**ADDEH**

**V.**

**ONAKOMAIYA**

COURT OF APPEAL, (LAGOS DIVISION)

TUESDAY, 28 JUNE 2016

CA/L/636/08

**LEX (2016) - CA/L/636/08**

OTHER CITATIONS

2PLR/2017/19 (SC)

**BEFORE THEIR LORDSHIPS:**

SAMUEL CHUKWUDUMEBI OSEJI, JCA (Presided)

ABIMBOLA OSARUGUE OBASEKI-ADEJUMO, JCA (Read the Lead Judgment)

JAMILU YAMMAMA TUKUR, JCA

**BETWEEN**

EMANKHU ADDEH – Appellant

AND

BIMBO ONAKOMAIYA – Respondent

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE (R. I. B. Adebiyi J., Presiding)

**REPRESENTATION/LAWYERS**

N. J. Nwogun - For the Appellant

Elu Eric Osamene Esq. - For the Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW – PROPERTY DEVELOPMENT AND LEASE AGREEMENTS:- Arrangement whereunder a property developer takes over a property, renovates at his cost and rents out to third parties while paying a subsidized rent to the landlord for a period specified by contract – Legal basis of in contract – When would not be deemed to be an offer subject to contract – Relevant considerations

COMMERCIAL LAW - CONTRACT – AGREEMENT:- Meaning of - Valid contract – What constitutes.

COMMERCIAL LAW - CONTRACT - ‘OFFER SUBJECT TO CONTRACT’:- Meaning and effect of – Relevant considerations – Requisite intention to found same - Duty of court thereto

COMMERCIAL LAW - CONTRACT – AWARD OF DAMAGES - SPECIAL DAMAGES:- Requirement that same be strictly pleaded and proved – How discharged

**PRACTICE AND PROCEDURE ISSUES**

ACTION - COUNTERCLAIM :- Nature and proof of.

EVIDENCE: - Averments in pleadings - Whether can substitute for evidence - Evidence at variance with pleadings - Effect of - Exception thereto

PLEADINGS - AVERMENTS THEREIN:- Duty of party to substantiate same with evidence - Evidence at variance with pleadings – Proper treatment of

PLEADINGS - ISSUES RAISED THEREIN:- Duty on court to confine itself to the pleadings – Joinder of issues therein – How resolved - Role of court thereto..

WORDS AND PHRASES - “AGREEMENT” - Meaning of.

WORDS AND PHRASES - “SUBJECT TO CONTRACT” - Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

At the trial court, the Claimant claimed against the Defendant the sum of N1,200,000.00 (one million, two hundred thousand naira) being arrears of rent (two (2) years). As well other sums representing solicitorsl fees and Interest.

The defendant counterclaimed against the Claimant the sum of N1,845,000.00 being balance due on expenses incurred by him in the renovation of the property subject matter of the action (allegedly paid out from the tenant’s own fund and at the claimant’s request) plus interest on the sum.

The lower court entered judgment for the claimant and dismissed the counter-claim. The appellant being dissatisfied with the judgment appealed.

DECISION(S) APPEALED AGAINST

The trial Court entered judgment in favour of the Claimant/Respondent and dismissed the Counterclaim of the Defendant/Appellant, hence the appeal by the Defendant/Appellant.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

“(1) Whether the failure by the lower court to hold that the claimant who had categorically denied in her pleadings, any knowledge of the existence of exhibit “P1” (which contained proposals 1 and 2) and also failed to refer to exhibit “P1” in her pleadings, could not at the trial of the suit abandon her pleadings and claim exhibit “P1” as the basis of her claim against the defendant was not fatal to the finding of the court that the claimant had proved her case for the payment of N1,200,000.00 (one million, two hundred thousand naira) by the defendant.

(2) Whether upon the totality of the evidence, the claimant had proved her case for the lower court to find in her favour as per claim before the court.

(3) Whether the lower court was right in dismissing the defendant’s counterclaim in respect of renovation carried out on the claimant’s property at the claimant’s request with the claimant’s consent.”

*BY RESPONDENTS*

“(1) Whether the lower court was right when it held that the claimant’s testimony as to a proposal forming the basis of the agreement between the parties is within the facts pleaded.

(2) Whether lower court was right when it held that the claimant is entitled to the relief as claimed in her statement of claim save her claim for pre-judgment interest.

(3) Whether the lower court was right when it held that the appellant/defendant failed to discharge their burden of proof placed on him in proof of his counterclaim. A reading of the issues formulated by the parties indicates that they are similar except for the manner phrased. For the purpose of resolving the issues in this appeal, I shall adopt the appellant’s issue as identified.”

*AS ADOPTED BY COURT*

[The Court adopted the Issues pas resented by the Appellant].

DECISION OF COURT OF APPEAL

1. The circumstance of the case was clearly one of an offer which was made subject to contract. It was an intention to create a development lease which was subject to contract: that is, a contract made subject to fulfilment of certain terms.

2. A contract made subject to the fulfilment of certain specific terms and conditions is not formed and not binding under and until these terms and condition are complied with or fulfilled.

3. By the nature of the contract whereunder the developer had the duty to renovate and rent out to third parties to recoup expenses while paying an agreed sum as “rent” to the landlords, the parties ought to resolve the costs of renovation first before determining the rent to be paid.

4. A counterclaim is a separate and independent action which has to be instituted in accordance with the rules of the court. The counterclaim as a separate and distinct claim ought to also be proved – like the claim. The counterclaim does not fail because the main claim by the opposite party has succeeded. It does not lean on the statement of defence for support or sustenance even though it is filed along the statement of defence; it is equal to and not subservient to the main suit and as such must comply fully with the law with regard to pleadings.

**MAIN JUDGMENT**

**OBASEKI-ADEJUMO JCA** (Delivering the Lead Judgment):

This is an appeal against the decision of R. I. B. Adebiyi J of High Court of Lagos stated delivered on 1 March 2007.

The action in the lower court was commenced by a writ of summons and statement of claim wherein they claimed the following:

(a) The sum of N1,200,000.00 (one million, two hundred thousand naira) being rent for two (2) years at the rate of N600,000.00 (six hundred thousand naira) per year for property situate at 3, Ricketts Close, Akoka Lagos.

(b) N200,000.00 (two hundred thousand naira) being professional fees charged by the claimant’s solicitors, Deji Sasegbon & Co. and paid by the claimant for prosecution of the suit for the recovery of N1,200,00.00 (one million, two hundred thousand

(c) Interest from 1 September 2003 on the N1,200,000.00 (one million two hundred thousand naira) at the rate of 21% from 19 September 2003 till judgment is granted and after judgment at the rate the court shall determine.

The defendant/plaintiff counterclaimed as follows in:

(a) The sum of N1,845,000.00 (one million, eight hundred and forty-five thousand naira) being balance to be recouped for expenses incurred by him in renovating the property at 3, Ricketts Close, Akoka Lagos, property of the claimant with his own fund and at the claimant’s request.

(b) Interest on the N1,845,000.00 (one million, eight hundred and forty-five thousand naira) at the rate of 15% per annum before judgment and 6% after judgment until the whole judgment debt is finally paid off.

At the close of pleadings, the claimant/respondent testified and called one witness. The defendant/appellant also testified and called one witness. Upon filing of final written addresses, the lower court entered judgment for the claimant and dismissed the counter-claim.

The appellant dissatisfied with the judgment filed a notice of appeal on 25 May 2007 at pages 232 -233 of the record of appeal on three (3) grounds.

The parties in compliance of the rules of court filed brief and exchanged same. The appellant’s brief was dated 9 July 2010 and filed same date. It is settled by Emankhu Addeh of Addeh & Associates wherein three (3) issues for determination were nominated thus:

“(1) Whether the failure by the lower court to hold that the claimant who had categorically denied in her pleadings, any knowledge of the existence of exhibit “P1” (which contained proposals 1 and 2) and also failed to refer to exhibit “P1” in her pleadings, could not at the trial of the suit abandon her pleadings and claim exhibit “P1” as the basis of her claim against the defendant was not fatal to the finding of the court that the claimant had proved her case for the payment of N1,200,000.00 (one million, two hundred thousand naira) by the defendant.

(2) Whether upon the totality of the evidence, the claimant had proved her case for the lower court to find in her favour as per claim before the court.

(3) Whether the lower court was right in dismissing the defendant’s counterclaim in respect of renovation carried out on the claimant’s property at the claimant’s request with the claimant’s consent.

The respondent’s brief settled by Chukwudi Adiukwu Esq. of Messrs Deji Sasegbon & Co. is dated 3 March 2015 filed on same date but deemed 14 May 2015. Three (3) issues were formulated thus:

(1) Whether the lower court was right when it held that the claimant’s testimony as to a proposal forming the basis of the agreement between the parties is within the facts pleaded.

(2) Whether lower court was right when it held that the claimant is entitled to the relief as claimed in her statement of claim save her claim for pre-judgment interest.

(3) Whether the lower court was right when it held that the appellant/defendant failed to discharge their burden of proof placed on him in proof of his counterclaim. A reading of the issues formulated by the parties indicates that they are similar except for the manner phrased. For the purpose of resolving the issues in this appeal, I shall adopt the appellant’s issue as identified.

Issue 1

The claimant referred to paragraphs 43 and 44 of the claim and her position regarding the transaction between the parties, that the defendant did not refer to exhibit “Pl”, he only did same in paragraph 4c of the statement of defence which was specifically denied in the reply in paragraph 2 on the existence of any proposal, and also denies receipt of any letter, exhibit “Pl” which was addressed to claimant. He contended that the lower court can made findings that exhibit “Pl” was not specifically pleaded as a payment forming basis of agreement of parties at page 26 of record.

He further pointed out that exhibit “Pl” was not frontloaded by either party or included in list of documents. This he says is incompletely inconsistent with the pleadings which the trial court sought to rely upon, he further stated that if exhibit “Pl” was written in August 2003 then it could not have been discussed and agreed upon in July 2003. The lower court having accepted that the document was not specifically pleaded and does not constitute an agreement between them turned around to canvass argument for the claimant, he relied on Omega Bank Nigeria Plc. v. O. B. C. Ltd. (2005) All FWLR (Pt. 249) 1964, (2005) 2 MJSC 26 at 29 and urged that the appeal be allowed on the ground.

The respondent on the other hand submitted that the trial court did not solely base her findings on exhibit “Pl”, he referred to page 227 of lines 6 - 8 of the records that the court considered all surrounding, circumstances of the case and determined the contractual relationship between them by their conduct.

He referred to Obayiuwana v. Ede (1998) 1 NWLR (Pt. 535) 670 at 679. Counsel finally submitted that the trial court rightly held at page 228 of the record that the court gave effect to the intention of parties. He urged the court to discountenance the argument of the appellant.

Resolution

The respondent via her statement of claim in paragraph 4 of the statement of claims avers:

“4. Further to paragraph 3 above, the discussions culminated in the drafting of an agreement which was still in the process of being fine-tuned, but the following salient points were agreed to wit:

(a) That the rent would commence on 1 September 2003 for an initial period of two (2) years.

(b) That the defendant will refurnish the said premises at their own expense with a view to sub-leasing the said premises on behalf of the estate of the late Rear Admiral V. C. Oduwaiye.

(c) That the rent payable by the defendant would be subsidized to give allowance for the said renovation and the rent was agreed at N600,000.00 (six hundred thousand naira), per annum for all the six (6) flats in the said premises.

(d) That the defendant will subsequently draw up individual agreements between the sub-lessors of the said estate. As the statement of defence on the other hand denied the above and in paragraph 4( a - d) states as follows:

(a) The defendant was invited by the claimant in August 2003, to help rebuild, renovate and develop dilapidated building block of six flats situate at 3, Rickett Street, Akoka, Yaba, Lagos.

(b) The building was completely run down and dilapidated with a substantial part having been burnt by fire and the house subsequently under lock and key for over six (6) years.

(c) The defendant proposed two initial options to the claimant on the manner of renovation of the property, both of which the claimant rejected, as she claimed she had no funds to contribute to the development of her house as she was cash strapped.

(d) The claimant and defendant subsequently verbally and mutually agreed that the defendant should rebuild, renovate and develop the dilapidated building, 3 Ricketts Close, Akoka Yaba, Lagos, entirely at his own cost, with his own funds and without any financial input from the claimant.

(e) The claimant and defendant verbally agreed that the defendant will recoup his entire monetary investment from rent subsequently accruing out of the property after renovation of same, and shall continue to do so until his investment is fully repaid.”

Paragraph 3 (a) to (e) of the statement on oath of the respondent at page 24 of the record, is on all fours with the corresponding averments contained in the statement of claim. Meanwhile, in the reply to the averments contained in the statement of defence, the respondent aver in paragraphs 2 and 3 of her reply thus:

“2. The claimant denies paragraphs 4, 5, 6, 7, 8, 9, 10, 18, 19 and 20 of the statement of defence and puts the defendant to the strictest proof.

3. The claimant denies paragraphs 5 of the statement of defence categorically and states that she did not receive any letter dated 5 September 2003 or any letter at all and puts the defendant on notice to produce the original acknowledgment of the letter dated 5 September 2003.”

During her examination-in-chief found at page 200, she referred to the proposal made by the appellant which was sent to her dated 6 August 2003 and tendered same as exhibit “Pl”; whereas in the defence to counterclaim, the respondent denied having anything to do with any proposal as evident from paragraph 3(c) of the statement of defence.

Under cross-examination, she testified thus:

“It is time I accepted proposal. I see exhibit “P1”, I accepted proposal I went to the office of the defendant twice to communicate my acceptance of proposal 1. There was no written agreement ...”

This categorically puts the averment of the appellant in his statement of defence in issue as it has been denied in paragraph 2 of the reply as above.

I have searched through the entire statement of claim and I do not find any pleading relating to exhibit “P1” and her option therein, even in the list of documents, this document was not listed. Indeed, if it was so important to the case of the respondent, all the stages would have been complied with. See exhibit P, it is a letter written by the appellant clearly with two options for the respondent to choose from. It defines the terms of the agreement of each option.

The learned trial court held as follows at page 226 of the record that:

“In her testimony, she stated this fact and stated that defendant came up with two options which were set to her. The court assumes that the proposal, exhibit P1 was set to her, in the course of discussions as to the contents of the proposal. At the end of the letter dated 6 August 2003 signed by the defendant, it reads:

“Kindly attend promptly, we trust we reach a common ground”.

The court finds that the claimant’s testimony as to a proposal forming the basis of the agreement between the parties is within the facts pleaded as to the discussions between the parties as the said exhibit P1 contains a proposal as regards the property in issue, the court therefore holds that the said testimony is admissible in evidence ...”

In Anyah v. African Newspapers Of Nig. Ltd (1992) 6 NWLR (Pt. 247) 319, per Olatawura JSC held:

“It must be appreciated that there cannot be a better notice of the case a party intends to make than his pleading. It is a mere notice and cannot be substituted for the evidence required in proof of the facts pleaded, subject however to an admission made by the other party unless a party through skilful cross-examination”...

See also American Cynamid Co. v. Vitality Pharmaceuticals Ltd (1991) 2 NWLR (Pt. 171) 15; ACB Ltd v. Obmiami Brick & Stone (Nig.) Ltd (1992) 3 NWLR (Pt. 229) 377.

In Bamgboye v. University Of Ilorin & Anor. (1999) 10 NWLR (Pt. 622) 290, the apex court per Onu JSC, held that “issues, it must be emphasized, are joined in the pleadings and not in the evidence.” See also Ehimere v. Emhayen (supra); Adeosun v. Adisa (1986) 5 NWLR (Pt. 40) 225 at 235; Akintola v. Solano (1986) 2 NWLR (Pt. 24) 598 at 623. Evidence which is at variance with the pleadings goes to no issue, and should be rejected and if admitted should be expunged from the record.

See Emegokwe v. Okadigbo (1973) 4 SC 113 at 117; Dike v. Nzeka (1986) 4 NWLR (Pt. 34) 144. The apex court in Vakessai v. Messrs Inec Motors Nig. Ltd (1975) All NLR 287 held that in all civil matters where findings are filed, the court should only consider matters in respect of which issues have been joined by the parties in their pleadings. Similarly, in Abdul v. Hon. Isa Garba & Ors. (2010) LPELR 9132 (CA) this court, per Tur JCA at page 40, paragraphs B - F echoed:

“When the parties to an action have answered one another’s pleading in such a manner that they have arrived at same material point or matter affirm on one side and denied on the other, and the party whose turn it is to plead adds nothing to his previous pleading the parties are said to be at “issue”; the last pleading is called a joinder in issue ... and the question thus raised is called the issue, one of the issues, in the action. Frequently, issue is joined one question in the case, and the pleadings continue as to the other questions; where the defendant sets up a counterclaim, issue is generally joined on the original claim before it is joined on the counterclaim.”

More so, Etim v. Clasen Ventures & Ors. (2011) LPELR 3827, it was held that:

”... when cases are pursued on the basis of issues joined in the pleadings filed by the parties. Such cases are determined on the platform of the said pleadings and evidence led therein. Hence, they stand or fall, sink or float purely on the basis of evidence led on the pleaded facts. It is settled that a trial court is strictly bound to limit itself to the issues raised by the parties in their pleadings ...”

Based on the forgoing position of the law, I must say the respondent cannot turn around to rely on an unpleaded document which she has denied and therefore the learned trial judge erred in accepting such evidence as admissible. It is inadmissible because it conflicts with the respondent’s pleadings, so much more as issues had been joined at the pleadings. It is trite that, cases stand or fall, sink or float purely on the basis of evidence led on pleaded facts. The evidence is therefore expunged and the said exhibit “P1” is rejected. I resolve issue 1 in favour of the appellant.

Issue 2

Appellant adopted argument in issue 1, and submitted that it is the exact agreement of parties, and the failure of defendant to honour same that is required evidence to prove the balance of probabilities and not the weakness of the defendant’s case. He relied on Agbeje v. Ajibola (2002) FWLR (Pt. 92) 1677, (2002) 2 NWLR (Pt. 750) 127 at 144; Nsirim v. Nsirim (2002) 3 NWLR (Pt. 785) 697 at 709.

He referred to evidence of claimant at pages 199 -202 and cross-examination of the claimant at pages 203 - 205 of the record which the lower court relied upon. He submitted that claimant completely deviated from the pleadings, on the existence of a draft agreement and also led no evidence to show where parties had agreed to a landlord/tenant relationship which was to commence from 1st September 2003. He referred to exhibit “P7” wherein claimant identified her signature.

Counsel further contended that there was no evidence before the trial court that the claimant presented the defendant with any form of indemnity as demanded in the letter as a prerequisite to the claimant paying into her account. He submitted that upon the given circumstances it was clear that the lower court misinterpreted the contents of exhibit “P9”, item 3 which has the letter forwarding the cheques to the claimant and which sets out the mode of payment pending formal written agreements, and the trial court held that the claimant proved her case on based on this.

He contended that the fact that the defendant spent his hard-earned monies as a legal practitioner to renovate and develop her premises is without any financial contribution from her and for which there was no indemnity is the basis of the case canvassed by the claimant is hopeless and urges the court to allow this appeal.

The respondent canvassed and referred to writ of summons and submitted that the onus was on claimant to prove the claim and that the lower court rightly found that evidence was not disputed nor contradicted nor denied by appellant.

On the issue of the solicitor’s fee, he submitted that the lower court rightly found that the respondent’s evidence which was supported with exhibits that the fees were paid was neither controverted nor denied by the appellant. He cited Fortune International Bank Plc. v. Pegasus Trading Office (2004) All FWLR (Pt. 199) 1312, (2004) 4 NWLR (Pt. 363) 369; Okoebor v. Police Council (2003) FWLR (Pt. 164) 189, (2003) 12 NWLR (Pt. 834)444; Asafa Foods Factory v. Alraine (Nig.) Ltd (2002) 12 NWLR (Pt. 781) 353 at 361.

Resolution

The question herein is whether the respondent proved her case before the lower court? The starting point again would be the pleadings. Even though I had earlier reproduced paragraph 4 (a) to (d) of the respondent’s statement of claim, I believe for better appreciation of the issue at hand, it is necessary for me to reproduced same herein. In that paragraph, the respondent averred thus:

”4. Further to paragraph 3 above, the discussion culminated in the drafting of an agreement which as still in the process of being fine-tuned but the following salient point were agreed to wit:

a. That the rent would commence 1 September 2003, for an initial period of two (2) years.

b. That the defendant will refurbish the said premises at their own expenses with a view to subleasing the said premises on behalf of the estate of late Rear Admiral V. C. Oduwaiye.

c. That the rent payable by the defendant would be subsidized to give allowance for the said renovation and the rent was agreed at N600,000.00 (six hundred thousand naira only), per annum for all the six (6) flats in the said premises.

d. That the defendant will subsequently draw up individual agreements between the sub-lessors and the said estate.

The respondent did not tender the draft agreement. From the statement of claim and reply, the case of the respondent at the lower court is that she entered into an agreement via a discussion with the appellant that the property will be refurbished at the expense of the appellant and the appellant will rent out the apartment at a subsidized rent which would allow for cost of renovation and the rent was N600,000.00 (six hundred thousand naira) for six (6) flats, N100,000.00 (one hundred thousand naira) per flat and an individual agreement would be drawn up between the estate and the sub-lessor, but that the two years rent cheque did not clear upon presentation. That the keys released were in exchange for the two (2) cheques as rent. She informed the appellant but he refused to give effect to the refund of the cheques, thereafter she went to her solicitors, all these was in July 2003.

During trial at the lower court, she testified at page 200 of the record to the effect that that they agreed that appellant will rent the six (6) flats at N100,000.00 each subsidized, renovate, recoup his money and draw up agreements between the 6 tenants and the estate. She relied on exhibit P1 (which has been expunged/ rejected while considering issue one (1). She said the cheques were in exchange for the keys of the building. One of the cheques is dated 19 September 2003, exhibit P2, the returned cheques had a covering letter, exhibit P3 dated 10 March 2004, and the appellant sublet all six (6) flats and referred to re-issuance of the cheques. She said the property is fully renovated now and it was not the agreement that the defendant would not make payment until he recovered the cost of renovation.

During cross-examination, she retracted her earlier evidence and said the keys were not handed over on the day she collected the cheques and she did not acknowledge receipt copies of the cheques - exhibit P8 are photocopies of the cheques shown, her acknowledgment on the “original” on 5 September 2003. Exhibit P9 is a photocopy of the letter of appellant to respondent spelling out terms of the agreement in respect of payment and renovation; it is dated by her as 5 September 2003, though she disputes receipts of the letter.

It is clear that the agreement between the two parties was inconclusive as at the date of the cheques, the exact renovation cost to be recouped had not been agreed upon. Therefore, there ought not to have been an assumption or speculation on their intention as it was yet to crystallize.

I draw support from the correspondence between the respondent’s lawyer and the claimant before the action was filed. From exhibit P4 which is the copy of the cheque presented, at the back it shows that it was presented on 25 September 2003 while it was confirmed on 3 September 2003.

The respondent at page 200 of the record stated:

“... we agreed that the defendant will rent the six (6) flats at N100,000.00 (one hundred thousand naira) each subsidized, renovate, recoup his money and draw up agreements between the six (6) tenants and the estate ...”

If this in her opinion was the terms of the agreement, then the understanding was for the appellant to renovate a property that was abandoned for one and half years which included rebuilding a flat that was burnt down through kerosene explosion which rendered the property unfit for human habitation. Surely, it is not disputed that it was a commercial agreement and the appellant was in it for same, not a charity or gratuitous venture.

He had to ascertain the extent of renovation and extract an agreement/understanding as to how he would recoup his investment; same was not agreed by parties even on the list of expenses that was attached. After the complete renovation of the property which was now habitable, the respondent made an U-turn to claim that the N100,000.00 (one hundred thousand naira) was sufficient for the renovation, refurbishment of the six (6) flats. This is not justice and fair play despite admitting that she did not calculate to the renovation.

What is an agreement? It is an understanding between parties, (two or more persons) which creates an obligation to do or not to do a particular thing. See Bilante Int’l Ltd v. N.D.I.C. (2011) All FWLR (Pt. 598) 804, (2011) LPELR -781 (SC). For a valid contract to exist there must be:

(a) a binding offer;

(b) an unqualified acceptance of the offer;

(c) legal consideration.

There must be mutuality of purpose and intention. See Neka B.B.B. Manufacturing Co. Ltd v. African Continental Bank Ltd (2004) All FWLR (Pt. 198) 1175, (2004) 2 NWLR (Pt. 858) 5211.

It is apparent that from exhibits “P9” and “P8”, the circumstance herein was clearly a case of an offer which was made subject to contract. It was an intention to create a development lease which was subject to contract, means a contract made subject to fulfilment of certain terms. See Best (Nig.) Ltd v. Hodge (Nig.) Ltd & Ors. (2011) LPELR 776 SC, where it was held that where a contract is made subject to the fulfilment of certain specific terms and conditions, the contract is not formed and not binding under and until these terms and condition complied with or fulfilled. See also Tsokwa Oil Marketing Co. Nig. Ltd v. Bank of The North Ltd (2002) FWLR (Pt. 112) 1, (2002) 11 NWLR (Pt. 777) 163.

In the instant appeal, the learned trial judge did not evaluate exhibits P8 and P9 properly. The court at page 228, paragraph 5 of the record held thus:

“The exhibit P9 states in item 3 as follows:

you can however receive value for the 1st cheque of N600,000.00 only if it was agreed you indemnify us to the tune of the same amount if when the final development costs are ready same differs (higher) significantly from what you represented to us.

On weighing the evidence before the court, the court finds that as no evidence of payment of the first cheque of N600,000.00 (six hundred thousand naira) from the account of the defendant was placed before the court to rebut the evidence of the claimant that the two (2) cheques were not honoured by the bank and were returned to her, the defendant failed to produce any evidence in support of exhibit P9 to show that the final development costs were ever communicated to the claimant, the court holds that the defendant act of paying over cheques totalling the sum of N1,200,000 (one million two hundred thousand naira) in September 2003 to the claimant supports the testimony of the 1st PW that parties had agreed on a rental of N100,000.00 (one hundred thousand naira) per flat per annum and the payment of two (2) years rent totaling N1,200,000.00 (one million two hundred thousand naira) of the property in issue”....

This takes me back to the testimony of the PW1, on the agreement and exhibit P9 where she stated thus:

“you can receive value for the first cheque of N600,000.00 (six hundred thousand naira) only if as we agreed you indemnify us to the tune of the same amount if when the final development costs are ready same differs (higher) significantly from what you presented to us”.

Surely and clearly, there was a condition precedent to the funding of first cheque and parties were yet to reach a conclusive agreement; what the appellant needed was an undertaking to indemnify him, which the respondent is apparently running away from. This is consistent with exhibit D2 which tallies with and is consistent (with) the exhibit P9, the cheques were intact. PW1 had agreed that the keys were not given on the date she collected the cheques so the instruction that the keys were in exchange for the cheques is not correct and not proved.

In Best Nig Ltd v. Black Wood Hodge (Nig.) Ltd, the apex court held that:

“It is noteworthy that a contract of sale of this nature is guided by the basic rules of contract where a contract is made subject to the fulfilment of certain specific terms and conditions, the contract is not formed and not binding unless and until these terms and conditions are complied with and fulfilled”.

From the totality of the evidence on record, respondent as PW1 was economical with the truth and there is abundant evidence that there was a disagreement over total cost of renovation and indemnity thereof. Exhibit PW3, shows that a loan was to perfect the renovation even though it was not disclosed to the respondent and which he is not duty bound to. To my mind, the respondent failed to prove that there was an agreement or intention of the agreement between parties as put forward by her and hence her action was premature. The parties ought to resolve the costs of renovation first before final rent and especially now that she, the respondent, is in possession and collects rents directly. The learned trial judge glossed over the salient issues in the discussions of the parties, which was yet to crystallize.

To this extent, I am of the firm view that the respondent failed to prove her case for the lower court to find in her favour as per her claims. The issue is resolved in favour of the appellant.

Issue 3

The appellant adopts his previous submissions in issues 1 and 2 and submitted that the lower court failed to properly consider his counterclaim and referred to the statement of defence and counterclaim at pages 223 to 225 of the record and submitted that evidence was led by defendant to establish the amount spent by him. He further contended that a mere denial of this would not suffice as that would leave the evidence of the defendant unchallenged and thus admitted, he referred to Asafa Foods Factory v. Alraine (Nig.) Ltd (2002) 12 NWLR (Pt. 781) 353 at 361; Okoebor v. Police Council (2003) 12 NWLR (Pt. 834) 444 at 483.

He referred to the evidence of PW1 in cross-examination at page 200 and the testimony of PW1 admitted the fact that the defendant was to recoup his investment (money) put into renovating the claimant’s property. It is not disputed between the parties that the defendant without any financial input from the claimant used her funds to rebuild and renovate the claimant’s property. He referred to page 202, line 16 of the record that the PW1 conceded same.

He contended that no further proof is required that the defendant effectively and fully discharged his obligations regarding the renovation of the property. He referred to paragraph 10(iii) of the statement of defence and paragraph 17(c) of the statement of oath all at pages 64 and 69 as well as pages 72 to 74 of the record, respectively, where expenses were listed for such renovation and rebuilding to the tune of N4,165,000.00 (four million one hundred and sixty-five thousand naira). Also, the defendant in paragraph 11 of the statement of defence and paragraph 18 of statement on oath averred that he has so far recouped from the property the sum of N2,320,000.00 (two million three hundred and twenty thousand naira only), and this was not denied by the claimant and thus unchallenged. He relied on FIB Plc v. Pegasus Trade Office. Counsel also contends that it is not in issue that the defendant actually sourced the funds and invested money into the claimant’s property, and fully renovated same. He referred to Order 32, rule 1 of the Lagos State High Court (Civil Procedure) Rules, 2004.

He admitted all the depositions of the defendant and seemingly only challenges the contents of the list by curiously denying its existence. He urged the court to hold that the defendant has proved his counterclaim and give judgment in favour of the counterclaim. Respondent referred to page 114 of the record that the counterclaim is for Nl,845.000.00 (one million, eight hundred and forty-five thousand naira); pre judgment interest of 15% per annum and post-judgment interest of 6% per annum. He referred to Oyegbola v. Esso West Africa Incorp (1966) 1 All NLR 162; Tayo Oyetibo & Co. v. Ajose Adeogun (1996) 16 NWLR (Pt. 452) 29; Total Nigeria Plc v. Morkah (2002) 9 NWLR (Pt. 773) 492, (2003) FWLR (Pt. 148) 1343, to the effect that a counterclaim is a separate and independent action and thus different from the original suit.

Resolution

The issue herein is whether the court was right in dismissing the defendant’s counterclaim in respect of renovation carried out on the claimant’s property at the claimant’s request and with the claimant’s consent. The appellant had filed a statement of defence and a statement of counterclaim at page 111 of the record wherein he relied on the statement of defence to the claim to prove and maintain that respondent is indebted to the tune of Nl,845.000.00 (one million, eight hundred and forty- five thousand naira) being balance to be recouped by him for expenses incurred by him in renovating the property at 3, Ricketts Street, Akoka, Lagos, property of the claimant, with his own funds and at the claimant’s request. The respondent filed a defence where she made several denials at page 114 of record.

During evidence-in-chief of DW1 contained at pages 207 to 213 of the records, he testified on the loan and the actual amount collected as rent in the first two years which amounted to N2,300,000.00 (two million three hundred thousand naira). During the cross-examination of PW1 nothing was said on the actual renovation, or extent of renovation works or costs of same.

In the statement of defence at page 59, paragraph 4 (a - e) touches on the issue of renovation, recouping the entire investment, paragraph (G) is on the notion that claimant misrepresented the actual extent of dilapidation.

Paragraph 10 (ii) are specific copious detailed pleading on the estimates of renovating the claimant’s huge dilapidated, burnt down building of six (6) flats of 3 bedroom each and turning same around into a modern habitable safe and well-furnished edifice to the tune of N4,165,000.00 (four million one hundred and sixty-five thousand naira), but he failed to prove same.

In Dabup v. Kolo (1993) NWLR (Pt. 317) 254, Ogundare JSC, rightly held that:

“The law is very clear on the point. There are numerous authorities that say that a counterclaim is in the same position as an action being itself a cross-action and subject to the same rules of court as regards pleadings.”

The same position was also re-echoed in Ogli Oko Memorial Farms Limited v. Nigerian Agricultural and Cooperative Bank Ltd & Anor. (2008) All FWLR (Pt. 419) 400, (2008) 12 NWLR (Pt. 1098) 412, per Onnoghen JSC,

“that a counterclaim is a separate and independent action which has to be instituted in accordance with the rules of the court.”

In this case, the counterclaim as a separate and distinct claim ought to also be proved. The counterclaim does not fail because the main claim by the opposite party has succeeded. It does not lean on the statement of defence for support or sustenance even though it is filed along the statement of defence; it is equal to and not subservient to the main suit and as such must comply fully with the law with regard to pleadings. See Ali v. Salihu & Ors. (2011) 1 NWLR (Pt. 1228) 227; First Bank of Nigeria Plc. v. Faiko Nig. Ltd (2008) All FWLR (Pt. 416) 1960.

Meanwhile, it is trite law that pleading is not evidence upon which the court may rely on to give judgment in favour of a party unless such pleadings requires no further proof, for instance, in case of admission. See Olorunfemi v. Asho (2000) FWLR (Pt. 20) 654, (2000) 2 NWLR (Pt. 643) 143; Adegbite vs Ogunfaolu (1990) 4 NWLR (Pt. 146) 578; Egbunike & Anor. v. ACB Ltd (1995) 2 NWLR (Pt. 375) 34. In Joseph Ifeta v. Shell Petroleum Development Company of Nigeria Limited (2006) All FWLR (Pt. 314) 305, (2006) 8 NWLR (Pt. 983) 585, Mohammed JSC, held:

“It is noted that pleading cannot constitute evidence and a defendant as in the instant case, who does not give evidence in support of this pleading or in challenge of the evidence of the plaintiff, is deemed to have accepted and rested his case on the facts adduced by the plaintiff notwithstanding his general traverse. In other words, averments in pleading on which no evidence is adduced, are deemed to have been abandoned as mere averment, without proof of facts pleaded and does not constitute proof of such facts unless such facts are admitted.”

See also Woluchem v. Gudi (1981) 5 SC 291; Basheer v. Same (1992) 4 NWLR (Pt. 236) 491. Moreover, in Felix Nwoye Adim v. Nigerian Bottling Co. Ltd & Anor. (2010) All FWLR (Pt. 527) 690, (2010) 9 NWLR (Pt. 1200) 543 SC, the Supreme Court, per Musdapher JSC, held that:

“It is improper for a court to award special damages on incomplete and inconclusive facts given from memory which have not been documented. See Agbaje v. James (1967) NWLR 49; Agunwa v. Onukwe (1962) 1 All NLR 537. The particularity of the pleading and the evidence must be such that the losses are exactly known and accurately measured.”

Therefore, the counterclaim is in form of special damages - a recovery of money spent must be particularized as in the claim that must be adequately proved by evidence. The appellant having failed on this score to show that even though he obtained a loan, same was utilized for the renovation and refurbishment of the property in question. The learned trial judge was thus correct when she held at page 230 as follows:

“However no evidence was adduced by the defendant to show how he arrived at the amount claimed and how much he spent on the property. The court finds that the defendant failed to discharge the burden of proof placed on him in proof of his counterclaim. The defendant’s counterclaim therefore fails and is hereby dismissed.”

The conclusion of the learned judge is unassailable and ought not to be disturbed. To this extent, I resolve issue three (3) in favour of the respondent. On the whole, the appeal of the appellant partly succeeds on issues 1 and 2. The appeal is allowed in part. The judgment of Adebiyi J, of Lagos High Court, delivered on 1 March 2007 is hereby set aside in part. No order as to costs.

**OSEJI JCA**:

I had the privilege of reading the draft copy of the judgment just delivered by my learned brother, A. O. Obaseki Adejumo JCA.

I agree with the reasoning and conclusion that the appeal be allowed in part.

I also will and hereby allow the appeal in part. I abide by the consequential orders made in the lead judgment including order as to costs.

**TUKUR JCA:**

I had the opportunity of reading in draft the lead judgment just delivered by my learn**ed** brother, A. O. Obaseki Adejumo JCA and I adopt the judgment as mine with nothing more to add.

Appeal allowed in part