**TEJU INVESTMENT AND PROPERTY COMPANY LIMITED**

**V.**

**ALHAJA MOJI SUBAIR**

IN THE COURT OF APPEAL OF NIGERIA

THE 27TH DAY OF JANUARY, 2016

CA/L/149/15

**LEX (2016) - CA/L/149/15**

OTHER CITATIONS

(2016) LPELR-40087(CA)

2PLR/2016/57 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, J.C.A

JUMMAI HANNATU SANKEY, J.C.A

UZO I. NDUKWE-ANYANWU, J.C.A

TUNDE OYEBANJI AWOTOYE, J.C.A

IBRAHIM SHATA BDLIYA, J.C.A

**BETWEEN**

TEJU INVESTMENT AND PROPERTY COMPANY LIMITED - Appellant(s)

AND

ALHAJA MOJI SUBAIR - Respondent(s)

**REPRESENTATION**

A. O. AGBOLA, Esq. with A. V. CHINWUBA and S. T. AGBAJE, Esq. - For Appellant

AND

OLUSEGUN OGUNBODE, Esq. - For Respondent

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

REAL ESTATE/LAND LAW:- Landlord and Tenant – Long lease - Subsequent tenant – Whether takes from the terms of the head title on the property – Whether can resile from terms of original lease

COMMERCIAL LAW - CONTRACT - AGREEMENT: Doctrine of sanctity of contract or agreement - Rule that Parties are bound by the terms of their agreement - Whether parties to a contract are allowed to regulate their rights and liabilities themselves – Duty of court to respect the sanctity of the agreement of the parties

COMMERCIAL LAW - CONTRACT - AGREEMENT: Contract which has been reduced into writing can only be varied by an agreement in writing - Whether the court can go outside the intention of a party clearly expressed in a document

COMMERCIAL LAW - CONTRACT – Whether a party cannot ordinarily resile from a contract or agreement just because he later found that the terms of the contract or agreement are not favourable to him

COMMERCIAL LAW – CONTRACT:- Contracts made in foreign currency – whether enforceable in Nigeria – Nigerian pounds and British Pounds Sterling – Whether different

CHILDREN AND WOMEN LAW:- *Women and Real Estate/Land –* Defence of interest in leased property – Relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

COURT - POWER OF COURT: Power of court to enter judgment in foreign currency

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF:- Meaning – Civil proceedings – Shifting burden of proof – When on the state of the pleadings, the burden of proof lies on the defendant – When it may become the duty of the defendant to call evidence in proof or rebuttal of some particular point which may arise in the case – How determined - Whether the principle is that the burden of proof lies on he who asserts the positive and not on he who asserts the negative of an issue.

EVIDENCE - DOCUMENTARY EVIDENCE: Importance of documentary evidence - Where a document is clear and unambiguous – Whether parole evidence can be led to contradict it

INTERPRETATION OF STATUTE:- Section 1(2) of the Decimal Currency Act Cap D2 Laws of the Federation of Nigeria 2004 – Meaning and purport

WORDS AND PHRASES - LATIN MAXIMS:- "Pacta sunt servanda" and "Pacta convent quae neque contro leges neque dolo malo inita sunt omni modo observando sunt" – Meaning(s) of

**MAIN JUDGMENT**

**JUMMAI HANNATU SANKEY, J.C.A**. (DELIVERING THE LEADING JUDGMENT):

This is an Appeal against the Judgment of the Lagos State High Court (hereinafter referred to as the Lower Court) delivered on 23rd December, 2014 in Suit No.LD/1641/2011. Therein, the Lower Court entered Judgment for the Plaintiff (hereinafter referred to as the Respondent) and against the Defendant (hereinafter referred to as the Appellant) for arrears of rent in the sum of 6,750 Pounds Sterling plus cost of N200,000.00 in respect of the property lying and situate at No. 29 Taiwo Street, Central Lagos, Lagos Island. The Respondent had filed an action seeking three reliefs as per her Statement of Claim, dated and filed on 09-09-11, as follows:

"(a) Possession of the premises known as 29 Taiwo Street, Central Lagos, Lagos Island in that the Defendant has flagrantly and unconscionably breached its sacred covenant of rent payment.

(b) Arrears of rent in the sum of 1125 pounds sterling per month from April, 2000 till possession is given up by the Defendant.

(c) Mesne profit in the sum of 500 pounds sterling per month from April, 2000 until possession is given up by the Defendant.

(d) Cost of this action."

Upon being served the claim, the Defendant denied same and proceeded to file a Statement of Defence in that vein on 20-10-11. At the close of the pre-trial hearing, the matter proceeded to trial; and at the close of trial, Judgment was entered for the Respondent on 23rd December, 2014 in the sum of 6,750 Pounds Sterling, plus costs to the tune of N200, 000.00. However, the claims for possession of the premises in question and mesne profit were refused. Peeved by this decision, the Appellant filed an Appeal via his Notice of Appeal on 3rd February, 2015, wherein he complained on two grounds. The grounds, without their particulars state as follows:

"**Ground One**:

The learned trial Judge erred in law when he ordered that the rent on the premises is payable in British Pounds Sterling despite the fact that the Decimal Currency Act stipulates that every transaction prior to 1972 denominated in Pounds is automatically converted to Nigerian Naira.

**Ground Two**:

The learned trial Judge erred in law by holding that the burden of showing non-payment of the rent in Pound Sterling between the period 1962 and 1999 rests on the Defendant despite the clear and unambiguous provisions of Section 1(2) of the Decimal Currency Act and Sections 131 and 167 (c) & (d) of the Evidence Act."

Both parties are largely in agreement on the facts of the case leading up to this Appeal. Thus, a synopsis of the facts is as follows: The Respondent is the beneficial owner of the property lying and situate at No. 29 Taiwo Street, Lagos Island and covered by a Land Certificate with Title No. 0591 dated 19th February, 1951.The Respondent's father, Pa Solomon Oshomoyo, had previously granted a Lease of the property to one Kamil Ismail in 1953 for a term of 70 years certain commencing from 1st April, 1953 and ending on 31st March, 2013, at an annual rent of 350 Pounds Sterling for the first 25 years and 450 Pounds Sterling for the remaining 45 years. Kamil transferred the Lease to VYB Company, which also transferred the Lease to Alberto Jose Miseri & Co. Subsequently, Alberto Jose also transferred the Lease to the Appellant. Pa Oshomoye died in 1997, and the last rent paid by the Appellant expired in December, 1999. The Appellant thereafter defaulted in paying rent. The Respondent commenced eviction processes against the Appellant through her Solicitors by a letter dated 9th November, 2010. As a result, by a letter dated 16th March, 2011, the Appellant forwarded cheques to the Respondent's Solicitors which were said to represent payment for all outstanding rents, as well as payment in advance for the un-expired residue of the Lease in Naira. However, by a letter dated 8th April, 2011, the Respondent's Solicitors rejected the money and returned all the cheques. The Respondent followed this up by filing an action before the Lower Court seeking payment of the arrears of rent, mesne profits and possession of premises.

The Respondent adduced evidence through two witnesses and the Appellant, who disputed the claim, presented its case through its sole witness. Judgment was subsequently entered in favour of the Respondent in these terms, inter alia, at pages 149-151 of the printed Record of Appeal:

"It is trite that every subsequent tenant takes from the terms of the head title on the property. To that extent therefore the Defendant's tenure on the property in issue can only be in accordance with the terms of the 1953 Lease to the original Lessee. Both parties were in tandem that rent was to be at the rate of 350 (Three Hundred and Fifty) Pounds Sterling for the first 25 years and thereafter at 450 (Four Hundred and Fifty) Pounds for the remainder of the Lease period. Accordingly what is admitted need no further proof. The bone of contention on that now is in what currency that should continue to be paid. The claimant says in British Pounds Sterling, but the Defendant contended that by operation of the Decimal Currency Act (supra) that should now be in Naira.”

Without much ado I hold that that submission is misconceived, more particularly because Section 1(2) of the Act clearly provides for contracts or matters for which payment was to have been made in "Nigerian Pounds" and concluded that to be ‘on the basis that one Nigerian Pound equals Two Naira."... Accordingly therefore I hold that that provision did not change the agreement of the parties (their privies inclusive) in this case under the 1953 Lease, that payment of rent thereunder shall be in pounds Sterling and I so hold...

I therefore hold that Pounds sterling is the currency of rent payment under the Lease and order that the Defendant shall pay rent themselves in Pounds Sterling. I therefore hold that Pounds sterling is the currency of rent payment under the Lease and order that the Defendant shall pay rent themselves in Pounds Sterling.

I therefore enter Judgment in favour of the Claimant in the sum of 450 (Four Hundred and Fifty) pounds sterling per annum from January 2000 till 31st December 2014, totaling 6750 (Six Thousand, Seven Hundred and Fifty) Pounds Sterling to be paid forthwith."

It is this Judgment that has now given rise to this Appeal.

In consonance with the relevant rules of this Court, parties through their respective Counsel filed their Briefs of argument, which they duly adopted and relied upon as their submissions in this Appeal at the hearing of the Appeal on 5th November, 2015. In their respective Briefs, both learned Counsel for the Appellant and learned Counsel for the Respondent crafted two issues apiece for the determination of the Appeal. After scrutinizing the issues vis-a-vis the Grounds of Appeal, I am of the view that the issues distilled by the Appellant will suffice for a final resolution of the all the issues calling for determination in this Appeal. They are therefore adopted by the Court, and are set out hereunder as follows:

"(a) What effect, if any, does the Decimal Currency Act, Cap 2, Laws of the Federation, 2004, have on the mode of payment of the rent as fixed in the Deed of Lease dated 10th day of April, 1953.

(b) Does the burden of proving currency of payment post-Decimal Currency Act lie on the Appellant or Respondent in view of the fact that the legal tender in Nigeria is the Naira."

Issue one: what effect, if any, does the Decimal Currency Act, Cap 2, Laws of the Federation, 20O4, have on the mode of payment of the rent as fixed in the Deed of lease dated 10th day of April, 1953.

Under this issue, learned Counsel for the Appellant submits that the original Deed of Lease in respect of the property was entered into on 10th April, 1953. By various Deeds of assignment, the benefits of the lease were eventually acquired by the Appellant in 1974. Both parties are agreed that the terms of the lease are governed by the provisions of the Deed of lease of 1953; and that the annual rent per annum for the first 25 years of the lease was 350 pounds sterling, whilst the annual rent for the remaining 45 years would be 450 pounds sterling. He contends that from the pleadings and evidence before the Lower Court, the Respondent wanted payment for the annual rent to be in Pounds Sterling. That however, the Appellant insists that, by the operation of law, i.e. the Decimal Currency Act, Cap D2 Laws of the Federation of Nigeria, 2004, this cannot be so.

While conceding that the Deed of Lease stated the rent in terms of Pounds Sterling, the Appellant urged the Court to take judicial notice of the fact that the Deed of Lease was entered into in 1953 when Nigeria was still a colony of the United Kingdom, and the currency then in circulation was the Pounds Sterling. He embarked upon a history of how the currency in Nigeria evolved from way back when it was a British Colony to 1973 when the Decimal Currency Act was promulgated. In 1971, the Federal Military Government of Nigeria promulgated the Decimal Currency Act which changed the legal tender from "Nigerian Pounds" to Nigerian Naira commencing from 1st January, 1973. This, he contends, is further reinforced by Section 19(1) of The Central Bank of Nigeria, Act, Cap C4, Laws of the Federation of Nigeria, 2004, which provides that the legal tender in Nigeria shall be the Naira.

Counsel thus submits that a person who enters into a contract with another person is obliged to pay for the contract in the currency of the contract, i.e. the legal tender in the place of performance. He argues that the property in dispute is here in Nigeria and the rent is payable by a Nigerian corporate citizen to another Nigerian citizen, and both of them are ordinarily resident in Nigeria; that the source of the obligation and the obligation itself both arose in Nigeria. He relies on National Bank of Greece S. A. v. Westminister Bank Executor & Trustee Co. (Channel Islands) Ltd (1971) AC 945; and Aluminium Industries v. Inland Revenue Board (1971) - Citation incomplete.

Counsel agrees that the legal tender in Nigeria as at the time the Lease was entered into was the Pounds Sterling. That subsequently the legal tender was changed to Nigerian Pounds in 1962, and it retained parity with the British Pounds. However, that the Decimal Currency Act, 1971 again changed the currency and legal tender from Nigerian Pounds to Nigerian Naira. He relies on Section 1 of the Act (supra) to submit that it is illegal for any person carrying on business in Nigeria to demand for payment in Pounds Sterling or any other currency other than Naira and kobo, for a contract meant to be performed in Nigeria in which all parties are also resident in Nigeria. Counsel therefore submits that with this provision, instead of the sum of 450 pounds sterling expected as annual rent, by the imperative of Legislative fiat, it has been converted to N900.00.

Counsel urged the Court to distinguish this case from the line of recent authorities which confirm that Nigerian Courts can give Judgment in foreign currencies, because this is only applicable where the contract is international in nature and/or where the parties expressly agreed that the payment would be made in a particular foreign currency. He relies on Tankereederi Alrenkiel GMBH V Adalma International Services Ltd (1979) 1 NSC 459 at 470; Tawa Petroleum Products Co. Ltd & another V The Owners of M.V. Sea Winner & others (1980) 2 NSC 25 at 38

Counsel further urged the Court to overrule the recent decision of this Court in Appeal No. CA/L/363/2012 Adedeji Adedoyin v. Igbobi Development Company Ltd LPELR delivered on 6th May, 2014 which suggests that once an agreement to Lease is expressed in foreign currency, the rent must continue to be paid in that currency. He contends that the Judgment was given per in curiam without considering the historical evolution of the Nigerian currency and the effect of the Decimal Currency Act in respect of Leases entered into in Nigeria prior to its promulgation. That the error in the Adedoyin's case (supra) was the assumption that the currency, i.e. the British Pounds Sterling, in the Deed of Lease which was entered into in 1956 was a "foreign currency" at the time of the contract. Counsel therefore urged the Court to follow the plain and unambiguous provision of Section 1(2) of the Act (supra) to hold that by the operation of law, the amount stated as 450 Pounds Sterling in the Deed of Lease, is now N900.00; and to resolve issue one in favour of the Appellant.

On his part, learned Counsel for the Respondent submits that, whereas the Lease in respect of the property was entered into on 10th April, 1953, it was eventually assigned to the Appellant sometime in 1974. He contends that there is no evidence before the Court that the Appellant ever paid its rent in any other currency apart from British Pounds Sterling, just as there is no evidence that parties elected to vary the express provision in the Lease Agreement that rents must be paid in British Pounds Sterling.

In relation to Section 1(2) of the Decimal Currency Act (supra) relied on by the Appellant to justify his payment of rent in Naira, Counsel submits that it is only applicable to conversion of Nigerian Pounds to Naira and not to British pounds Sterling, which is the currency stipulated in the Lease Agreement. He argues that since there was no mention of Nigerian Pounds in the Lease, the Decimal Currency Act is not applicable to the transaction between the parties.

In the alternative, Counsel submits that, assuming without conceding that the Decimal Currency Act is applicable, it does not prohibit parties from entering into a contract where the means of payment would be made in foreign currency. He relies on: West Construction Company Ltd V Santos B. Batalha (2005) 4 SC (Pt. 1) 88; & Appeal No CA/L/363/2012 Adedeji Adedoyin V Igbobi Development Company Ltd (2015) LPELR. On the invitation to this Court to overrule its earlier decision in the latter case, Counsel submits that the Court will not depart or overrule its earlier decision unless a party is able to convince it of the necessity of doing so. He therefore urged the Court to resolve this issue in favour of the Respondent.

Findings:

Since it is evident that parties are ad idem on the facts, and it is really the interpretation and applicability of Section 1(2) of the Decimal Currency Act, Cap D2 Laws of the Federation, 2004 to the Lease Agreement that is the bone of contention, it is pertinent to set out both the contents of the Lease as well as the provision of the Law relied on for ease of reference. First, the terms of the Lease Agreement (at page 19 of the Record) state as follows:

This indenture made the 10th day of April, 1953, Between Solomon Oshomoye, of No. 16 Olushi Street, in the colony of Lagos, in the colony and protectorate of Nigeria, Trader (hereinafter called the "Lessor") which expressions where the context admits include the persons deriving title under him) of the one part and KAMIL ISMAIL, Trader of No. 70, Martins Street in Lagos aforesaid, (hereinafter called the “Lessee”, which expression where the context admits, includes the persons deriving title under him) of the other part.

NOW THIS INDENTURE WITNESSETH that in consideration of the rents and covenants hereinafter reserved and contained the Lessor DOTH hereby demise to UNTO the Lessee ALL THAT piece and Parcel of land together with the messuage and other buildings thereon situate, lying and being at No. 29, Taiwo Street, in Lagos aforesaid, and which with its dimensions and abuttals are described and more particularly delineated on the plan drawn at the foot to THESE PRESENTS and thereon EDGED PINK TO HOLD the same for a term of 70 years from the 1st Day of April, 1953, yielding and paying therefor during the said term the yearly rent of 350 pounds sterling for the first 25 years and thereafter the yearly rent of 450 pounds sterling for the remaining 45 years."

Also, Section 1(2) of the Decimal Currency Act, Cap D2 Laws of the Federation of Nigeria, 2004 provides as follows:

"1(2) Every contract, sale, payment, bill, note, instrument and security for money and every transaction, dealing, matter and thing whatsoever relating to money or involving the payment of or the liability to pay any money which, but for this subsection, would have been deemed to be made, executed, entered into, done and had, in and in relation to Nigerian Pounds shall in Nigeria be deemed instead to be made, executed entered into done and had, in and in relation to naira on the basis that one Nigerian Pound equals two naira.” (Emphasis supplied)

Applying the Golden/literal rule of interpretation, it is plain as light is today that the provision relates only to contracts et al entered into "in relation to Nigerian Pounds". No other construction can be given to this provision without doing violence to it and to the spirit and intendment of the Law. It would certainly be stretching it too far and out of the bounds of the Law to suggest that parties to a contract had no freedom and latitude to decide for themselves the terms of their contracts, which could include the terms and manner of payment. It is certainly not the intention of the Lawmaker to constrain and constrict parties into a straitjacket when contracting with each other.

It is incontrovertible that the Decimal Currency Act (supra) came into force for the purpose of establishing a decimal currency for Nigeria. That having been said, in cases where parties, of their own free-will, decide and agree that the currency of their contract shall be in Pounds Sterling, or for that matter, US Dollars, Euro, Francs, Riyadh, Shillings, or the like, Section 1(2) of the Decimal Currency Act does not operate to limit, restrict or hinder them from doing so. The extent of the application of this provision is that, all transactions and contracts entered into before the coming into operation of the Act in "Nigerian pounds", shall be deemed to have been done in relation to the Naira. This was clearly in order to facilitate the smooth change-over of the legal tender in Nigeria from the Nigerian Pounds to the Naira. The learned Trial Judge was therefore quite right when she found as she did that the provision was exclusively limited and confined to transactions made in relation to Nigerian Pounds. This is more so as, in the interpretation of statutes, it is a cardinal principle of law that the express mention of one thing excludes the other.

In addition, it is trite law that where parties enter into a contract, they are bound by the terms and conditions of the Lease Agreement they signed, and cannot operate outside its terms and conditions. The Court will also not permit to be read into such contract, terms on which there is no agreement. A Court of law must always respect the sanctity of the agreement of the parties. The role of the Court is to pronounce on the wishes of the parties and not to make a contract for them or to re-write the one they have already made for themselves. The express intention of the parties as contained in the Deed of Lease, Exhibit C10, must be maintained. Where parties have used clear and unambiguous words, such words must be given their plain interpretation. See: Baliol Nig. Ltd V Navcon Nig. Ltd (2010) LPELR-717(SC) 1 at 18; Alade V Alic (2010) LPELR-399(SC) 1 at 38; JFS Investment Ltd V Brawal Line Ltd (2010) LPELR-1610(SC) 1 at 38; Isheno V Julius Berger Nig. Plc (2008) LPELR-154(SC) 1 at 35; SE Co. Ltd V NBC (2006) 17 NWLR (Pt.978) 201; Sona Breweries Plc v Peters (2005) 1 NWLR (Pt.908) 478; Owoniboys Technical Services Ltd V UBN Ltd (2003) 15 NWLR (Pt.844) 545; Chime V Ude (1996) 7 NWLR (Pt.461) 379; & Tukur V Govt. of Gongola State (1989) 4 NWLR (Pt.117).

With these principles of law, it is clear to me that the Lower Court was on firm ground when it found that the currency as expressed in Exhibit C10 must be given its strict connotation to reflect the intention of the parties in the agreement freely and voluntarily entered into. To do otherwise would be tantamount to re-writing the contract agreement for the parties based on extrinsic evidence, and this is not allowed.

The argument proffered by the Appellant that the Respondent's father had previously received payment of the rent from the Appellant in Naira and issued it receipt(s) in that vein, and which is alleged to have therefore varied the terms of the contract, must be strictly proved by the person making this assertion. The best evidence of this is the production of the receipt(s) itself/themselves. The law is that a contract which has been reduced into writing can only be varied by an agreement in writing. In other words, where a contract is in writing, any agreement which seeks to vary the original agreement must itself be in writing.

See: Baliol Nig. Ltd V Navcon Nig. Ltd (supra) at 10; Bjou Nig. Ltd V Osidoroewo (1992) 6 NWLR (Pt. 249) 463 at 469; John Holt Ltd V Stephen Lafe (1938) 15 NLR 14; & Morris V Baron & Co. (1918) AC 1 at 39. Thus, since the Appellant, who made this assertion, was unable to produce any proof thereof, the onus of proof on it was not discharged.

Indeed, the law is also trite that where a document is clear and unambiguous, parole evidence cannot be led to contradict it. In other words, extrinsic evidence is basically inadmissible to add to or alter the contents of a document. See: NEPA v Elfandi (1985) 3 NWLR (Pt.32) 884; Royal Exchange Nig. Ltd V Aswani Textile Industries Ltd (1991) 2 NWLR (Pt.176) 639 at 765. Clearly, the finding of the Lower Court is borne out from the Records, as the Court was not entitled to act on oral evidence given by the sole witness of the Appellant to vary or contradict the express stipulations in the written agreement.

The legal maxim is Pacta sunt servanda, which means contracts are to be kept. Or an even better and more incisive maxim is, Pacta convent quae neque contro leges neque dolo malo inita sunt omni modo observando sunt, meaning - agreements which are neither contrary to the law nor fraudulently entered into, should be adhered to in every manner and in every detail. See Sonnar (Nigera) Ltd V Partenreedri M.S. Nordwind Owners of the Ship M. V. Nordwind (1987) LPELR-3494 (SC) 1 at 44 per Oputa, JSC.

There is no doubt that parties to a contract are allowed, within the law, to regulate their rights and their liabilities themselves. Courts do not make contracts for parties. It cannot be emphasized enough to say that Courts will only give effect to the intention of the parties as expressed in and by their contract. In this case, it is evident that the parties had a clear and unambiguous intention to make payment of rent in Pounds Sterling, and from the evidence on the Record, this mode of payment continued right up till 1999, long after the Decimal Currency Decree of 1971 (which commuted into the Decimal Currency Act of 2004) came into force.

Thus, the intention of the parties to the contract as to the currency to be used in the payment of rent was expressed in words, and this intention must determine the execution of contract. Where the intention of parties to a contract are clearly expressed in a document, the Court cannot go outside the document in search of other documents not forming part of the intention of the parties. In this case, Exhibit 10 clearly provided for the terms of the contract between the parties, and the Lower Court was right not to have gone outside the contract in search of more palatable terms for one of the parties to the detriment of the other party. The Court is bound to interpret the contract as per the terms agreed upon therein.

A party cannot ordinarily resile from a contract or agreement just because he later found that the terms of the contract or agreement are not favourable to him. This is the whole doctrine of the sanctity of contract or agreement. The Court is therefore bound to properly construe the terms of the contract or agreement in the event of an action arising therefrom. See Arjay Ltd V Airline management Support Ltd (2003) LPELR-555(SC) 1 at 67; & Nneji v Zakhem Con. (Nig.) Ltd (2006) LPELR-2059 (SC) 1 at 27.

In conclusion, Tobi, JSC, summarised the principles of law governing contracts succinctly in Nika Fishing Co. Ltd V Lavina Corporation (2008) LPELR-2035(SC) 1 at 30-31, in these words:

"Parties are bound by the conditions and terms in a contract they freely enter into... The meaning to be placed on a contract is that which is the plain, clear and obvious result of the terms used... when construing documents in dispute between two parties, the proper course is to discover the intention or contemplation of the parties and not to import into the contract ideas not potent on the face of the document... Where there is a contract regulating any arrangement between the parties, the main duty of the Court is to interpret that contract and to give effect to the wishes of the parties as expressed in the contract document...It is the law that parties to an agreement retain the commercial freedom to determine their own terms. No other person, not even the Court can determine the terms of contract between parties thereto. The duty of the Court is to strictly interpret the terms of the agreement on its clear wordings... Finally, it is not the function of a Court of law either to make agreements for the parties or to change their agreements as made." (Emphasis mine)

On the issue canvassed that it is illegal to enter into contracts where the currency of the transaction is stipulated to be in foreign currency, Counsel has not cited any authority for this, neither have I come across any authority for this submission. Instead, authorities, even from the highest Court in the land, say that this is certainly not the law. A few instances will suffice. In the case of Koya V UBA Ltd (1997) LPELR-1711(SC) 1 at 67, Iguh, JSC, put paid to any doubts on the issue when he stated unequivocally as follows:

"In view, however, of the prominence the issue received in the Judgment of the Court below, I need to draw attention to the decision of this Court in Broadline Enterprises Ltd v Montery Maritime Corporation (1995) 9 NWLR (pt. 477) 1 in which it was pointed out that our Courts, in appropriate cases, have the power and jurisdiction to enter judgment in the foreign currency claimed depending entirely on the particular facts and circumstances of a case, where, for instance, the currency of a contract made, executed and enforceable in Nigeria is in foreign currency, our Courts of competent jurisdiction would, in my opinion, have power to enter judgment in foreign currency... The underlining principle is said to involve, and I agree entirely with this, that it is the duty of a debtor to pay his debt to the creditor in the currency of the contract according to its clear terms, Besides, it does not seem to me open to question that our Courts have ample power, again in appropriate cases, to order specific performance of a contract to pay in a stipulated or named currency."

Yet again, this Court also held in the case of Harka Air Services (Nig.) Ltd V Keazor (2005) LPELR-5693(CA) 1 at 4-46, per Ogunbiyi, JCA (as she then was), that there is no doubt that judgments can be entered in foreign currency, and thus proceeded to award the sum of Eleven Thousand U.S. Dollars (11,000) as an appropriate compensation in general damages. In concurring with the lead Judgment, my learned lord, Garba, JCA, pronounced inter alia thus at page 49 of the Report:

"Let me also quickly say that it is not in dispute that the Nigerian Courts have the power to enter judgments and make awards in foreign currency in appropriate cases... Accordingly, if the respondent had adduced sufficient evidence in US Dollars to support the claims he made for special damages in particular, in that currency, the Lower Court would have had the power to have granted him the claims in US Dollars as proved by such evidence."

In addition, their lordships of the Apex Court have enunciated and laid down affirmatively in a long line of cases the jurisdiction of Nigerian Courts to award judgments in foreign currency. See Adedoyin V Igbobi Development Co. Ltd (2014) LPELR-22994(CA); Saeby Jernstoberi MFA/S V Olaogun Ent. Ltd (1999) 14 NWLR (Pt.637) 128 at 145-146 per Ayoola, JSC; Koya v UBA Ltd (1997) 1 NWLR (Pt.481) 251, 269-289 per Ogundare, JSC; Nwankwo V Ecumenical Development Co-operative Society (2002) I NWLR (Pt.749) 513 at 540.

Thus, it is settled law, beyond peradventure, that parties can make an agreement or enter into a contract to pay in foreign currency, and a Nigerian Court can, in its discretion, award same accordingly. See further on this: Saltzgitter Stahl GMBH v. Tunji Dosumu Industries Ltd (2010) LPELR-2999(SC) 1 at 41; Witt & Busch Ltd V. Dale Power Systems Plc (2007) LPELR-3499(SC); UBA Plc V BTL Industries Ltd (2004) 18 NWLR (Pt.904) 180 (CA); Prospect Textile Mills (Nig) Ltd v ICI Plc England (1996) 6 NWLR (Pt.457) 568) at 682; UBA Ltd V Odusote Bookstores Ltd (1995) 12 SCNJ 175; Broadline Enterprises Ltd V Montery Maritime Corporation (1995) 10 SCNJ 1; Olaoyin Enterprises Ltd V SJ & M (1992) 4 NWLR (Pt. 235) 361 at 385; & Metronex (Mg) Ltd V Griffin George Ltd (1991) 1 NWLR (Pt.169) 651 at 659.

In the light of these plentiful decisions, the invitation to this Court by learned Counsel for the Appellant to overrule its recent decision in Appeal No.CA/L/363/2012 Adedeji Adedoyin v. Igbobi Development Company Ltd LPELR delivered on 6th May, 2014, on the ground that it was given per in curiam, is highly unwarranted, unsubstantiated and uncalled for. The decision is well-considered and represents the extant state of the law as enunciated in the several decisions of the Supreme Court and this Court referred to. The submissions made by Counsel are therefore erroneous and must be discountenanced as such. I do so hold.

Thus, for all these reasons, I am of the view that the Decimal Currency Act, Cap 2, Laws of the Federation of Nigeria, 2004, does not operate in the peculiar facts of this case to affect the mode of payment of rent as agreed upon and fixed in the Deed of Lease dated 10th April, 1953 (Exhibit 10 herein). Issue one is accordingly resolved in favour of the Respondent.

Issue Two: Does the burden of proving currency of payment post-Decimal Currency Act lie on the Appellant or Respondent in view of the fact that the legal tender in Nigeria is the Naira.

Under this issue, learned Counsel for the Appellant faults the finding of the learned trial Judge (particularly as contained at page 149 of the printed Record) that the burden of proof lay on the Appellant to prove that payment for the Lease was to be made in Naira. He submits that Exhibit C4, the letter from Pa Shomoye, does not support the contention of the learned trial Judge that demand for rent was made in Pounds Sterling. He urged the Court to take judicial notice of the fact that, at the time the demand letter was written on 16th April, 1968, the currency of Nigeria was the Nigerian Pounds which was reflected in the symbol.

Counsel further submits that there was no evidence before the Lower Court to show that there was any demand for rent for the period between the year 2000 to the date of the Judgment, in line with Clause 2 of the Deed of Lease dated 10th April, 1953 (at pages 17 & 19 of the Record). He therefore urged the Court to hold that, without any demand for rent having been shown to have been made, the Respondent did not discharge the burden of proof on her.

In addition, Counsel submits that, contrary to the holding of the learned trial Judge, although both parties agreed that the 1953 Lease mentioned Pounds Sterling, the Appellant discharged the burden on it by pleading Section 2(1) of the Decimal Currency Act; and that the burden thereafter shifted to the Respondent to show that, despite the Act (supra), she has been receiving payment in foreign exchange. He also submits that by the Exchange Control (Anti Sabotage) Act, Cap 114 Laws of the Federation, 1990, it was a felony to pay or to accept any payment in Nigeria in foreign exchange without the express approval of the Minister of Finance. He relies on Co-op Society V NACB Ltd (1999) 2 NWLR (Pt. 590) 234 at 243 to submit that the burden of proof, having been wrongly placed on the Appellant, has vitiated the trial and renders the Judgment liable to be set aside. He therefore urged the Court to resolve this issue in favour of the Appellant. He finally urged that the Appeal be allowed.

In response to these submissions, learned Counsel for the Respondent submits that, whereas both parties are agreed that the Appellant took over the lease of the property in 1974, it is only now raising the issue of the provision of the Decimal Currency Act (supra) for rent that became due in the year 2000, which is more than 25 years after it moved into the property in 1974, and also after it had assumed the full benefits and liabilities of the Lease of 1953. Counsel contends that the Appellant however failed to produce even a shred of evidence to prove that rent had been paid on the property in any currency other than Pounds Sterling. He therefore submits that the onus of proof of payment of rent is on the Appellant who is raising the issue for the first time more than 30 years after taking over the Lease. Reliance is placed on Okorie Echi V Joseph Nnamani (2000) 5 SC 78 to submit that, where issues are joined, the onus of proof rests on the person who would fail if no evidence was adduced.

Counsel referred to the evidence adduced by the Appellant at the Lower Court that it made payment of rent in Naira and collected receipt(s) for same. It however failed to tender the receipt(s). He submits that the Lower Court rightly invoked Section 167(d) of the Evidence Act, 2011 to presume that the Appellant failed to tender those receipts in Naira because none existed. Counsel therefore urged the Court to also invoke this provision against the Appellant in the light of the above facts, and to hold that the Appellant deliberately withheld the receipts for the payment of rent because it is detrimental to its interest.

Counsel relies on FGN V Zebra Energy Ltd (2002) 3 NWIR (Pt.754) 471 at 491 to further submit that contracts entered into by parties are binding on them, and a Court of law will not sanction an unwarranted departure from them unless they have been lawfully abrogated or discharged. He submits that it is not the duty of the Court to rewrite the agreement of parties. It is only enjoined to enforce the clear provisions of agreements as entered into by the parties. He relies on Yadis Nigeria Ltd V Great Nigeria Insurance Ltd (2007) 4-5 SC 235. Counsel submits that the Appellant's position is an afterthought to deprive the Respondent of the full benefits of the Lease of a property which is located in the Central business District of Lagos Island. He therefore urged the Court to discountenance the submission of the Appellant and to resolve this issue in favour of the Respondent.

Findings:

I must observe that some of the matters raised under this issue have since been answered in my findings under issue one. In order to prevent a repetition of those findings, I hereby adopt wholesale my findings under issue one. I will simply make additional findings in respect of the issue raised as it pertains to the finding of the Lower Court on the burden of proof (at page 149 of the Record), which findings state thus:

"whereas both parties agreed that rent was paid up to 1999, it is the Defendant who now contends that it paid in Naira and not Pound Sterling as the Lease stipulated to prove that. The burden is therefore not on the claimant to prove otherwise, but on the Defendant to prove so. Proof in civil matters is on the balance of probabilities and by preponderance of credible evidence. The law is that he who alleges must prove - Section 131 - 133 of the Evidence Act. The Claimant has alleged, and as the Lease itself stipulated, that rent is payable in Pounds Sterling and at least on her side, Exhibit C4 has shown demand in that currency, The Defendant has alleged that it had been paid in Naira, but collected receipts therefore up to 1999, it therefore behoves it to tender those receipt(s) to prove its assertion. It is therefore to the Defendant that Section 167(d) of the Evidence Act, 2011 applies, in that it is then presumed that it failed or neglected to put forward those Receipts in Naira, because none existed; if any existed, its position will be disproved thereby."

In civil cases, while the general burden of proof in the sense of establishing his case lies on the plaintiff, such a burden is not static as in a criminal case. Not only will there be instances in which, on the state of the pleadings, the burden of proof lies on the defendant, but also as the case progresses, it may become the duty of the defendant to call evidence in proof or rebuttal of some particular point which may arise in the case. The principle is that the burden of proof lies on he who asserts the positive and not on he who asserts the negative of an issue. See Egharevba V Osagie (2009) LPELR-1044(SC) 1 17-18; Calabar Central Cooperative Thrift & Credit Society Ltd V Ekpo (2008) LPELR-825(SC) 1 at 29; Adegoke V Adibi (1992) LPELR-95 (SC) 1 at 19-20; Noibi V Fikolati (1987) LPELR-2064(SC) 1 at 13. In Elema v Akenzua (2000) LPELR-1112(SC) 1 at 19, the Supreme Court, per Katsina-Alu, JSC stated the law explicitly thus:

'The law in this regard is settled. In civil cases while the burden of proof initially lies on a plaintiff, the proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the defendant and vice-versa as the case progresses. This is also referred to as the evidential burden. This is good law and good sense. For if a party calls evidence which reasonably satisfies the Court that the fact sought to be proved is established, the burden would shift on his adversary against whom judgment would be given if no more evidence were adduced."

Thus, the whole concept of the Law on the burden of proof has been fully captured and epitomized in Sections 131 - 133 of the Evidence Act, 2011.

From the facts of this case as disclosed in the evidence adduced, in the Exhibit C9, a letter from A. A. Tejuoso & Co, Solicitors to the Appellant, dated 16th March, 2011 and addressed to the Solicitors to the Respondent, the Appellant alleged that in 1978, the ground rent was increased to N900.00 by an instrument in writing dated 12th May, 1977 which took effect from 1st April, 1978, between S.O. Shomoye and the Appellant, for the remaining 45 years of the agreement. It also stated therein that the Appellant had paid the ground rent regularly as was evidenced by photocopies of cheques and correspondences, such as a Union Bank of Nigeria cheque number 92055 dated 21st October, 1998. (See Pages 60-61 of the Record). In the face of the abundant evidence already adduced by the Claimant, the Defendant had a duty to adduce rebuttal the evidence, the onus of proof having shifted to it. Thus, the Appellant's Solicitors, having made these assertions in the Exhibit C9, (a letter to the Claimant's Solicitors), it was incumbent on the Appellant to have adduced evidence in proof of same in order to prove that after the Lease Agreement of 1953, a fresh Agreement was entered into between it and the Respondent's father, S. O. Shomoye, via another instrument, to effect payment of rent from 1987, not in Pounds Sterling (as was the stipulation in the Lease Agreement), but in Naira, and that such payments were subsequently made accordingly.

Surprisingly however, no scintilla of evidence was adduced by the Appellant in this regard, notwithstanding that an instrument and cheques were claimed to be in existence to prove this. It is in consequence of this failure to adduce rebuttal evidence that the Lower Court found that the Appellant had failed to discharge the burden of proof on it to prove its assertion that, previous to 1999, it had made payments in Naira in line with his new agreement with the Respondent's father, Pa Shomoye. It is therefore misleading for the Appellant to canvass that the burden of proof was in respect of any other issue, as he has sought to do in his Brief of argument. The position of the law is as stated eloquently by the learned trial Judge and it was properly applied. Thus, I have no reason to disturb her findings thereon.

Besides which, it is now firmly settled that documentary evidence is the best evidence. It is the best proof of the contents of such a document, and no oral evidence will be allowed to discredit or contradict the contents thereof, except where fraud is pleaded. See: AG Bendel State V UBA Ltd (1986) 4 NWLR (Pt.337) 547 at 563. Thus, the Appellant, having claimed in a document emanating from it that there was in existence a subsequent instrument varying the mode of payment of the Lease, as well as cheques to prove previous payments for the Lease in Naira, it is only those documents, and not oral evidence, that is acceptable in proof of those assertions. Having failed to produce the touted documents in evidence, the Appellant failed to discharge the onus placed on it by the operation of law, and the learned trial Judge was entitled to find as she did. I therefore also resolve issue two in favour of the Respondent.

In the result, having resolved both issues in favour of the Respondent, the Appeal is glaringly bereft of merit. It fails and is dismissed.

Accordingly, the Judgment of the High Court of Lagos State in Suit No.LD/1641/2011, delivered on 23rd December, 2014, granting the Respondent's claim in the sum of 6,750 Pounds Sterling, plus the sum of N200,000.00 as costs, is affirmed.

I award costs in the sum of N50,000.00 in favour of the Respondent.

**MOHAMMED LAWAL GARBA, J.C.A**.:

I have read in draft, the lead judgment delivered by my learned brother H. J. Sankey, JCA, in this appeal and agree that the appeal is completely unmeritorious. The issues have been comprehensively considered in the lead judgment and I do not wish to more than that I join in dismissing the appeal in all the terms set out therein.

**UZO I. NDUKWE-ANYANWU, J.C.A.:**

I had the privilege of reading in draft form, the judgment just delivered by my learned brother Jummai Hannatu Sankey, JCA.

I agree with her reasoning and final conclusions.

This appeal is unmeritorious, it is dismissed. I abide by all the orders contained in the lead judgment.

**TUNDE OYEBANJI AWOTOYE, J.C.A**.:

I entirely agree.

**IBRAHIAA SHATA BDLIYA, J.C.A**.:

I have had the advantage of reading before now the judgment just delivered by my Lord, Hon Justice J. H. Sankey J.C.A.

My Lord has dealt with all the issues raised in the appeal extensively and exhaustively, leaving no space for me to contribute thereto. I can only adopt the reasonings and conclusion contained in the lead judgment as mine and accordingly dismiss the appeal for ordering in merit.

I abide with the order as to costs contained in the lead judgment.