

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON THURSDAY THE
23RD DAY OF FEBRUARY, 2017.

BETWEEN:

SUIT NO. B/228//08

1. MR. FRANKLIN OMOZEE
2. MR. FRANK IYEKEKPOLOR

CLAIMANTS

(On behalf of themselves and the Administrators of the Estate of late Edward Omozee)

AND

WEMA BANK PLC í DEFENDANT

JUDGMENT

The Claimants instituted this suit *vide* a Writ of Summons and Statement of Claim dated 13/5/2008 but filed on 28/4/2008. In the course of the proceedings the parties made several amendments.

However, the extant pleadings in this suit are as follows:

- I. The Claimantsø Consequentially Amended 5th Statement of Claim and Defence to Counter-Claim filed on 22/12/2015;
- II. The Claimantsø Consequentially Amended Reply to Statement of Defence/Counter-Claim filed 22/12/2015; and
- III. The Defendantø Further Amended Statement of Defence/Counter-Claim filed on 28/7/2016.

The Claimants claims against the Defendant, as contained in the Consequentially Amended Statement of Claim and Defence to Counter-Claim dated and filed on the 22nd of December, 2015 are as follows:

1. A Declaration that the Claimants are entitled to a return of the title documents to the property known as No. 3, Abu Street, off Agho Street, Off Ekenwan Road, Benin City, Edo State, belonging to Mr. Edward Omozee (deceased), the debt owed for which the property was used as security having been fully repaid to National Bank Limited (now Wema Bank Plc); and
2. The sum of N30, 000,000.00 (thirty million naira) being damages for wrongfully withholding the title documents to the said property despite repeated demands by the Claimants for the release.

On the other hand, the Defendant Counter- Claims against the Claimants, the sum of N2, 617,260.39K (two million six hundred and seventeen thousand two hundred and sixty naira, thirty nine kobo) being the outstanding debit balance in the company account run and managed by Mr. Edward Omozee with the Defendant Bank, that is OMOZEE COMMERCIAL AND TECHNICAL LIMITED: Account No.1136 for the period between 28/09/86 and 26/06/14.

On the 23rd day of May, 2016, the Claimants opened their case.

The 1st Claimant adopted his Written Statement on Oath as his testimony in this suit. In his oral testimony, he informed the Court that they filed this suit in a representative capacity on behalf of the family of late Edward Omozee. He identified the Letter of Authority which was admitted in evidence as Exhibit -Aø. The original copy of the Letter of Administration of the Estate of the deceased was also admitted in evidence as Exhibit -Bø.

In his Written Statement on oath, the 1st Claimant stated *inter alia* that the 2nd Claimant is his uncle, and one of the Administrators of the estate of his late father (Mr. Edward Omozee). That his father died in a motor accident on the 28th of January, 1985 and that he is the eldest son of the deceased.

He maintained that his late father was a Bini man and was buried in accordance with Bini Native law and custom.

He stated that No. 3 Abu Street, Off Agho Street, Benin City was his father's personal house which is regarded as his *Igiogbe* under Bini native law and custom.

He stated that being the eldest son, he inherited the said house, after burying his father in accordance with Bini native law and custom on inheritance.

Furthermore, he stated that the Defendant took over the asset and liability of the defunct National Bank of Nigeria Limited.

That his late father obtained an overdraft from the defendant on behalf of Omozee Commercial Typewriters in which he was the Managing Director and sole signatory to the Bank Account of the Firm.

He stated that his late father used his personal house as security for the overdraft facility.

He gave the address of the house as No. 3, Abu Street, Off Agho Street, Benin City with the title documents registered as No. 9 at page 9 volume 489 at the Lands Registry in Benin City.

He maintained that his family has repaid the overdraft facility in full but the Defendant has refused despite several demands to release the title documents to them.

According to him, the Defendant's action is an attempt to deprive him of his inheritance and this has caused him a lot of stress.

Under cross-examination the 1st Claimant stated that it is not true that the company that took the loan from the bank was a Limited Liability Company. According to him, when the loan was taken, the firm was called: 'Omozee Commercial Typewriters'. The enterprise later metamorphosed into a Limited Liability Company. He stated that there was no resolution by the Board of the Limited Liability Company authorizing him to institute this action. He maintained that the family has fully repaid the loan.

The 2nd Claimant was the next person to testify. He stated that he is one of the administrators of the deceased's estate. He identified Exhibit B and tendered another letter of authority from the family which was admitted in evidence as Exhibit C.

He informed the Court that the deceased obtained a facility from the defunct National Bank. He tendered some documents relating to the transaction which were admitted in evidence as: Exhibits D, D1 and D2.

He stated that the deceased died in an accident in January, 1985 and tendered the Death Certificate which was admitted in evidence as Exhibit -Eø

He notified the Bank of the demise of the deceased *vide* a letter which was admitted in evidence as Exhibit -Fø

At the time of his demise, the deceased owed the bank the sum of N35, 873.08 in January, 1985. He tendered a document to establish this fact. The document was admitted in evidence as Exhibit -GøHe wrote reminder letters to the defendant to stop charging interest on the said account. The 1st reminder was admitted in evidence as Exhibit -Hø

Their family made some payments to settle the debt after the deceasedø demise. He tendered a document in support which was admitted as Exhibit -Iø He wrote several letters to the bank to release the title documents and they replied him. The bankø replies were admitted in evidence as: Exhibits J, J1, J2, J3, J4, J5, and J6.

When the Bank refused to accede to their request to release the collateral, they instructed their solicitors to write the Bank. Their solicitorø letters were admitted in evidence as: Exhibits K and K1.

He also tendered some documents with which the deceased applied for the facility from Defendant and the response of the Bank. The documents were admitted in evidence as: Exhibit L, L1, L2, L3, L4, L5, L6, L7 and L8.

The 2nd Claimant adopted his Written Statement on oath as his evidence in this suit. Therein, he stated *inter alia* that the Defendant assured the deceasedø family that the interest will be stopped when they received the notification of his

demise. That the deceased's indebtedness to the Defendant as at the time of his death was N35, 873.08 DR.

That the total indebtedness of the deceased was endorsed by the Defendant on the Bank Certificate given to his family by the Probate Registry (Exhibit G).

That his family undertook to pay the sum of money owed the Defendant.

That in April, 1985 his family started making payments into the Account No. 500183 in the Defendant Bank. That this payment was made by means of the proceeds realized from the sale of some of the deceased's property.

That the Defendant assured his family that interest on the overdraft facility had been stopped.

That based on the assurance from the management of the Defendant that interest had been stopped, his family made further lodgments into the said account.

That his family was later informed by the Defendant that Account No. 500183 into which they had been making payments was not the overdraft account and that the overdraft account number was No.001136.

That his family subsequently, by a letter authorized the Defendant to transfer all payment erroneously paid into account No. 500183 to Account No. 001136.

That his family later observed that the Defendant contrary to its assurance did not stop charging interest on the overdraft account. That this made the debt to rise to N37, 706.97 by November, 1985.

That this discovery prompted his family to write the Defendant once again through a letter dated 25th of June, 1985 to stop charging interest on the overdraft account.

That his family actually paid off the debt and the Defendant's Branch Manager sent his debt relief committee to invite them to his office where he thanked them for paying off the debt.

That after paying off the debt his family wrote the Defendant demanding for the release of the title documents.

That the said letter could not be delivered because the National Bank of Nigeria Limited which was later acquired by the Defendant had closed its office.

That the above situation remained till 2006 when the letter was eventually delivered upon the re-opening of the Bank.

That before the National Bank of Nigeria Limited was acquired by the Defendant; his family was not informed of any outstanding debt in respect of the account.

That it was only after the administrators had written to the Defendant requesting for the title documents that they were informed that the account was still in debt.

That the debt which was initially N37, 706.97k had risen to about N600, 000.00 which the Defendant insisted must be repaid before the title documents can be released to the family.

That this made the administrators to request for a comprehensive statement of account from the Defendant by means of several letters.

That the Defendant failed to provide the comprehensive statement of account as demanded by the administrators.

That he believes the comprehensive statement of account will show the true state of account Nos. 500183 and 001136 between 9th April, 1985 and 6th November, 1992.

That it is the right of the 1st Claimant and himself as the administrators of the estate of late Mr. Edward Omozee to have the comprehensive statement of the accounts. That the estate of late Mr. Edward Omozee is not owing the Defendant the sum of about N600,000.00 or any sum of money whatsoever. That the Defendant's refusal to release the title documents to them has been a source of untold stress.

Thereafter, the 2nd Claimant was cross-examined by the learned counsel for the Defendant. Under cross-examination, he stated that Exhibits A and C were made by his family.

That the Defendant verbally assured them that they would stop the interest on the account. He could not remember the date the Manager paid them a visit. The Defendant told them to produce the documents of payment.

They did not furnish the Defendant with any evidence of the repayment.

The Defendant informed them that interest will continue to accrue on the outstanding debt balance until it is repaid.

That on the 25th of June, 1985, the Defendant verbally told him that they had stopped the interest on the loan. When he was confronted with the contents of Exhibit J, he stated that the date on it is July 2007. He denied the suggestion that it was in Exhibit J that he asked the defendant to stop the interest.

He stated that he is not a director in Omozee Commercial and Technical Ltd. and there was no board resolution from Omozee Commercial and Technical Ltd authorizing him to institute this suit. He maintained that the enterprise metamorphosed into a Limited Liability Company shortly before the death of the deceased.

Thereafter, the Claimants closed their case.

On the 4th of July, 2016, the Defendant opened their case for their defence and Counter-Claim by calling a lone witness named Emmanuel Esekie, a Legal Officer in the Bank.

He adopted his Written Statements on oath dated 24th September, 2016 and the one dated 28th July, 2016 as his evidence in this suit.

In his depositions, the witness stated *inter alia*, that the claimants lack the requisite *locus standi* to institute this action. That they are not the duly appointed administrators of the estate of the deceased.

That the defendant is counter-claiming the sum of N2, 617,260.39k (two million, two hundred and sixty naira and thirty ónine kobo), plus any further interest that will accrue on the said amount at the time judgment is entered in this suit being the outstanding debit balance in the company account run and managed by Mr. Edward Omozee with the defendant bank, that is OMOZEE COMMERCIAL & TECHNICAL LIMITED vide Account No. 1136 for the period between 28/09/1985 and 26/6/2014.

That he has a copy of the statement of account of Omozee Commercial & Technical Limited with the defendant bank Account No.1136 for the period between 28/09/1986 and 26/6/2014 which was produced from a computer belonging to the defendant during the period and was used by the defendant to store and process information in the ordinary course of banking transactions including the transactions in issue in this case. That he intends to rely on the certificate dated 26th June, 2014 made in compliance with section 84 of the Evidence Acts 2011 and signed by one Endurance Okobia, Business Service Manager, Wema Bank Plc.

That the interest chargeable on Account No. 1136, OMOZEE COMMERCIAL & TECHNICAL LIMITED is 21% per annum.

The witness denied any knowledge of the Claimants in this suit. While testifying, he identified the Statement of Account and the Certificate which he mentioned in his Deposition. The statement of account and the certificate were accordingly admitted in evidence as Exhibits M & M1 respectively.

He stated that the deceased did not specifically inform the bank that the mortgaged property belonged to either Omozee Technical Enterprises or Omozee Commercial & Technical Ltd.

He is aware that Omozee Commercial Typewriters was later converted to Omozee Commercial & Technical Ltd.

The deceased did not give the bank a resolution from Omozee Commercial Technical Ltd that the property should be used as collateral.

The defendant did not give the Claimants any statement of account in respect of this transaction from the inception. They did not explain to the Claimants before this case started, how they arrived at the amount they are counter claiming against them. He is not aware of any policy that interest stops running on a loan account when the person dies.

He admitted that payments were made into a certain account when Wema Bank Plc took over from National Bank.

The loan account was never operated after the death of Edward Omozee. From Exhibit L, it was the bank that separated the loan account from the original account.

The Defendant closed their case and the suit was adjourned for adoption of Written Addresses.

Both counsel filed Written Addresses which. The Defendant's Final Written Address is dated 10th November, 2016 and filed on the 11th of November, 2016. The Claimant's Final Address was dated and filed on the 1st of December; 2016. The Defendant also filed a Reply to the Claimant's Address dated and filed on the 15th of December, 2016.

In his first address, the learned counsel for the Defendant, Nyerhovwo Orhe Esq. identified a sole Issue for Determination as follows:

“Whether in the light of the pleadings and evidence before court and the circumstances of this case the claimants have sufficiently and convincingly proven their case to be entitled to the reliefs sought.”

Arguing the issue, learned counsel submitted that in the light of the pleadings and evidence before the court the claimants have not sufficiently and convincingly proved their case for the following reasons:

- i. The claimants’ case is not supported by credible evidence;
- ii. The claimants on record do not have the *locus standi* to institute this action; and
- iii. The claimants’ claim for damages is not supported by evidence.

Claimants’ Case Not Supported By Evidence:

Counsel submitted that for a claimant in a suit before a court of law to succeed, the Claimant must lead credible evidence in support of his case. He maintained that a more onerous burden is placed on the claimant when the defendant joins issues with him on the pleadings. In such a case, if the claimant’s evidence does not preponderate against the defendant’s, the court must resolve the suit against the claimant. See the case of **Geneva v. Afribank (Nig.) Plc [2013] All FWLR (Pt. 702) pg. 1652 [Pp. 1678-1679, paras. G-A]**.

See also **section 131 (1)& (2) of the Evidence Act 2011.**

He posited that the defendant joined issues with the claimants on the above mentioned assertions and contends that the overdraft has not been liquidated and aside the fact that interest accrual on the overdraft was never stopped, interest will continue to build up on the debit balance in the loan account until the same is fully paid in accordance with the terms and conditions regulating the overdraft facility.

He submitted that it is trite law that liquidation of a loan secured by mortgage is a condition *sine-qua-non* to the release of the mortgage security and

referred the Court to: **Law of Securities for Bank Advances (Mortgage of Land) 2004, 2nd edition**, by Professor Emeka Chianu at page 186 and the case of: **Bickersteth v. Igho (1949) 19 NLR 63**. He also referred to paragraph 1 of the Deed of Legal Charge (i.e. Exhibit D in this suit) and paragraph 3(d) of the Deed of Legal Mortgage (i.e. Exhibit D1 in this suit).

He submitted that the foregoing confirms indisputably that full repayment of the overdraft and all accrued costs and interest thereof is a fundamental term of the mortgage transaction between Mr. Edward Eguogie Omozee and the defendant.

He maintained that there is no evidence to show that upon the mortgagor's death, any person(s) approached the defendant in the proper manner to ascertain the state of the overdraft facility.

He referred the Court to Exhibit F a letter dated 30/1/1985 written by one A. S. Enakele of Aigbona Enakele & Co (who identified themselves as the statutory auditors of Omozee Commercial and Technical Company Ltd) addressed to the defendant requesting that all operations on all accounts operated by the mortgagor be stopped; another letter dated 25/6/1985 (i.e. Exhibit H) purportedly addressed to the defendant, wherein the signatories requested that interest on Account No. 500183 be stopped; and another letter dated 30/9/1998 (i.e. Exhibit J6) and purportedly addressed to the defendant where the signatories noted that they had cleared the outstanding debit balance in Account No. 001136 by paying the sum of ₦37,706.97 (Thirty-seven thousand seven hundred and six naira ninety-seven kobo); hence they requested for the release of the title instrument of the mortgage security.

Counsel argued that assuming but without conceding that Exhibits F, H and J6 were actually written to the defendant, one would ask, in the light of the fact that Omozee Commercial and Technical Ltd is a limited liability company with directors and shareholders, whether Exhibits F, H and J6 qualify as valid letters in the eyes of the law to be acted upon by the defendant? He answered in the negative and submitted that only the board of directors or any person(s) authorized by the board has the right to make such request from the defendant.

Again he pointed out that the alleged balance of the loan account was extracted from a purported bank certificate obtained from the Probate Registry (i.e.

Exhibit G) which relates only to the personal estate of late Edward Omozee and not to Omozee Commercial and Technical Ltd.

He referred the Court to paragraph 31 of the 2nd Claimant's Statement on Oath filed on 26/4/2013 which shows clearly that Exhibit J6 which is dated 30/9/1998 was only delivered to the defendant in the year 2006 (21 years after the death of the mortgagor and sole signatory to the company's account). He pointed out that for a period of 21 years (1985-2006), the claimants never bothered to ask for the details of the company's account or to ascertain the balance of the loan account.

He stated that despite the failure of the appropriate authority to request for the account details of Omozee Commercial and Technical Ltd, when the claimant's letter dated 30/9/1998 was received by the defendant on 18/9/2006, the defendant immediately replied via a letter dated 26/9/2006 (i.e. Exhibit J5) and stated categorically thus:

- i. That claimant's letter dated 30/9/1998 was received by defendant on 18/9/2006;
- ii. That the outstanding debit balance in respect of the aforesaid overdraft was N483,676.38 (Four hundred and eighty-three thousand six hundred and seventy-six naira thirty-eight kobo);
- iii. That the debt has to be liquidated before the title document can be released;
- iv. That if the claimants were convinced that the debt has been liquidated they should forward the evidence of liquidation to the bank; and
- v. That interest will continue to accrue on the outstanding debt of N483,676.38 until the indebtedness is liquidated in full.

He posited that instead of heeding the aforesaid directives, the claimants purportedly wrote further letters admitted as Exhibits J4, J3 and J2 respectively to the defendant wherein the claimants:

- i. Alleged that they had lost all documents pertaining to their transactions with the bank; and

- ii. Pleaded that the bank should go through its ledger books and other documents relating to payment to ascertain and verify that the overdraft had completely been liquidated.

Counsel submitted that where the claimants have failed to produce any proof that the overdraft had been liquidated and have chosen to resort to the records of the defendant, they cannot turn around to challenge the defendant's records by resorting to conjectures and sentiments. See **section 133 (1) of Evidence Act 2011**.

Furthermore he submitted that a party who alleges that he paid money into an account must prove same by producing the deposits slips with which the said payment was made. See: **Omoyola v. Enterprise Bank Ltd [2013] All FWLR (Pt. 698) pg. 911 [P. 933, paras A-C] Ratio 9**.

He urged the Court to enter judgment against the claimants in the absence of credible and reliable evidence of full liquidation of the overdraft facility in issue.

Counsel also referred to the letters written to the Defendant by one Dr. G. I. S. Omonuwa & Co, a firm of legal practitioners who introduced themselves unequivocally as *counsel to the family of late Mr. Edward Omozee* (Exhibits ̄K̄ö and ̄K̄1̄ö), requesting for a comprehensive statement of account of Omozee Commercial and Technical Ltd and threatening to sue the defendant in the event that the defendant failed to furnish them with same.

Counsel submitted that every limited liability company is an independent and separate entity completely different from its directors or shareholders and their relatives thereof. See: the case of **Adewumi v. Adebesei Telecoms (Nig.)Ltd. [2013] All FWLR (Pt. 703) pg. 1954 [P. 1991, paras. C-F, Pp. 1992-1994, paras.D-A] Ratio 6**. See also **sections 38 and 299 of the Companies and Allied Matters Act cap C20. Laws of the Federation of Nigeria, 2004**.

He argued that in the light of the above, looking at paragraph one of Exhibit ̄K̄ö which states categorically that Dr. G. I. S. Omonuwa & Co are counsel to the family of the deceased, it is not proper for the defendant to release any detail/statement of account of Omozee Commercial and Technical Ltd to Dr. G. I. S. Omonuwa & Co.

Furthermore, he submitted that assuming but not conceding that a wrong has been committed against Omozee Commercial and Technical Ltd, the law is that when an injury is done to a company, only the company itself can bring an action for vindication or claim for the injury done to it. See the case of **Omisade & Ors v. Akande (1987) 2 NWLR (Pt. 55) 158 at 170.**

Again, Counsel submitted that it has been held in a plethora of cases that where an action is purported to have been taken on behalf of a company, the company can ratify such action and the same will be deemed to be proper in law.

He posited that apart from the fact that the firm of legal practitioners never claimed to have acted for Omozee Commercial and Technical Ltd, there is no evidence before the Court to show that the solicitors' action in writing Exhibits K and K1 was sanctioned or ratified by the Board of directors of Omozee Commercial and Technical Ltd or the company in a General Meeting. He cited **section 299 of the Companies and Allied Matters Act cap C20. Laws of the Federation of Nigeria, 2004;** and the decision of the Court of Appeal in: **Ejekam v. Devon Ind. Ltd. (1998) 1 NWLR (Pt. 534) 417 at 433.**

He therefore urged the Court to hold that Exhibits K and K1 are illegal and the defendant rightly discountenanced same by refusing to release the account details of Omozee Commercial and Technical Ltd to any person without the authorization of the board of directors of the company.

Counsel also addressed on Exhibit 5Gö, the certificate issued by the Probate Registry to show the bank balance of the loan account. He submitted that for all intents and purposes, Exhibit 5Gö does not qualify as a lawful source of the company's account position with the defendant.

He submitted that a close observation of Exhibit 5Gö would show that it is not indicated anywhere on the face of the document that it relates to either Account Number (500183) or (001136). Furthermore, it is clearly written in legible letters on the face of Exhibit 5Gö that the purported bank certificate relates to the *personal property* of late Mr. Edward Eguagie Omozee and the amount standing to his personal credit in the books of banks. That Mr. Edward Omozee's personal assets and liabilities are not and cannot be construed as the assets and liabilities of Omozee Commercial and Technical Ltd which is a limited liability company. The same applies to Exhibit 5Bö which is a Letter of Administration authorizing

claimants to superintend only the real and personal estate of late Edward E. Omozee.

Learned Counsel submitted that distortions and contradictions abound in claimants' pleadings and evidence before court. For example, at paragraph 13 of the Consequentially Amended 5th Statement of Claim and Defence to Counter-Claim, the claimants allege that the defendant's Branch Manager visited the family of the deceased to commiserate with them and express his gratitude for their efforts in clearing the debt. But at paragraph 28 of the statement on oath of the 2nd Claimant, the claimants stated that the Branch Manager did not visit the deceased's family by himself but through his debt relief committee.

He submitted that this contradiction is too grave to be swept under the carpet. He maintained that it is trite law that in judicial proceedings, parties are expected to be consistent in stating their case and no party is allowed to approbate and reprobate at the same time. He said that where the evidence led by a party in support of his case falls foul of this hallowed principle of law, the court is expected to discountenance such evidence in its entirety. He urged the Court to do so in this case and relied on the cases of: **Nwabude v. Ugodu [2011] All FWLR (Pt. 604) pg. 26 [P. 46, Paras. F-H] Ratio 4; and Akaninwo v. Nsirim [2008] All FWLR (Pt. 410) pg. 610 [P. 663, paras. C-D]**

On the vexed issue of the total liquidation of the loan, he submitted that in the light of the fact that parties in this suit have joined issues on the full liquidation of the overdraft facility in issue; the claimants' evidence must be manifestly weightier than the evidence of the defendant before this Court can decide in their favour. He said that if the claimants' evidence does not preponderate, their case must fail. See: **Omoyola v. Enterprise Bank Ltd (Supra) [P. 933, paras. A-C] Ratio 9.** He said that the only evidence the claimants placed before the court in proof of the acclaimed liquidation of the overdraft facility are some pieces of bank tellers i.e. Exhibit 10 with which claimants allegedly lodged cash into Account number 500183 between April and August, 1985. He said that the sum total of all the lodgments made with Exhibit 10 is not anywhere close to ₦35,873.08DR which the claimants themselves allege was the balance in the loan account at the time of death of Mr. Edward Omozee on 28/1/1985. He said that the claimants tried to explain their shortcoming by alleging that they had lost some of the tellers with which they lodged money into the loan account as recounted in Exhibits 11, 12,

õJ2ö, õJ3ö, õJ4ö and õJ6ö. He said that this is a mere appeal to sentiment which cannot avail the claimants because sentiment has no place in law. See the case of **Bassey v. PHCN [2012] All FWLR (Pt. 613) 2019 [P. 2025, paras. F-G] Ratio 1**

Counsel argued that since full liquidation of the overdraft facility is a condition *sine-qua-non* for the release of the title instrument in issue, the claimants' failure to prove that the overdraft has been completely liquidated is fatal to the claimants' case. He maintained that the defendants have no duty to prove that the debt was not paid. See: the case of **Omoyola v. Enterprise Bank Ltd (Supra)[P. 933, paras. E-H] Ratio 5.**

Submitting on the Claimants' contention that the defendant assured the deceased's family that the interest on the overdraft facility will be stopped, Counsel observed that the Claimants did not adduce any evidence to substantiate this alleged assurance by the defendant. He urged the Court to hold that the defendant did not give any sort of assurance to claimants or their family thereof in respect of stoppage of interest on the overdraft facility.

Counsel referred to paragraph 1 (e) of the Claimants' Defence to Counter-Claim wherein claimants stated that the defendant was duly informed of the demise of late Edward Omozee in January 1985 and so the interest should have ceased by law and banking policy and submitted that the law is that where a bank grants a loan facility, the bank is entitled to charge interest continuously on the loan until same is liquidated. See the case of: **Nagebu Company (Nig.) Ltd v. Unity Bank Plc [2013] All FWLR (Pt. 698) 871 [P, 906. Paras. B-C] Ration 10.**

Arguing further, Counsel referred the Court to paragraph four of Exhibit õJö wherein the claimants pleaded very passionately for stoppage of further interest and waiver of accrued interest. For the avoidance of doubt, he quoted the said paragraph 4 thus:

õOUR PASSIONATE APPEAL. We wish to request you to kindly look at our plight and apply your humanness to the situation. We request you to kindly check account No. 500183 of the defunct National Bank Limited, Benin City so as to see if our payments

were transferred to this account instead of account 001136. And in the alternative if this cannot be done, then please in the name of the Almighty God and Humanity, we passionately plead that you:

1. Stop further interest on the account.
2. Wave off the interest of over ₦500,000.00 already charged to this account. (underlined by counsel)

He submitted that the above underlined portion of Exhibit ðJö is a clear admission by claimants that interest of over ₦500, 000.00 had accrued on the loan account as at 6/7/2007 when Exhibit ðJö was written. Thus, he maintained that the attempt by the claimants to challenge Exhibit ðMö in their Defence to Counter-Claim amounts to blowing hot and cold. This he said is not tenable in law and he relied on the case of: **Akaninwo v. Nsirim(Supra)**; and the case of: **H.N.I.K.G. vs. U.B.A Plc [2014] All FWLR (Pt. 719) 1137 [P. 1161, para. B] Ratio 5.**

He therefore urged the Court to enter judgment against the claimants on the Counter-Claim; the defendant/Counter-Claimant having established that the overdraft is yet to be liquidated.

CLAIMANTS LACK *LOCUS STANDI*:

Learned Counsel submitted that in view of the pleadings, evidence and circumstances of this case, the claimants on record lack the *locus standi* to bring this suit and the Court in turn lacks the jurisdiction to entertain same.

According to him, the pleadings and evidence before the Court show clearly that the overdraft facility was originally granted to Omozee Commercial Typewriters sometime in 1977 and sometime in 1980, the said Omozee Commercial Typewriters metamorphosed into Omozee Commercial and Technical Ltd. The claimants themselves frontloaded the Certificate of Incorporation of Omozee Commercial and Technical Ltd with **RC No. 34658**; which they annexed to Exhibit ðLö in this suit.

He argued that the claimants do not have the capacity to sue on behalf of Omozee Commercial and Technical Ltd for any wrong whatsoever because:

- I. They are neither directors nor shareholders of Omozee Commercial and Technical Ltd;
- II. The board of directors did not authorize the institution of this suit; and
- III. There is no resolution of the board of directors ratifying the institution. Furthermore, it is not in evidence that either the directors or members in general meeting sanctioned the institution of this suit in any manner whatsoever.

Counsel pointed out that the claimants purportedly derived their authority to sue from Exhibits ðAö, ðBö and ðCö. He observed that Exhibit ðBö is a Letter of Administration of the real and personal estate of Edward E. Omozee. Whilst Exhibits ðAö and ðCö are letters of authority for legal action by which the claimants were authorized based on Exhibit ðBö to take legal actions against the defendant for the release of title instrument relating to the real and personal property of Mr. Edward E. Omozee which was pledged as security for an overdraft facility.

He submitted that from the foregoing, there is no doubt that the claimants are merely acting for the estate of late Edward E. Omozee .He said this is also reflected on the face of the Claimantsø claim before this Court.

The learned Counsel summarized the following salient points to establish the lack of locus standi on the part of the Claimants:

- I. There is no privity of contract between the claimants and the defendant;
- II. The Claimants have no legal nexus with Omozee Commercial and Technical Ltd to clothe them with the right to sue on their behalf;
- III. The Claimantsø right to sue the defendant for release of the title instrument as Administrators of the estate of late Edward E. Omozee can only crystalize after the overdraft has been liquidated;
- IV. Until the overdraft is fully liquidated, the title instrument sought to be recovered by claimants cannot be classified as part of the estate of late Edward E. Omozee;
- V. Until the overdraft is fully liquidated, the defendant remains in lawful possession of the title instrument and reserves the right to deal with same in compliance with the law as a legal mortgagee;
- VI. Upon the execution of Exhibits ðDö and ðD1ö, the mortgagor, Mr. Edward E. Omozee became divested of all his rights to the mortgaged property as all

go to the mortgagee and the mortgagor is merely left with his equity of redemption which crystalizes upon the fulfillment of the terms of the mortgage and the full payment of the debt secured. This is also applicable to the administrators of the estate of the mortgagor and any person acting on his behalf upon his demise.

He therefore submitted that the claimants are mere meddling interlopers not deserving of the attention of this Court and relied on the case of **Adetono vs. Zenith Bank Plc(Supra) [Pp. 1454-1455,paras. H-C] Ratio 2** where the Supreme Court held that:

“A mortgage is the creation of an interest in a property defeasible (i.e. annullable) upon performing the condition of paying a given sum of money with interest at a certain time. The legal consequence of the definition is that the owner of the mortgaged property becomes divested of the right to dispose of it until he has secured a release of the property from the mortgagee. In other words, in a proper mortgage, the title to the property must have been transferred to the mortgagee subject to the proviso of the mortgaged property being reconveyed by the mortgagee to the mortgagor upon performing the conditions stipulated in the mortgage deed and invariably upon payment of the debt at the time so stipulated in the deed of mortgage. The mortgagor is liable to repay the loan as stipulated; otherwise the mortgaged property is foreclosed. It is settled that by a legal mortgage, the mortgagee becomes the legal owner of the property although the mortgagor may be left in actual possession/occupation of the mortgaged property but because the mortgagee is entitled to enter into possession immediately upon the execution of the mortgage, he has the right to immediate possession. In this position, the mortgagee wields enormous rights over the mortgaged property.”

Counsel therefore urged the Court to hold that claimants lack the requisite *locus standi* to institute this action and this Court lacks the jurisdiction to entertain same. He further urged the Court to dismiss the suit with crushing costs and relied

on the case of: **Amobi vs. Nzegwu [2014] All FWLR (Pt. 730) Pg 1284 [P. 1299, Para. C] Ratio 5.**

CLAIMANTS ARE NOT ENTITLED TO DAMAGES AS CLAIMED OR AT ALL:

Counsel submitted that since the Claimants lack the capacity to sue, it follows naturally that the Claimants are not entitled to damages of any sort from the defendant because they have suffered no wrong.

In the alternative, he submitted that assuming but not conceding that claimants have the requisite locus standi to institute this action, the claimants have nonetheless suffered no injury on account of the actions or inactions of the defendant as to be entitled to damages. He referred the Court to the claimant's Written Statement on Oath filed on 26/4/2013 and his evidence under cross-examination on 7/6/2016 where the 1st claimant testified that he inherited the mortgaged property in issue without let or hindrance from the defendant or any person whomsoever after burying his late father as his first son in accordance with Bini native law and custom of inheritance. He argued that if the 1st claimant has peacefully inherited the mortgaged property and also has access to a certified copy of the title instrument then he has not suffered any injury to warrant the award of damages. He submitted that a claimant must be worthy of damages before same can be granted by the court. See the cases of: **S.P.D.C Nig. Ltd. v. Katad Nig. Ltd.[2005] All FWLR (Pt. 263) 675 [P. 689, paras. F-G; and C. B. N v. Okojie [2015] All FWLR (Pt. 807) 478 [P. 507, para. E] Ratio 15.**

COUNTER-CLAIM:

Submitting on the Counter-Claim, learned Counsel referred the Court to the testimony of the sole witness for the Defendant who reechoed the evidence that Omozee Commercial Typewriters metamorphosed into Omozee Commercial and Technical Ltd, a limited liability company which inherited all the assets and liabilities of the original company including the overdraft facility in issue and accrued interest thereof.

He submitted that Omozee Commercial and Technical Ltd is indebted to the defendant in the manner outlined in the defendant's Counter-claim before this Court and the claimants are liable to the defendant in the same sum before the claimants can request for the title instrument to be released to them.

Next, Counsel addressed the Court on the competence of Exhibits M0 and M10, tendered by the Defendant to establish the current indebtedness of the Claimants.

He referred the Court to the evidence of the DWI who testified during that he started working with the defendant in 2013 after having worked with other banks and financial institutions for many years and that in all his years in the employment of banks he has never seen or known of any banking policy which states that interest stops running on a loan account upon the death of the account holder or signatory to the account. He submitted that this is a confirmation that Exhibit M0 is unimpeachable in content and policy.

Finally, he urged the Court to grant the Counter-claim of the defendant in its entirety and dismiss the claimants' case for being unsupported by evidence, vexatious, gold-digging, instituted without *locus standi* and thereby robbed the court of the requisite jurisdiction.

As earlier stated, the learned Counsel for the Defendant also filed a further Written Address titled: ***Defendant's Reply to the Claimant's Final Written Address*** dated and filed on the 15th of December, 2016. The said further address is mostly a veiled repetition of the arguments contained in his marathon address. He mainly urged the Court to discountenance and reject the arguments advanced by the Claimant's Counsel in her Written Address. All the submissions made by both counsel will be considered in this judgment.

On the 15th of December, 2016, the learned Counsel for the Claimants, Ms. Adesuwa Omonuwa adopted her Written Address. With the leave of the Court, she advanced some additional oral arguments. In her further submissions, Counsel maintained that it is the law that a bank must stop charging interest upon

notification of the death of the customer. For this submission, she referred the Court to the case of: National Bank of Nigeria Ltd v Adejoro (1985) 3 Journal of Private and Property Law Unilag 67 at 302 -303, also reported in the book: Law of Banking, Texts,Cases & Comments by Prof. Emeka Chianu.

In her Written Address, the learned Counsel formulated three Issues for Determination as follows:

ISSUES FOR DETERMINATION:

- (i) Whether the Defendant is justified in refusing to release the title documents of late Edward Omozee to the Claimants;
- (ii) Whether the Claimants are entitled to an award of damages for the unlawful withholding of the title documents of late Edward Omozee which he had used as security for a facility obtained pursuant to a legal mortgage between Omozee Commercial Typewriters and the Defendant; and
- (iii) Whether there is any merit in the Defendant's Counter-Claim.

ISSUE I - WHETHER THE DEFENDANT IS JUSTIFIED IN REFUSING TO RELEASE THE TITLE DOCUMENTS OF LATE EDWARD OMOZEE TO THE CLAIMANTS:

Learned Counsel submitted that it is quite clear that the parties to the legal mortgage and the subsequent legal charges (Exhibits D, D1 and D2) were Omozee Commercial Typewriters and National Bank Ltd. She asserted that it was on the basis of these written agreements that the title documents were handed to the bank to secure the facility it enjoyed from the Bank. She maintained that Omozee Technical Commercial Limited is a limited liability company, with a distinct legal personality from Edward Omozee, and it **never** entered into any legal mortgage or charge with the National Bank Ltd, much less the Defendant.

She further stated that the limited liability company never created any equitable mortgage with the bank, because the owner of the said title document

never deposited it with the bank to secure any facility for Omozee Technical and Commercial Ltd neither did he sign any written authorization for the limited liability company to use his personal property to secure its loans. Again, she emphasized that the board of Directors of the company (of which Edward Omozee was a Director) never passed a Resolution authorizing the Company to use the personal property of Edward Omozee to secure the facility it had with National Bank Ltd neither did the Board of Directors of National Bank Ltd pass any Resolution directing the Bank to use the personal property of Edward Omozee as security for the facility

Counsel argued that while Omozee Commercial Typewriters had no separate legal personality from Edward Omozee, Omozee Technical and Commercial Ltd had a distinct legal personality from Edward Omozee and therefore could not appropriate Edward Omozee's personal property as security for any facility without his express written consent. She posited that it was irrelevant that Edward Omozee was a Director of the limited liability Company, because the Directors or shareholders or their relations have a distinct legal personality from the limited liability company. See the cases of: **Salomon v. Salomon(1896)UKHL 1; Adewunmi v. Adebisi Telecoms (Nig.) Ltd. (2013) All FWLR (Pt 703) 1954, 1991 Ratio 6; and Sections 38 and 299 of the Companies and Allied Matters Act (CAMA) Cap C20, Laws of the Federation of Nigeria 2004,** which alleged the Defendant's counsel cited out of context.

Counsel submitted that there is no nexus in law between Edward Omozee's personal property known as No. 3 Abu Street, off Agho Street, Uzebu Quarters (Ward 20/K) and Omozee Technical and Commercial Typewriters Ltd.

Furthermore, she urged the Court to reject the submission that **Omozee Commercial and Technical Company acquired/inherited all assets and liabilities of the original company including the aforesaid overdraft facility.** According to her, there is no known principle of law that permits such an 'acquisition' or 'inheritance' neither was the Defendant able to present any documentary evidence in support of that claim.

Counsel submitted that whatever facility enjoyed by Omozee Technical and Commercial Ltd after the cessation of Omozee Commercial Typewriters was unsecured and the blame for that fact cannot be laid at the doorstep of the Claimants. Furthermore, she maintained that the Defendant cannot deny the 1st Claimant of his lawful inheritance based on an imaginary legal mortgage.

She posited that since Omozee Technical and Commercial Ltd was never privy to the legal mortgage and subsequent charges which the Defendant relies upon for withholding the late Edward Omozee's title documents and statements of account. According to her, the title documents were not deposited by Omozee Technical and Commercial Ltd (which was only incorporated in 1980) or pursuant to a resolution of its directors. They were deposited by Edward Omozee trading under the name and style of Omozee Commercial Typewriters in 1977 to secure a facility he had personal liability for because he and Omozee Commercial Typewriters were one and the same in law.

On the issue of payments which the family of late Edward Omozee made to National Bank Ltd after his death in 1985, Counsel submitted that the Defendant has not shown that the tellers (Exhibit I) with which payments were made were not tellers of the National Bank Ltd or that they were forged or a fraud. Secondly, she stated that the Defendant was not able to produce a Statement of Account covering the lifetime of late Edward Omozee who they admitted, under cross-examination, was the sole signatory of the account. She said that such a statement of account would have disputed the Claimant's claim if indeed the claim were false. She faulted the Statement of Account which they tendered at the trial (Exhibit M) on the grounds *inter alia* that it contained only the loan account No. 1136 which commenced from September 29, 1986 twenty months after the demise of Edward Omozee; and the Defendant was not able to explain how the figures contained therein were arrived at nor even the source. She wondered why the Statement of Account No. 50013 was never tendered. She urged the Court to discountenance the said Exhibit M.

Counsel referred the Court to the evidence of the Defence witness under Cross-examination where he admitted that the loan account was unilaterally

created by the bank as evidenced in Exhibit L8 and that after the demise of Edward Omozee no money was ever withdrawn from his account by anyone.

She therefore argued that the payments made into Account No. 500183 by the family of the Claimants after Edward Omozee's death were made **TO THE BANK, WERE NEVER WITHDRAWN, REMAIN IN THE CUSTODY OF THE BANK, AND WERE IN SATISFACTION OF THE OUTSTANDING BALANCE** which had been given **BY** the Bank to be N35,873.08DR. She said that the tellers (Exhibit I) add up to N25, 481.97 leaving only a balance of N10, 391.11 which she alleged the Claimants had liquidated but unfortunately misplaced the tellers.

On the burden of proof, Counsel submitted that in this case, the question whether or not the debt incurred by Omozee Commercial Typewriters was liquidated is in issue. She said that the Claimants assert that the debt was liquidated and tendered tellers evidencing payment at trial (Exhibit I). She submitted that the burden consequently shifts to the Defendant to disprove payment. For this view, she relied on: **Section 136 of the Evidence Act, 2011.**

She submitted that the Defendant has not been able to disprove the Claimants lodgments into the account because this would require production of a comprehensive statement of account hence it resorted to a misstatement of the law by alleging that the Defendant failed to produce evidence of any letter showing that the debt had been liquidated. She said that the Defendant tendered no evidence of ever sending any statements of account to the late Edward Omozee much less to the Claimants.

Counsel submitted that the Defendant failed in their fundamental duty to provide the late Edward Omozee and the Claimants with regular and comprehensive Statements of Account as required by law and Nigerian Banking Policy thereby making it impossible for the Claimants to show conclusively that the debt had in fact been liquidated. She referred the Court to the following authorities: **The Central Bank of Nigeria POLICY on Consumer Protection (CONSUMER EDUCATION) which states clearly the Right to free monthly Statement of Account;** and **paragraphs 3.4, 4.1 and 4.3 of the CODE OF BANKING PRACTICE Produced by the General Assembly of Bank Chief Executives**

Under the Auspices of the CHARTERED INSTITUTE OF BANKERS OF NIGERIA still on the same point.

She submitted that the Defendant cannot benefit from its own failure to fulfill its duty neither has it discharged the burden of disproving the Claimants' claim that it made lodgments in liquidation of the debt owed by late Edward Omozee.

She further urged the Court to overrule the Defendant's submission that the Court should ignore Exhibit I as there is nothing speculative about it. According to her, they are documents which emanated from the Defendant and where the Defendant willfully withholds information which could assist the Court in verifying or disproving some facts, the Defendant cannot profit from that conduct. For this view, she relied on: **Section 167(d) of the Evidence Act, 2011.**

Counsel argued that the Defendant having withheld the requisite Statements of Accounts Nos. 500183 and 1136 from the Claimants and from the Court, the Court is entitled to presume that the information contained therein would be unfavourable to the Defendant, that it would show clearly that the debt was in fact liquidated. She submitted that this point is underscored by the fact that Exhibit M shows nothing at all about the operation of the account during the lifetime of its only signatory, Edward Omozee neither does it show the lodgments the Claimants made after his death up till August 1985. She posited that the Defendant's withholding of this vital information is inimical to the Court's attempt to do justice in this case.

Still on Issue (i), Counsel went on to address the question of whether the Defendant should have stopped charging interest on the debt upon notification of the death of the deceased. She reiterated that the debtor was EDWARD OMOZEE trading under the name and style of OMOZEE COMMERCIAL TYPEWRITERS as clearly stated in Exhibits D, D1 and D2. She submitted that it is the practice upon notification of death for interest to be stopped to enable the family pay of the debtor's debt. She stated that this is a standard global banking practice as may be seen in various banking publications. She cited an example of such publication: **The Money Advice Service publication on 'Dealing with the debts of someone**

who has died' available at <https://www.moneyadviceservice.org.uk> (last viewed on November 1, 2016).

Furthermore, she submitted that the Defendant's argument that the security for a mortgage cannot be released until the debt has been repaid is clearly inapplicable because the Claimants have adduced evidence of payment of the debt.

She urged the Court to resolve Issue (i) in favour of the Claimants.

ISSUE II - WHETHER THE CLAIMANTS ARE ENTITLED TO AN AWARD OF DAMAGES FOR THE UNLAWFUL WITHHOLDING OF THE TITLE DOCUMENTS OF LATE EDWARD WHICH HE HAD USED AS SECURITY FOR A FACILITY OBTAINED PURSUANT TO A LEGAL MORTGAGE BETWEEN OMOZEE COMMERCIAL TYPEWRITERS AND THE DEFENDANT.

Learned Counsel submitted that following the arguments under Issue 1, the Claimants, having proved their case, are entitled to damages in the sum of N30,000,000.00 (Thirty Million Naira) for wrongfully withholding the said title documents and refusing to return them after the debt had been paid.

She submitted that Damages are the pecuniary recompense given to a person for the actionable wrong that another has done to him. She relied on the following decisions: **Kotek Construction Ltd v. Ekisola (2010) LPELR-1703 (SC)**,;and **Economic and Financial Crimes Commission v. Alhaji Baba Inuwa & Anor (2014) LPELR-23597 (CA)**.

Counsel pointed out that the Claimants claim is only for general damages, so the Claimants need not prove any specific damage or injury. She submitted that having proved their case, the Court can reasonably assess damages based on the following factors: The obdurate refusal of the Defendant to return the title documents in breach of their contractual obligation under the legal mortgage; subjecting the Claimants to stress and financial hardship occasioned by having to institute to institute legal action; and the sustained years of litigation at great financial expense.

She submitted that the General Damages is meant to be place the Claimants in the same position as if the contract had been performed. See the case of: **Stag Engineering Company Ltd v. Sabalco Nigeria Ltd and Anor (2008) LEPLR-8485 (CA)**. She reiterated that the Defendant's refusal to release the title documents after the liquidation of the debt amounts to a breach of contract. She relied on the dictum of Fabiyi JSC in the case of: **Best (Nigeria) Ltd v. Blackwood Hodge (Nigeria) Ltd &Ors (2011) LEPLR-776 (JSC)** where he said:

There is no gainsaying the point that a breach of contract is committed when a party to the contract without lawful excuse fails, neglects or refuses to perform an obligation he undertook in the contract or incapacitates himself from performing same or in a way back down from carrying out a material term.

Counsel also relied on the following decisions: **Adeoti & Anor v. Ayorinde & Anor (2001) 6 NWLR (Pt 709) 336**; and **1st Concept Associates (Nigeria) Ltd v. Tropics Finance & Investment Company Ltd (2014) LEPLR-22644 (CA)**,per Oseji JCA.

ISSUE III– WHETHER THERE IS ANY MERIT IN THE DEFENDANT'S COUNTER-CLAIM:

Counsel submitted that the Defendant's Counter-Claim is completely baseless in law, in fact and in logic. She stated that the Defendant never explained to the Court how they arrived at the amount they are claiming.

She submitted that in withholding the detailed and comprehensive statement of the accounts numbers 500183 and 1136, Section 179 (d) of the Evidence Act 2011 comes into play to enable this Court assume that the detailed statements of account would not favour the Defendant's case. She maintained that he who asserts must prove. She submitted that the Defendant has woefully failed to prove its Counter-Claim and urged the Court to decide Issue III in favour of the Claimants and hold that the Counter-Claim lacks merit.

In conclusion, she urged the Court to grant the Claimants' Claim and dismiss the Defendant's Counter-Claim.

I have carefully considered all the processes filed in this Suit, together with the evidence led, the exhibits admitted in the course of the hearing and the addresses of the respective Counsel to the parties. Upon a careful examination of the Issues formulated by learned counsel for the parties, I am of the view that the three Issues for Determination formulated by the Claimants are sufficient to determine the case. The sole Issue formulated by the Defendant is not comprehensive enough. Strangely, it failed to capture the Counter-Claim of the Defendant.

Consequently, I adopt the three Issues formulated by the Claimants with slight modifications as follows:

- (i) Whether the Defendant is justified for refusing to release the title documents of late Edward Omozee to the Claimants;
- (ii) Whether the Claimants are entitled to an award of damages for the refusal of the Defendant to release the title documents of late Edward Omozee which he had used as security for the loan facility which he obtained from the Defendant; and
- (iii) Whether there is any merit in the Defendant's Counter-Claim.

Before I consider the Issues for Determination, there is a preliminary issue which I think is fundamental enough to be determined before we decide the substantive issues. This is the challenge raised by the Defendant on the lack of *locus standi* on the part of the Claimants.

It is settled law that the *locus standi* of a claimant is a crucial matter touching on the competence and the jurisdiction of the Court. It is so fundamental that the Court is obliged to determine the issue first before going into the merits of the case. See the cases of: ***Momoh vs.Olotu (1979) 1 All NLR 117; and Egolum vs.Obasanjo (1999) 7 NWLR (Pt.611) 355 at 410.***

To ascertain whether a Claimant in an action has *locus standi*, the pleading, that is the statement of claim must disclose a cause of action vested in the Claimant. See: ***Adefulu vs.Oyesile (1989) 5 NWLR (Pt.122) 377; Senator Adesanya vs. President of Nigeria & Anor (1981) 5 S.C. 112-119; Chief Irene Thomas vs.Olufosoye (1985) 3 NWLR (Pt.13) 523 at 538-539.***

In a nutshell, the Defendant challenged the *locus standi* of the Claimants on the grounds *inter alia* that: there is no privity of contract between the claimants and the defendant; the Claimants have no legal nexus with Omozee Commercial and Technical Ltd to clothe them with the right to sue on their behalf; and the Claimants' right to sue the defendant for release of the title instrument as Administrators of the estate of late Edward E. Omozee can only crystallize after the overdraft has been liquidated.

Going through the extant pleadings of the Claimant, the first point to note is that the Claimants are suing on behalf of themselves and the Administrators of the Estate of late Edward Omozee. They are not suing on behalf of Omozee Technical and Commercial Ltd as the learned Counsel for the Defendant tried to stress upon in his address. Clearly, on the face of the Court processes, the company is not a party to this suit so the issue of the nexus between the Claimants and Omozee Commercial and Technical Ltd is clearly misconceived.

In their capacity as Administrators of the said estate, they are seeking a Declaration that they are entitled to a return of the title documents to the property known as No. 3, Abu Street, off Agho Street, Off Ekenwan Road, Benin City, Edo State, belonging to the deceased the debt owed for which the property was used as security having been fully repaid to the Defendant. They are also claiming the sum of N30, 000,000.00 (Thirty Million Naira) as damages for wrongfully withholding the title documents to the said property despite repeated demands by them for the release of the documents.

To establish their status as Administrators, they tendered: Exhibit B, the Letter of Administration of the real and personal estate of Edward E. Omozee; and Exhibits C and D, letters of authority to institute this suit for the release of the title documents relating to the real and personal property of Mr. Edward E. Omozee which was pledged as security for an overdraft.

For a claimant to have *locus standi* in a suit, he must show that he has sufficient interest in the subject matter of the suit. See the cases of: *Yar'adua vs. Yandoma (2015) 4 NWLR (Pt.1448) 123 at 133-134; and Adesokan vs. Adegorolu (1991) 3 NWLR (Pt.179) 293 at 307.*

From the Statement of Claim and the evidence adduced at the trial it is clear that the Claimants have adduced enough evidence to show sufficient interest in the subject matter of this suit. The issues of privity of contract between the claimants and the defendant and the Claimants' right to sue crystallizing after liquidation of the debt are too premature to be determined while considering the

locus standi of the Claimants. Those are substantive issues to be determined on the merits of the entire case. The point must be made that *locus standi* is a threshold issue. See: *Nigerian Airways Ltd. vs. Lapite (1990) 7 NWLR (Pt.163) 392 at 409-410*.

Consequently, I hold that the Claimants have the *locus standi* to institute this suit against the Defendant on behalf of themselves and the Administrators of the Estate of late Edward Omozee.

I will now determine the suit on the merits by considering the Issues for Determination *seriatim*.

ISSUE 1:

WHETHER THE DEFENDANT IS JUSTIFIED FOR REFUSING TO RELEASE THE TITLE DOCUMENTS OF LATE EDWARD OMOZEE TO THE CLAIMANTS:

The resolution of this issue is very pivotal to the determination of the entire suit. The starting point is to identify the parties to the mortgage. The parties to the legal charge and the legal mortgage (Exhibits D, and D1) were *Edward Eguogie Omozee trading under the name and style of Omozee Commercial Typewriters and National Bank of Nigeria Ltd*. The title document itself (Exhibit D2) is bearing the name: *Edward Eguogie Omozee*.

It is instructive to note that the name of the limited liability company Omozee Technical Commercial Limited does not appear in any of the mortgage documents. This is not surprising because the Limited liability Company has a distinct legal personality from Edward Omozee. Thus, I agree with the submission of the learned Counsel for the Claimants that Omozee Technical Commercial Limited did not enter into any legal mortgage or charge with the National Bank Ltd. or the Defendant.

Furthermore, I endorse the submission of learned Counsel that whereas, Omozee Commercial Typewriters has no separate legal personality from Edward Omozee, Omozee Technical and Commercial Ltd is a distinct legal personality from Edward Omozee. Again, it is irrelevant that Edward Omozee was a Director

of the limited liability Company, because the Directors or shareholders or their relations have a distinct legal personality from the limited liability company. See the following authorities on the point: *Salomon v. Salomon & Co. Ltd. (1897) A.C. 22*; *Adewunmi v. Adebisi Telecoms (Nig.) Ltd. (2013) All FWLR (Pt 703) 1954, 1991 Ratio 6*; and *Sections 38 and 299 of the Companies and Allied Matters Act (CAMA) Cap C20, Laws of the Federation of Nigeria.*

I must observe that the Defendant Bank appears to have introduced this confusion of identity through their theory of the metamorphosis or transformation of the Firm from Edward Eguogie Omozee trading under the name and style of Omozee Commercial Typewriters to Omozee Technical Commercial Limited. They went further to contend that the assets and liabilities of the former were inherited by the latter. These are all speculations not borne out of the evidence adduced at the hearing.

The effect of incorporation or registration of a company, firm etc is to confer on it legal entity as a person separate and distinct from its members. It is a legal person with personality of its own. It is more than a mere association of individuals. It becomes an artificial legal entity once the formal procedure of registration or incorporation has been complied with. This is what underlies the concept of corporate personality which became finally established at Common Law in the *locus classicus* of: *Salomon v. Salomon & Co. Ltd. (1897) A.C.22.*

It is settled law that a limited liability company is not bound by any contract entered into on its behalf by its promoters or other persons before its incorporation. The company cannot, after incorporation, ratify or adopt any such contract because there is in such cases no agency and the contract remains that of the parties making it. See the old case of: *Caligara vs. Sartori Co. Ltd.(1961) 1 All N.L.R. 534 at 535.* See also: *Stephen vs. Build Co.(Nig.) Ltd. (1968) 5N.S.C.C.130 at 132.*

The only circumstance under which a pre-incorporation contract can bind a company is if after incorporation, the company enters into a new contract to put into effect the terms of the pre-incorporation contract. See the cases of: *Trans*

Bridge Co.Ltd. vs.Survey International Ltd. (1986) 2 NWLR (Pt.37) 576; and F.A.T.B. vs. Ezegebu (1994) 9 NWLR (Pt.367) 149 at 192-193.

From the factual situation in this case, there is nothing to show that after the incorporation of Omozee Technical Commercial Limited, the company entered into a new contract with the bank to give effect to the Mortgage agreement. This is however not surprising because the collateral for the mortgage was actually the personal property of Edward Omozee.

Furthermore, the board of Directors of the company (of which Edward Omozee was a Director) never passed a Resolution authorizing the Company to use the personal property of Edward Omozee to secure the facility it had with National Bank Ltd.Of course, the company could not have done so, because before the incorporation of the company, the ***legal title*** to the property was already vested in the Defendant bank under the mortgage agreement.

Again, there is no evidence of any resolution by the company to transfer the personal liability of Edward Omozee under the mortgage to the Limited liability Company. I therefore agree with learned Counsel for the Claimants that there is no nexus in law between Edward Omozee's personal property known as No. 3 Abu Street, off Agho Street, Uzebu Quarters (Ward 20/K) and Omozee Technical and Commercial Typewriters Ltd.

For the umpteenth time I wish to reiterate that Omozee Technical Commercial Limited is not a party to this suit. The suit was filed by the 1st and 2nd Claimants on behalf of themselves and the Administrators of the Estate of late Edward Omozee.

Thus it is quite clear that this suit is in respect of a facility obtained by the deceased for which he was personally indebted to the Defendant, having pledged his personal asset as security for the said facility. The mortgage Deed (Exhibit D1) stated very clearly that the agreement is binding on Edward Omozee, his õheirs, executors, assigns and administrators and any person or persons from time to time deriving title under himõ. Hence upon his demise; the lot fell on the Claimants (the lawful Administrators of his estate), to settle his debt.

The Claimants are insisting that they have settled the debt and they are urging this Court to compel the Defendant to release the title deeds to the family.

It is settled law that in a Mortgage transaction, the Mortgagor is only entitled to the release of his title documents after he has fully repaid the debt. See the cases of: *Nasr vs. Berini Bank Ltd. (1967) N.C.L.R. 414 at 423; and Adetono vs. Zenith Bank Plc NSCQR VOLUME 48 2011 Page 605.*

The Claimants are insisting that they have liquidated the debt. According to them the outstanding debt is put at: N35, 873.08DR, as derived from the endorsement on the Bank Certificate issued by the Probate Registry (Exhibit G). They contend that this was the total sum the deceased was owing the bank at the time of his demise. That they requested the Defendant to stop the interest upon notifying them of his demise and they agreed to stop the interest. They even contended that it is a standard banking practice to stop interest on a debt when the deceased dies. The Defendant vehemently rejected that position. According to them the interest was never stopped, it continued to run and it has escalated to the staggering sum of N2, 617,260.39 as per Exhibit M.

One issue that I must determine before I proceed further is whether the Defendant actually agreed to stop the interest upon being notified of the death of the debtor. I must confess that the evidence adduced by the Claimants in this regard appears rather weak for the following reasons:

- I. The Claimants did not tender any credible documentary evidence from the Defendant bank formally stopping the interest;
- II. The Claimants did not lead any evidence on the actual date the interest stopped;
- III. The Claimants did not cite any statute or decided case on the so-called universal banking practice that interests should be stopped when the bank is notified of the demise of the account holder. It is quite clear on the face of the Mortgage Deed (Exhibit D1) that the terms of the mortgage agreement remains binding on the *heirs, executors, administrators etc* of the mortgagor upon his demise;
- IV. In Exhibit J, the Claimants themselves made a passionate appeal to the Defendant, requesting them to “**...1. Stop further interest on the account; and 2. Waive off the interest of over N500,000.00 already**”

charged to this account "(underling mine).This is an admission on their part that the Defendant had not stopped the interest.

From the foregoing, I am of the view that the Claimants have not discharged the burden on them to prove that the Defendant agreed to stop the interest running on the mortgage.

It is significant to note that even from the evidence led by the Claimants; there is not sufficient evidence of the liquidation of the sum of: N35, 873.08DR which they allege is the only amount now outstanding.

It is settled law that the best evidence of proving payment into a bank account is by the production of a bank teller or an acknowledgement that the bank has received payment. See: ***Saleh vs. Bank of the North Ltd. (2006) 6 NWLR (Pt.976) 316 at 327.***

The Claimants tendered some tellers (Exhibit I) as evidence of payment. However, if you add up the total payments captured in Exhibit I it amounts to N25, 481.97 leaving a balance of N10, 391.11 which the Claimants maintained they also liquidated but they allegedly misplaced the tellers.

Again, they fell short of the standard of proof to establish the fact that they have liquidated even the sum which they allege is the outstanding debt. Having failed to prove that they have liquidated the debt, the Claimants are not entitled to enforce their equity of redemption. See: ***SCQR VOLUME 30 2007 Page 1193chief D.S. Yaro) Appellant Vs.Arewa Construction Limited And Ors .***

Sequel to the foregoing, I hold that the Defendants are quite entitled to withhold the title documents of the deceased until the debt is fully settled. I therefore resolve Issue 1 in favour of the Defendant.

ISSUE 2:

WHETHER THE CLAIMANTS ARE ENTITLED TO AN AWARD OF DAMAGES FOR THE REFUSAL OF THE DEFENDANT TO RELEASE THE TITLE DOCUMENTS OF LATE EDWARD OMOZEE WHICH HE HAD USED AS SECURITY FOR THE LOAN FACILITY WHICH HE OBTAINED FROM THE DEFENDANT:

Having resolved Issue 1 in favour of the Defendant, it is evident that the Claimants are not entitled to any award of damages. Issue 2 is equally resolved in favour of the Defendant.

ISSUE 3:

WHETHER THERE IS ANY MERIT IN THE DEFENDANT'S COUNTER-CLAIM:

It has been settled by several decided cases that a counter-claim is to all intents and purposes a separate action. Like the Claimant; the Counter-Claimant must prove his case against the Claimant before obtaining judgment on the Counter-Claim. See the cases of: ***Raphael vs. Ezi (2015) 12 NWLR (Pt.1472) 39 at 45; and Ogbona vs. A.G. Imo State (1992) 1 NWLR (Pt.220) 647 at 675.*** Furthermore, the burden of proof in a Counter-Claim rests on the Defendant. See: ***Akpang vs. Amiyé (2015) 18 NWLR (Pt.1490) 148 at 152.***

The defendant's counter-claim is regarded as a cross action in which the defendant is the Claimant and the Claimant is the defendant thereto. See: ***N.P.A. Vs. G.G.F.C. (1974) 12 SC 81; U.B.A v. Sambam Petroleum Ltd (2002) 16 NWLR (Pt 793) 361; Emaphil Ltd vs. Odili (1987) 4 NWLR (pt 67) 915.***

The Defendant's Counter-Claim is for the sum of: N2, 617,260.39K (two million six hundred and seventeen thousand two hundred and sixty naira, thirty nine kobo) being the outstanding debit balance in the company account run and managed by Mr. Edward Omozee with the Defendant Bank, that is OMOZEE COMMERCIAL AND TECHNICAL LIMITED: Account No.1136 for the period between 28/09/86 and 26/06/14.

To establish their case, the Defendant called a sole witness who gave some formal evidence of the transactions culminating in this action. The witness tendered a Bank Statement of Account which was admitted as Exhibit M. The witness denied that the Bank ever agreed to stop charging interest on the loan account. He equally denied knowledge of any banking practice that warrants the stoppage of interest when the bank is notified of the death of the account holder.

The issue at stake is whether the Defendant established the alleged debt of N2, 617,260.39K (two million six hundred and seventeen thousand two hundred and sixty naira, thirty nine kobo) which is stated to be the outstanding debit balance on the loan account *vide* Exhibit M.

In order for a claim of a debt outstanding in a customer's account with its banker to succeed, the Courts have held that the banker must prove how the debit balance claimed from the customer was arrived at. The bank has to demonstrate through oral evidence given by an official who is familiar with the accounts, how the debit balance was arrived at. By just tendering the statement of account without adducing oral evidence to put the exhibit in proper perspective so as to establish the claim, the claim is not proved. See: ***Bilante International Ltd. vs. Nigerian Deposit Insurance Corporation (2012) 15 NWLR (Pt.1270) 407 at 428-429.***

Furthermore, a statement of account is not sufficient explanation of debts and lodgements. Evidence needs to be adduced of its contents. There should be a breakdown of how much of the debt is interest to enable the Court appreciate what is before it, without having to do a private calculation. See the case of: ***Biezan Exclusive Guest House Ltd. vs. Union Homes Savings and Loans Ltd. (2001) 7 NWLR (Pt.1246) 246 at 286.***

Applying the above principles to the instant case, I must observe that the Defendant did not lead sufficient evidence to prove how they arrived at the sum of N2, 617,260.39K (two million six hundred and seventeen thousand two hundred and sixty naira, thirty nine kobo) which they claim is the outstanding debit balance in the loan account.

In the first place, the statement of account (Exhibit M) is grossly incomplete. The date in the opening balance is: 26/09/86. The complete statement of account should run from the date the facility was taken (1977), till the date the suit was filed or at least, from the date of the Mortgagor's demise (30/01/85).

Where is the Statement of Account from 1977 to 1986? It is instructive to note that there is no single credit entry on Exhibit M. This is a one sided Statement of Account. It is not a balanced Statement of Account. Exhibit M does not reflect the complete and comprehensive sequence of events.

Another shortcoming in the Defendants case is their failure to clarify the confusion about ***Account No.1136*** and ***Account No.50013***. The evidence showed that money was paid into ***Account No.50013***. The Defendant ought to have also tendered the Statement of Account No.50013 to give the Court the full picture. Litigation is not a game of hide and seek.

The Defendant did not give any explanation whatsoever for their failure to tender these Statements of Accounts.

The Court may presume that evidence which could be produced and is not produced would if produced, be unfavourable to the person who withholds it. See: ***section 167(d) of the Evidence Act, 2011.***

I am of the view that the Statements of Account in respect of this transaction which the Defendant refused to tender were withheld because they were not favourable to the Defendant.

In view of all these gaping gaps in the case of the Defendant I hold that there is no merit whatsoever in the Defendant's Counter-Claim. I therefore resolve Issue 3 in favour of the Claimants.

On the whole, I hold that the Claimants have failed to prove their Claim and the Defendant has also failed to prove its Counter-Claim. In the event, both the Claim and the Counter-Claim have failed and they are hereby dismissed. I make no order as to costs.

P.A.AKHIHIRO
JUDGE
23/02/17

COUNSEL:

MS. ADESUWA OMONUWA.....CLAIMANTS.

NYERHOVWO ORHE ESQ.....DEFENDANT.

