

SUPREME COURT OF NIGERIA

15th APRIL, 1994. SC.272/1988.

**CORAM:- M. L. UWAIS, O. OLATAWURA,
M. E. OGUNDARE, E. O. OGWUEGBU, Y. O. ADIO, JJSC**

NATIONAL BANK OF NIGERIA LTD ... DEFENDANT/APPELLANT
AND
P. B. OLATUNDE & CO. NIGERIA LTD. .. PLAINTIFF/RESPONDENT

CONTRACTS - Evidence - Failure to tender alleged written contract executed by the parties - Whether a non executed articles of agreement embodied within the bills of quantities cannot qualify as the written agreement.

EVIDENCE - Secondary evidence - Contracts - Defendant's failure to produce the contract agreement - Though notice to produce was given - unexecuted blank "articles of agreement" - cannot qualify as secondary evidence.

EVIDENCE - Burden of proof - Plaintiffs failure to prove his claim - The claim would have failed in toto - But for Defendant's admission of certain amount as due.

ORDERS - Retrial - Appeals - Court of Appeal's order of retrial - when held to be manifestly wrong

FACTS

The Defendant/Appellant awarded a building contract to the Plaintiff/Respondent for the construction of its bank building at Ilorin. The contract sum was later reviewed upward to the sum of N1,047,637.06. Defendant paid a total of N977,460.83 vide Valuation Certificates numbers 1 - 26 issued by its Architects and Quantity Surveyor, leaving a balance of N70,176.25. The Plaintiff relied on Valuation Certificate No. 27 further issued to it for the sum of N294,552.25 and claimed that amount as what is due to it before the High Court. The Plaintiff did not tender the Building Contract Agreement pleaded by it but rather tendered the Bills of Quantities (Exh. 4) which was not executed by the parties. Plaintiff failed to prove how it was entitled to the higher amount being claimed by it as the outstanding balance.

The Defendant maintained that the sum of N294,552.25 stated in Valuation Certificate No. 27 was in error and admitted that the Plaintiff was only entitled to the balance sum of N70,176.25. The trial court found for the Defendant and awarded the amount admitted by it as due to the Plaintiff. Upon an appeal by the Plaintiff to the Court of Appeal, that court held that none of the parties was entitled to succeed from the pleadings and evidence. It ordered a retrial of the case before the High Court. The Defendant being dissatisfied appealed to the Supreme Court and the Plaintiff also cross-appealed. The apex court had to determine whether the Plaintiff/ Respondent proved its case and whether the order of retrial made by the court of Appeal was proper.

HELD (unanimously allowing the appeal)

1. The alleged written contract agreement pleaded by the Plaintiff as having been executed by the parties was not tendered at the trial. Exhibit 4, a pro-forma Contract agreement titled “Articles of Agreement” which was not executed by the parties, cannot qualify as the written agreement referred to in the statement of claim. (p.43 L3)
2. The blank pages, “Articles of Agreement” contained in the Bills of Quantities (Exh. 4) tendered by the Plaintiff upon Defendant’s failure to produce the parties’ contract agreement though notice to produce was given, do not qualify as secondary evidence of the written agreement.(p.43 L11).
3. The Plaintiff in agreeing with the Defendant’s pleading and evidence as to the total amount that has been paid, failed to prove how it arrived at the sum of N294,552.25 claimed as outstanding on the contract. (p.44 L14)
4. But for the admission made by the Defendant in its pleading and evidence to the effect that Plaintiff was entitled to only N70,176.23, the Plaintiffs claim would have failed in toto. (p.44 L 20)
5. The order for a retrial made by the Court of Appeal is manifestly wrong having regard to its conclusion that the state of the parties’ pleadings could not justify or support the contract sum claimed by the Plaintiff. (p.44 L.25)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

Order of retrial - When to be tampered with

1. An order of retrial is made where there has been a serious irregularity in the original trial or where the rules of fair hearing under S.33(1) of the Constitution appears to have been violated. The discretion whether or not to order a retrial is that of the Court of Appeal and the Supreme Court will not interfere even if it might have exercised the discretion differently unless it comes to the conclusion that the court below exercised its discretion on wrong principles, for example, if the exercise of it was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice. (p.44 L 31)

UWAIS JSC

When to prove averments in pleading in spite of admission

2. In view of the admission of paragraphs 1-9 of the Plaintiffs Statement of Claim by the Defendant, the Plaintiff did not need to adduce evidence to prove these averments. However, Plaintiff could not have safely adopted this attitude because if it did, it would not be able to establish the terms of the contract on which its claim is based. It, therefore, became incumbent on the Plaintiff/Respondent to tender in evidence, the contract agreement between it and the Defendant/Appellant as pleaded, which the Plaintiff failed to do at the trial court. (p.45 L 30)

Whether Bills of Quantities is the parties' agreement

2. Bills of quantities do not constitute the agreement or articles of agreement binding the parties unless they are expressly made part of the agreement. It was wrong for the trial court to rely on Exhibit 4 (the bills of quantities) as if it is the written agreement. (p.47 L14)

Ground for Respondent's entitlement to the amount awarded by the trial court

3. The Plaintiff/Respondent is entitled to judgment in the sum of N70,176.23 by virtue of Defendant/Appellant's admission of that liability in its pleadings but not on account of any agreement based on

Exhibit 4 (Bills of Quantities), since the written contract had not been produced in evidence by the Respondent to establish that the bills of quantities form part of the contract. (p.47 L 38)

OLATAWURA JSC

5 *Burden of proof on the Plaintiff*
5. It would appear sufficient attention was not paid to sections 135-137 of the Evidence Act on Burden of proof. It is not sufficient to make allegation in a pleading, as was done by the Plaintiff in this
10 case. Credible evidence must be led in proof of it. (p.48 L20)

Impropriety of filing two briefs by one party in a case

6. It is not permissible for a party to file two briefs in a case. It is an appellant that has the right to file a reply brief after a respondent's
15 brief pursuant to O. 6 rr. 5 & 6 of the Supreme Court Rules (p. 48 L33)

OGUNDARE JSC

20 *Dismissal of case for want of proof*
7. The Plaintiff having failed to discharge the burden on it to prove its case, that case ought to have been dismissed. Its claim is not one in quantum meruit. It was for a specific contractual sum which was not proved, as rightly found by the court below. (p.53 L16)

25 **ADIO JSC**

When not to order a retrial or enter a non-suit

8. When a Plaintiffs case has failed in toto an order for retrial is not an
30 appropriate order. If a plaintiff has failed to prove his case in the court below, an appellant court will neither order a retrial or enter a judgment for non-suit, if to do so will amount only to giving the plaintiff another opportunity of proving what he had failed to prove in the first instance. (p. 54 L 22)

35 **REPRESENTATION:**

Chief F. A. O. Olorunnisola SAN, with Dele Ogundele for the Appellant

Mr. J. O. Ijaodola for the Respondent.

CASES REFERRED TO

1. Okeowo v. Migliore (1979) 11 SC 138 at 201
2. Adeyomo v. Arokopo (1988) 6 SCNJ 1 at 13
3. Umar v. Bayero University, Kano (1987) 7SCNJ 380 at 387 5
4. Lion Buildings Ltd. v. Shadipe (1976) 12 SC 135 at 153
5. Ikpaloka v. Umeh (1976) 9-10 SC 269 at 300
6. Shell B.P. v. Cole (1978) 3 SC 183 at 194
7. Lewis & Peat Ltd. v. Akhimien (1976) 7 SC. 157
8. Akintola v. Solano (1986) 2 NWLR (Pt. 24) at 598 10
9. Okubule v. Oyegbola (1990) NWLR (Pt. 147) at 723
10. Bello v. Fayose (1994) NWLR (Pt. 327) 404 at 418
11. Okorodudu v. Ejuefami (1967) NMLR 282
12. Adio v. A-G Oyo State (1990) NWLR (Pt. 163) 448
13. Imonikhe v. A-G Bendel State (1992) NWLR (Pt. 248) 396 15
14. University of Lagos v. Olaniyan (1985) NWLR (Pt. 1) 143
15. Total (Nig.) Ltd. v. Nwako (1978) 5 SC. 14
16. Elias v. Disu (1962) 1 All NLR 214

STATUTES & RULES REFERRED TO

20

1979 Constitution S.33(1)

Evidence Act SS. 135-137

Supreme Court Rules O. 6 rr. 5 & 6

BOOK REFERRED TO

25

Law and Practice of Building Contract by D. Keafing

LEAD JUDGMENT BY OGWUEGBU JSC

The defendants awarded a building construction contract of 30
their bank building at Ilorin, Kwara State to the plaintiffs for the sum
of N451,857.22. The contract was stated to be in writing. By a letter
dated 13th April, 1981 written by the agent of the defendants - Ar-
chitects Co-design, the contract sum was revised from N451,857.22
to N1,047,637.06. There is the Bill of Quantities which was admitted 35
in evidence as "Exhibit 4."

The defendants paid the sum of N977,460.83 in respect of
Valuation Certificates numbers 1 to 26. On the whole, Architects Co-
design issued a total of 27 Valuation Certificates.

Clause II of Exhibit 4 (Bill of Quantities) provides that the defendants could alter and vary the contract and payments for work done under the contract was to be made upon the issuance of Valuation Certificates from time to time by the defendants' Architects and Quantity Surveyor. The plaintiffs maintained that Valuation Certificate No. 27 issued to him was for N294,552.25 and that this amount had been paid. The defendants however, contended that although that amount is reflected on the Valuation Certificate No. 27, it was wrong because the authorised contract sum is N1,047,637.06 and the sum of N977,460.83 having been paid, the balance due to the plaintiffs is N70,176.25. This was the cause of action. The defendants therefore admitted liability in the sum of N70,176.25. Had the defendants paid the sum of N294,552.25 certified in Valuation Certificate No.27, they would have paid a total of N1,272,013.08 (N977,460.83 plus N294,552.25) as against the contract sum of N1,047,637.06.

The learned trial Judge in a reserved judgment held that the plaintiffs were only entitled to the sum of N70,176.25 as admitted by the defendants plus interest at 10% on the sum found due. The plaintiffs were dissatisfied with the judgment and appealed to the Court of Appeal Kaduna Judicial Division.

The court below held that neither the plaintiffs nor the defendants ought to be awarded judgment on the basis of the findings of the learned trial Judge. It set aside the decision of the trial Judge and made an order for a retrial.

The defendant appealed against the decision of the Court of Appeal and the plaintiffs also cross-appealed. I will from now refer to the defendants as defendants/appellants and the plaintiffs as plaintiffs/respondents in this judgment.

From the grounds of appeal filed by both parties, the appellants identified the following issues for determination at page 2 of their brief of argument filed on 15:12:88:

“(i) Could the Court of Appeal validly reverse the Ilorin High Court decision which was supported by evidence.

(ii) Was it proper of the Court of Appeal to have ordered a retrial when the Court of Appeal agreed that it appeared the balance due was N70,176.23.

(iii) Was it right to hold that the particulars of errors in issuance of certificate number 27 was not stated in the appellant's (N.B.N. Ltd) pleading in view of paragraphs 2-6 of the statement of defence, and

(iv) *Was the Court of Appeal right to hold that Exhibit 1A, tendered by the respondent herein (P.B. Olatunde & Co. (Nig.) Ltd.), did not bind the respondent herein.*”

The plaintiffs/respondents on 6/12/88 filed a brief of argument in respect of their own appeal. At page one of the said brief, the only issue for determination is:

“Whether it is proper for the Court of Appeal to order a retrial in this case when the Court had held that variation was properly authorized and that Exhibit 7A (Certificate No. 27) was not faulted.”

On 10:1:89, the plaintiffs/respondents filed another brief of argument titled “brief of Argument For Cross-Respondent.” In it, the following issues are identified as arising from the grounds of appeal filed by the plaintiffs/respondents in their cross-appeal:-

“(i) What is the duty of an appeal court if it finds the judgment of the trial court perverse?”

“(ii) Is the order of retrial made by the Court of Appeal proper considering the fact that the Court of Appeal has held that Exhibit 7A (Certificate No.27) cannot be impugned and that indeed extra (sic) jobs were done which is reflected on Exhibit 7A (Certificate No. 27) and which were not paid for?”

“(iii) Was it right to hold that the particulars of error in issuance of certificate No. 27 was not stated in the appellant’s (N.B.N. Ltd.) pleading in view of paragraphs 2-6 of her Statement of Defence.

“(iv) Was the Court of Appeal right to hold that Exhibit 1A which was pleaded and tendered by the respondent herein (P.B. Olatunde & Co.) did not bind the respondent therein.”

In what is titled “Additional brief for N.B.N. Ltd.” filed on 3:2:89, the defendants/appellants formulated two issues for determination, namely:-

“(i) How is the final certificate to be arrived at according to Exhibit 4 the Bill of Quantities? and

“(ii) Was the Court of Appeal right in reversing the High Court’s decision that P.B. Olatunde & Co. Nig. Ltd. (respondent) was entitled to only N70,176.23 i.e. Revised contractual sum less payments made on certificates 1-26.”

Both parties filed two briefs each in respect of the two appeals hence the multiplicity of issues for determination whereas a brief of argument by each opposing party would have taken care of

both appeals. I think it is a tidier and neater practice which should be adopted in future except where the circumstances of the particular case dictate otherwise.

It seems to me from the four sets of issues formulated by the parties, the main issues raised in this appeal can be categorised as follows:-

1. *Did the plaintiffs/respondents prove at the court of trial that they are entitled to the amount claimed on Certificate No. 27 having regard to their pleading and evidence?*

2. *Were there variations of the contract in accordance with Exhibit 4 and if so whether Exhibit 7A reflected the final contract sum.*

3. *Whether the order of retrial made by the court below was proper having regard to all the circumstances of the case.*

At the hearing of the appeal both learned counsel adopted and relied on their respective briefs of argument. There was little or no additional points highlighted by both learned counsel at the hearing. One has to fall back on the briefs of argument filed.

In a rather very sketchy briefs of argument filed by the learned counsel for the defendants/appellants, the following points were canvassed:-

(1) *The court below was in grave error to have set aside the judgment of the trial court which was supported by evidence adduced in the said court and the court below should not have substituted its own views of the facts for those of the learned trial Judge.*

(2) *There was no basis for an order of retrial because the court below applied the formula in Clause 30(6) of Exhibit 4 and found that the sum of N70,176,23 would be the only permissible balance due to the plaintiffs/respondents as there was no pleading or evidence to support the purported balance of N294,552.25. Counsel cited and relied on the cases of Okeowo & Ors. v. Migliore & Ors. (1979) 11 S.C.138 at 201; Adeyemo v. Arokopo (1988) 6 SCN.J. 1 at 13 (1988) 2 NWLR (Pt.79) 703 and Umar v. Bayero University, Kano (1988) 7 SCN.J 380 at 387 (1988) 4 NWLR (Pt.86) 85.*

(3) *The totality of the judgment of the court below is to the effect that the decision of the trial court was based on the pleadings and evidence adduced by the both parties and that decision should not have been disturbed.*

(4) *Exhibit 7A (Certificate No. 27), was issued in error as it was contrary to the express terms of the Bills of quantities (Exhibit 4) which stipulated that the final certificate is to be arrived at by subtracting what had been paid (Certificates Nos. 1 to 26) from the final contractual sum.*

(5) *The agents had power to authorise variations and to quantify the values of such variations but they cannot change the terms of the Bills of Quantities which provides that variations must be specified and quantified in writing as stipulated in Exhibit 4 and that Exhibit 1A contained provision for contingencies which covered Exhibit X.*

We were urged to allow the defendants' appeal, dismiss the plaintiffs'/respondents' cross-appeal and affirm the decision of the learned trial Judge.

In the briefs of argument filed on behalf of the plaintiffs/respondents, learned counsel submitted that where an appeal is against the weight of evidence or that it is perverse, an appellate court "must make up its own mind on the evidence, not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from overruling it, if, on full consideration, it comes to the conclusion that the judgment is wrong." He rested his submission on *Macaulay v. Tukur* (1881-1911) 1 NLR. 35; *Lion Buildings Ltd. v. M.M. Shadipe* (1976) 12 S.C.135 at 153 and *Ikpaloka & Ors. v. Umeh & Or.* (1976) 9-10 S.C. 269 at 300- 301. He said that the evidence before the court is documentary and does not involve the question of assessing the demeanour of the witnesses but of drawing inferences from admitted documentary evidence. He referred to the case of *Shell B.P. v. Cole & Ors.* (1978) 3 S.C.183 at 194 and that the Court of Appeal is in as much as good position as the trial court to deal with the facts and make proper findings from the admitted documents.

He further submitted that Exhibit 7A (Certificate No. 27) part of the facts pleaded in paragraphs 12 and 13 of the amended Statement of Claim, that Certificate No.27 was admitted in evidence as Exhibit 7A and that the court below accepted that the figure N1,748,771.73 was well demonstrated by the pleading and the evidence.

It was the contention of the plaintiffs/respondents' counsel that the plaintiffs claimed the sum of N464,246.10 in their Writ of Summons and N294,552.25 in the amended Statement of Claim because the defendants/appellants paid the amount on Certificate No. 26 after the Writ of Summons was filed. It was therefore not

necessary for the plaintiffs to plead the sum of N1,748,771.73 in any other way since that is not the amount of money they were claiming and in any case, there is no dispute about the contents of Certificates No. 1 to 26 as both parties agreed both in their pleadings and evidence that the amount in Certificate Nos. 1-26 had been settled.

5 Learned counsel further submitted that it was not necessary to tender Certificate No. 1-26 since both parties have agreed on those points. The cases of *Lewis & Peat Ltd. v. Akhimien* (1976) 7 S.C.157 and *Akintola v. Solano* (1986) 2 NWLR (Pt.24) 589 were cited.

As to the variations made, counsel said that they were properly made and that the court below held that after the revised contract sum of N1,047,637.06, some variations were carried out that were not paid for and that Exhibit 7A clearly demonstrated the variation properly made and showed how the contract sum of N1,748,771.73 was arrived at. Since the court below held that the amount stated in Exhibit 7A is conclusive of the outstanding money due on the contract and that it was not issued in error, the court below should have entered judgment for the plaintiffs in the sum of N294,552.25 claimed on Certificate No.27 (Exhibit 7A).

10 In his further submission on Exhibit 7A, learned counsel stated that the court below found that it was valid and binding as no fraud, mistake or collusion was alleged by the defendants and that Exhibit 'X' is a variation made subsequent to the revised sum of N1,047,637.06.

Learned counsel also submitted that after evaluating the evidence before the trial court, the proper order which the court below should have made is not that of a retrial. He urged the court to nullify the order of retrial made by the court below and enter judgment for the plaintiffs for the sum of N294,552.25 which they claim.

The determination of issue number one above will involve the consideration of the pleadings of both parties and the evidence led in proof of the facts pleaded. The relevant averments in the plaintiff's amended statement of claim are paragraphs 3 to 15 which are reproduced hereunder:-

30 *"3. By a letter dated 19th January, 1978 the defendant awarded the construction of its Bank Building at Ilorin to the plaintiff for the sum of N451,857.22. The plaintiff hereby pleads Architects Co. Design letter to the plaintiff and shall rely on the same.*

4. By another letter dated 13th April, 1981 written by Architects Co. Design, servant or Agent of the defendant, the contract sum

was revised from N451,857.22 to the sum of N1,047,637.06. The plaintiff hereby pleads the said letter.

5. *The said contract was reduced to writing and signed by parties which the plaintiff hereby pleads.*
6. *By Clause II of the said contract agreement, otherwise known as Bills of Quantities the defendant could alter and vary the contract.*

The plaintiff hereby pleads the following documents relating to variation of the said contract:-

1. Archodes letter dated 28th April, 1978 copied to the plaintiff.
2. Archodes letter dated 7th March, 1979 addressed to the plaintiff. 10
3. Defendant's letter to the plaintiff No. AP/L/41 (1) Vol.II/80 of 7th February, 1979.
4. Archodes's letter to the plaintiff dated 14th January, 1980.
5. Defendant's letter copied to the plaintiff and dated 27th November, 1980. 15
6. Archode's letter to the plaintiff dated 18th February, 1982.
7. Plaintiff's letters to the defendant or their agents Architect Co-Design Span Group on the said contract dated 31/10/78, 21/2/79, 21/1/80, 10/7/82, 24/8/82, and 14/1/83.
- 6(a) The plaintiff further pleads letters from Architects Co-Design to the plaintiff dated 9th December, 1981 and 25th April, 1983 relating to variation of the contract between the plaintiff and the defendant. 20
7. The plaintiff shall also rely on the minutes of site meetings held between the plaintiff, the defendant and the defendant's agents on 6th July, 1979, 3rd August, 1979, 7th September, 1979, 1st February, 1980, 2nd May, 1980, 4th July, 1980, 1st August, 1980 and 5th September, 1980. 25
8. The plaintiff has since completed the contract and handed over the building to the defendant since the 20th January, 1984. The plaintiff hereby pleads his handling over note dated 13th December, 1983 but signed for and on behalf of the defendant on 20th January, 1984. 30
9. That the plaintiff was paid his entitlement under the agreement after the Architects and Quantity Surveyors who were employed by the defendant were satisfied with the amount and standard of plaintiff's work. 35
10. That the Architects as well as the Quantity Surveyors issued Valuation Certificate to show that the plaintiff was entitled to whatever was due to him.
11. *The plaintiff shall rely on the Valuation Certificate Nos. 1-27 jointly*

issued by Architects Co-design of 50 Olowu Street, Ikeja, Lagos and Span Group Quantity Surveyor's & Construction Consultants of 84 Bobs Kazeem Street, Obanikoro, Ikorodu Road, Lagos.

12. By reason of the variation ordered by the Architect and the Quantity Surveyors, the contract sum rose to the sum of N1,234,719.73k.

5 *The plaintiff hereby pleads Architects Co-design letter on 1st July, 1984 to the defendant in respect of certificate No.27 for the sum N294,552.25.*

10 *13. The plaintiff have (sic) so far been paid amounts specified in all the valuation certificate Nos. 1-26 and has certificate No. 27 of 17th July, 1984 for the sum of N294,552.25k still outstanding.*

14. The defendant has refused to settle the balance of N294,552.25k despite repeated demands by the plaintiff.

15 *15. Wherefore the plaintiff claims from the defendant the sum of N294,552.25k plus 10% of the said sum from the 31st of January, 1984 to the date of judgment. (Italics are mine for emphasis only).*

The defendants admitted paragraphs 1 to 9 in their paragraph 1. Paragraphs 1 to 6 of their statement of defence read:-

"1. The defendant admits paragraphs 1-9 of the statement of claim.

20 *2. The defendant denies paragraphs 10-15 of the Statement of Claim and requires strict proof thereof.*

3. In further answer to paragraphs 10-15 of the Statement of Claim the defendant avers;

(a) that the revised contractual sum was N1,047,637.06;

25 *(b) that by a letter Ref. No. AP/L.41(1) Vo1.V/29 of 18th March, 1981, the defendant made it clear that the revised sum could not be exceeded and*

30 *(c) the plaintiff was duly informed of the limitation. The defendant pleads (i) the aforesaid letter of 18/3/81 from Property & Estate Manager of the defendant to Architect Co-Design and (ii) a letter from Architects Co-Design dated 13/4/81 to the plaintiff.*

4. The defendant also pleads the letter from Spanqants Associates dated April 11, 1985, to the plaintiff which shows that the defendant had paid on Certificates 1-26 the sum of N977,460.83.

35 *5. The defendant avers that the plaintiff was wrongly issued certificate No.27 for N294,552.25k by the Quantity Surveyor whereas the plaintiff is entitled to only N1,047,637.06 - N977,460.83 i.e. N70,176.23, and the plaintiff is aware of the error.*

6. Wherefore the defendant avers that the plaintiff is entitled to only N70,176.23 in respect of Certificate No.27 and not N294,552.25 as

falsely stated in Certificate No.27.”

There are a lot of flaws in the case presented by the plaintiffs. The alleged contract agreement which was in writing and signed by both parties was pleaded in paragraph 5 of the amended Statement of Claim but was not tendered at the trial. What is contained at pages 1 to 2A of Exhibit 4 is a pro-forma contract agreement titled “Articles of Agreement.” It was not executed by the parties. Had this been done, Exhibit 4 would have qualified as the written agreement referred to in the said paragraph of the amended statement of claim.

It is in evidence that both parties signed an agreement which is in the possession of the defendants/appellants and notice to produce the same at the trial was given to them. It was not produced and the plaintiffs/respondents proceeded to tender Exhibit 4 (the Bills of Quantities). Pages 1 to 2A Exhibit 4 contain a blank “Articles of Agreement.” Those pages do not quantify as secondary evidence of the written agreement.

Exhibits 1 and 1A on the other hand are no substitutes for the written contract. They only revised the contract sum from N451,857.22 to N1,047,637.06 and are relevant for that purpose only.

The Bills of Quantities which were admitted in evidence as Exhibit 4 described in detail every item of works to be done. They are usually referred to in the contract agreement and form part of it. They are mere estimates and specifications of the work to be done and they cannot exist without the contract agreement.

The plaintiffs also averred in paragraphs 10 to 13 of their amended statement of claim that they were issued 27 Valuation Certificates by the Architects and Quantity Surveyors employed by the defendants showing that they are entitled to whatever was due to them; that they would rely on the Valuation Certificates; that they had been paid the amounts specified in Valuation Certificate Nos. 1 to 26 and that Certificate No. 27 for N294,552.25 was still outstanding. In paragraph 12 of the amended statement of claim they averred that the contract sum rose to N1,234,719.73 by reason of variations ordered by the Architects and Quantity Surveyors. Exhibit 7A showed the sum of N1,748,771.72 as the final contract sum.

This amount was not pleaded. Certificate Nos. 1 to 26 were not tendered either. The defendants/appellants averred in paragraphs

44 N.B.N. Ltd. v. Olatunde & Co. Ltd. (1994) 5 KLR Ogwuegbu JSC
4 and 5 of their statement of defence that they paid the sum of N977,460.83 on Valuation Certificate Nos. 1 to 26; that Certificate No.27 for the sum of N294,552.25 was wrongly issued by the Quantity Surveyors and that the plaintiffs were entitled to only N1,047,637.06 minus N977,460.83 i.e. N70,176.23.

5 The plaintiffs/respondents did not in their amended statement of claim state the amount they have received on Certificate Nos. 1 to 26 to be able to arrive at the balance shown in Exhibit 7A - Certificate No.27. However, under cross-examination by the learned counsel for the defendants/appellants, the Managing Director of the plaintiffs/respondents who testified as P.W.1 said:-

10 *"I agree the contract sum is N1,047,637.06.*

On Certificate 1-26 I have been paid N977,460.83.

I do not agree that the balance due to be paid is N70,176.23."
(see page 22 lines 2 to 5 of the record of appeal).

15 So, they agreed with the appellant's pleading as well as their evidence that the sum of N977,460.83 had been paid to them on Certificate 1 to 26. They failed to prove how they arrived at the sum of N294,552.25 which according to them was outstanding on the contract.

20 The material documents pleaded by defendants were not produced and tendered. See *Okubule v. Oyagbola* (1990) 4 NWLR (Pt.147) at 723 and *Bello v. Fayose & Ors.* (1994) 2 NWLR (Pt.327) 404 at 418. But for the admission made by the defendants/appellants in their pleading and evidence to the effect that the plaintiffs were entitled to only N1,047,637.06 minus N977,460.83 i.e. N70,176.23, the plaintiffs' claim would have failed in toto.

25 The court below came to the conclusion that from whatever angle the issue was examined, the state of the parties pleadings could not justify or support the contract sum of N1,748,771.72 in Exhibit 7A nor could it satisfactorily displace the pleaded contract sum of N1,234,719.73 and I agree with it. The order for a retrial made by
30 the court below after coming to the above conclusion is manifestly wrong having regard to the above conclusion. An order of retrial is made where there has been a serious irregularity in the original trial or where the rules of fair hearing under S.33(1) of the Constitution appears to have been violated. See *Okorodudu v. Ejuetami* (1967) 35 NMLR 282; *Adio v. Attorney-General, Oyo State* (1990) 7 NMLR (Pt.163) 448. The discretion whether or not to order a retrial is that of the Court of Appeal and this court will not interfere even if it might have exercised it differently unless this court comes to the conclusion that the court below exercised its discretion on wrong principles, for

example, if the exercise of it was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice. See *Imonikhe & Ors. v. Attorney-General Bendel State & Ors.* (1992) 6 NWLR (Pt.248) 396 at 408; *University of Lagos & Ors. v. Olaniyan & Ors.* (1985) 1 NWLR (Pt.1) 156.

In the result, I am of the view that the appeal of the defendants should be allowed and it is hereby allowed. The appeal of the plaintiffs is dismissed. The judgment of the court below is set aside and the judgment of the High Court is affirmed. The defendants/appellants are entitled to the costs of this appeal in the sum of N1,000.00 in this court and N300.00 in the court below respectively.

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UWAIS JSC

In the action brought by the respondent; in the High Court of Kwara State sitting at Ilorin, against the appellant the respondent pleaded inter alia as follows in its amended Statement of Claim:-

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“3. By a letter dated 19th January, 1978, the defendant awarded the construction of its Bank Building at Ilorin to the plaintiff for the sum of N451,857.22. The plaintiff hereby pleads Architects Co-design letter to the plaintiff and shall rely on the same.

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4. By another letter dated 13th April, 1981 written by Architects-Co-Design, servant or agent of the defendant, the contract sum was revised from N451,857.22 to the sum of N1,047,637.06. The plaintiff hereby pleads the said letter.

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5. The said contract was reduced to writing and signed by parties which the plaintiff hereby pleads.”

These averments together with those in paragraphs 6 to 9 of amended statement of claim were admitted by the appellant in paragraph 1 of its Statement of Defence which reads -

30

“1. The defendant admits paragraphs 1-9 of the Statement of Claim.”

In effect the respondent did not need to adduce evidence to prove the averments in paragraphs 1 to 9 of its amended statement of claim. However, the respondent could not have safely adopted this attitude because if it did so it would not be able to establish the terms of the contract on the basis of which its claim for the sum of N294,552.25 was based. It, therefore, became incumbent on the respondent to tender in evidence, the contract agreement between it

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and the appellant which was pleaded in paragraph 5 of the amended
statement of claim. This the respondent filed to do at the hearing of
the case by the trial court.

In practice, the form of a building contract consists of the
following:-

5 (a) *An agreement or articles of agreement. This usually sets
out the date, the parties, the intended works and the consideration.
It may also name the architect and the surveyor.*

10 (b) *The conditions. Elaborate conditions are often made part
of the contract and attempt to provide for the various problems which
can arise during and after the execution of the works.*

(c) *Architect's plans and drawings.*

15 (d) *Bills of quantities. These put into words every obligation
or service which will be required in carrying out the building project.
"They may not form part of the contract although submitted to the
contractor for tender; and in general it requires express words in the
articles of agreement to make the bills of quantities a contract docu-
ment.*

20 (e) *Specification. This describes the work which the contrac-
tor must execute and the materials he must supply but does not usu-
ally attempt to achieve the exact quantifications of bills of quantities.*

25 (f) *Other documents. These may include letters, estimates,
memoranda and the tender or invitation to tender.*

See Law and Practice of Building Contracts by D. Keating,
3rd Edition at pp. 4 and 5. At the trial of the present case, the re-
spondent adduced evidence as per the testimony of its Managing
30 Director (P.W.1) to show that there were exchanges of letters (Exhib-
its 1, 1A and 2) between the parties concerning the award of contract
by the appellant to the respondent and that PW1 signed the bills of
quantities and so also the appellant. A copy of a bills of quantities was
35 admitted as Exhibit 4. The trial court appears to rely on Exhibit 4 as
the contract between the parties for it made the following observa-
tions in its judgment -

*"..... the plaintiff contracted to build defendant's office block
along Muritala Mohammed Way, Ilorin Vide the Bill of Quantity which*

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is exhibit 4 in this suit. The original contract sum N451,857.22 as at 19th January, 1978.

By Clause II of Exhibit 4, variations could take place. Indeed, between 19th January, 1978 and 18th March, 1981, both parties agreed that variations took place

The acrimony in this case has nothing to do with the fact of variation Clause II of Exhibit 4 - the Bill of Quantity provides for variation..... 5

I hold finally that certificate No. 27 was issued in error in the sum of N294,552.25. Certificate No.27 should have read N1,047,637.06 - the final revised contract sum less the sum of N977,460.83 paid up already on Certificates 1-26. Such step is in line with article 30 of Exhibit 4.” 10

As shown above, the bills of quantities do not constitute the agreement or articles of agreement binding the parties unless they are expressly made part of the agreement. The written agreement signed by the parties was not produced in evidence. It was wrong therefore, for the trial court to rely on exhibit 4 as if it is the written agreement. This error was further compounded by the Court of Appeal (Aikawa, Ogundare and Achike, JJ.C.A.) when it categorically held that Exhibit 4 was the written contract between the parties as it stated as follows per Achike, J.C.A. - 20

“It is important to reiterate that the arrangement between the parties was covered by a written contract, exhibit 4, otherwise referred to as Bills of Quantities. Consequently, matters which relate to the actions of the parties as regards this contract are only competent if they are referable to Exhibit 4.” 25

Although, the trial court entered judgment for the respondent in the sum of N70,176.23, it did so on the ground that the Bills of Quantities, Exhibit 4 was the written contract between the parties. This decision was reversed by the Court of Appeal, which relying on Clause 30(6) of Exhibit 4 held that the sum awarded by the trial court and more than that was due to the respondent on the ground that the further variations as per Exhibits X, Y, 8 and 9 were given by the respondent’s agents to the appellant. It then held that neither of the parties ought to be given judgment on the findings made by the learned trial Judge and therefore made an order for the case to be retried in the High Court. 30 35

I am satisfied that by virtue of the pleadings in which the appellant admitted liability for the variation of the contract which gave rise to an additional amount which is less than the sum claimed by

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the respondent, the latter is entitled to judgment in the sum of N70,176.23;
but not on account of any agreement based on Exhibit 4 since the written
contract had not been produced in evidence by the respondent to establish
that the bills of quantities form part of the contract.

It is for these and the reasons contained in the judgment
5 read by my learned brother Ogwuegbu, J.S.C., the draft of which I
have had the privilege of reading in advance, that I too will allow the
appeal by the appellant and dismiss the cross-appeal by the respon-
dent. The decision of the Court of Appeal is therefore set aside and
the judgment of the High Court in the sum of N70,176.23 which
10 was in favour of the respondent is hereby restored. I adopt the con-
sequential order contained in the said judgment.

OLATAWURA JSC

15 I had a preview of the judgment of my learned brother
Ogwuegbu, J.S.C. I agree with his reasoning and conclusions.

It would appear sufficient attention was not paid to sections
135- 137 of the Evidence Act on '*Burden of proof*'. Ogwuegbu,
J.S.C. has analysed carefully the pleadings and evidence led and the
20 omission by the parties to lead evidence in support of what they
averred. It is not sufficient to make allegation in a pleading, as was
done by the plaintiff in this case. Credible evidence must be led in
proof of it. The facts pleaded with regard to the outstanding sum of
N294,552.25 were not established. The order of retrial made by the
25 court below is to give an opportunity to the plaintiff to have a second
bite at the cherry. On the facts disclosed and accepted by the trial
Judge, a retrial by the lower court was inappropriate. This court is in
a position to do complete justice between the parties: Okeowo v.
Migliore (1979) 11 SC 138; Ayoola v. Adebayo & Ors. (1969)
30 N.S.C.C. 173; (1969) 1 All NLR 159.

My learned brother has again drawn attention to the practice
whereby a party files more than one brief in a case. It is not permis-
sible for a party to file two briefs.

It is an appellant that has the right to file a reply after a
35 respondent's brief. I will therefore draw the attention of counsel to
Order 6 rules 5 and 6 of the Supreme Court Rules.

I agree that the appeal filed by the plaintiff should be and is
hereby dismissed. The appeal filed by the defendant is hereby al-
lowed. I abide by the order for costs in the lead judgment.

OGUNDARE JSC

I have had the advantage of reading in draft the judgment of my learned brother Ogwuegbu J.S.C.

The facts have been fully stated in the judgment of my learned brother; I need not go over again except as may be necessary. Suffice it to say that the plaintiff's amended claim for N294,552.25 failed at the trial but the learned trial Judge entered judgment for it in the sum of N70,176.23 admitted as owing by the defendant. The plaintiff appealed to the Court of Appeal against that decision. The latter court allowed the appeal, set aside the judgment of the court below and ordered a re-trial of the action. Both parties have appealed against the decision of the court below, the plaintiff contending that judgment ought to have been entered in its favour for the sum claimed by him. Whilst the defendant contends that the judgment of the trial High Court should not have been interfered with. Having regard to the judgment appealed against and the grounds of appeal contained in the Notices of Appeal filed by the parties, I agreed with my learned brother that the questions that call for determination in the two appeals are as follows:

1. *Did the plaintiffs/respondents prove at the court of trial that they are entitled to the amount claimed on Certificate No.27 having regard to their pleading and evidence?*
2. *Were there variations of the contract in accordance with Exhibit 4 and if so whether Exhibit 7A reflected the final contract sum?*
3. *Whether the order of retrial made by the court below was proper having regard to all the circumstances of the case.*

I shall take all the Questions together as they dovetail into each other.

It is not in dispute that the defendant awarded a building contract to the plaintiff in the sum of N451,857.22; this was in January 1978. The contract sum was, by a letter dated 13th April, 1981, revised to N1,047,637.06. The plaintiff in his amended statement of claim averred that the contract was reduced into writing and signed by the parties. I must note at this stage that the plaintiff failed to tender the written contract; what was tendered by him was bill of Quantity (Exhibit 4) but this is not the written contract. The contract was only made subject to exhibit 4 according to the evidence of PW2 Rasaki Omolayo Okunola, the plaintiff's building Engineer on the site.

It is equally not in dispute that the plaintiff was paid a total sum of N977,460.83 on Certificates Nos. 1-26. The final Certificate No. 27 was issued by the defendant's Quantity Surveyor for the sum of N294,552.25. The defendant contended that the sum on these certificates was erroneous and that the certificates should have been for N70,176.23 being the difference between the revised contract sum, N1,047,637.06 and N977,460.85 already paid by it to the plaintiffs. Plaintiff's claim for N294,552.25 appeared to be based on paragraph 12 of its amended statement of claim which reads:

"12. By reason of the variations ordered by the Architect and the Quantity Surveyors, the contract sum rose to the sum of N1,234,719.73. The plaintiff hereby pleads Architects Co-design letter of 31st July, 1984 to the defendant in respect of certificates No. 27 for the sum of N294,552.25."

Plaintiff's case depended for its success on the proof of the above averment.

What evidence has plaintiff led to prove that the contract sum as a result of variations ordered by the defendant through its agents the Architect and the Quantity Surveyor rose from N1,047,637.06 to N1,234,719.73 as pleaded in paragraph 12? The answer, regrettably, is 'practically nil'. Neither in the pleadings nor in evidence did plaintiff indicate the nature of the variations ordered by the Architect and the sum of each such variations as quantified by the Quantity Surveyor. A number of letters were tendered and of these, only exhibits 12, 13 and X could be said to indicate that some variations were ordered by the Architect in the cause of the execution of the building project. I must note however that Exhibit 12 dated 27th November 1980 was issued before the revision of the contract sum from N451,857.22 to N1,047,637.06. It is not clear from the pleadings and the evidence that the instructions contained in that letter were not taken into account in revising the contract sum. No scintilla of evidence was led by the plaintiff to show what amount the variations instructed in Exhibits 13 and X were quantified for. Indeed plaintiff led no evidence to show that the contract sum arose to the figure pleaded in paragraph 12 of his amended statement of claim. In his evidence PW1, Peter Babatunde Olatunde the Managing Director of the plaintiff's company testified:

"Page 7 clause II of Exhibit 4 talks about variation of the contract. In carrying out the contract, there was variation. Variation was handed out in writing".

Later in his evidence he deposed as follows:

"I do not agree that Certificate No. 27 was issued out of error. On variation, the work assigned to the plaintiff by the architect is evaluated by the architect by the Quantity Surveyor and we are paid any amount assessed by the quantity surveyor, variations are paid with normal valuation certificates."

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Cross-examination by learned counsel for the defendant the witness deposed:

"When contract was revised from N451,857.22 to N1,047,637.06, I was notified by Exhibits 1 & 2. There was no further revision of the contract. There were variations thereafter. I agree that the contract sum is N1,047,637.06. On certificates 1-26 I have been paid N977,460.83."

10

I do not agree that the balance due to be paid is N70,176.23.

I agree that any revision or variation has to be in writing by the agreement between us. Apart from Exhibit 1 & 2, there are other documents revising or varying the contract. Any revision or variations is communicated to us by the defendant."

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The company's site Engineer who worked on the project testified as PW2 and said as follows:

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"Apart from basement, the defendant varied the contract in respect of fencing, staircase with terrazo, on roofing, steel burglar proof for windows, strong room, generator house, canopy in the front house, drainage with cover slabs also in the front house. All instructions were made in writing."

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He tendered five letters marked Exhibit 9- 13. Two of which Exhibits 12 and 13 appear relevant to the issue of variation. Significantly this witness under cross-examination admitted that apart from Exhibit 1'A, there is no other letter authorising increase on the contractual sum."

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This last piece of evidence was confirmed by PW3 Titus Aina Oggunniwa, plaintiffs' Accountant who under cross-examination testified thus:

"I am aware of Exhibit 1 'A' I am not aware of any other letter after Exhibit 1' A authorising the plaintiff to exceed the revised contractual sum."

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The defendant through its witnesses maintained that the contract sum remained at the revised figure of N1,047,637,06 and that Certificate No. 27 for the sum of N294,552.25 was issued by its Quan-

tity Surveyor in error. The error being discovered was brought to notice of the plaintiff whose representative at a meeting agreed that the true balance from the defendant to the plaintiff was N70,176.23. See the evidence of DW1 Abdullahi Saka Bayero. This witness admitted that many variations were made in the project. Strangely enough
 5 the witness was not cross examined to show that these variations were out side the revised contract sum.

In the light of the evidence adduced by the plaintiff at the trial, the only reasonable conclusion one could reach is that plaintiff failed woefully to prove the kernel or base of its claim that the even-
 10 tual contract sum was N1,234,719.73 and not N1,047,637.06. Having regard to the admission by the plaintiff that the defendant had paid it a total of N977,460.83, the learned trial Judge in my respectful view was right to give judgment to the plaintiff in the sum of N70,176.25, a sum readily admitted by the defendant. The court below per Achike
 15 J.C.A. found, and quite rightly in my view, as follows:

*“There is ample evidence as well as from the pleadings that after the first revision, which was mutually agreed to by both parties, that the CONTRACT SUM was N1,047,637.06. Unfortunately the position is tricky with regard to the value of the total sum paid in
 20 respect of Valuation Certificates Nos.1-26 because while the appellant failed to plead it and although the respondent pleaded that amount as N977,460.83, in Exhibit 7A it is stated as N980,167.48. Strangely PW1 in his evidence testified that the total value of certificates Nos.1-26 that was paid amounted to N977,460.83, in effect
 25 agreeing with the respondent’s pleading on this point, and also with the evidence of respondent’s witness, DW1 on the same amount. The learned trial Judge appeared to have accepted the sum of N977,460.83 as the correct amount in this regard. Therefore, applying the formula stated above under clause 30(6), we have:
 30 $N1,047,637.06 - N977,460.83 = N70,176.23$. This ordinarily would be the only permissible balance due to the appellant because there is nothing from his pleadings and evidence to support his purported balance of N294,552.25.”*

Strangely however, Achike J.C.A. in his lead judgment (with
 35 which the other Justices agreed) went on to conclude:-

“To conclude the matter thus is to deliberately turn one’s back to the obvious injustice that stares one in the face. As earlier observed, Exhibits X and Y, and one would include Exhibits X and 9, ex facie bear out clearly the fact that of some variational instructions

This fact has not been expressly or impliedly controverted. Undoubtedly, some benefit has been conferred on the respondent which generally (though not always) entail appreciable increase in the contract sum. Therefore, to accede to the respondent's stance that the appellant is only entitled the balance of N70,176.23 is to ignore the actual work done in compliance with the variations borne out in Exhibits 8, 9, X and Y, that were subsequent to the revision of the contract sum to N1,047,637.06, for which ex debito justitiae the respondent has a correlative duty to remunerate the appellant.

In the circumstances, I am of the view that neither the appellant nor the respondent ought to be awarded judgment on the basis of the findings of the learned trial Judge."

The plaintiff having failed to discharge the burden on it to prove its case, that case ought to have been dismissed. His claim is not one in quantum meruit. It was for a specific contractual sum which was not proved, as rightly found by the court below too. On what the plaintiff established at the trial judgment was rightly entered in its favour for N70,176.23 and its appeal to the court below should have been dismissed. There is, therefore, no basis for an order of retrial. This is not a case where the trial Judge could be said to have failed to determined vital issues by appraising and evaluating the evidence before him. See *Total Nig. Ltd. & Anor. v. Nwako & Anor.* (1978) 5 S.C. 1; (1978) 11 SC 298, 297 where Obaseki, J.S.C. delivering the judgment of this court said:

Where it is established before a Court of Appeal that vital issues which depend much on the appraisal and evaluation of the evidence are left undetermined, a case for a retrial is made out for such a failure has occasioned a miscarriage of justice, i.e. miscarriage of justice which in this context means (as ably defined by Lord Thankerton in the case of *Bibhabati Devi v. Kuma Ramendra Narayan Roy* (1946) A.C. 508 at page 521" 'such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all'

And the reason given by the court below for setting aside the judgment of the court, while it might, if valid, be a good ground for entering an order of non suit if this order were available in the High Court Rules of Benue State and after hearing counsel for the parties on non-suit, it certainly would not be a good ground for ordering a retrial.

For the reasons I have given above and for the other reasons

contained in the judgment of my Lord, Ogwuegbu J.S.C. I allow this appeal, set aside the judgment of the court below and restore the judgment of the trial High Court. I award to the defendant Bank costs as assessed in the lead judgment of Ogwuegbu J.S.C. I dismissed the plaintiff's appeal.

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ADIO JSC

I have had the privilege of reading, in draft, the judgment
10 just read by my learned brother, Ogwuegbu, J.S.C., and I agree that the order for retrial made by the court of Appeal was wrong. I too allow the appeal of the appellants and dismiss the cross-appeal of the respondents.

What happened was that the respondents in this case were
15 unable to prove that certificate No. 27, which related to the alleged variation, was issued in accordance with or in the manner required by the provisions of the alleged agreement between the parties. Indeed, the respondent's did not produce or tender the alleged relevant agreement on the execution of the project. In fact, the respondents failed completely to prove their claim. When a plaintiff's case
20 has failed in toto an order of retrial is not appropriate order. If a plaintiff has failed to prove his case in the court below, an appellate court will neither order a retrial nor enter a judgment of non-suit, if to do so will amount only to giving the plaintiff another opportunity
25 of proving what he had failed to prove in the first instance. See *Elias v. Disu* (1962) 1 SCNLR 361; (1962) 1 All NLR 214.

It is for the foregoing reasons and for the fuller reasons given in the lead judgment of my learned brother, Ogwuegbu, J.S.C., that I agree that the appeal of the appellants should be allowed and that
30 the cross-appeal of the respondents should be dismissed. I abide by the consequential orders, including the order for costs.

Appeal allowed.

Cross appeal dismissed.

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