

**SUPREME COURT OF NIGERIA**  
25TH MARCH, 1994. SC. 159/1991.  
**CORAM:- M. L. UWAIS, O. OLATAWURA,**  
**M. E. OGUNDARE, E. O. OGWUEGBU, Y. O. ADIO, JJSC.**

UNION BANK OF NIGERIA LTD ..... APPELLANT  
AND  
PROF. ALBERT OJO OZIGI ..... RESPONDENT

---

***APPEALS*** - Issues - Admissibility of documents - No appeal against rejection of document by trial court on ground of inadmissibility - (Whether) Court of Appeal's reopening of the issue and ruling that the document admissible was not proper.

***APPEALS*** - Error of law - Court of Appeal's error of law - (Whether) substantial miscarriage of justice was occasioned thereby.

***CONTRACTS*** - Extraneous matters - Imported into the provision of the parties' contract - (Whether) is not proper.

***EVIDENCE*** - Burden of Proof on the plaintiff - Where not discharged - Legal Implications.

***EVIDENCE*** - Extrinsic evidence - Documents - Move to rely on a memorandum to contradict the parties deeds of mortgage - Memorandum held not admissible for being extrinsic evidence.

***EVIDENCE*** - Oral evidence - Where there is a written agreement matter - (Whether oral evidence of contents of an inadmissible memorandum cannot be given.

***LEGAL PRACTITIONERS*** - Clarity of counsel's view - Practice & Procedure - Admissibility of a document sought to be tendered - Counsel make his view known and not to sit on the fence.

***PLEADINGS*** - Failure of plaintiff to prove the assertion in his pleading - Proper order to be made - Is dismissal of the claim.

### ***FACTS***

The Appellant gave a loan to the Respondent the terms of which were set out in two deeds of mortgage, Exhibit “5” and “6”. A disagreement arose between the parties over the percentage of interest chargeable on the loan which led to the filing of this action before the Kwara State High Court, Okene, by the Respondent seeking certain declarations and orders. The Respondent contended that the agreed interest rate was 11 % flat per annum and sought to rely on a memorandum issued to him by an Assistant General Manager of the Appellant and oral discussions between them in proof of his claim. The Appellant relied on the provision of clause 3 of the mortgage deeds in maintaining that it was empowered to stipulate the interest rate from time to time without consultation with the Respondent. And it had previously stipulated interest rates higher than 11 % as a result of credit guidelines issued by the Central Bank of Nigeria to Commercial Banks.

Counsel to the Appellant exhibited certain indefinite attitude towards the admission of the Memorandum (Exh “1”) sought to be tendered by the Respondent. The learned Trial Judge rejected the Memorandum as being inadmissible but relied on the oral evidence of the contents thereof in finding for the Respondent and granted four out of the declarations sought. Appellant’s appeal to the Court of Appeal was dismissed and it held that the said memorandum was relevant and admissible in evidence. The Appellant being dissatisfied has further appealed to the Supreme Court Contending that the Respondent did not discharge the burden of proving his case by credible evidence. It was also contended that the construction placed on clause 3 of the legal mortgage deeds was improper.

### ***HELD*** (unanimously allowing the appeal)

1. A counsel must make his view known before the case is fixed for judgment, he cannot sit on the fence as the law does not permit such. What is open to a counsel when a document is tendered by the other party is to raise an objection if he opposes the admissibility of the document and if he has no objection he should say so. (p. 12 L 14)

2. As there was no appeal to the lower court against the trial court’s rejection of the memorandum (Exh “1”) on the ground of inadmis-

sibility, the Court of Appeal erred in law in reopening (*suo motu*) the issue of the admissibility of the document and in ruling the that document was relevant and admissible. (p. 12 L 25)

3. Exhibit “1” (the memorandum) constituted an extrinsic evidence tended to be used to contradict the mortgage deeds and admissible for that reason. (p. 14 L 19)

4. The Respondent cannot give oral evidence of contents of the inadmissible document (Exh “1”) because where a written agreement matter exists, evidence of a preliminary oral agreement can be introduced. (p. 14 L 22)

5. The Court of Appeal erred in endorsing the 11% per annum flat rate of interest chargeable on the loan, and in affirming the modification of the terms of the deeds of mortgage by oral evidence as done trial Judge. This error of law was fatal in the sense that it occasioned a substantial miscarriage of justice for without the error the bottom would have been knocked off the Respondent’s claim which could not have been able to succeed on that ground alone. (p. 15 L24 & p. 16 L4)

6. It was wrong in the circumstance of this case to import extraneous matters into the provision of the mortgage deeds because general parties are bound by their contract and it is not the duty of a court to make or rewrite a contract for the parties. (p. 19 L 6)

7. It is possible to understand and apply the provision of clause 3 mortgage agreements as it stands for it is clear and unambiguous was no necessity to import new or additional words into it. Therefore, failure of the Appellant to give prior notice or hold prior consultation with the Respondent about increase in interest rates on the loan not, as held by the Court of Appeal, result in the modification interest rates stipulated under the said clause 3. (p.21 L 2)

8. On the applicable principles, the onus was on the Respondent to prove his assertion in his pleading that the rate of interest applicable to the loan granted to him by the Appellant was 11 % per annum. The proper order to be made by the trial court is dismissal of the claim for want of proof and it is immaterial that the Appellant did not prove the averments in its Statement of Defence since it claimed nothing. (p.23 L 15)
9. The Respondent did not discharge the burden of proving his case by credible evidence, the question of the burden of proof being shifted to the Appellant did not arise, and the affirmation by the Court of Appeal of the judgment of the learned trial Judge granting the first four reliefs was not justified. (p.24 L31)

**NOTABLE POINTS OF INTEREST**

***ADIO JSC***

*Variation of written contract by extrinsic evidence*

1. The general rule is that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. (p. 14 L 2)

*Operation of parol evidence rule*

2. The law is that the operation of the parol evidence rule is not limited to oral evidence. It extends to extrinsic evidence in writing, such as drafts of agreement, preliminary agreements and letters relating to previous negotiations. (p. 14 L 14)

*Suo motu raising of issue by Appellate, court*

3. It is wrong for an appellate court to raise an issue suo motu and determine the issue without giving the parties or their counsel the opportunity to argue the point. (p. 15 L 37)

*Clear documents to be given their simple and ordinary meaning*

4. "I have read the provision of clause 3 of the mortgage agreements set out above, and it is my view that it is plain, clear and unambigu-

ous. Where a document is clear, the operative words in it should be their simple and ordinal grammatical meaning.” (p. 18 L 18)

*Court’s intervention to imply a term in an agreement*

5. In certain special circumstances, a court may intervene and imply a term into an agreement. The circumstances in this case did not warrant such an intervention. (p. 19 L 15)

*Condition under which to import additional words in the parties contract - Presumption of validity of contract* 10

6. The words in a document must first be given their simple and ordinary meaning and under no circumstances may new or additional word imported into the text unless the document would be by the absence of that which is imported impossible to understand. The 15 presumption is that the parties have intended what they have in fact said so that their words must be construed as they stand. (p. 1.9 L 21)

**UWAIS JSC** 20

*Vesting of power to fix the minimum interest payable on loan*

7. Indeed the power to fix the minimum interest payable on a loan is vested by law in the Central Bank of Nigeria, (p.26 L 9)

**OLATAWURA JSC** 25

*Basis for respondent’s misconception of rate of interest*

8. “I will only add that the basis for the misconception about the rate of interest was the respondent’s difficulty to appreciate the difference between arrangements made before the execution shown in clause: 30 Exhibits 5 and 6”. (p. 28 L 6)

**REPRESENTATION:**

S. A. Bello Esq., for the Appellant.

Chief W. Olanipekim SAN, with

Mr. B. Erinmaiye, for the Respondent 35

**CASES REFERRED TO**

1. Olaloye v. Balogun (1990) 5 NWLR (pt. 148) 24

2. Eke v. Odolofm (1961) 1 All NLR 842
3. Macaulay v. Nal Merchant Bank (1990) 4 NWLR (pt. 144) 283
4. Ejowhomu v. Edok-Eter Ltd. (1986) 4 NWLR (pt. 39) 1
5. Udeze v. Chidebe (1990) 1 NWLR (pt 125) 141
6. Idundun v. Okumagba (1976) 9-10 SC 22
- 5 7. Fatunde v. Omwoamanam (1990) 2 NWLR (pt. 132) 322
8. Oyenuga v. Provisional Council of the University of Ife (1965) NMLR 9
9. Solicitor-General, Western Nigeria v. Adebonojo (1971) 1 All NLR 178
- 10 10. Okubule v. Oyagbola (1990) 4 NWLR (pt. 147) 723
11. Ike v. Ugboaja (1992) 6 NWLR (pt. 301) 539
12. Nigerian Maritime Service Ltd. v. Afolabi (1978) 2 SC 79
13. High Grade Maritime Services Ltd v. First Bank (1991) NWLR 15 (pt. 167)290
14. Colony Development Board v. Kamson (1955) 2 1 NLR 75
15. Molade v. Molade (1958) NSCC 40

### **STATUTES REFERRED TO**

- 20 Evidence Act s. 135 (1)
- Banking Act 1969 s. 15

### **LEAD JUDGMENT BY ADIO JSC**

- 25 The respondent, a customer of the appellant, in 1982, obtained a loan of N250,000.00 from the appellant to enable the respondent complete a restaurant in Ilorin. The terms under or subject to which the loan was granted were set out in two deeds of mortgage, Exhibits 5 and 6. He was making payment to the appellant until 1988 when there was a disagreement between the appellant and the respondent on the question of
- 30 the rate of the interest chargeable on the loan. The respondent was of the view that the rate was 11% throughout the period of repayment and, for that reason, the balance of the loan-outstanding was N116,076,10. The appellant maintained that the rate of the interest chargeable was not fixed.
- 35 It was empowered by the mortgage agreements to stipulate the rate of interest from time to time and pursuant to the exercise of that power, the appellant had from time to time, after the granting of the loan, stipulated rates of interest higher than 11% as a result of credit guidelines issued by the Central Bank of Nigeria to commercial banks. Consequently, the balance outstanding on the loan granted to the respondent was N353,632.09.

The disagreement could not be resolved. So, the respondent instituted an action against the appellant in the High Court, Kwara State, Okene Judicial Division, in which he claimed the following reliefs:-

*"(1) A declaration that the defendants are only entitled to charge on any loan overdraft or banking facilities granted to the plaintiffs banking interest prevailing as at the time the plaintiff was granted the said loan, overdraft and/or banking facilities.*

*(2) A declaration that the defendants cannot unilaterally and arbitrarily increase the banking interest payable on the loan, overdraft or banking facilities granted to the plaintiff without the knowledge and consent of the plaintiff.*

*(3) A declaration that the plaintiff having paid over a sum of N229,000.00 out of a total loan of N250,000.00 granted to him by the defendants sometime in 1982 cannot be owing the defendants a staggering amount of N353,632,09 or anything in the neighbourhood of that amount.*

*(4) A declaration that the plaintiff having paid a total sum of N261,632.50 as at 15:11:88 to the defendant on the principal loan/ overdraft of N250,000.00 based on the agreed 11% interest rate, he (the plaintiff) is only indebted to the defendant in the sum of N116,076.10 as at the said 15th November, 1988.*

*(5) Pursuant to sub-paragraph (4) Supra, an order permitting the plaintiff to settle the said outstanding indebtedness of a sum of N116,076.10 to the defendant by monthly instalment of a sum of N3,500.00.*

*(6) An order of injunction restraining the defendants either by themselves, agents, servants, privies or through any person however (sic) from selling, alienating or advertising for sale the plaintiff's landed property .....unless and until the plaintiff's indebtedness to the defendant is determined and thereafter unless and until the plaintiff defaults in meeting the monthly instalmental payment as prayed for."*

The parties duly filed and exchanged pleadings. The evidence led by the respondent was that before he was granted the loan, he had a discussion or negotiated with Assistant General Manager, Operations, Union Bank in Lagos and the rate of interest they agreed was 11%. The aforesaid Assistant General Manager gave him (respondent) a memorandum containing the terms agreed upon during the discussion or negotiation and he gave the said memorandum

to the appellant as requested. An extra copy of the memorandum was given to the respondent for his own use. The position of the appellant was that the terms regulating the rate of interest were in clause 3 of each of the two mortgage deeds (Exhibits '5' and '6') and not in the memorandum, Exhibit '1'. Evidence, was led to show that  
 5 the prime Drate of interest was not fixed. It ranged from 13 1/2% in 1984, 13% in 1986, 15% in 1987, 21% in February, 1988, 18 1/4% from March, 1988 to 19 3/4% from September, 1988 to January, 1989.

10      After consideration of the evidence before him and the submissions of the learned counsel for the parties, the learned trial Judge granted the first four reliefs claimed by the respondent. He rejected the memorandum, Exhibit '1', because it was inadmissible on the ground that it could not vary or contradict the provisions of the mortgage  
 15 deeds, Exhibits '5' and '6', executed by the appellant and the respondent in relation to the transaction between them. The learned trial Judge however, accepted the oral evidence of the respondent as to what he negotiated with the Assistant Manager of the appellant's bank in Lagos, which allegedly fixed the rate of interest at 11% per  
 20 annum.

Dissatisfied with the Judgment of the learned trial Judge, the appellant appealed to the Court of Appeal which dismissed the appeal of the appellant. The Court of Appeal held that the mortgage  
 25 deeds (Exhibits '5' and '6') did not contain terms specifying the rate of interest chargeable on the loan. It upheld the finding of the learned trial Judge based on the oral evidence of the respondent that the rate agreed upon during the negotiation between him and the Assistant General Manager of the Union Bank in Lagos was 11% per annum  
 30 throughout the period of the repayment of the loan. The court was of the view that the appellant could not unilaterally increase the interest rate, thus affirming the view of the learned trial Judge that the appellant could not increase the rate of interest without the consent of or notice to the respondent. In the view of the court of Appeal, the  
 35 memorandum (Exhibit '1') which allegedly contained, inter alia, the particulars of the negotiation between the respondent and the Assistant Manager, Operations Lagos, on the loan, subsequently granted to the respondent and which was rejected by the learned trial Judge as inadmissible, was not only relevant but also admissible. The court

was also of the view that as the respondent had discharged the burden of adducing evidence in support of his case, the burden shifted to the appellant. As the evidence led by the appellant was unsatisfactory the learned trial Judge was right in granting the reliefs claimed by the respondents in items 1 to 4 of his claim.

Dissatisfied with the judgment of the Court of Appeal, the appellant has further appealed to this court. In accordance with the rules of this court, the parties duly filed and exchanged briefs. The appellant, in its brief of argument, identified two issues for determination while the respondent, in his own brief, also identified two issues. The issues identified in the appellant's brief, which were based on the grounds of appeal, are more comprehensive and are sufficient for the determination of this appeal. They are as follows:-

*1. Whether the plaintiff in the court below, discharged his burden to prove his case by credible evidence to justify the affirmation by the Court of Appeal of the first, second, third and fourth reliefs granted to the plaintiff/respondent by the trial court.*

*2. Whether, on a proper construction of Clause 3 of Exhibits 5 and 6 (Deeds of legal mortgage) the mortgagee (the appellant herein) had an obligation to notify the mortgagor (respondent herein) of the change in interest rates from time to time, and whether the failure of the appellant to give such notice justified the nullification by the Court of Appeal of the variation of interest rate in Clause 3.*

I shall consider the questions raised under the two issues together. I have already set out in brief the evidence led by the respondent for the purpose of proving his claim and the evidence led by the appellant in defence. The respondent told the court how he came to the conclusion that the rate of interest chargeable on the loan granted him by the appellant was 11% per annum flat rate. It was fixed. He was not told that the rate could be increased without his consent or knowledge and he was not notified of any increase. The basis of his conclusion was that the rate was what was agreed upon by him and the Assistant General Manager, Operations. Lagos, during the negotiation between them before the loan was granted to him. Details of the matters on which they negotiated were set out in a memorandum which the said Assistant General Manager sent through the respondent to the appellant and a copy of which was given to the

respondent. The memorandum is Exhibit '1'.

It is necessary to first of all deal with the issue of the rate of interest that was chargeable on the loan given to the respondent. In this connection, the respondent relied on the copy of the said memorandum, Exhibit '1', and on the oral evidence of the contents thereof  
 5 given by him. He used the fixed rate of 11% per annum to calculate the total amount payable by him, subtracted the amount he had paid so far, and stated what was outstanding. The contention of the appellant was that the rate fluctuated as the appellant was empowered by clause 3 of the mortgage deeds (Exhibits '5' and '6'), which  
 10 were the loan agreements, to stipulate the rate of interest from time to time. The learned trial Judge rejected Exhibit '1' because it was inadmissible but accepted the respondent's oral evidence of the negotiation which fixed the rate at 11% per annum. In upholding the  
 15 finding, the Court of Appeal stated, inter alia, as follows:-

*It was then submitted that clause 3 in Exhibits 5 and 6 contained no clear provision as to the rate of interest payable. And this view, is supported by page 7 of the appellant's brief where it was submitted that the trial Judge ought to have applied the rate of interest given in evidence by DW 1 instead of implying strange rate of  
 20 interest not intended by the parties. Also the failure of the appellant to call Alhaji Maiyaki Usman to rebut the evidence of the plaintiff was fatal to the defendant's case under section 148(d) of the Evidence Act .....it follows that the inference of 11% per annum should be  
 25 drawn in favour of the respondent..... I have given the briefs and record of this appeal deep thought. One of the difficulties in this appeal is the finding of the lower court against the admissibility of that Exhibit 1, a directive from the Assistant General Manager, Union Bank  
 30 Headquarters, Lagos that their Lokoja Branch Manager should charge the prime rate plus 2% which he totalled 11 % on the loan between the parties:.....*

*Thus in this case, the negotiations for the loan agreement was evidenced by Exhibit 1 dated December 28, 1981 which was a  
 35 letter under the hand of the Assistant General Manager, Lagos Operation, Union Bank, Headquarters, 40 Marina, Lagos and addressed to the Manager, Lokoja Branch .....*

*.....A copy was also sent to the Area Manager, Ibadan, Exhibit 1 is not only relevant, but also admissible."*

It was argued for the appellant that the two mortgage deeds executed by the respondent in relation to the loan transaction contained the terms upon which the loan was granted. None of the parties could, therefore, call Alhaji Usman who wrote the memorandum, Exhibit '1', to give evidence of the particulars of the preliminary oral negotiation or agreement between him and the respondent. It was also contended that neither the oral evidence of the respondent or of any witness nor the memorandum, Exhibit '1', which contained the particulars of the alleged negotiation was admissible to contradict the provisions of clause 3 of the mortgage deed (Exhibits '5' and '6') relating to the rate of interest payable on the loan. It was, therefore, argued that the Court of Appeal erred in law in basing its decision on the said memorandum which had been rejected by the learned trial Judge when there was no appeal against the rejection. Further, it was argued that the Court of Appeal erred in law in raising the issue of the admissibility of Exhibit '1' suo motu and deciding it without hearing the parties and that, in any case, Exhibit '1' was an internal memorandum which was not addressed to the appellant. The learned counsel for the respondent argued that the only evidence on the rate of interest payable on the loan was the oral evidence of the respondent on the 11% per annum which, according to the respondent, was agreed upon by him and the Assistant General Manager, Lagos during the alleged negotiation. Exhibit '1' contained the particulars of what were discussed or agreed upon during the said negotiation. Finally, it was submitted that even if it was wrong for the Court of Appeal to admit the memorandum, Exhibit '1', the admission alone could not be a ground for reversing the decision of the court because it did not occasion a miscarriage of justice.

The first question, which comes to mind, is how the memorandum, Exhibit '1', containing details of the alleged negotiation between the respondent and the Assistant General Manager, Operations, Lagos, became Exhibit '1' and how did it come before the Court of Appeal so as to warrant the Court of Appeal holding that it was not only relevant; it was admissible? When the document was tendered before the learned trial Judge, the learned counsel for the appellant objected to its admissibility. Before the learned trial Judge ruled on the objection, the learned counsel for the appellants withdrew his

objection. He stated that the withdrawal of his objection did not mean that the document was admissible in evidence or that it could be used to vary the contents/terms of a contract to which it was extraneous. The learned trial Judge made a note of what the learned counsel for the appellant said and received the memorandum as Exhibit '1'.

5 The fact that the document was before the Court of Appeal as Exhibit '1' in this case, to a large extent, misled the Court of Appeal in reaching the decision it reached in relation to the memorandum. Be that as it may, the whole of the record of proceedings in this case was

10 before the Court of Appeal and that court should have discovered that the learned trial Judge subsequently, in his judgment, gave consideration to the admissibility or otherwise of the memorandum (Exhibit '1') and came to the conclusion that it was not admissible and rejected it. In the first place, the attitude which the learned counsel

15 for the appellant adopted in the matter was irregular. A counsel has to take a definite stand. He cannot sit on the fence as the law does not permit such a thing. He must make his view known before the case is fixed for judgment. What is open to a counsel when a document is tendered by the other party is to raise an objection if he opposes the admissibility of the

20 document and if he has no objection he should say so. It will then be for the court, if there is an objection to the admissibility of the document, to give a ruling. If the objection is upheld the document should be rejected and marked, "*rejected*". It should not be marked as an exhibit, and, while it remains rejected, the document is irrelevant and

25 its contents cannot be used for the determination of any issue in the case by either the trial court or by an appellate court. There is nothing in the record of appeal showing that there was an appeal to the Court of Appeal against the ruling in the Judgment of the learned trial Judge rejecting the memorandum (Exhibit '1') on the ground

30 that it was inadmissible. For as long as there was no such appeal, the Court of Appeal erred in law in reopening the issue of the admissibility of the document and in ruling that the document was relevant and admissible. If there is no appeal against the ruling of a trial court

35 rejecting a document as being inadmissible or if there is such an appeal which is unsuccessful, then the document or the contents thereof cannot be properly used or relied upon in the determination of any relevant issue in the case.

The respondent, for the contention that the rate of the interest, chargeable or agreed upon, in relation to the said loan was 11% per annum and no more, relied on his oral evidence on the matters on which he and the Assistant General Manager, Operations, Lagos, negotiated, and on the memorandum, Exhibit '1' containing particulars of the said negotiation sent by the Assistant General Manager to the appellant through him (respondent) and a copy of which was given to him. The learned trial Judge rejected the said memorandum when he stated, inter alia, in his judgment as follows:-

*"Therefore, I agree with the learned counsel for the defendant that the memorandum Exhibit'1' is extrinsic to the agreement between the parties and, consequently, that document cannot be relied upon to determine the rate of interest governing the transactions between the parties."*

Though the learned trial Judge rejected Exhibit'1' (the memorandum) he eventually accepted the oral evidence of the respondent about the aforesaid negotiation between the respondent and the Assistant General Manager, Operations, Lagos, set out in writing in Exhibit'1', for the determination of the rate of interest as 11% per annum. The learned trial Judge stated further in his judgment, inter alia, as follows:

*"Apart from Exhibit'1' on which the plaintiff relied which I have found is inadmissible to vary or contradict the mortgage deeds the plaintiff also insisted that he came to an agreement with the defendant's Assistant General Manager, Operations, Alhaji Maiyaki Usman, with whom he settled on the 11 % fixed rate of interest. That evidence was not contradicted by the defendant who was in a position to do so ..... Therefore, I find as a fact that the rate of interest on the loan agreement between the parties was settled at 11% per annum and I imply that rate into the two mortgage deeds, Exhibits '5' and '6' to interpret clause 3 of each Deed."*

The Court of Appeal not only endorsed the use which the learned trial Judge made of the oral or parol evidence of the respondent about the matters allegedly agreed upon during the alleged negotiation between him and the said Assistant General Manager, Lagos, the Court of Appeal went further to hold that the memorandum, in which the details of the alleged negotiation were set out in writing, was not

only relevant but also admissible. The general rule is that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract  
5 from or contradict the terms of the written instrument. See S.132(1) of the Evidence Act; and *Olaloye v. Balogun* (1990) 5 NWLR (Pt.148) 24. In the present case, the relevant agreements were the mortgage deeds, Exhibits '5' and '6', which contained, inter alia, provisions concerning the amount of the loan, its period of repayment and made  
10 provision for the determination of the rate of interest payable on the loan. I have pointed out that the memorandum, Exhibit '1', irregularly found its way to the Court of Appeal as an exhibit and that it was, in any case, wrong, in law, for the Court of Appeal to hold that the document was relevant and admissible. Further, the law is that  
15 the operation of the parol evidence rule is not limited to oral evidence. It extends to extrinsic evidence in writing, such as drafts of agreement, preliminary agreements and letters relating to previous negotiations. Generally, evidence is not admitted as to what passed  
20 between the parties before the execution of a written agreement or during its preparation. Exhibit '1' constituted an extrinsic evidence intended to be used to contradict the mortgage deeds and was, for that reason, not admissible.

The next question, for consideration, is whether if the afore-  
25 said memorandum (Exhibit '1') was not admissible, the respondent could properly give oral evidence of its contents, that is, matters which the respondent and the said Assistant General Manager, Operations, Lagos, discussed and agreed upon about the loan during the alleged  
30 negotiation between them. The answer to the question is in the negative. This is because where a written agreement on a matter exists, evidence of a preliminary oral agreement cannot be introduced. See *Eke v. Odolajin* (1961) 1 All NLR 404. In *Macaulay v. NAL Merchant Bank Ltd.* (1990) 4 NWLR (Pt.144) 283, the appellant was granted  
35 a loan by the respondent and, according to the relevant loan agreement, repayment was to be effected in full within four years from either the rental income on the buildings which were to be completed with the loan or from any other sources. As there was default in payment of the loan, the respondent sued the appellant for the

Union Bank of Nig. Ltd. v. Ozigi (1994) 5 KLR Adio JSC 15  
balance. The appellant filed a defence but the respondent still filed a motion, supported by an affidavit, that final judgment be entered for it. In the affidavit filed by the appellant, he deposed that there was a mutual agreement between the parties (not recorded in the loan agreement) that time was not of the essence of the contract and that the respondent made him to understand that the loan was to be repaid within four years of completing the buildings and letting them out to tenants. The learned trial Judge, for that reason, held that the appellant should be let in to defend the action because there was a dispute about the terms of the loan. On appeal to the court of Appeal, the ruling of the learned trial Judge was reversed because, on the construction of the relevant clause in the loan agreement, the appellant did not raise any defence to the claim either in the statement of defence or in the affidavit in support of the statement of defence. On further appeal to the Supreme Court, Agbaje, J.S.C., stated, at p. 311, inter alia, as follows:-

*"As I have said above the defendant has himself admitted in his affidavit that the terms and conditions of the loan agreement between him and the plaintiff have been reduced into writing. In the circumstances and having regard to the provisions of section 131(1) of the Evidence Act can the defendant be heard to say that besides these written terms and conditions there is other evidence of the terms of the loan agreement? I have no difficulty at all in answering the question in the negative. So in my judgment, it is only the written conditions and terms of the loan agreement that are evidence of the terms and conditions."* 15 20

The Court of Appeal erred in endorsing the 11% per annum flat rate of interest chargeable on the loan, granted by the appellant to the respondent, implied by the learned trial Judge into the written agreements, Exhibits '5' and '6'. The Court of Appeal also erred in affirming the modification, by the learned trial Judge, of the terms of the deeds of mortgage, Exhibits '5' and '6', by the oral evidence of the respondent on the alleged negotiation between the respondent and Assistant General Manager, Operations, of the Union Bank in Lagos. The same reason given by the learned trial Judge for rejecting the memorandum also applied to the oral evidence of its contents. 25 30

There was also the question that it was the Court of appeal that suo motu raised or re-opened the issue of admissibility of the memorandum (Exhibit 1') and determined the aforesaid issue without giving the learned counsel for the parties an opportunity of making submissions. It is wrong for an appellate court to raise an issue suo motu and determine the issue without giving the parties or their counsel the opportunity to argue the point. See Ejowhomu v. Edok-Eter Ltd. (1986) 5 NWLR (Pt.39) 1. 35

It is necessary, at this stage, to consider whether the admission of the memorandum (Exhibit '1') and/or of the oral evidence of its contents occasioned a substantial miscarriage of justice. The error of law committed by the Court of Appeal, in the circumstance, was fatal in the sense that it occasioned a substantial miscarriage of justice in that without  
5 the admission of the memorandum (Exhibit '1') and/or of the oral evidence of the contents thereof on the alleged negotiation, the bottom would have been knocked off the respondent's case. On that ground alone, he could not have been able to succeed in his claim, as he had done, as there would have been no other evidence to  
10 support his contention that the rate of interest was 11% per annum and that the balance that he claimed to be outstanding was, in fact, the amount outstanding. The amount which, according to the calculation made by the respondent, was outstanding was about one third of the amount  
15 which the appellant said was outstanding. A decision of a lower court on any point will be reversed by the appellate court where error of law committed by the lower court is fatal because it has occasioned a substantial miscarriage of justice. See *Udeze v. Chidehe* (1990) 1 NWLR (Pt.125) 141. If the error of law is the wrongful admission of evidence, the appellant must  
20 show that, without the admission of the evidence, the decision would have been otherwise. See *Idundun v. Okumagha* (1976) 9-10 S.C.227. There is no doubt, therefore, that the error of law committed by the Court of Appeal occasioned a substantial miscarriage of justice and that without the admission of the aforesaid evidence, the  
25 decision of the Court of Appeal would have been otherwise. Further, if by disregarding the offending evidence of the alleged negotiation, Exhibit '1', and the oral evidence of the respondent of the content thereof, there was no other evidence on which the finding that the rate of interest on the loan was 11% per annum could be based, then the finding could properly  
30 be set aside because an appellate court has power to reverse a finding of fact made by the trial court which is not supported by evidence. See *Fatunde v. Onwoamanam* (1990) 2 NWLR (Pt.132) 322. -

Having dealt with one major aspect of the evidence led by the parties, that is, whether the evidence of previous alleged negotiation, oral or written, between the respondent and the Assistant General Manager, Operations, Lagos, was or was not admissible, to vary,  
35 alter, or contradict the relevant provisions in clause 3 of Exhibits '5' and '6', the question raised under the second issue becomes relevant as it was the second or another major aspect. The position of the

appellant was that the relevant provisions on the rate of the interest payable on the loan in question in this case were contained in clause 3 of Exhibit '5' and '6' and that under the provisions the appellant was empowered to stipulate the rate of interest and, in doing so, the appellant might increase it from time to time, as had been done in this case. The appellant was not under any obligation to hold prior consultation with or to give prior notice of such increases to the respondent. The respondent contended that the appellant had no power to increase the rate of the interest payable on the loan unilaterally, that is, without prior consultation with or notice of such increase being given to the respondent. In rejecting the appellant's contention, the Court of Appeal stated, inter alia, as follows:-

*"Also no evidence was led as to any banking practice, usage or custom which gave the appellant the right to unilaterally vary upwards interest rate, .....The word "stipulated" according to the Concise Oxford Dictionary means: mention or insist upon as essential part of agreement; demand as part of a bargain or agreement, the appellant therefore had an obligation under clause 3 to notify the mortgagor or plaintiff/respondent of the change in and demand interest rates from time to time starting with the offer of 11% in Exhibit 1. Failure to do this nullifies the variation of interest rate clause and fixed the rate at 11% per annum.-*

The issue raised, in this connection, is how to interpret the provision of clause 3 of the mortgage deeds. The provision is as follows:-

*"All interest payable on the money hereby secured shall accrue due from day to day at the rate from time to time stipulated by the bank and may be capitalised at such intervals as the bank may from time to time prescribe but not more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid."*

The submission made for the appellant, in this connection, was that if the relationship of a banker and a customer was altered into that of a mortgagee and a mortgagor by the taking of a mortgage (as in the present case) interest must be calculated according to the terms of the mortgage. The parties (appellant and respondent) should be presumed to have intended what they, in fact, stated in the mortgage deeds so that the provision in clause 3 thereof which was clear and unambiguous must be construed as they stood. The appellant contended also that the provision should be given its ordinary meaning

and that there was, therefore, no necessity for importing into the provision of clause 3 of the mortgage agreements extraneous matters, such as the requirement that the appellant must obtain prior  
5 consent of and give prior notice of increase in the rate of interest to the respondent. For that reason, it was contended further that the purported nullification, by the Court of Appeal, of the rates of interest stipulated by the appellant in the exercise of the power conferred by clause 3 of the mortgage agreements was wrong in law. It was contended for the  
10 respondent that failure of the appellant to produce the Central Bank guidelines which warranted the increase in the rate of interest from time to time by the appellant was fatal to the appellant's case. It was also contended that there was no evidence of any banking practice, usage or custom which supported the increase of the rate of interest by the appellant  
15 unilaterally. Finally, it was argued that it would be unreasonable to hold that clause 3 of the mortgage agreements implied a carte blanche on the part of the appellant to vary the interest rate at will.

I have read the provision of clause 3 of the mortgage agreements set out above, and it is my view that it is plain, clear and unambiguous.  
20 Where a document is clear, the operative words in it should be given their simple and ordinary grammatical meaning. On the application of the provision, the following evidence of the D.W.1 is relevant:

*"The interest varies from time to time as directed by the Central  
25 bank e.g. 11/1/88 September, 1984 the prevailing interest rate was 13 1/2%. From September, 1984 to August 1986 - 13%. September, 1986 to August 1987 it rose to 15%.. September, 1987 to February, 1988 - 21% March, 1988 to August, 1988 - 18 3/4 and September, 1988 to January, 1989 or today 19 3/4%. The rates were fixed by the Central Bank."*

If the prevailing interest rates (prime rates) fixed by the Central  
30 Bank vary from time to time, then the interest rates stipulated by the appellant, that was under obligation as a bank to comply with the Central Bank guidelines, in the matter, could not be fixed: it had to vary from time to time in response to the Central Bank guide-lines. That was the process provided for in Clause 3 of the mortgage agreements, Exhibits '5' and '6'.  
35 The provision of clause 3 of the mortgage agreements can be relied upon to stipulate rates of interest in response to the C.B.N.'s guidelines on the matter. There can be no question of fixing arbitrary rates of interest or rates of interest contrary to the C.B.N.'s guidelines. The necessary guidelines on the rate of interest on loans are given by the Central Bank from time to time

generally and not to a particular bank or in relation to a particular loan transaction. The general rule is that where the words of any instrument are free from ambiguity in themselves, and where the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is always to be construed according to its strict, plain and the common meaning of the words themselves. In the circumstance, it was therefore, wrong to import into the provision of clause 3 of the mortgage deeds (Exhibits '5' and '6') extraneous matters such as the requirement that the appellant must obtain the prior consent of or given prior notice of increase in the rate of interest on the loan to the respondent. This is because, generally, if the conditions necessary for the formation of a contract are fulfilled by the parties thereto, they will be bound by it. It is not the function of a court to make a contract for the parties or to rewrite the one which they have made. See *Oyenuga v. Provisional Council of the University of Ife* (1965) NMLR 9. In certain special circumstances, a court may intervene and imply a term into an agreement. The circumstances in this case did not warrant such an intervention because the assumption of the learned trial Judge, affirmed by the Court of Appeal, that the provision in the mortgage deeds (Exhibits '5' and '6') could not enable the rate of interest to be determined as it was ambiguous, was erroneous and not correct. In other words, the words in a document must first be given their simple and ordinary meaning and under no circumstances may new or additional words be imported into the text unless the document would be by the absence of that which is imported impossible to understand. The presumption is that the parties have intended what they have in fact said so that their words must be construed as they stand. See *Solicitor-General, Western Nigeria v. Adebajo* (1971) 1 All NLR 1978. What happened in the case was that the 1st respondent was granted a scholarship by the Government of Western State of Nigeria. As a result he and his guarantors executed a bond in which he undertook that upon passing the relevant examinations he would serve the Government for a period of five years in any capacity considered appropriate by the Government. The respondent passed the relevant examination and returned to Nigeria but he was not given the necessary certificate because he had not spent the stipulated period on the course. The Government gave him an appointment which, having regard to all the circumstances of the case, was considered appropriate. He was not satisfied. He resigned the appointment before the expiration of five years. The Government consequently sued him and his guarantors for the refund of the amount spent on him pursuant to the

grant of the scholarship. The learned trial Judge found that the 1st respondent committed a breach of the bond by resigning his appointment before the expiration of the period stipulated in the agreement and entered judgment for the Government.

On appeal to the then Western State Court of Appeal by the  
 5 respondents, the court allowed the appeal and set aside the judgment of the learned trial Judge. The Western State Court of Appeal held, inter alia, that to be appropriate, any capacity in which the 1st respondent was called upon to serve by virtue of the relevant clause of the agreement must be reasonable. Dissatisfied with the judgment,  
 10 the Government appealed to the Supreme Court. The Supreme Court allowed the appeal, set aside the judgment of the Western State Court of Appeal, and restored the judgment of the learned trial Judge. In allowing the appeal, the Supreme Court stated, inter alia, as follows:-

15      *"Now we have already set out the provisions of clause 4(a) of exhibit C and in the events which had happened it is easy to see why a consideration of that clause has become a matter of paramount relevance. To us, this clause clearly stipulates that after qualification the first defendant could be offered employment by the Permanent Secretary, Ministry of*  
 20 *Education, Western State in a capacity considered suitable by the regional government." In his consideration of that clause and his application of it to the facts of this case, Delumo, J. had held that according to the provision of the clause it is the regional government that would decide the capacity which is appropriate." On the other hand, the Western State Court of Ap-*  
 25 *peal took the view that the word "reasonable" and (the "concept of reasonableness") should be imported into the contracts of the parties for the purpose of construction. Neither of the parties to Exhibit C (and Exhibit H) contemplated that the word should be included in their agreement and throughout Exhibit C (and Exhibit H) that word was not even breathed. It*  
 30 *is obvious from the confusion that arose in the Western State Court of Appeal itself that the court was in difficulty to ascertain the real position into which the word "reasonable" could or should be fixed*  
 35 *.....It is the alphabet of his study to any lawyer that in the construction of documents the words must first be given their simple and ordinary meaning and that under no circumstances may new or additional words be imported into the text unless the documents would be by the absence of that which is imported impossible to understand."*

The provision of clause 3 of the mortgage agreements is clear

and unambiguous. It is possible to understand and apply it as it stands. There was, therefore, no necessity to import new or additional words into it to require prior consultation with, or the giving of prior notice of increase in rates of interest on the loan in question to the respondent. Therefore, failure of the appellant to hold prior consultation with or to give prior notice to the respondent about increase in rates of interest on the loan could not, as the Court of Appeal held, result in the nullification of the interest rates stipulated under the provision of clause 3 of the mortgage agreements.

The result of the consideration, above, of the two major aspects is that the rate of 11% per annum which the respondent purported to use for the determination of his indebtedness to the appellant was wrong because (a) what the respondent discussed or agreed with the Assistant General Manager, Operation, Lagos, during an alleged negotiation before the appellant granted the loan to the respondent was not admissible for the purpose of altering, modifying or contradicting the provision of clause 3 of the mortgage agreements; (b) it was not legally right to import into the provision of the clause 3 of the mortgage agreements, a requirement that the appellant must obtain the respondent's prior consent or give prior notice of increase of the rate of interest to the respondent. The foregoing two major aspects of the matter must be borne in mind for the determination of the question whether the respondent discharged the onus of proving his case so as to justify the affirmation, by the Court of Appeal, of the judgment of the learned trial Judge granting items (i), (ii), (iii) and (iv) of the respondent's claim.

What really happened before the learned trial Judge was that he rejected the memorandum containing the particulars of the alleged negotiation between the respondent and the Assistant General Manager, Operation, Lagos, because it was inadmissible. However, the learned trial Judge accepted the oral evidence of the respondent on the alleged negotiation and, particularly, that aspect of it fixing the rate of interest payable on the loan as 11% per annum. In the view of the learned trial Judge, there was no evidence led by the appellant contradicting or challenging the allegation of the respondent that it was 11% per annum that he and Assistant General Manager agreed upon during the alleged negotiation. In the circumstance, the learned trial Judge implied the rate of 11% per annum into the provisions of the

two mortgage deeds. The rate of 11 % per annum was used for the purpose of determining the total indebtedness of the respondent. The balance outstanding was determined by subtracting what he had paid from the total indebtedness. The foregoing was the basis upon which the learned trial Judge held that the respondent had discharged the onus of proving his case and gave judgment for the respondent in relating to items (i), (ii), (iii), and (iv) of his claim. The Court of Appeal considered the various issues involved and the conclusions of the learned trial Judge on them. The court then stated, inter alia, as follows:

*"In the face of the unsatisfactory evidence led by the defence and the detailed credible evidence of the plaintiff on the loan, year by year repayments, interests and outstanding balance from 1982 to 1988 which at 11 % fixed rate showed the plaintiff paid N257,400.33k to the Bank and by his calculation only owed the bank N116,076.10k, the learned trial Judge granted all the reliefs sought by the plaintiff ..... Applying all these principles the plaintiff in the court below, having set up a credible case by discharging the burden of proof on him under section 136 of the Evidence Act, which was not demolished under cross-examination, the onus shifted on the defendant to explain that it applied clause 3 properly to the transaction which it failed to do."*

It was pointed out, in the appellant's brief, that it was not correct to hold that the evidence led by the appellant was unsatisfactory, that the appellant did not lead any evidence on the initial rate and the subsequent rates of interest, or that the evidence of the respondent that the rate of interest was fixed at 11 % per annum was unchallenged. The appellant referred to the evidence of the D.W.1. that the initial rate stipulated under the provision of clause 3 of the mortgage agreements was 13 1/2 % per annum and the witness gave evidence of the different rates stipulated from time to time. It was then contended that the evidence adduced by the respondent could not, in the present circumstances, be described as credible and that the respondent, had not proved his case so as to warrant the burden being shifted to the appellant. The submission in the respondent's brief was that the respondent having given evidence to the effect that the rate of interest was 11 % per annum which was settled between him and the said Assistant General Manager, the respondent had discharged the onus on him by section 135(1) of the Evidence Act and so the burden was shifted to the appellant to prove or establish the contrary.

It is necessary to clarify one aspect of this case. It is that it was the respondent that was claiming all the reliefs set out above. The appellant did not counter-claim though it led evidence on the rates of inter-

est and on the amount outstanding. It was, therefore, open to the appellant, in defending this case, to establish what it averred to be the rates of interest stipulated under clause 3 of the mortgage agreements or alternatively, not to establish the averments but to destroy the respondent's case by making it impossible, by lawful means, for the respondent to prove his case, for example, by valid objections on points of law. The burden of proving a particular fact is on the party who asserts it. See *Okubule v. Oyagbola*, (1990) 4 N.W.L.R. (Pt.147) 723; and *Ike v. Ugboaja* (1993) 6 N.W.L.R. (Pt.301) 539. That is the position in civil cases but the onus does not remain static. It shifts from side to side, where necessary, and the onus of adducing further evidence is on the person who will fail if such evidence was not adduced. See *Nigerian Maritime Services Ltd., v. Afolabi* (1978) 2 S.C. 79 at p. 84; and *Highgrade Maritime Services Ltd. v. First Bank of Nigeria Ltd.* (1991) 1 NWLR (Pt.167) 290. As the respondent was the party who asserted, in his pleading, that the rate of interest applicable to the loan granted to him by the appellant was 11% per annum, the onus was on him, on the principles stated above, to prove his assertion. If he failed to prove the assertion the proper order which the learned trial Judge should make was one dismissing the respondent's claim and it would not matter whether the appellant was unable to prove the averments in its own Statement of Defence, since the appellant had claimed nothing.

What then was the evidence before the learned trial Judge, warranting the granting of the reliefs in items (i), (ii), (iii) and (iv) of the respondent's claim and which evidence the Court of Appeal described as credible and on the basis of which the Court of Appeal affirmed the judgment of the learned trial judge? The crucial and the most important aspect of the evidence led by the respondent and upon which the whole of his case depended, was his evidence that 11% per annum was the rate of interest, on the loan. That, according to him, was what was discussed and agreed between him (respondent) and the Assistant General Manager, Operations, Lagos, during the negotiation between them. The evidence had been completely discredited and rendered of no probative value by the appellant that successfully showed or demonstrated that the agreements relating to the loan in question were the mortgage deeds (Exhibits '5' and '6') and not the memorandum (Exhibit '1') containing the particulars or details of the alleged negotiation; that the aforesaid memorandum (Exhibit '1') or oral evidence of the respondent concerning the aforesaid nego-

tiation could not be used to vary, alter or contradict the provision of clause 3 of the mortgage deeds; and that a provision could not be imported into the said agreements requiring the appellant to obtain the respondent's prior consent or to give prior notice of an increase in the rate on interest to the respondent. In short, the memorandum (Exhibit '1') or the evidence of the respondent of the rate of interest of 11 % per annum allegedly agreed upon during negotiation, was not admissible. If that was so, the amount determined by the respondent as his total indebtedness and the amount stated by him to be the balance could not be correct. In the circumstance, the respondent's case was in disarray and could not be said to have any legal or factual basis. It also could not be rightly said (as the learned trial Judge and the Court of Appeal had said) that the respondent had discharged the burden on him to prove his case or that (as the Court of Appeal had said) the respondent had set up a credible case. Further, one really could not see what was unsatisfactory, in the evidence led by the appellant, that pursuant to the power conferred upon the appellant by clause 3 of the mortgage agreements (Exhibits '5' and '6') to stipulate the rate of interest from time to time, the appellant stipulated interest rates from time to time bearing in mind the relevant central Bank guidelines to commercial banks in respect of which it had no alternative but to comply.

The answer to the question raised under the second issue has been stated in this judgment. The provision of clause 3 of the mortgage deeds could not reasonably or properly be construed to require the appellant to obtain the prior consent of the respondent or to give prior notice to the respondent in connection with increase or increases in rates of interest and failure, if any, to obtain respondent's consent or to give prior notice of increase to the respondent could not nullify the rates of interest stipulated by the appellant under clause 3 of the mortgage agreements. The answer to the question raised under the first issue is in the negative. The respondent did not discharge the burden of proving his case by credible evidence, the question of the burden of proof being shifted to the appellant did not arise, and the affirmation by the Court of Appeal of the judgment of the learned trial Judge granting the first four reliefs was not justified.

The appeal succeeds and it is hereby allowed. The judgment of the Court of Appeal, in so far as it related to items (i), (ii), (iii) and (iv) of the respondent's claim and the order awarding costs to the respondent are hereby set aside. In their place is substituted an order dismissing the respondent's claim in items (i), (ii), (iii) and (iv) of the respondent's claim.

The sum of N500.00 is awarded to the appellant as costs in the court below and the sum of N1.000.00 is awarded to it as costs in this court.

### **UWAIS JSC**

I have had the opportunity of reading in draft the judgment of my learned brother Adio, J.S.C. I agree with it, and for the reasons he gives I too would allow the appeal. However, I would desire to add the following for emphasis only. 5

There is no doubt from the facts of this case that at the time the respondent negotiated the loan in question with the Assistant General Manager of the appellant, it was represented to the respondent that the loan would attract interest at the rate of 11%. The loan was subsequently secured by two deeds of mortgage (Exhibits 5 and 6). The fact that the parties executed the deeds of mortgage after the negotiation establishes that the negotiation by itself was too general to establish a binding contract between the parties. It hence became necessary for the parties to execute formal documents in the form of the deeds of mortgage (Exhibits 5 and 6.) 10 15

By clause 3 of Exhibit 5 which is identical with clause 3 of Exhibit 6, the interest payable on the money secured by the deeds of mortgage is as follows:- 20

*"All interest payable on the moneys hereby secured shall accrue due from day to day at the rate from time to time stipulated by the bank and may be capitalized at such intervals as the bank may from time to time prescribed but not more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid."* 25

The words *"at the rate from time to time stipulated by the bank"* clearly show that the appellant is at liberty to fix the interest rate as it would deem fit. In other words, the appellant is not bound to adhere to the rate of 11% per annum negotiated between the respondent and the Assistant General Manager of the appellant. However, the learned trial Judge (Olagunju, J.) was of contrary view for he held as follows:- 30 35

*"I find as a fact that the rate of interest on the loan agreement between the parties was settled at 11% per annum and I imply that rate into the two Mortgage Deeds, Exhibits 5 and 6 to interpret clause 3 of each Deed."*

With respect, by so holding the learned trial Judge was in fact saying that the words in italics in clause 3 above mean that the rate of interest is fixed at 11% per annum. But surely that makes nonsense of the expression. Admittedly, that result could be attained by the  
5 appellant fixing the same rate all the time; but the evidence adduced by the appellant, whose prerogative it is under the deeds of mortgage to fix the interest rate, was that the rates varied from year to year in accordance with the credit guidelines issued by the Central Bank of Nigeria. Indeed the power to fix the minimum interest payable on a loan is vested by law in the Central Bank of Nigeria. Section  
10 14 of the Banking Act, 1969, (now Section 15 of Cap. 28 of the Laws of the Federation of Nigeria, 1990) provides:-

*"(1) The rate of interest charged on advances, loans or credit facilities or paid on deposits by any licensed bank shall be linked to the minimum rediscount rate at the Central Bank subject to stated  
15 minimum and maximum rates of interest, and the minimum and maximum rates of interest when so approved shall be the same for all licensed banks: provided that differential rates may be approved for the various categories of banks to which this Act applies.*  
20

*(2) The interest structure of each licensed bank shall be subject to the approval of the Central Bank."*

*The Court of Appeal (Mohammed, J.C.A. as he then was, Aikawa and Ogundare, JJ.C.A.) in interpreting the same words held  
25 as follows (per Ogundare, J.C.A.):*-

*"The word stipulated according to the Concise Oxford Dictionary means; mention or insist upon as essential part of agreement; demand as part of a bargain or agreement. The appellant therefore had an obligation under clause 3 to notify the mortgagor or plaintiff/respondent of the change  
30 in and demand interest rates from time to time starting with the offer of 11% in Exhibit 1. Failure to do this nullifies the variation of interest rate clause and fixed the rate at 11% per annum."*

In paragraph 7 of the Statement of Defence, the appellant averred that it always communicated to the respondent his periodic statements of account (which show the charges made on the account)  
35 as well as the prevailing interest rate chargeable on the loan granted to him. The appellant called evidence in proof and the periodic statements of account were admitted as exhibits 4 to 4S inclusive. These

exhibits show credit and debit columns and symbols which are explained at the bottom of each page. The symbols indicated and explained as well include "interests". The interests deducted from the account are shown under the debit column of the exhibits. It is therefore evident from the exhibits that the interests charged are clearly stated. I am unable to understand the finding by the Court of Appeal that the appellant was not notified of the change in interest rate nor was demand made of the new interest rates. The position taken by the Court of Appeal is clearer when it states (per Ogundare, J.C.A.):-

*"Thus Exhibit 4, the statement of account of the respondent which is based on various interest rates is bad in law as it does not comply with proper banking usage, nor was the testimony of D.W.1 on the unstipulated various interest rates in compliance with clause 3. No loan account of the respondent rendering periodically to him was tendered, nor the letters of notification of changes of interest rates. What was a loan agreement, was treated like an overdraft with a fixed rate of interest at least as can be inferred from Exhibit 4. It does not appear as if the Union Bank officials understand or appreciated the full purport of clause 3"*

The foregoing is a critique of how the appellant administers the provisions in clause 3 of Exhibits 5 and 6. The manner in which the appellant exercises its prerogative under clause 3 may not be satisfactory but that does not derogate from the fact that it has the right under the deeds of mortgage to charge respondent interest from time to time at rates different from 11 % per annum. The respondent claims that the interest chargeable on the loan agreed is static at 11% per annum, but Exhibits 5 and 6 prove the contrary. It is for the respondent, as plaintiff, to prove that the interest rate of 11% per annum is not changeable, but clause 3 in exhibits 5 and 6 and section 15 of Cap. 28 have conclusively disproved that fact. The burden on the appellant, as defendant, is not to prove beyond the balance of probabilities that the interest rates are variable. In my opinion, the burden had been discharged by the appellant putting exhibits 5 and 6 in evidence and relying on clause 3 therein.

It is for these and the fuller reasons contained in the judgment of my learned brother Adiom J.S.C. that I too allow the appeal. The decision of the Court of Appeal as well as that of the High Court are hereby set aside. I adopt the order as to costs.

**OLATAWURA JSC**

My learned brother Adio J.S.C. has in his illuminating judgment set out the facts and law applicable in this appeal. I do not  
 5 consider it necessary to repeat them. I agree with his reasoning and conclusions. I will only add that the basis for the misconception about the rate of interest was the respondent's difficulty to appreciate the difference between arrangements made before the execution of the  
 10 deeds and the terms of the legal mortgage as clearly shown in clause 3 of exhibits 5 and 6.

Clause 3 which is common to both Exhibits 5 and 6 reads:-

*"All interest payable on the money hereby secured shall accrue due from day to day at the rate from time to time stipulated by  
 15 the bank and may be capitalised at such intervals as the bank may from time to time prescribe but no more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid."*

Exhibits 5 and 6 were executed on 4th June, 1982. It is to be  
 20 observed that the case of the respondent was based on the rate of interest which according to him was fixed at 11%. This was in 1981 i.e. prior to the execution of Exhibits 5 and 6. The respondent acknowledged that he executed Exhibits 5 and 6. There was evidence before the learned trial Judge that the respondent was informed of the changes in the rates of interest.  
 25 There was no evidence of protest. The agreement having been reduced into writing i.e. by virtue of Exhibits 5 and 6, extrinsic evidence is inadmissible to vary or contradict the clear meaning of the deeds especially clause 3: Colonial Development Board v. Kamson and 2 Ors. (1955) 21 NLR 75; Molade & Ors. v. Molade & Ors. (1958) NSCC 40; (1958) 3 FSC 72 (1958) SCNLR 206.

30 I will also allow the appeal, set aside the judgment of the Court of Appeal dated 23rd day of January, 1991 which confirmed the judgment of the trial court. The action instituted by the plaintiff is hereby dismissed. I abide by the consequential orders for costs made in the lead judgment.  
 35

**OGUNDARE JSC**

I have had the advantage of a preview of the judgment of my learned brother Adio, J.S.C. just delivered. I agree with the reasoning and conclusion reached by him that this appeal be allowed. The learned trial

Judge having held the view, and quite rightly in my view, that exhibit 1 was not admissible to alter the mortgage deeds in this case, that is, Exhibits 5 and 6, could not rely on the oral evidence of the plaintiff/respondent which also was intended to contradict or alter clause 3 of Exhibits 5 and 6. By rejecting Exhibit 1 and relying on oral evidence of the plaintiff/respondent, the learned trial Judge was in serious error. Section 132(1) of the Evidence Act Cap. 112 (formerly Section 131(1) provides as follows:-

*"(1) When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained, nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence."*

(Italics is mine)

The provisos are not applicable in this case. In view of the provisions of sub-section (1) of Section 132, the learned trial Judge was in error to act on the oral evidence of the plaintiff/respondent to determine the interest chargeable on the loan he took from the defendant/appellant. The Court of Appeal (Kaduna Division) was, with profound respect to the Justices of that court, in greater error when it not only acted on the oral evidence but also on the written document exhibit 1. The correct position in law is that both exhibit 1 and plaintiff's oral evidence on the interest chargeable should have been rejected and if this had been done, there would have been no evidence upon which the plaintiff could be entitled to judgment.

For the reasons given by my learned brother in his lead judgment which I hereby adopt as mine, I too allow this appeal set aside the judgment of the court below affirming the judgment of the trial High Court. I order that plaintiff's claims be dismissed and I subscribe to the order for costs made by my learned brother.

---

**OGWUEGBU JSC**

I have had the advantage of reading in draft the judgment prepared by my learned brother Adio, J.S.C. I agree with the rea-

sons and conclusion.

For the reasons contained in the said judgment, I too allow the appeal.

Accordingly, the appeal is hereby allowed and the judgment of the court below is set aside. I make the same consequential orders  
5 as are contained in the lead judgment.

Appeal allowed.

10

15

20

25

30

35