

SUPREME COURT OF NIGERIA
29TH APRIL, 1994 SC26/1990
CORAM: M. L. UWAI, O. OLATAWURA, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, JJSC

AFRICAN CONTINENTAL BANK LTD APPELLANT

AND

ALHAJI UMARU GWAGWADA RESPONDENT

EVIDENCE - Admissibility of evidence - Need to establish relevance first - Since admissible but not relevant evidence will not advance the party's case.

EVIDENCE - Admission as defined under the Evidence Act - Does not cease to be an admission on ground of not being pleaded - If sought to be relied on as an estoppel - Issue of pleading will become relevant.

EVIDENCE - Admission - Does not necessarily mean proof of what is contained therein - Duty of the court to ensure the admission is in accordance with pleaded facts and truth of the case.

PLEADINGS - Averment of indebtedness for a specific amount - Denial thereof via an affidavit - Whether that affidavit is admissible.

PRACTICE & PROCEDURE - Notice of intention to defend and its annexures - Sought to be tendered towards establishing a paragraph of the Claim - Whether 834(1) of the Evidence Act was relevant at that stage - To prevent admission of the document

FACTS

The Plaintiff/Appellant before the Benue state High Court claimed the sum of N5,377,374.20 from the Defendant/ Respondent on the undefended list, being the principal and interest due on the money allegedly lent to the Defendant by the Plaintiff at 7% interest. Defendant filed a notice of intention to defend supported by an affidavit with several documents annexed. The trial Judge pursuant to Defendant's averments and denial of the indebtedness admitted the Defendant to defend the action. The parties filed their pleadings and the trial of the suit was commenced. Plaintiff sought to tender the notice

of intention to defend together with the annexures through its first witness. Defendant's counsel raised an objection on the ground that there was no compliance with the provisions of S34 (1) (b) of the Evidence Act.

The learned trial Judge upheld the objection and ruled that the document sought to be tendered are inadmissible and marked them rejected. The Plaintiffs appeal to the Court of Appeal was dismissed by that court which upheld the trial court's ruling. Being dissatisfied, the Plaintiff/Appellant has now appealed to the Supreme Court to determine whether s.34 (1) of the Evidence Act is applicable to the document sought to be tendered in this case and whether the annexures to the affidavit amounted to admission under S 19 of the Act.

HELD (Unanimously allowing the appeal)

1. Before considering admissibility of any evidence or document in support of a party's case, it must be shown that the evidence sought to be led is relevant. For even if the evidence is admissible but not relevant, its admission will not advance the case of the party. (P. 103 L 32)

2. An averment in a pleading that the other party is indebted to the plaintiff for a specific amount and an affidavit to the contrary by that other party is not only material but admissible to enable the court know which party should be believed. Certainly, without the affidavit attached to the notice, leave to defend would not have been granted. (P. 104 L 22)

3. An admission as defined under s. 19 of the Evidence Act is "a statement, oral or documentary, which suggests any inference as to any fact, in issue or relevant fact, and which is made by any of the persons,," does not cease to be an admission on the ground that it is not pleaded. If however the party relying on it wishes to rely on it as an estoppel, the issue of pleading will be relevant. (P. 105 L 8)

4. At the stage the notice of intention to defend and its annexures were about being tendered, it was to establish paragraphs 17 (b) and (d) of the statement of claim. Section 34(1) was quite irrelevant to the issue before the court at the stage of the trial and was a technical manoeuvre to confuse the real issue (P. 105 L 13)

5. It is difficult to see why S.34(1) of the Evidence Act was invoked and

96 A.C.B. LTD V. GWAGWADA (1994) 7 KLR 94; (1994) 5 NWLR
accepted by the Court of Appeal. An admission does not necessarily mean proof of what is contained therein. An admission relied upon by any party is not ipso facto accepted to be the truth by the court once it is not in accordance with the facts pleaded and proved to be the truth of the case. It is the court's duty to decide the case in accordance with the facts pleaded and proved to be true. (P. 105L30)

NOTABLE POINTS OF INTEREST

OLATAWURA.JSC

1. Rule and purpose of pleading

The elementary rule of pleading is that a party shall plead facts which he proposes to rely upon in order to establish his own case. It is now trite law that a party will not be allowed to lead evidence in respect of facts not pleaded; or to lead evidence contrary to his pleading. The sole purpose of pleading is to ensure that the parties to the case know the case they will meet at the trial, to obviate element of surprise. Pleading saves time and brings out clearly the issues in the case. (P. 103 L 9)

2. Significance of the notice of intention to defend

The significance of the Notice to defend is borne out by the affidavit accompanying the Notice that the ground for asking to be heard in defence are not frivolous, vague or designed to delay the trial of the action and must show that there is a dispute between the parties: When the judge is satisfied that there is a prima facie defence then leave is granted to defend and then pleadings may be ordered. (P. 104 L 7)

OGUNDARE.JSC

3. Admissibility of notice of intention to defend

"In my respectful view, as the disputed documents were put in evidence as documents served on the Plaintiff by the Defendant in the course of the proceedings they are clearly admissible in evidence. It is significant to note that they already form part of the record of the trial court in the case. It cannot be denied that they are relevant to the issues in controversy between the parties. And in so far as the documents contain admissions by the Defendant they are equally admissible under sections 19-26 inclusive of the Evidence Act, though they do not constitute conclusive proof of the matters admitted. (P. 111 L 24)

REPRESENTATION:

E.O. Ekpo with J.N. Ngenegbo and J.C. Umeiyiura for the Appellant.
Ayo Olanrewaju with Bassey U. Ekpo and Amade Samuel for the Respondent

CASES REFERRED TO

Pritchard v. Bagshave (1) 138 E.R. 551
Richards v. Morgan (1865) 122 E.R. 600
Seismograph Service (Nig.) Ltd. v Chief Keke Eyuafe (1976) 11 S.C. 1
Sanyaolu v. Coker (1983) Vol. 14 N.S.C.C 119/126
El Khalil v. Oredein (1985) 3 N.W.L.R. (Pt. 12) 371/378
Ajao v. Awoseni (1986) 5 N.W.L.R. (Pt. 43) 578/584
Ajide v. Kelani
Total (Nig) Ltd & Anor. v. Nwako & Anor. (1978) S.C.I.
George & Ors. v. Dominion flour Mills Ltd (1963) I All N.L.R. 71
Okugbue & 2 Ors. v. Romaine (1982) 5 S.C. 133
James v. Midmotors Nig. Co. Ltd. (1978) 11 & 12 S.C. 31
Emegokwue v. Okadigbo (1973) N.S.C.C. 220
The National Investment & Properties Co. Ltd. v. The Thompson Organisation Ltd. & Ors. (1969) N.M.L.R. 99
Olubusola Stores v. Standard Bank Nig. Ltd. (1975) N.S.C.C. 137
John Holt & Co. (Liverpool) Ltd. v. Fajemirokun (1961) All N.L.R 513
Nahman v. Odutola (1953) 14 WACA 381
Joe Iga & Ors. v. Chief Amakiri (1976) 11 SC I
Ojeigbe & Ors. v. Okwaranya & Ors. (1962) I All NLR (Pt. 4) 605
K. Chellaram & Sons V. G.B. Olivand Ltd. (1944) 10 WACA 77
Ajayi v. Briscoe (Nig.) Ltd. (1974) 3 All E.R. 556
Chukwura v. Ofochebe (1972) I All NLR (pt. 2) 5, 4
Okai v. Ayika II 12 WACA 31, 32
Kuruma v. Regina (1955) A.C. 197 at 203
Torti v. Ukpabi (1984) 1 SCNLR 214
British India General Insurance Co Nig. Ltd v. Tharwadas (1978) 3 S.C 143 at 149-150

STATUTES & RULES REFERRED TO

High Court of Benue State (Civil Procedure) Rules 1978 O. 3 rr. 8 & 10.
Evidence Act ss. 34(1) (b), 6,7,8, 135(1), 136 19 to 16

LEAD.JUDGMENTBYOLATAWURAJSC

This appeal arose out of the ruling by Puusu. J. when the learned trial Judge on 10th February, 1988 ordered certain documents sought to be tendered by the appellant (hereinafter referred to as the plaintiff) on the objection raised by the respondent (hereinafter referred to as the defendant) be marked
5 “tendered and rejected”. Any document so marked in the course of any proceedings can neither be tendered again nor relied upon either in the course of address by counsel nor commented upon by the trial judge. The importance or relevance of such a document marked “tendered and rejected” invariably gave rise to the appeal to the Court of Appeal.

10 In order to appreciate the issue involved, I will set hereunder the relevant and short history of this case. The claim which was for the sum of N5,377,374.20 being the principal and interest due on the money allegedly lent to the defendant by the plaintiff at 7% interest was first put on the undefended list by virtue of Order 3 Rule 8 of High Court of Benue state (Civil Procedure)
15 Rules 1978. The defendant through his counsel and in accordance with Order 3 Rule 10 of the same Rules filed a notice of Intention to Defend the suit. The Notice was dated 17th August, 1987. It was served on the plaintiff. There was an affidavit in support. According to the affidavit the defendant deposed he was reliably informed by officials of the plaintiff/Bank at Idumota branch Lagos
20 and the manager of the Plaintiff/Bank at Makurdi that the plaintiff had instituted an action against him for the said sum of N5,377,374.20 being money allegedly lent to him by the plaintiff. He denied the indebtedness and gave a breakdown of his various lodgments in the branches of the plaintiff/Bank in Makurdi, Idumota and Kaduna and specifically deposed in paragraph 7 of the
25 said affidavit as follows:-

“7. That apart from the lodgments referred to in paragraph 6 above. I have made more lodgments into my various accounts with the plaintiff/bank but I have not been presently able to gather together all the relevant pay-in slips.”

30 To this affidavit he attached a letter and many pay-in-slips.

The record of appeal forwarded to this court shows that pleadings were filed. I believe this must have been ordered after the case was taken out of the undefended list and leave to defend was granted. In the Statement of Claim the Plaintiff averred in paragraph 3 as follows:-

35 *“3. In the course of his business and in operating his accounts with the plaintiffs the defendant used the names ALHAJI GWAGWADA UMARU, GWAGWADA UMARU ALHAJI, A. U. GWAGWADA & SONS LIMITED and ALHAJI UMARU GWAGWADA & SONS LIMITED interchangeable with Alhaji Umaru Gwagwada and held these names out as his other names and the*

plaintiffs treated these names as defendant's business names or aliases. These business names were not incorporated."

Thereafter all the various account numbers operated by the defendants were mentioned and the plaintiffs specially averred in paragraphs 17 5 and 23 thus:-

"17. The following accounts were opened by the plaintiffs on 2nd December, 1980 as per the defendant's instructions:-

(a) Loan Account in the name of A.U. Gwagwada Lines & Sons Limited.

10

(b) A Current Account in the name of Alhaji Umaru Gwagwada & Sons Limited numbered 1372.

(c) A Sinking Fund Account in the name of Alhaji Umaru Gwagwada and Sons Limited numbered 1373.

(d) A Current Account in the name of A. U. Gwagwada & Sons Limited numbered 12540.

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XX

(23) WHEREOF the plaintiffs claim against the defendant 20
N5,377,374.20 (five million, three hundred and seventy seven thousand three
hundred and seventy-four Naira twenty kobo) being money payable by the
defendant to the plaintiffs for money lent by the plaintiffs to the defendant
and/or for credit facilities granted and for interest at seven percent (7% per
annum agreed to be paid upon the amount due from the defendant to the 25
plaintiffs. Principal and interest due as at 26th February, 1987
N5,377,374.20. And the plaintiffs claim the said sum and interest thereon at
the agreed rate of interest of 7 per cent per annum until judgment and at the
rate of six per cent from date of judgment until payment is fully made."

The defendant filed a defence to the action and specifically denied 30
 paragraph 17 of the Statement of Claim set out above through his paragraph
 16 of the Statement of Defence to wit:-

"16. The defendant further avers that he never at any time proposed
or authorised the opening of the accounts stated in paragraphs 17(a),(b),(c)
and (d) of the Statement of Claim"

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By this denial issue as to whether the accounts were opened on the instruction of the defendant was joined.

The trial started before Puusu, J. on the 9th February, 1988. The opening speeches by counsel gave foreboding of the subsequent trial. The

first witness for the plaintiff was one John Irukwu. Part of his evidence is as follows:

“.....*The defendant operates various accounts with the plaintiff at various branches of the plaintiffs bank. He (sic) has various branches at Kaduna, Jos, Enugu, Idumota Lagos and Makurdi...*”

5 In continuation of his evidence, the mandate and signature card dated June 22nd, 1976 was tendered and admitted as Exhibit 1. After a preliminary objection which was over-ruled, the defendant's Statement of Account No.1023 was tendered and admitted as Exhibit 2. Consolidation of Accounts was also admitted as Exhibit 3. Instruction by the General Manager of the
10 plaintiff/bank to the Makurdi Branch was admitted as Exhibit 4. The witness i.e. Mr. Irukwu also gave evidence that the defendant operated three accounts. I had earlier mentioned that the defendant filed a notice of intention to defend the action which was put on the undefended list. I have set out also paragraph 7 of the affidavit in support of the said notice. It was at the stage the Notice to
15 defend together with the attachments was about to be tendered that an objection was raised on the tendering of the documents by the learned counsel for the defendant on the ground that there was no compliance with the provisions of section 34(1) (b) of the Evidence Act. The learned counsel for the plaintiff replied to the objection and after a consideration of the submissions
20 the learned trial Judge ruled thus:-

“*I accept all the submissions made by the learned counsel for the defendant that the documents sought to be tendered are inadmissible and they are rejected. The notice of intention to defend. The affidavit and annexures are B1-36. Letter dated 9.1.81 are all marked rejected.*”

25 The learned counsel for the plaintiff gave oral notice of appeal and sought leave to appeal. The appeal was heard. On 16th March, 1989, the Court of Appeal Jos, dismissed the appeal. It is against that judgment that the plaintiff filed Notice of appeal to this court on the following grounds:-

30 “(1) *The learned Justices of the Court of Appeal erred in law by holding the section 34(1) of the Evidence Act precluded the plaintiff/appellant from tendering the rejected documents through their witness P.W.1 John Irukwu.*

PARTICULARS OF ERROR

35 (a) *The defendant/respondent is not a witness within the meaning and effect of section 34(1) of the Evidence Act.*

(b) *The learned Justices in the court below misconstrued the meaning and effect of section 34(1) of the Evidence Act.*

(2) *The learned Justices of the Court of Appeal erred in law by*

holding that the principles enunciated in the English cases of *Pritchard v Bagshave* (1881) 138 E.R. 551 and *Richard. v. Morgan* (1865) 122 E.R. 600 and applied in *Seismograph Services Nig Ltd v. Chief Keke Eyuafe* (1976) 9-10 S.C.135 to the effect that a document or affidavit made in one proceeding is admissible in evidence in a subsequent proceedings as proof of the facts stated therein against the party who made such affidavit or against the party on whose behalf it was made, on it being shown that he knowingly made use of it is not applicable in the case. 5

PARTICULAR OF ERROR

(a) The plaintiff/appellant wanted to tender the Notice of Intention to defend and its attachments as documents filed and served on them and used by the defendant/respondent in the court. 10

(b) The plaintiff/appellant wanted to tender the Notice of Intention to defend as admission made by the defendant/ respondent and not as estoppel. 15

Briefs were filed by both parties. The plaintiff also filed a reply brief. The issues for determination by the appellant are two:-

“(a) Whether having regard to the fact of this case, section 34(1) Evidence Act is applicable to an adverse party who seeks to tender a deponent’s previous affidavit when that affidavit was used by the other party to the dispute; 20

(b) Whether having regard to the facts of this case, the court below ought not to have held that the affidavit in question and its annexures amounted to an admission under section 19. Evidence Act.” 25

The defendant has also raised one issue for determination, It reads:-

“From the foregoing the issue to be decided by the Supreme Court is whether the affidavit together with the annexures thereto sought to be tendered by the plaintiff at the lower court constitute evidence in previous proceeding” within the meaning of Section 34(1) of the Evidence Act and if the answer is in the affirmative, whether the conditions prescribed by that subsection were complied with to render the evidence admissible in law.” 30

In his oral submissions Mr. Ekpo, the learned counsel for the plaintiff relied on his brief and cited *Sanyaolu v. Coker* (1983) Vol.14 NSCC 119/126: (1983) 1 SCNLR 168. He pointed to paragraph 17 of the plaintiff’s pleading where the documents sought to be tendered were denied by the defendant in the Statement of Defence and submitted that the Notice sought to be tendered does not amount to “evidence” in previous proceeding as the deponent was not a witness within the context of section 34 of the Evidence Act. Learned 35

counsel described him as a deponent to an affidavit as there was no opportunity to cross-examine him. He again cited: *Seismograph Services (Nig) Ltd v. Eyuafe* (1976) NSCC. 9-10 S.C. 135434/439-441, Learned counsel then submitted that the lower courts misconceived the nature of the Notice of Intention to Defend. With regard to the respondent's brief, learned counsel submitted that the issue as to whether the Notice to Defend amounted to evidence in previous proceedings does not arise and referred to the Notice of appeal filed: *El khali Oredein* (1985) 3 NWLR (Pt.12) 371/378; *Ajao v. Awoseni* (1986) 5 NWLR (Pt. 43) 578-584. He finally urged that the appeal be allowed.

In his own oral submission, Mr. Olanrewaju, learned counsel for the defendant adopted his brief and pointed to the reply brief where the plaintiff conceded that the affidavit and its annexures in support for the Notice of Intention to Defend may constitute "evidence in a previous proceeding", he however conceded that what the plaintiff sought to tender was evidence in respect of the same proceeding and not evidence in "previous proceeding", Learned counsel referred to Black's Law Dictionary 5th Ed, for the meaning of the words "deponent and witness", He relied on two cases: *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248 and *Sanyaolu v. Coker* and finally urged that the appeal be dismissed.

Mr. Ekpo in reply referred to pages 126-7 of *Sanayaolu's* case (Supra) and again submitted that s.34 of the Evidence Act does not apply as the plaintiff could not have cross-examined the deponent when he deposed to the affidavit in support of the Notice of Intention to Defend.

The issues formulated by both parties can conveniently be reduced into one:- Does section 34(1) of the Evidence Act apply to the matter before the courts?

It is with this view in mind that a reproduction of the said section 34(1) of the Evidence Act will be of assistance bearing in mind the pleadings filed by both parties, evidence led, before the objection was raised and the burden of proof.

Section 34(1) of the Evidence Act provides:-

"Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable or (sic) giving evidence, or is kept out of the way by the adverse party or when his presence cannot be obtained

without an amount of delay or expense which in the circumstances of the case, the court considers unreasonable; provided-

(a) that the proceeding was between the same parties or their representatives in interest:

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceeding.”

The elementary rule of pleading is that a party shall plead facts which he propose to rely upon in order to establish his own case. It is now trite law that a party will not be allowed to lead evidence in respect of facts not pleaded; or to lead evidence contrary to his pleading. The sole purpose of pleading is to ensure that the parties to the case know the case they will meet at the trial, to obviate element of surprise. Pleading saves time and brings out clearly the issues in the case. On the above principles see:-

- (i) Total (Nig) Limited & Anor. v. Nwako & Anor.(1978) 5 S.C. 1
- (ii) George & Ors. v. Dominion Flour Mills Ltd. (1963) 1 All NLR 71; (1963) 1 SCNLR 117
- (iii) Okagbue & Ors v. Romaine (1982) 5 S.C. 133
- (iv) James v. Midmotors Nigeria Co. Ltd. (1978) 11 & 12 S.C. 31
- (v) Emegokwue v. Okadigbo (1973) NSCC 220; (1973) 4 S.C. 113; All NLR (Pt.1) 379
- (vi) The National Investment & Project Co. Ltd. v. The Thompson Organisation Ltd. & Ors. (1969) NMLR 99

The plaintiff has averred in paragraph 17 of its pleading already set out above that accounts Nos.1372 and 12540 were opened at the defendant’s instructions. He denied. Sections 135(1) and 136 of the Evidence Act shown clearly that unless evidence is led in respect of paragraph 17 of the Statement of Claim, the plaintiff will fail in respect of those facts pleaded. Before considering admissibility of any evidence or document in support of a party’s case, it must be shown that the evidence sought to be led is relevant. Even if the evidence is admissible and it is not relevant. The admission of such evidence does not advance the case of the party. See sections 6,7 and 8 of the Evidence Act.

The defendant in paragraph 4.2 of his brief has submitted that “for the” purpose of admissibility under the law of evidence, every document

sought to be tendered in evidence must pass the test of admissibility laid down by the Evidence Act. This submission is however subject to the issue of relevance already referred to above.

5 What is the significance of the Notice of Intention to Defend filed by the defendant? I will remind myself once again that the case was originally put on the undefended list. The significance of the Notice to defend is borne out by the affidavit accompanying the Notice that the grounds for asking to be heard in defence are not frivolous, vague or designed to delay the trial of the action and must show that there is a dispute between the parties: *Olubusola stores v. Standard Bank Nigeria Ltd.* (1975) NSCC. 137, (1975) 4 S.C. 51; *John Holt & Co (Liverpool) Ltd. v. Fajemirokun* (1961) All NLR. 513. When the Judge is satisfied that there is a *prima facie* defence then leave is granted to defend and then pleadings may be ordered. Paragraph 6 of the affidavit in support of the Notice to defend not only disputed the debt but that he had an
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15 excess of over N100,000.00 facilities in his two accounts. The paragraph states:

20 *‘That subsequent to the said Exhibit A I have made various lodgements into my various accounts with the defendant (sic) Bank far in excess of the sum of N100,000.00 facilities. A breakdown of some of the said lodgements is as follows’*

25 An averment in a pleading that the other party is indebted to the plaintiff for a specific amount and an affidavit to the contrary by the other party is not only material but admissible to enable the court know which party should be believed. Certainly, without the affidavit attached to the Notice, leave to defend would not have been granted.

30 I now come to section 34(1) of the Evidence Act already reproduced above. It appears to me that the Court of Appeal did not advert its mind properly to the rule of pleadings, some of the principles of which are already set out above. The lead judgment of the court per Adio, J.C.A. (as he then was) on issue of admission which is as follows:-

35 *“As has been stated above, an admission of any fact in issue or relevant fact by a party, whether the admission was made in a judicial proceeding or not is admissible against the maker in Judicial proceeding against the maker under sections 19-26 inclusive of the Evidence Act. Joe Iga’s case (supra). However, if an admission is relied upon as an estoppel., it must be pleaded. In this case, the affidavit and the documents attached to it were tendered not for the purpose of discrediting the respondent under section*

198 of the Evidence Act or to impeach his credit under sections 207 and 209 of the Act but for the purpose of stopping him to assert that he did not at any time propose or authorise the opening of current numbers 1372 and 12540....

There was no averment in the appellant's Statement of Claim relating to the alleged admission or to the said affidavit and the documents 5 attached to it."

Overlooks the simple rule of pleading that facts, and not evidence, are to be pleaded. An admission as defined under s. 19 of the Evidence Act is "a statement, oral, or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons" 10 does not cease to be an admission on the ground that it is not pleaded. If however the party relying on it wishes to rely on it as an estoppel, the issue of pleading will be relevant. At the stage, the Notice of intention to defend and all its annexures were about to be tendered, it was to establish paragraphs 17(b) 15 and (d) of the Statement of Claim. I find it difficult how the lower court accepted the relevance of section 34(1) of the Evidence Act to the issue before the court at that stage of the trial. It was quite irrelevant. It was a technical maneuver to confuse the court at that stage. Anxiety of the defendant in respect of the documents should have been allayed if counsel had adverted to section 26 of the Evidence Act:- 20

"Admissions are not conclusive proof of the matters admitted but they may operate as estoppel...."

I agree with the plaintiff's counsel where in his brief he said:-

"4.9 The appellants submit that the question of estoppel was wrongly 25 imported by the court below into this case. Estoppel does not, in any manner whatsoever, come into play here. All the appellants sought to do was prove that the respondent knew about, and indeed authorised the opening of, current accounts numbers 12540 and 1372, just as it had pleaded in paragraph 17 of the Statement of Claim."

I fail to see why s.34(1) of the Evidence Act was invoked and accepted by the Court of Appeal. I may repeat that an admission does not necessarily mean proof of what is contained therein. An admission relied upon by any party is not ipso facto accepted to be the truth by the court once it is not in accordance with the truth of the case. It is the duty of the court to decide the case in accordance with the facts pleaded and proved to be true. 35

In sum, I will allow this appeal, set aside the judgment of the lower court dated 16th day of March, 1989 which confirmed the ruling of the High Court dated 10th February, 1988. I hereby order that the Notice of Intention to defend together with all its annexures be admitted as Exhibit in the trial. Costs

of this appeal against the respondent are assessed at N150.00 in the lower court and N1,000.00 in this court.

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UWAIS JSC

I have had the privilege of reading in advance the judgment read by my learned brother Olatawura, J.S.C. I agree that the appeal has merit. Accordingly, it is hereby allowed. I adopt the consequential order in the said judgment.

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OGUNDARE JSC

I read in advance the judgment of my learned brother Olatawura J.S.C. just delivered.

My learned brother has in his lead judgment stated the facts leading to the appeal. I do not intend to go over them again. The only issue for determination is as to whether the documents used by the defendant now respondent before us in his application for leave to defend the action are admissible in evidence at a subsequent stage of the proceedings that is the trial of the action.

Plaintiffs action was originally on the undefended list. The defendant filed a notice of Intention to defend pursuant to Order 3 Rule 10 of the High Court (Civil Procedure) Rule 1978 of Benue State. In support of the Notice was an affidavit sworn to by the defendant and annexed to the affidavit were some tellers (or pay-in-slips). At the trial of the action the plaintiff sought to tender the Notice, the affidavit in support and the annexures to the affidavit in order to show that the defendant had admitted owning two accounts with the plaintiff numbered 1372 and 12540. On an objection taken by defence counsel the Learned trial Judge rejected the documents in evidence. In doing so, he observed as follows:-

“In the course of giving evidence P.W1 said he received an affidavit sworn to by the defendant together with some annextures. The learned Senior Advocate of Nigeria who appeared for the plaintiff sought to tender this affidavit with its annextures through this witness as documents which the plaintiff received from the defendant.

The learned counsel for the defendant objected on the ground that the documents being evidence of previous proceedings are not admissible by virtue of S.34(1) of the Evidence Act. Counsel also referred to Aguda, Law and Practice Relating to Evidence in Nigeria 1980 Edition p.160. 5

The learned Senior Advocate submitted on the other hand that the fact that the documents contain an affidavit does not make the defendant who filed them an witness (sic) within the meaning of S.34(1) of the Evidence Act. To apply s.34 in the circumstances of the case would be absurd. The court was urged to admit the documents. 10

Section 34(1) provides:-

‘Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable (sic) giving evidence, or is kept out of the way by the adverse party or when his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case, the court considers unreasonable; provided- 15

(a) That the proceeding was between the same parties or their representatives in interest. 20

(b) That the adverse party in the first proceedings had the right and opportunity to cross- examine.

(c) That the questions in issue were substantially the same in the first as in the second proceeding.’ 25

I am of the opinion that the affidavit together with its annexures is evidence taken before a Commission for Oaths, person authorised by law to take such evidence within the meaning of s.34(1) of the Evidence Act.

The defendant who swore to that affidavit is before the court to defend the suit against him and cannot be said to have been kept out of the way by the plaintiff, the adverse party. 30

I accept all the submissions made by the learned counsel for the defendants that the documents sought to be tendered are inadmissible and they are rejected.” 35

Being dissatisfied with this decision, the plaintiff appealed to the Court of Appeal. The court dismissed the appeal and Adio J.C.A. (as he then was) in his lead judgment observed:-

“Apart from the relevant portion of the record of proceedings (page

8 of the record) which clearly showed that the documents on which the learned counsel for the appellant tendered included the said affidavit, the foregoing portion of the reply brief quoted above showed that the admission
 5 allegedly made by the respondent upon which the appellant would want to rely, for the purpose of contending that the respondent was estopped from denying that he opened or authorised the opening of current accounts numbers 1372 and 12540, could not be established or proved without the fact
 10 deposited to in paragraph 6 of the affidavit in support of the notice of intention to defend, which fact has also been quoted above. It was, therefore not by mere coincidence that the said affidavit was included in the documents attached to the notice of intention to defend which the appellants tendered in the lower court. The appellant need the admission of the affidavit for the purpose of establishing the alleged admissions of the respondent.

15 What the respondent intended paragraph 6 of his affidavit (quoted above) to show was the fact that he had made various judgments into his various accounts with the appellant far in excess of the sum of N100,000.00 facilities. Certainly, the portion of the reply brief of the appellant, which I have quoted above, showed that the fact which the respondent used the
 20 affidavit. Particularly, paragraph 6 thereof, to establish was not the same fact that the appellant wanted to use paragraph 6 of the said affidavit to establish what the appellant wanted to use the alleged admission in paragraph 6 of the respondent's affidavit to establish that the respondent was estopped from denying that he opened or authorised the opening of current
 25 accounts numbers 1372 and 12540. In the circumstances Pritchard's case and Richard's case (*supra*) cited by the learned counsel for the appellant could not help the appellant's case because the principle established in those cases is that affidavits or documents which a party has expressly caused to be made or used as true, in a judicial proceeding, for the purpose of
 30 proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers. The principle was applied by this court in Eyifomi's case (*supra*) in which Pritchard's case and Richard's cases (*supra*) were cited with approval."

35 He then went on to cite the dictum of Bello J.S.C. (as he then was) in Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248 where at page 260 Bello, J .S.C. said as follows:-

"The authorities may be categorised as follows:-

(1) Under section 34 of the Evidence Act, evidence given by a witness in a previous judicial proceedings, whether the witness was a party or

not to the previous proceeding is admissible in a subsequent judicial proceeding to prove the truth of the fact it states when the conditions specified by the section have been satisfied: Nahman v. Odutola (1953) 14 WACA 381 at page 384 and Sanyaolu v. Coker (1983) 3 S.C.124 at p.155,(1983) 1 SCNLR 168. Section 34 is not in issue in this appeal.

(2) Though admissions are not conclusive proof of the matters admitted, an admission of any fact in issue or relevant fact by a party or his agent, whether the admission was made in a previous judicial proceeding or not, is admissible in judicial proceeding against or on behalf of the maker under sections 19 to 26 inclusive of the Evidence Act:- Joe Iga & Ors. v. Chief Amakiri (1976) 11 S.C. 1 at page 12 and Ojeighe & Ors v. Okwarania & Ors. (1962) 1 All NLR (Pt.4) 605 at p .610.

It must be noted that if an admission is relied on as an estoppel, then it must be pleaded. K. Chellaram & Sons v. G. B. Oliviant Ltd. (1944) 10 WACA 77; Ajayi v. Briscoe (Nig.) Ltd. (1964) 3 All ER. 556 at ps.559-560 and Chukwura v. Ofochebe (1972) 1 All NLR (Pt.2) 5;4.

(3) Under section 198 of the Evidence Act, evidence given by a witness in a previous judicial proceeding is admissible in a subsequent judicial proceeding to discredit the witness provided that the condition prescribed by the section have been satisfied:- Nahman v. Odutola (supra) and Alade v. Aborishade (supra); (1960) SCNLR 398"

Adio J.C.A. after observing that the plaintiff did not adopt the procedure under section 198 of the Evidence Act as discussed by Bello J.S.C. in the passage above, concluded:-

"As has been stated above, an admission of any fact in issue or relevant fact by a party, whether the admission was made by a judicial proceeding or not is admissible against the maker in judicial proceeding against the maker under sections 19-26 inclusive of the Evidence Act. Joe Iga's case (supra). However, if an admission is relied upon as an estoppel, it must be pleaded. In this case, the affidavit and the documents attached to it were tendered not for the purpose of discrediting the respondent under section 198 of the Evidence Act or to impeach his credit under sections 207 and 209 of the Act but for the purpose of stopping him to assert that he did not at any time propose or authorise the opening of current account numbers 1372 and 12540. In the circumstance the appellant had invoked estoppel and, that reason, estoppel ought to have been pleaded in the Statement of Claim otherwise the documents (affidavit and the documents attached to it) would not be admissible. See Ajide's case, (supra) at p.260-262. There was no averment in the

appellant's Statement of Claim relating to the alleged admission or to the said affidavit and the documents attached to it.

With reference to the application of section 34(1) of the Evidence Act as what the appellant wanted to do at the lower court did not fall within the second or the third category of evidence in previous judicial proceedings which is admission in subsequent judicial proceeding mentioned above by Bello J.S.C. (as he then was) and as sections 207 and 209 of the Evidence Act and the principle in Pritchard's case and Richard's case (supra) did not apply, the only conceivable provision of the Evidence Act of any real significance, which come to mind in the circumstances of this case, is the provision of section 34(1) of the Act. I have no doubt in my mind that the affidavit in question together with the documents attached thereto constituted evidence given by a witness in a previous judicial proceeding which, subject to certain conditions is admissible in subsequent judicial proceeding. Even in that case, the contention of the learned counsel for the respondent, with which I agree, was that the provisions of sections 34(1) had not been complied with and for that reason the affidavit and the documents attached to it were not admissible. The answer to the question raised in the issue for determination above is that the affidavit together with the annexures thereto sought to be tendered in the lower court constituted 'evidence given by a witness in a previous judicial proceeding' within the meaning of that expression in sections 34(1) of the Evidence Act. The aforesaid evidence was not legally admissible as the conditions prescribed in the section were not complied with.

It would appear from the first paragraph of the immediate passage above that Adio J.C.A. accepted the view that the documents the plaintiff sought to put in evidence were admissible under sections 19 to 26 inclusive of the Evidence Act. He however, concluded that the documents were not admissible under category 2 in Bello, J.S.C's dictum in Ajide v. Kelani (supra) because estoppel was not pleaded by the plaintiff. With profound respect to the learned Justice, I think there is a misconception of the plaintiff's case. Plaintiff's learned leading counsel did not say at the stage he sought to tender the disputed documents that he was doing so as estopping the defendant from denying that he authorised the opening of Accounts Nos. 1372 and 12540.

This is what happened at the trial:- Plaintiff's first witness, John Irukwu, an accountant with the plaintiff Bank at Markudi was called to testify. In the course of his testimony he deposed thus:-

"As a result of Exhibit No.4 a loan account was created for the consolidation of all the various overdraft accounts of the defendant in all the various branches. The defendant also opened a current account No.1372

also at Makurdi. Account No. 1373 called the sinking fund account was opened. The accounts were to be operated by deducting 10% of the contract proceeds paid into account No.1372. The 10% proceeds was to be paid into sinking fund account No.1373. All monies paid into account No.1373 was to be transferred to the loan account. Account No. 1372 would feed Account No. 1373 which in turn would feed the loan account. The defendants operated these three accounts. I received the notice to defend the suit together with the affidavit and its attachments which are lodgments claimed by the defendant to have been made into the defendants accounts."

At this stage, Chief Onyiuke, S.A.N. learned counsel for the plaintiff said:-
"I seek to tender these documents as exhibits."

Promptly, Mr. Oyetibo, learned counsel for the defendant objected to the admissibility of the documents on the ground of non-compliance with section 34(1) of the Evidence Act. The learned trial Judge after arguments by learned counsel for the parties, gave the ruling quoted by me earlier in this judgment. It is clear from the above that no intention was expressed that the disputed documents were being tendered in evidence as estoppel as against the defendant but rather as documents received from the defendants at an earlier stage of the proceedings in this case. Mr. Oyetibo's objection was not based on non-pleading of estoppel. Nor was the learned trial Judge's ruling based on it either. It would appear from the record of appeal before us that it was the court below that imported the issue of estoppel into the case.

In my respectful view, as the disputed documents were put in evidence as documents served on the plaintiff by the defendant in the course of the proceedings they are clearly admissible in evidence. It is significant to note that they already form part of the record of the trial court in the case. It cannot be denied that they are relevant to the issues in controversy between the parties. And in so far as the documents contain admissions by the defendants they are equally admissible under sections 19-26 inclusive of the Evidence Act, though they do not constitute conclusive proof of the matters admitted- *Ajide v. Kelani (supra)*. In considering the worth of an admission, the court must take into account the circumstances under which it was made and the weight to be attached to it- see *Seismograph Service (Nig.) Ltd v. Eyuafe* (1976) 9-10 S.C. 135; *Okai v. Ayika II*. 12 WACA 31, 32. It has been held that any statement made by a person on oath may be used against him as an admission:- *Iga & Ors. v. Amakiri & Ors* (1976) 11 S.C.1; *Ex-parte Hall*, in re *Cooper* (1881-1882) 19 Ch.d 580, where it was held (and I agree with the decision) that a deposition of a witness, taken in the Court of Bankruptcy for one purpose, and filed, may be used against him as an admission in any other

proceeding in the matter of the same bankruptcy.

I have read the case of Sanyaolu v. Coker (1983) 3 S.C.124, (1983) 1 SCNLR 168 cited to us by learned counsel for the defendant/respondent. With respect, I do not find this case applicable here as the case relates, in part, to a consideration of section 34(1) of the Evidence Act and not to sections 19-26 of the Act.

For the reasons I have given above and the other reasons in the lead judgment of my learned brother, I too allow this appeal and set aside the decision of the two courts below. I abide by the consequential orders including the orders as to costs made in the lead judgment.

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MOHAMMED JSC

I have had the privilege of reading the draft judgment of my learned brother, Olatawura J.S.C; in this interlocutory appeal and I agree with him that the appeal should be allowed.

For the reasons given by my learned brother with which I agree, I hereby order that the notice and intention to defend the suit which was objected to at the trial court should be admitted in evidence. I abide by the order made on costs in the lead judgment.

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ONU JSC

I have been privileged to read before now the draft of the judgment of my learned brother Olatawura, J.S.C. just delivered. I entirely agree with him that this appeal is meritorious and ought to succeed. I only wish to add the following by way of emphasis.

The dominant question in this case as I can see it and in my own words is whether having regard to the facts of the case, the court below ought not to have held that an affidavit earlier deposed to with its annexures by the defendant as deponent after moving the trial court to remove the case from the undefended list to the general cause list, cannot in the same or subsequent proceedings be received as an admission under section 19 of the Evidence Act by its production through cross-examination of the defendant during the presentation of the plaintiff's case. Now in his Ruling dated 10th February, 1988 the learned trial Judge has ruled inter alia at page 63 of the record thus:-

"In the course of giving evidence, P.W.1 said he received an affidavit sworn to by the defendant together with some annexures. The learned Senior Advocate of Nigeria who appeared for the plaintiff sought to tender this affidavit with its annexures through this witness as documents which the

plaintiff received from the defendant.

The learned trial judge then went to conclude his ruling at page 64 of the Record with the following words:-

"I accept all the submissions made by the learned counsel for the defendant that the documents sought to be tendered are inadmissible and they are rejected. The notice of intention to defend, the affidavit and annexures are B1-36. Letter dated 9/1/81 are all marked Rejected."

That the documents marked Exhibits B1-36 are relevant stems from the very fact not only did they enable the defendant to remove the case against him by the plaintiff for N5,377.374.20 for a loan given to him by former from the undefended list to the trial court's general cause list, issues in relation to certain accounts particularly Accounts Nos. 12540 and 1372 opened by or on behalf of the defendant with the plaintiff and the amount of indebtedness by the defendant, were clearly later joined in pleadings that were ordered and duly filed before hearing in the suit commenced. See paragraphs 3 and 17 of the Statement of Claim vis-a-vis paragraph 16 of the Statement of Defence at pages 46-49 and 50-54 of the record respectively. Hence, when P.W.1, John Irukwu, was testifying for the plaintiff and a stage was set for the Notice of Intention to Defend with the attachments to be tendered but was objected to by learned counsel for the defendant. What one would have expected was that the objection would have been overruled because of its direct relevancy and admissibility. See the provisions of sections 19 and 26 of the Evidence Act which provide:-

"19. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons and in the circumstances hereinafter mentioned" and

"26. Admissions are not conclusive proof of the matters admitted but they may operate as estoppel...."

The general situation in civil or criminal matters in respect of admissibility was considered in *Kuruma v. Regina* (1955) A.C. 197 at 203 where it was held:-

"In their Lordships' opinion, the test to be applied in considering whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with, how the evidence was obtained. There can be no difference for the purpose between a civil and a criminal case...."

See also Sections 6 of the Evidence Act and *Torti v. Ukpabi* (1984) 1 SCNLR 214. Where a defendant admits a fact in dispute by his pleading that fact is taken as established and forms one of the agreed facts of the case- The

British India General Insurance Co, Nig Ltd v. Tharwadas (1978) 3 S.C.143 at 149-150. Albeit, there was a clutching to section 34(1) of the Evidence Act and an erroneous reliance on estoppel both of which, in my view, are strictly not in point for the resolution of the argument adduced herein.

Clearly therefore, the affidavit supporting the Notice of Intention to
5 defend with attachments became relevant because an averment in a pleading that the defendant is indebted to the plaintiff for a specific amount and an affidavit to the contrary by the other party is not only material but admissible to enable the court know which of the two parties should be believed. Indeed, without the affidavit attached to Notice of Intention to Defend, leave to de-
10 fend would not have been granted. What in the end the tendering of the Notice of Intention to Defend and attachments was meant to achieve in the instant case was to prove that the defendant knew about and authorised the opening of current accounts Nos. 12540 and 1372 as plaintiff had pleaded same in paragraph 17 of its Statement of Claim. In my view, the respondent
15 ought not to be allowed to opt in and out of the case at will.

For these and the fuller reasons set out in the judgment of my learned brother, Olatawura, J.S.C. with which I agree in toto, I will allow the appeal and subscribe to the consequential orders therein made.

Appeal allowed.

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