Respondent the sum of N892,603.05k (Eight Hundred and Ninety-Two Thousand, Six Hundred and ThreeNaira, Five Kobo) as special damages and refused the Counter-Claim of the Appellant. The Appellant dissatisfied with the Judgment filed an Amended Notice of Appeal on the 8thof February, 2023, predicated on three grounds set out hereunder as follows:

**GROUND 1**

The Honourable Court below erred in law when the learned trial judge without an essential particulars and details of the facts of the special damages suffered and no evidence adduced by the Respondent awarded the sum of N897,603.05k (Eight Hundred and Ninety-Seven Thousand Six Hundred and Three Naira, Five Kobo) as Special Damages to the Respondent.

**GROUND 2**

The Honourable Court below erred in law when the learned trial judge held that, ***"In my considered view, however, this does not suffice for this court to enter judgment for the Counterclaimant on their claim for management and maintenance fees for Plots 91A and 91B as the burden of strictly proving this claimin the counterclaim also lies on the counterclaimant and the court will not therefore merely rely on the weakness of the defence of the Defendant to counterclaim to grant this claim."***

**GROUND 3**

The judgment delivered by the Honourable Court below is against the weight of evidence adduced before the Honourable Court.

**RELIEFS SOUGHT**

a. Allow this appeal and set aside the award of the sum of ₦892,603.05(Eight Hundred and Ninety-Two Thousand, Six Hundred and Three-Naira, Five Kobo) as special damages to the Respondent by the Honourable Court below on the 3rdof November, 2022. In No

AB/SDC/CV/49/17 between Mrs Ngozi O. Ike v. Nofax International Construction Company Ltd. being the outstanding and unpaid balance of the amount expended by the Claimant in painting, ceiling, wall, tilling and installation of shower tray described as Plot 7, Golden Spring Estate, Duboyi, Abuja.

b. An order mandating the Respondent to pay managementand maintenance fees for Plots 91A and 91B at the rate of ₦92,000 (Ninety-Two Thousand Naira) per annum for the years 2011 to 2021.
c. For such further other Orders which this Honourable court shall deem fit to make in the circumstances.

**ISSUES FOR DETERMINATION**

The Appellant's Brief of Argument settledby NduwuezeAnyama nominated two issues for determination as follows:

1. ***Whether in the circumstances of the case, the trial court was right in awarding the sum of N892, 603.05k (Eight Hundred and Ninety-Two Naira, Six Hundred and Three-Naira Five Kobo) as special damages against the Appellant? (Ground1)***
2. ***Whether the learned trial judge was right when he refused to enter judgment for the Appellant for its claim on the payment of management and maintenance fees for Plots 91A and 91B by the Respondent to the Appellant for the years 2011 to 2021? (Ground 2)***

The Respondent proposed the following issues for the determination of this Appealas follows:

1. ***Whether in the circumstances of this case, the trial court was right in granting the Respondent the sum of N892,603.05 (Eight Hundred and Ninety-Two Thousand, Six Hundred and Three Naira, Five Kobo) being outstanding and unpaid balance of the amount expended by the Respondent in painting, ceiling, wall tiling, floor tiling and installation of shower tray at the property described as Plot 77, Golden Spring Estate,Duboyi, Abuja less N92,000(Ninety-Two Thousand Naira) unpaid management and***

***maintenance fees for the year 2017? (this issue was distilled from ground 1 of the Amended Notice of Appeal)***

***(2) Whether the learned trial judge was right when he refused to enter judgment for the Appellant in respect of its claims for management and maintenance fees for Plots 91A and 91B from the year 2011 to 2021? (this issue was distilled from ground 2 of the amended notice of appeal).***

We have thoroughly analysed the issues proposed by both Parties. They are virtually the same save for the use of different semantics. In that light, this Court will adopt the two issues distilled by the Appellant's Counsel as it is apt and also captured the issues nominated by the Respondent. This Court will therefore proceed to determine this appeal by reviewing the arguments of Counsel under the said issues and determine same thematically as follows:

**ISSUE 1**

***Whether in the circumstances of the case, the trial court was right in awarding the sum of N892,603.05k (Eight Hundred and Ninety-Two Naira, Six Hundred and Three-Naira Five Kobo) as special damages against the Appellant? (Ground) 1)***.

It is the contention of the Appellant that the sum of N892,603.05k (Eight Hundred and Ninety Two Thousand, Six Hundred and Three Naira, Five Kobo) awarded by the Learned Trial Judge as special damages for the outstanding and unpaid balance of the amount expended by the Respondent in painting, ceiling, wall tiling, floor tiling and installation of shower tray at the property described as Plot 77 Golden Spring Estate, Duboyi, Abuja, ought to have been strictly proved. He relied on the case of**MTN NIG. COMMS. LID V. A. C. F. S LTD. [2016] 1 NWLR [PART 1493] PP. 356, PARAS. E-F**.

Learned Counsel argued that special damages do not follow in the ordinary course of things as is the case with general damages. They are exceptional and so must be claimed specifically and proved strictly. He relied on the cases of**NNPC CHIFCO NIG. LTD. (2011) SCNJ 107 @**

**130, 131 PER RHODES-VIVOUR, JSC REPORTED AS NNPC 1. KLIFCO (NIG.) LTD. (2011) 10 NWLR IPT.1255] 209; INCAR (NIG.) LTD. V. BENSON TRANSPORT LTD. (1975) 3 SC 117: ODULAJA V. HADDAD (1973) 11 SC 357**.

Consequently, Learned Counsel contended that the Respondent in her evidence-in-chief found at pages 132-147 of the Record did not tender receipts to each item she claimed to have spent money on with respect to Plot 77 but tendered a document that itemized the items and monetary value attached to each item without receipts to those items which was admitted as Exhibit P6 found at pages 73 &136 of the Record. Furthermore, Learned Counsel argued that during cross-examination, PW1 who is now the Respondent, was asked whether there are no receipts as to painting, ceiling, wall tiles and shower tray and workmanship carried out on Plot 77, she responded, "I don't have the receipts." The Respondent only relied on Exhibit P6 to establish her claim to special damages.

It is also the submission of Learned Counsel that Exhibit P6 was admitted without proper foundation laid and there was no record of the Respondent laying proper foundation as at the time she was tendering the document admitted as Exhibit P6. Being a photocopy and not the original, it is expected that proper foundation be laid as to the whereabouts of the original. He referred the Court to the Record at pages 134-135.

Again, Counsel posits that contrary to the provision of Section 83 of the Evidence Act 2011, the Respondent is not the maker of Exhibit P6, and therefore cannot tender it. Furthermore, he submits that Exhibit P6 is a public document, as it forms part of the record of the company. This much was testified to by the Respondent in her evidence-in-chief when she admitted that she was given a copy of Exhibit P6 by the then Manager of the Appellant, found at page 134 of the Record. In view of this, Counsel maintained that this document ought to have been certified by the company before it can be tendered by the Respondent. He relied on the case of **OKOREAFFIA V AGWU [2012]1 NWLR (PRT.1282) 453 @ P. 453 PARAS. D-F**.He urged this Court toexpungeExhibit P6 admitted by the Learned Trial Judge as it has failed to meet the requirement for admissibility.

Furthermore, Learned Counsel submits that the Learned Trial Judge acted in error by relying on the admission of DW1 and the admissions in paragraphs 12 and 186a) 6) and (ii) of the Counterclaim found at pages 28-29 of the Record to further justify the award the sum of ₦892,603.05(Eight Hundred and Ninety-Two Thousand, Six Hundred and ThreeNaira Five Kobo) to the Respondent as special damages without any evidence adduced to that effect on the basis that facts admitted need no further proof. He asserts further that because of the special nature of special damages, special damages must be strictly proved even where it appears to be admitted, such does not relieve the party claiming it from the requirement of proof with compelling evidence.Therefore,special damages are exceptional in character and gives no room for any inferences to be drawn by the court. He referred to the Supreme Court case of **NNPC V. KLIFCO NIG. LTD (2011) 10 NWLR [PART 1255] PP.238, PARAS, A-D, 243 PARAS B-C**.

Learned Counsel further submits that the fact that there are discrepancies as to the sum to be paid to the Respondent by the Appellant, the Learned Trial Judge should have called for compelling evidence and not rely on Exhibits P6, D2 and the admissions of DW1 to award the aforesaid sum as damages. For instance, in paragraphs 12 and 13(a) (i) and (ii) of the Counterclaim found at pages 28-29 of the Record, the Appellant admittedthe sum of ₦892,603.05(Eight Hundred and Ninety Two Thousand, Six Hundred and Three Naira Five Kobo), again, in January 2017, the Appellant wrote a letter (Exhibit P10) to the Respondent admitting the indebtedness of the sum of ₦686,576.00(Six Hundred and Eighty-Six Thousand Five Hundred and Seventy-Six Naira)found at page 102 of the Record whereas DW1 in his evidence-in-chief found at page 173 of the Record, admitted the sum of ₦600,000.000 (Six Hundred Thousand Naira) only as sum to be paid. Therefore, the foregoing discrepancies should have persuaded the Learned Trial Judge to concur that special damages ought to be proved strictly with compelling evidence not just mere admission and evidence emanating from the Respondent as the maker of that document.

The Respondent on her part contended through her Counsel that the Court Below was right in awarding relief (1) contained in the Respondent's Amended Plaint, which is for the sum of ₦892,603.05 (Eight Hundred and Ninety-two Thousand, Six Hundred and Three Naira,

Five Kobo) being outstanding and unpaid balance of the amount expended by the Respondent in painting, ceiling, wall tiling, floor tiling and installation of shower tray at the property described as Plot 77, Golden Spring Estate, Duboyi, Abuja less ₦92,000(Ninety-two Thousand Naira) unpaid management and maintenance fees for the year 2017.

Learned Counsel maintained that the Respondent proved her entitlement at the Court Below byher testimony in her evidence-in-chief contained at pages 132 to 147 of the Records and Exhibits P6 and P8 that the total amount owed the her by the Appellant in respect of Plot 77, Golden Spring Estate, Duboyi-Abuja for completing the property with the agreement of the Appellant and as refundable contribution for the purchase of transformer and electric cables in the Estate cumulatively was the sum of One Million, One Hundred and Seventy-three Thousand, ThreeHundred and Twenty-Six Naira (₦1,173,326), that is, (₦1,016,576 in Exhibit P6; and N156,750 in Exhibit PB). He also submits that the Respondent tendered Exhibit P6 by PW1 on 04/10/2017 and acknowledged by PW2 on 25/02/19 as the person who made and signed it. PW2 was cross examined by the Defendant on it. Exhibit P8 was tendered by PW1 on 22/01/2018 where the sum of One Hundred and Fifty-Six Thousand, Seven Hundred and Fifty Naira (N156,750.00) was captured as being due to the Respondent.

Learned Counsel also contended that there was no dispute between the Parties as to whether the property handed over to the Respondent was completed according to specifications or not. There was also no dispute between the Parties as to whether or not the Respondent made contribution for the purchase of transformer in the Estate, which was the responsibility of the Appellant. It was not also disputed that the Appellant agreed to refund a certain percentage of the amount contributed for the electricity issues. Counsel submits that in the Respondent's testimony on 22/01/2018, 21/03/2022 and via Exhibits P7 and P9, she agreed and conceded that the sum of Two Hundred and Seventy-Six Thousand Naira (₦276,000.00) be deducted from the amount owed her by the Appellant in respect of Plot 77, as management and maintenance fees for year 2013 to 2014; 2015 to 2016, and 2016 to 2018 which she testified was not paid then due to ongoing controversy between the Appellant and residents of the Estate in respect of payment of management and maintenance fees. The Respondent had agreed via

Exhibit P9 that this ₦276,000.00 be removed from the cumulative sum above owed her thereby leaving the outstanding balance due to the Claimant/Respondent from the Defendant/Appellant in respect of Plot 77 as the sum of Eight Hundred and Ninety-Seven Thousand, Three Hundred and Twenty-Six Naira (N897,326), hence, the claim of the Respondent in relief 1 above. Counsel also referred to Exhibit P10, and contended that it amounts to admission by the Appellant owing the Claimant/Respondent the sum of Six Hundred and Eighty-six Thousand, Five Hundred and Seventy-Six Naira (₦686,576) and further in paragraphs 12, 13(a)(i)(ii), of the Defendant's Counter-Claim contained at pages 26 to 30 of the Records, the Defendant/Appellant admitted owing the Claimant the total sum of Eight Hundred and Forty-Three Thousand, Two Hundred and Ninety-OneNaira (₦843,291) in respect of the said Plot 77. In effect, in respect of the Respondent's claim of ₦897,603.05 before the Court Below, the Appellant admitted the sumof ₦843,291, leaving only the balance of ₦54,312 not covered by the admission. Therefore, Learned Counsel insisted that the Respondent was entitled to all the claims including the remaining ₦54,312 because there was sufficient evidence before the Court to support all her total claims of Eight Hundred and Ninety-Seven Thousand, Three Hundred and Twenty-Six Naira (₦897,326).

In this regard, Counsel submits that the Appellant's assertion in paragraph 14 of the Counter-claim that they unilaterally applied the sums admitted above to offsetting management and maintenance fees allegedly owed by the Respondent in respect of the said plot does not apply in the circumstances of this case. This is because the Appellant has not proved its entitlement to management and maintenance fees beyond the three (3) years conceded by the Respondent. In the circumstances of this casetherefore, Counsel submits that there was no evidence that the Respondent agreed that the amount owed her be applied to offsetting the said management and maintenance fees. Also, there were other pieces of evidence that showed that the Respondent did not owe management and maintenance fees in respect of Plot 77 and Counsel urged this Court to hold the same.

Furthermore, Learned Counsel adumbrated thatthe evidenceof admission can be acted upon even where special damage is claimed. On this point, Counsel argued that the Appellant'scontention that the

Respondent who claimed special damages in the Court Below did not particularize and prove her claim rather made a general argument, will not benefit the Appellant since he didnot state the particulars the Respondent did not provide and what proof was necessary that she failed to provide. He called to his aid the cases of **MBA VS. MBA (2018) LPELR-44295(SC), PP.24- 25, PARAS.F-E; SPDC (NIG) LTD & ORS VS. NWAWKA (S003) LPELR- 3206 (SC), PP.14-15, PARAS.E-B and In AG ANAMBRA STATE VS. AG FRN & ORS, PP.114-115, PARAS.B- C**.

As for the requirement of strict proof, Counsel submits that the law does not call unusual, special, extra-ordinary or different type of evidence other than credible and sufficient evidence which meets the standard of proof on the balance of probabilities required in civil matters generally. He referred the Court to the decisions in **MOBIL PRODUCING (NIG) UNLTD VS. AYENI & ORS(2019)LPELR-4782(CA)**and **OANDO NIGERIA LIMITED VS. ADIEJERE WAS LIMITED (2013) 15 NWLR(1377) 374**.

In the instant case, contrary to the argument of the Appellant on lack of particulars, Learned Counsel submits that detailed particulars of the special damages claimed by the Respondent was supplied in paragraph 19 of the Amended Plaint contained at page 22 of the Records. Therefore, the Respondent has fulfilled this aspect of the provisions of the law. The onus was therefore on the Appellant to prepare its defense based on these particulars and disprove same. However, Counsel submit that the Appellant did not lead any credible evidence whatsoever to impugn these particulars.

Again, Learned Counsel argued that the law is that the only circumstance in which admission would not relieve the Claimant of the burden of proof is where he/she seeks declaratory reliefs. As such, the Claimant can leverage on any form of admission of any fact in issue– whether admission of fact, admission against interest, to discharge the burden of proof on such claimant. Hereferred the Court to the decision in the case of **OLOGUN VS. FATAYO (2012) LPELR-9298 (CA), pp.19-20, paras. F-D; (2013) 1 NWLR PART 1335 P.303**.

Debunking the submission of Learned Counsel for the Appellant that no proper foundation was laid before Exhibit P6 was admitted in evidence,

Learned Counsel for the Respondent contended that theRecordclearly shows that PW1 traced and laid foundation of the origin of the document which entitled her to tender it. Same was acknowledged by PW2. Therefore, Counsel submitted that there is no way from theRecords that it can be argued that no proper foundation was laid in law to warrant the admission of that document. The Court Below was therefore right in admitting and acting on that document.

Conclusively, Counsel urgedthis Court to hold that the Court Below was right in awarding special damages to the Respondent as it did.

**RESOLUTION OF ISSUE 1**

It is trite law that special damages must be strictly proved and by the rules of pleadings, a claimant, who is claiming special damages, is required to first plead the special damages and give particulars thereof before he would be allowed to lead evidence in proof. Strict proof in this context does not necessarily mean proof beyond reasonable doubt. It simply implies that a claimant who has the advantage of being able to base his claim upon a precise calculation, must give the defendant access to the facts which make such calculation possible. Strict proof within the context of special damages can mean no more than such proof as would readily lend itself to qualification or assessment. See the case of **PER SIRAJO,J.C.A IN GRAND MARINE OIL & GAS (NIG) LTD & ANOR V. OTHNIEL BROOKS LTD (PP. 20-21 PARAS. B-B)**.

In the case of **ONYIORAH VS. ONYIORAH & ANOR (2019) LPELR - 49096 (SC) 6, PARAS E - F**, the Supreme Court, Per Rhodes-Vivour, JSC, held that:

> **"Special damages must be specially pleaded and strictly proved by the claimant. To succeed in a claim for special damages the claimant must plead the special damages and give necessary particulars and adduce credible evidence in support. The claimant must satisfy the Court as to how the sum claimed as special damages was quantified."**

On whether the claim for special damages will succeed based on admission, the Supreme Court in answering the above question, held in

the case of **N.N.P.C. V. CLIFCO NIG. LTD (2013) 4 MJ.S.C. 142 @ 174**, as follows:

> **Now, can what appears to be an admission apply to a claim for special damages, or put it another way, can a claim for special damages succeed because it is admitted? I do not think so. Special damages are never inferred from the nature of the act complained of. They do not follow in the ordinary course as is the case with general damages. They are exceptional and so must be claimed specially and proved strictly. See INCAR v. BENSON (1975) 3 SC p. 177; ODULAJA v. HADDAD (1973) 11 SC p. 351."**

In addition,PER GARBA, J.C.A in the case of **ARAB CONSTRUCTION LTD. & ANOR V. ISAAC (2012) LPELR-9787(CA) PP. 20, PARAS. A** held that:

> **... Put simply, the statement of the law above by apex court is that because special damages are exceptional and specific, they will not succeed and be granted as a matter of course, merely on admission, express or otherwise, even where pleaded as required by the law."**

Let us also use this forum to reiterate in line with judicial pronouncements thatthe term "strict proof" required in proof of special damages means no more than that the evidence must show the same particularity as is necessary for its pleading. Normally, it consistsof evidence of particular losses which is exactly known or accurately measured before the trial. It does not mean unusual proof.Claim for special damages based on mere estimates or estimation of the Plaintiff is not precise and at best, is as good as an exercise in mere conjecture, a guess work, which clearly is the antithesis of precise calculation. The party who founds an item of his claim on special damage intends thereby to remove from the Court its discretion in the matter to some extent. Equally, in a claim for special damages, the Court is not expected to issue its order on mere conjecture because every order of Court is expected to be precise and certain. See**FBN PLC V. ATUNRASE CARPETS & UNDERLAYS LTD (2011) LPELR-4161(CA) (PP. 39-40 PARAS. E);AKINDOLIE V. JOLAOSO (2020)**

**LPELR-52306(CA) (Pp. 32-40 paras. E)**; **IMANA V. ROBINSON (1979) 3 - 4 SC.1; U.B.N. V. ODUSOTE BOOKSTORE LTD. (1994) 3 NWLR (PT. 331) 129; JOSEPH V. ABUBAKAR (2002) FWLR (PT. 91) 7525; OKORONKWO V. CHUKWUEKE (1992) 1 NWLR (PT. 216) 176**.

Now, in the instant case, the Respondent in her relief 1 clearly sought for an order of Court mandating the Defendant/Appellant to pay to her, the sum of Eight Hundred and Ninety-Seven Thousand, Six Hundred and Three Naira (₦897,603.00) as special damages being the amount expended by her in painting, ceiling, wall tiling, floor tiling and installation of shower tray, in all that piece of property described as Plot 77, Golden Estate, Duboyi, Abuja.This in no doubt has put the Claimant's Claim within the realm of specific damages. The Claimant equally at paragraphs 19 and 20 of her pleadings before the Trial Court, specifically pleaded special damages and also led evidence to satisfy the requirement of the law.

Consequently, the Respondent tendered particularly Exhibit P6 to prove its claim of relief 1. We have keenly perused the said exhibit. From the content of the exhibit, it is manifest that the said Exhibit P6 contains a list of items with prices attached to it that were not carried out by the Developer wherein the General Manager of the Appellant countersigned. The said exhibit precisely stated the amount of each item which total is in the sum of N1,016,576.00. This exhibit resulted from several letters of Demand written to the Appellant which were tendered in evidence as P2, P3,P4 and P5. Thus, the Respondent(PW1)in her evidence-in-chief stated:

> **... I followed up with letters for the return of these items and in one I wrote in November, 2010, I followed it up with a visit to the Defendant's office and I met the then General Manager, Mr. Ibrahim Mshelia... He itemised the items and attached monetary value to each of the items and he signed it and the items came to N1,016,576.00 (One Million Sixteen Thousand Five Hundred and Seventy-six Naira)."**

It is worthy of note that the said General Manager who prepared the said Exhibit P6, testified as PW2 and stated as follows:

**"It is a list of items that were not carried out by the Developer with prices attached to them with the intent to refund the total price that is captured."**

The big question to ask at this point is whether Exhibit P6 in conjunction with other documents tendered are enough to sustain proof of special damages. The Appellant demands that the Claimant aught to be very specific especially by producing receipt of payments on how he arrived at the cost of the amount expended in painting, ceiling, wall tiling, floortiling and installation of shower tray, in all that piece of property described as Plot 77, Golden Spring Estate, Duboyi, Abuja. In trying to achieve this point, the Appellant during trial, cross examined PW1 on whether there is receipt of payment as to the aforesaid work carried out by the Claimant. In response on record, the Respondent/Claimant stated that she did not have receipts because the Defendant's General Manager (PW2) had attached prices to them.

From the aforesaid, I do not see cogent reason to rely on the narrow view of the Appellant that since receipts were not tendered then Exhibit P6 cannot be used to establish the claim of the Claimant. It should be noted that proof of special damages does not connote that receipts must be tendered in all cases to establish same. It is determined by the nature of each case. As postulated above, "strict proof" does not mean proof beyond reasonable doubt as required in criminal cases. It is enough where the Claimant **satisfies the Court as to how the sum claimed as special damages was quantified**.See the case of**ONYIORAH V. ONYIORAH & ANOR (2019) LPELR - 49096 (SC) 6, PARAS E - F**.In the instant case, Exhibit P6 relied by the Respondent is a document clearly showing how the items carried out by the Respondent were clearly quantified by the Appellant itself. The Appellant cannot at this point after quantifying the work and the amount it intended to pay demand receipt of payment on the wrong presumption of the law that strict proof is required in prove of special damages. Certainly, this Court will not be swayed by the technicalities the Appellant is trying to explore to defeat the substantial justice of this case.

Thus, the Apex Court held in the case of **C & C CONSTRUCTION CO. LTD. V. OKHA 1 2003 18 NWLR (pt. 79) 94**as follows:

**"The Judicial Process Malfunctions and is discredited when it is bossed down by technicalities and is manipulated to go from technicality to technicality and thrive on technicality. That is why at all times, the tendency towards technicality should be eschewed and the determination to do substantial justice should remain the preferred option and the hallmark of our Judicial System."**

See also the case of**WILSON & ORS V. OKEKE (2010) LPELR-4536(CA) (PP. 15 PARAS. C)**.

This Court therefore disagrees with the Appellant that special damages have not been proved. The items which the Respondent is claiming special damages were properly pleaded and the evidence put forward by the Respondent was sufficient enough since the Appellant did not file any statement of defence and has not canvassed any strong evidence to defeat same.The argument of the Appellant's Counselthat the Learned Trial Judge acted in error by relying on the admission of DW1 and the admissions in paragraphs 12 and 186a) 6) and the Counterclaim found at pages 28-29 of the Record to further justify the award the sum of ₦892,603.05(Eight Hundred and Ninety-Two Thousand, Six Hundred and ThreeNaira Five Kobo) to the Respondent as special damages without strict evidence adduced to that effect on the basis that facts admitted need no further proof is a gross misconception taking into consideration the proof in the exhibits before the Court and oral evidence of parties. It should be noted that the standard of proof required from a Plaintiff in support of a claim for damages when unchallenged is minimal as shown above because strict proof of special damages does not connote an unusual or extra-ordinary proof. Therefore, the finding of the Trial Court in this regard is endorsed by this Court.

It is also the grouse of the Appellant that the Exhibit PW6 being a photocopy was wrongfully admitted in evidenceby the Trial Court without proper foundation being laid. From the testimony of the PW1, the Respondent's Witness, Exhibit P6 contains list of items and attached monetary value to each of the items. Learned Counsel relied on Section 83 of the Evidence Act and other judicial case laws.

The trite position of the law established by plethora of judicial cases is thatadmissibility of document is governed by three criteria such as:

1. whether the document is pleaded;
2. whether the document is relevant to the issues being tried or in dispute between the parties; and
3. whether it is admissible in law. That is, whether any rule of law or provision of statute renders it inadmissible in evidence. See the cases of **OKONKWO OKONJI & ORS. V. GEORGE NJOKANMA & ORS. (1999) - 12 SC (PT. 11) 150, (1999) 14 NWLR (PT. 638) 250; DUNIYA V. JIMOH (1994) 3 NWLR (PT. 334) 609 AT 617**AND**AGBOOLA & ORS V. A. S. B. INVESTMENT LTD (PP. 14-15 PARAS. C-C)**.

There is no doubt that the general principle is that the proper person to tender a document is the maker so that the other party can have the opportunity to test the authenticity and veracity of the document and its content under cross examination. However, documentary evidence can be tendered in the absence of the maker under certain conditions. Failure to tender a document through the maker does not render the document inadmissible. The failure to tender the document through the maker goes to the probative value to be attached to it after taking into consideration the entire circumstances of the case. See **AJAYI V. STATE (2021) LPELR-56344(CA) (Pp. 15-16 paras. B); OMEGA BANK (NIG) PLC V. O.B.C. LTD. (2005) LPELR-2636 (SC) AT 36 (B-F), 41 (A-C). BUHARI V. INEC (2008) LPELR-814 (SC) AT 16 (A)**.

In the instant case, PW1, testified that she met the then General Manager, Mr. Ibrahim Mshelia who itemised the items and attached monetary value to each of the items, signed it and the items came to N1,016,576.00 (One Million Sixteen Thousand Five Hundred and Seventy-six Naira). He gave her a copy and signed on the cancellation he made on the copy then left the original in the Defendant's office. Also, PW2, the General Manager referred to by PW1 corroborated the testimony of PW1 where he testified that Exhibit P6 is one of the documents they compiled when he was the General Manager of the company, Noax International Construction Company Ltd.; they compiled list of outstanding items, kept copies, then gave out copies to the clients. It is a list of items that were not carried out by the Developer

with prices attached to them with the intent to refund the total price that is captured. Under cross examination, the PW2 reaffirmed the above testimony of the PW1.

From the above analysis, I find it difficult to disturb the findings andreliance on Exhibit P6 by the Learned Trial Court. The said exhibit to our mind, is of immense probative value and the Trial Court was right to have acted on the said document bearing in mind the compelling evidence surrounding the said document. Accordingly, issue 1 is hereby resolved in favour of the Respondent.

**ISSUE 2**

> **Whether the learned trial judge was right when he refused to enter judgment for the Appellant for its claim on the payment of management and maintenance fees for Plots 91A and 91B by the Respondent to the Appellant for the years 2011 to 2021? (Ground 2).**

Learned Counsel submits that regarding the Management fees for Plots 91A and 91B, by Exhibits P17B and 17C (sales and purchase agreement) found at pages 117-130 of the Record, it is the buyer who is responsible for payment of the annual management and maintenance fees for Plots 91A and 91B as affirmed by the Learned Trial Judge in his judgment. That being the case, Learned Counsel submits thatthe Trial Court went on to decide that the failure of the Appellant/Counterclaimant at the Trial Court to call or subpoena any occupant of Plots 91A and 91B to testify in the case and possibly be cross-examined on its claim of management and maintenance fees in respect of Plots 91A and 91Bcast a cloud of doubt on the case of the Appellant against the Respondent.

Learned Counsel submits that the instant case can be construed to be an exception to the general position of law on the nature of counterclaim.Thisis because the facts pleaded by parties in the main claim i.e., the originalsuit, the counterclaim and defense to counterclaim are intertwined and interwoven in that no judgment would have been given to the Respondent (Plaintiff/Defendant to the counterclaim at the Trial Court) without considering evidence on facts related to management and maintenance fees of Plots 91A and 91B.

Counsel for the Appellantfurther submits that the fact that the main suit, the counterclaim and defence to counterclaim in the instant appeal are intertwined and interwoven, the evidence elicited from PW1's testimony inclusive of documentary evidence tendered in the main suit, can be relied upon by the Appellant in its counterclaim to establish its claim. He relied on the case of **DARENG V. F.B.N (2020) LPELR-51492(CA)**.On this point,Counsel submits thatthe Respondent was cross-examined on facts related to the payment of the management and maintenance fees of Plots 91A and 91B in the main suit and counterclaim and documents were tendered to that effect. Therefore, the Defendant/Appellant had every right to rely on the evidence elicited to make its Counterclaim without calling any witness or tendering any document and be entitled to judgement based on the documents before the court and evidence elicited during cross-examination and he urged the Court to so hold.

On the whole, Learned Counsel submits that the Appellant had established its claim for payment of the management and maintenance fees with respect to Plots 91A and 91B from the evidence elicited and documents tendered and he urged this Court to hold that the Learned Trial Judge erred when he refused to hold that the Appellant had established its claim and the Respondent is to pay the Appellant maintenance and management fees for Plots 91A and 91B at the rate of N92,000 (Ninety Two Thousand Naira) from the years 2011 to 2021.

Arguing on behalf of the Respondent, Learned Counsel submits that the Appellant did not adduce any cogent and credible evidence in proof of its entitlement to management and maintenance fees claimed in its Counter-Claim in the Court Below. And when the onus also shifted to the Appellant to prove otherwise when the Respondent asserted that it is the occupier and not the owner who is not in occupation that pays management and maintenance fees in the circumstances of this case, the Appellant did not lead credible evidence to discharge that evidential burden. He referred the Court to the decision **OKAFOR V. ISIADINSO (2014) LPELR-23015(CA) pp.24-26, Paras.G-C**.

Learned Counsel also contended that the law is that a Claimant must succeed on the relative strength of its case and not on the weakness of the defense of the opposition. Hence, the Court Below was right in holding that the Appellant failed to prove entitlement to its claims for

management and maintenance fees in the circumstances of this case. The claims were therefore bound to fail as rightly held by the Court Below. He urgedthis Court to so hold. Appellant's Counsel also contends that Exhibit D7 relied upon by the Appellant was not signed and the maker was not stated.

He also drew the attention of the Court to the Cross Examination of Chika Ikebuasi(DW1) on 10/02/2022, and submits that he admitted that the collection of management and maintenance fees in the estate is the prerogative of Golden Glamour T & I Limited. Therefore, according to Counsel,the Appellant/Counter-Claimant had no locus standi to institute its Counter-Claim before the Court Below which is for the payment of management and maintenance fees to it when it is not so entitled. It may be argued that only the facts in the Counter-claim can be looked at to determine jurisdiction in respect of the management and maintenance fees claimed.However, in the face of these other contrary pieces of evidence, it would be unsafe to say that the Appellant proved its entitlement in the eyes of the law. He urged the Court to so hold and referred the Court to the case of**ACHONYE & ANOR V. EZE & ANOR (2014) LPELR-23782 (CA), PP.23-26, PARAS.A-C**.

It is the further submission of Learned Counsel that bearing in mind that the law is clear that a party cannot change his case or claims midway even on appeal, the Appellant's relief and by extension, the Amended Notice of Appeal is incompetent in the circumstances of this case. He anchored his argument onthe case of **FIDELITY BANK V. THE M.T. TABORA & ORS (2018) LPELR-44504(SC)**.

At the end, he submits that the Appellant did not discharge the onus on it in respect of the Counter-Claim it claimed in the Court Below and therefore not entitled to the counter-claim as claimed. He urged the Court to so hold and resolve this issue in favour of the Respondent.

## RESOLUTION OF ISSUE 2

This Court has dutifully considered the canvassed arguments on both side of the divide. There is no doubt that it is a settled law that a counterclaim is an independent action and the counterclaimant must prove that he is entitled to the relief(s) he seeks. In a Counterclaim, the

Defendant in the Substantive Claim becomes the Claimant and the Claimant in the substantive action itself becomes the Defendant for the purpose of the Counterclaim. The Counterclaim receives the same treatment as the substantive or main action. Pleadings are filed and evidence led to substantiate the claim of the Defendant in his Counterclaim. Counterclaim must be distinctly proved, as it is an independent action for all intent and purposes. In other words**,** the burden and standard of proof is the same as in the main claim. See **ANWOYI & ORS V. SHODEKE & ORS (2006) LPELR-502(SC); KWAJAFFA & ORS V. BANK OF THE NORTH LTD (1998) LPELR-6371(CA) ISHMO & ORS V. ABUUL (2020) LPELR-49947(CA)(PP. 41 PARAS. D);IHEKWOABA VS. OYEDEJI (2014) ALL FWLR (PT. 718) 921; FELIX GEORGE & CO LTD V. AFINOTAN (2015) ALL FWLR(PT.778)920; HASSAN V. REG. TRUSTEES OF BAPTIST CON. (1993) 7 NWLR (PT.308) 679;ZURMI V. OKONKWO & ANOR (2018) LPELR-46964(CA) (PP. 17-19 PARAS. A)**.

From the Record as captured in the TrialCourt's Judgment, the Defendant to the Counterclaim has asserted that she is not liable for payment of the Management and Maintenance fees for Plot 91A and 92B because the said properties were occupied by Tenants and that it was those occupants/tenants that were responsible for payment of such fees. Also, as observed by the Trial Court, ExhibitP17B and P17C(Sales and Purchase Agreement tendered before the Trial Court), it is the buyer that is responsible for payment of the annual Management and Maintenance fees for each property.

Thus, the Trial Court held in its Judgement as follows:-

> **In my considered view, even though the PW1 during her cross- examination also denied owing the Defendant any management and maintenance fees in respect of Plots 91A and 91B, I am not convinced that by a mere tendering of the annexure to Exhibit P8 which shows the names of tenants as occupants of the said plots 91A and 91B, that the Defendant to counterclaim is absolved from liability of paying the management and maintenance fees in respect of those properties. The Defendant to counterclaim especially in view of paragraph 5 of the**

**sales agreement of those properties ought to have called some of these tenants to come and give evidence and be cross-examined, if necessary, on whether they are liable to payment of such fees or not to the Counterclaimant. In the absence of the evidence from such witnesses or a document showing that such fees have been paid to the Counterclaimant, I hold that in view of the evidence of the DW1 that it is the obligation of the Defendant to counterclaim to pay management and maintenance fees as contained in the sales agreement (Exhibit D3) and particularly Exhibits P17B and P17C, and in the absence of any evidence from the 'tenants' or 'occupants' who ought to have been called as witnesses, it is quite obvious that it is the responsibility of the Defendant to counterclaim to pay such fees to the Counterclaimant.**

**Moreso, that the Defendant to counterclaim has not tendered any tenancy agreement to show that it is the responsibility of the said tenants to pay such fees. In my considered view, however, this does not suffice for this court to enter judgement for the Counterclaimant on their claim for management and maintenance fees for Plots 91A and P1B as the burden of strictly proving this claim in the counterclaim also lies on the Counterclaimant and the court will not therefore merely rely on the weakness of the defence of the Defendant to counterclaim to grant this claim. It is also the responsibility of the Counterclaimant to have called or subpoenaed any of the occupants of those properties to testify as a witness or witnesses before this court and also be cross-examined if need be. See the case of Thekeronye V Hart (2000) FWLR (pt.15) page 2571 at 2573 Ratio 4**

Contrariwise, the Learned Counsel for the Appellant submits that the Learned Trial Court erred where he held that"**it is also the responsibility of the Counterclaimant to have called or subpoenaed any of the occupants of those properties to testify as a witness or witnesses before this court and also be cross-**

**examined if need be to establish his claim for the Management and Maintenance Fees"**.

Now, 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."***

In the instant suit, I have thoroughly read the agreement between the parties (Exhibit D3, P17B and P17C) vis-à-vis the testimonies of Parties. There is no doubt that parties referred to the Sales Agreement before the Trial Court. For the sake of clarity, paragraph 5 of the Sales Agreement provides as follows:

> **PAYMENT FOR MANAGEMENT OF THE ESTATE**
>
> **The following payments shall also be payable by the Buyer of the Estate. An annual Management, Maintenance Services and Security Fees of N130, 000.00 (One Hundred and Thirty Thousand Naira) only for common and communal facilities in the estate to be administered by the Management of the Estate including any other fees as may be required or introduced by government from time to time.**

The Trial Court was no doubt in the right direction when it held that it is not convinced by the denial of PW1 during cross examination that it is not owing the Appellant (Counterclaimant) Management and Maintenance Fees for Plots 91A and 91B. We also concur with the view of the Trial Court that the mere tendering of the annexure to Exhibit P8 which shows the names of tenants as occupants of the said Plots 91A and 91B does not absolve the Respondent (Defendant to counterclaim)

from liability of paying the management and maintenance fees in respect of those properties taking into consideration paragraph 5 of the Sales Agreement.

However, it is the view of this Court that the Trial Court fell into error when it held that it was the duty of the Appellant to call in evidence the tenants occupying the property of the landlord to establish the payment of Management and Maintenance Fee. If the Trial Court had averted its mind to the Sales Agreement it acknowledged, it would not have fallen into this grave error. Thus, the Sales Agreement was very specific that the Management and Maintenance fees are to be paid by the buyers. It is therefore not the duty of the Appellant to prove that the Tenants did not pay the management and maintenance fees. It is rather the duty of the Respondents who denied such to establish by concrete evidence that the Tenants paid the Fees. Thus, during Cross Examination of DW1, when asked whether between the Tenants and the Landlord of Plot 91A and 91B who is liable to pay the Management and Maintenance fee, he simply said it depends on the agreement between the owner of the property and the Occupier (tenant).

It should be noted that the burden of proof is not static. It shifts. When the Appellant asserts in its Counterclaim that the Respondent has not paid itsManagement and Maintenance fees, it is also the duty of the Respondent to deny cogently not with a feeble denial by showing that she has Tenants in the property. The Court cannot overlook the document already tendered in a case before it simply because it was not tendered by the Counterclaimant. Where references were made with regards to the document and it is already before the Court, it is the duty of Court to consider all documents before it in other to do justice to the case.

On the whole, issue two is resolved partly in favour of the Appellant for the Respondent to pay the Appellant the sum of Ninety-Two Thousand Naira (N92,000.00) being the amount agreed by them as shown in the exhibit before this Honourable Court.

The implication of the resolution of the key issues in this appeal is that this Appeal succeeds in part. Therefore, orders made by the Lower Court in its judgment delivered on 3rd November, 2022 in Suit No: AB/SDC/355/2022 with respect to the main suitis hereby affirmed.

However, the Judgment delivered by the Lower Court with respect to the Counter-claim is hereby set aside. Accordingly, the Respondent should pay its Management and Maintenance fees at Ninety-Two Thousand Naira (N92,000.00)for the year 2011 – 2021.

There shall be no order as to cost.

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HON. JUSTICE J. ENOBIE OBANOR
(Presiding Judge)

HON. JUSTICE BINTA DOGONYARO
(HON. JUDGE)