

SUPREMECOURTOFNIGERIA
24THFEBRUARY, 1995.SC.35/1992
CORAM:-**S.M.A.BELGORE,M.E.OGUNDARE,**
E.O.OGWUEGBU,S.U.ONU,Y.O.ADIO,JJSC.

ALHAJI BAMIDELE LAWAL APPELLANT

AND

1. UNION BANK OF (NIG) PLC
2. ALHAJI SUBAIRU ATAND RESPONDENTS
3. SABAL TECH. & ENG. CO. LTD

APPEALS - Construction of exhibits - And oral evidence by the Court of Appeal
- Decision it arrived at was right.

CONTRACTS - Acceptance - Whether the points raised in a document -
Qualify as acceptance - to give rise to a binding agreement.

EVIDENCE - Finding of trial court - That document was not received by
appellant - Whether supported by evidence.

EVIDENCE - Meaning of evidence - Not limited to oral evidence alone - where
the case was mainly documentary - Whether oral evidence must be adduced -
To establish or disprove a claim.

ESTOPPEL - Doctrine of estoppel - Principle of waiver - Held wrongful applied
by the trial court.

ESTOPPEL - Misleading act - Where nothing that will mislead appellant was
done - And appellant failed to find out the true situation - Appellant cannot
complain.

GUARANTEES - Abandonment of respondent's right - Created under the
parties' guarantee agreement - Held not to be the case.

GUARANTEES - Release - Where appellant was not joined in the suit against
other co debtors - Whether appellant is released from liability under the

FACTS

The Appellant and the 2nd Respondent were directors of the 3rd Respondent. 3rd Respondent took a loan from the 1st Respondent and secured it with two legal mortgages covering landed properties belonging to the Appellant and the 2nd Respondent, respectively. The Appellant and 2nd Respondent guaranteed repayment of all loans granted to 3rd Respondent vide two separate guarantees (Exhibit “17” being the one executed by the Appellant). The 2nd Respondent pursuant to an agreement between him and Appellant, wrote a letter to the 1st Respondent informing it that he (2nd respondent) has been assigned the responsibility of liquidating the entire debt owed to it by 3rd respondent. Appellant, in his capacity as 3rd respondent’s managing director wrote a letter (Exhibit “9”) to 1st respondent in respect of the said assignment of indebtedness of 3rd respondent. 1st respondent promptly rejected the notice of assignment of 3rd respondent’s debt vide Exhibit “12”. Meanwhile, 1st respondent obtained judgment (Exhibit “19”) against 2nd and 3rd respondents in respect of loan granted to 3rd respondent.

The judgment debt not being satisfied, 1st respondent advertised sale of the mortgaged properties, belonging to Appellant and 2nd Respondent. Appellant then commenced this action before the Kwara State High Court seeking amongst other reliefs a declaration that he as plaintiff was discharged and relieved of all liabilities to 1st Respondent in relation to the debt owed to it by 3rd Respondent. The trial court erroneously applied the principle of estoppel and waiver in finding for the Appellant. The 1st Respondent’s appeal to the Court of Appeal was upheld. Appellant being dissatisfied has appealed to the Supreme Court to determine inter alia, whether in the circumstances he proved his case on a balance of probability in view of the fact that 1st Respondent did not adduce any evidence.

HELD (Unanimously dismissing the appeal per lead judgment **OGWUGWU JSC**)

Contracts - Acceptance

1. The two points raised in Exhibit “6” did not on a proper construction of it, amount to an acceptance of Exhibit “14” by the 1st respondent. Even if it is conceded that Exhibit “6” was a conditional acceptance (which was not the case), at best, it was a conditional acceptance which was dependent on the production of the resolution of 3rd respondent company authorizing the

sharing of its liabilities and an upward review of monthly instalmental payment acceptable to the 1st respondent. There was no reply to Exhibit “6”.

I agree with the court below that Exhibit “6” was a counter-offer or a qualified acceptance which could not give rise to a binding agreement between the parties. (P. 514C)

Evidence - Finding of the trial court

2. With this averment coupled with the evidence of the 2nd respondent on Exhibit 12 which was not challenged, one is at pains to see how the learned trial judge came to the conclusion that Exhibit 12 was not received by the appellant. That finding was unsound and the court below disregarded it. (P. 515 C)

Estoppel - Where nothing that will mislead appellant was done

3. From the foregoing, there was nothing done by the 1st respondent which could have misled the appellant. The appellant was also in a position to find out the reaction of the 1st respondent to Exhibit 14 being the managing director of the 3rd respondent to whom Exhibit 12 was addressed. A person who is in a position to find out the true situation but chooses not to cannot complain that the conduct led to his detriment or peril. (P. 516 C)

Mortgages - Abandonment of right

4. The 1st respondent never abandoned or relinquished its right Under Exhibit 15 or 17. Exhibits 6, 12 and 14 did not amount to any surrender of the right of the 1st respondent under Exhibit 17 nor varied Exhibit 17. (P. 516 D)

Whether appellant is discharged from liability under the mortgage

5. The judgment (Exhibit 19) which is against the 2nd and 3rd respondents did not amount to a release of the appellant. The appellant was still liable and had not discharged his joint and several liabilities with the 2nd respondent. Clause 12 of Exhibit 17 gave the 1st respondent power to enter into arrangements of any nature with any other person liable in respect of the principal debt without its rights under Exhibit 17 being affected. In the light of the above clause, the appellant cannot question his non-joinder in the suit which resulted in Exhibit 19. (P. 516H)

Wrongful application of estoppel & waiver

6. The court below was right in holding that the learned trial judge did not apply the doctrine of estoppel and the principle of waiver correctly. (P. 517 A)

Whether oral evidence must be adduced - To disprove a claim

7. Evidence, as used in judicial proceedings, has several meanings. In one sense, it means the testimony, whether oral, documentary or real which may legally be received in order to prove or disprove some fact in dispute. Evidence in a judicial proceeding does not consist of oral evidence alone and proof of a fact can be documentary. The case between the parties was mainly documentary. The 1st respondent tendered various documents through the appellant and his witnesses in support of its pleading. The 2nd respondent also gave evidence part of which supported the case of the 1st respondent. The 1st respondent through cross-examination of the appellant by its counsel extracted answers which supported its case. It is not in every case that a party must adduce oral evidence to establish his claim or disprove a claim against him since that can be done in other ways short of going into the witness box. Indeed, he need not be physically present in court if he is represented by a legal practitioner. (P.517C)

Appeals - Construction of exhibits

8. The court below construed the exhibits tendered and legally admitted in the trial court together with the oral evidence adduced before coming to its decision. Its decision was right. (P. 517 G)

NOTABLE POINTS OF INTEREST

OGWUEGBUJSC

1. Doctrine of estoppel - When to be raised

The doctrine, of estoppel is that where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his words and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous relations as if no such promise or assurance had been made by him. (P. 515 H)

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2. Essentials of estoppel

The essentials of estoppel include change of position of parties. If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will not be enforced, those persons will not be allowed by a court of Equity to enforce the rights without, at all events, placing the parties in the same position as they were before. (P.524F)

REPRESENTATION

Bayo Ojo Esq. with C. Azubike for the Appellant.
Shittu A. Bello Esq. for the 1st Respondent.

CASES REFERRED TO

- Birmingham and District Land Co. v. London and North Western Railway Co. (1889)40 Ch.D 268 at 286.
- Central London Property Trust Ltd. v. High Trees House Ltd. (1947) K.B13
- Tika-tore Press Ltd. v. Abino (1973) 1 All NLR (Pt. 11) 244.
- Ewerami v. A.C.B. Ltd. (1978) 4 SC. 99 at 108
- Tildesley v. Harper (1877) 7 Ch.D 403
- Omoregbe v. Lawani (1980) 3-4 SC 108 at 117
- De Souza v. Mandavia & or. (1964)(1) A.L.R. Comm. 414
- Stackhouse v. Barnston 32 E.R. 925
- Sulaiman & Bros. v. Haus Mehr of Hamburg (1957) 2 F.S.C. 60
- Odunsi v. Boulos (1959) 4 F.S.C. 234
- Commissioner for Works & Housing v. Lababedi & ors. (1977) 11- 12 S.15
- Chief Ebba v. Chief Ogodo & ors. (1984) 4 SC. 84
- Caroline Morayo v. Okiade & ors 8 W.A.C.A. 46
- International Bank for West Africa Ltd. v. Oguma Asso. Co. (Nig) Ltd. (1988)1 N.W.L.R. (Pt. 73) 658
- Cross River State Newspapers Corporation v. Oni & Ors
- British & French Bank Ltd. Sole (El- Asad (1967) N.M.L.R. 40.
- Kehinde v. Ogumbunmi & Ors. (1968) N.M.L.R. 37
- Union Bank of Nigeria Ltd. v. Ozigi (1991) 2 NWLR (Pt. 176) 677
- Attorney-General of Kaduna State & Ors. v. Atta & Ors (1986) 4 NWLR (Pt.38) 785.
- Ajayi Obe v. The Executive Secretary Family Planning Council of Nigeria (1975) 3 SC. 4
- Majekodunmi & anor v. National Bank of Nig. Ltd (1978) 3 SC. 119 at 127

Ebba v. Ogodo (1984) 4 SC. 84 at 98

BOOK REFERRED TO

Principles of Equity by M.I. Jegede at pages 227 - 231.

B

LEAD JUDGMENT BY OGWUEGBU JSC

This is an appeal from the judgment of the Court of Appeal Kaduna Division in which the judgment and order of the High Court of Kwara State (Gbadeyan. J.) in favour of the plaintiff were set aside.

C

The plaintiff who was dissatisfied with the judgment has appealed to this court on six grounds of appeal. From the grounds of appeal the following three issues for determination were formulated:-

“(i) Whether the Court of Appeal was right in disturbing the finding of the trial court that the 1st respondent accepted the arrangement contained in Exhibit 14;

D

(ii) Whether the Court of Appeal was right in holding that the trial court did not properly apply the doctrine of estoppel and waiver to the facts of the case;

(iii) Whether the Court of Appeal was right in reversing the decision of the learned trial lower court on whether in the circumstances of the case, the appellant proved his case on a balance of probability in view of the fact that the 1st respondent did not adduce any evidence.”

E

The plaintiff who is the appellant in this court claimed as per his amended statement of claim against the defendants jointly and severally as follows:-

F

“1. A declaration that the plaintiff was discharged and/or relieved of all liabilities whatsoever to the 2nd defendant for any debt howsoever in relation to the debt owed it by the 3rd defendant by reason of an agreement dated 3/7/87.

G

2. A declaration that the parties having acceded to, acted upon and implemented the said agreement of 3/7/87, are estopped in law and equity from going back on the said agreement, as they are deemed to have waived their rights.

3. An order directing the immediate release of the plaintiff's title documents and properties at numbers 1 - 3 Oremeji Idofian Street, Ilorin to the plaintiff by the 2nd defendant.”

H

The parties will hereinafter be referred to as appellant and respon

dents respectively. I will now set out briefly the facts of the case for a proper appreciation of the issues canvassed in the appeal.

The appellant and the 2nd respondent were the directors of the 3rd respondent. The appellant was the managing director. The 3rd respondent B operated a current account with the 1st respondent's Ilorin Main Branch. The 3rd respondent took a loan/overdraft facility from the 1st respondent and secured it with two legal mortgages one covering properties numbered 1 - 3 Oremoji Idofian Road, Ilorin, belonging to the appellant and the other covering properties numbered 4-7 in the same street belonging to 2nd respondent C (Exhibits 15 and 16).

In addition, the appellant and the 2nd respondent each guaranteed the repayment of all loans received from the 1st respondent by the 3rd respondent in two separate guarantees. The one executed by the appellant is Exhibit" 17' and that executed by the 2nd respondent is Exhibit" 18".

D By a letter dated 21/8/87 (Exhibit" 10") addressed to the 1st respondent by the 2nd respondent, the latter informed the 1st respondent that he had been assigned the responsibility of liquidating the entire debt owed to it by the 3rd respondent. The 1st respondent in its reply (Exhibit "6") demanded from the 2nd respondent a copy of the resolution of the 3rd respondent company to Exhibit" 10". E

The appellant in his capacity as the Managing Director of the 3rd respondent wrote to the 1st respondent (Exhibit "9") and enclosed a copy of the agreement between the appellant and the 2nd respondent (Exhibit" 14") with regard to the assignment of the indebtedness of the 3rd respondent. The F 1st respondent by a letter dated 28/9/87 (Exhibit"12") promptly reacted to (Exhibit "9") In (Exhibit "12"), the 1st respondent expressly rejected the notice of assignment of the 3rd respondent's indebtedness to it. In the interval, the 1st respondent successfully obtained judgment against the 2nd and 3rd respondents in respect of the loan granted to the 3rd respondent (Exhibit" 19").

G The judgment debt was not satisfied. The 1st respondent took steps to realize the debt and advertised the sale by public auction, the properties mortgaged to it by the appellant and the 2nd respondent. Thereupon, the appellant instituted the action claiming the reliefs set out above. The appellant sought and obtained an order of interlocutory injunction in the trial court H restraining the 1st respondent from exercising its power of sale under the deed of legal mortgage (Exhibit" 15") until the determination of the substantive action.

As stated earlier in this judgment, the appellant won in the High

Court and lost in the court below and being dissatisfied with the decision, appealed to this court. The three issues for determination in the appeal have also been set out above. At the hearing of the appeal, learned counsel for the appellant adopted and relied on the brief of the appellant filed on 8:5:92; the 1st respondent's counsel also adopted and relied on the 1st respondent's brief filed on 9:6:92. The 2nd and 3rd respondents filed no briefs of argument and were unrepresented. B

Mr. Adeleye for the appellant had submitted in the brief of argument that the Court of Appeal was wrong in disturbing the findings of the trial court; that all the parties including the 1st respondent accepted Exhibit "14" and acted upon it. It was also argued that on a proper construction of Exhibit "6", the 1st respondent impliedly accepted the assignment contained in Exhibit "14" and the court below was therefore wrong in treating Exhibits "14" and "6" as offer and acceptance. C

It was the contention of the learned appellant's counsel that the parties acted on Exhibit "14" and changed their positions when the appellant started liquidating the debt owed by the 3rd respondent to the Societe Generale Bank (Nig.) Ltd. And the 2nd respondent, in the same manner, started paying the debt of the 3rd respondent to the 1st respondent coupled with the action filed by the 1st respondent against the 2nd and 3rd respondents which resulted in Exhibit "19". D E

It was also submitted that in the above circumstances, it would be unconscionable for the 1st respondent to deny its acceptance of Exhibit "14" more so when the appellant was not made a party to Exhibit "19".

We were referred to Exhibits "11" and "12" which the learned trial Judge held was not received by the appellant and yet the court below placed undue reliance on Exhibit "12" which was not in existence when the action giving rise to this appeal was filed. F

It was further submitted that the appellant's case was not based on contract but on estoppel and that misapprehension led the court below to hold that the 1st respondent was not a party to Exhibit "14" and could not be bound by it. G

As to the doctrine of estoppel and the principle of waiver, counsel submitted that contrary to the conclusion reached by the court below, the learned trial Judge rightly and properly applied them based on his finding on the conduct of the parties towards Exhibits "14", "6", "9" and "10" and that by implication, the 1st respondent consented to the assignment. H

We were urged not to allow the 1st respondent who by its conduct had induced the appellant to believe that it would not enforce its rights under

the mortgage to do so. The following cases were referred to and relied upon:-
 Birmingham and District Land Co. v. London and North Western
 Railway Co.(1889) 40 Ch.D. 268 at 286 Central London Property Trust Ltd. v.
 High Trees House Ltd. (1947) K.B. 13; Tika-Tore Press Ltd. v.Abina (1973) 1All
 NLR (Pt.11) 244.

B On issue three, it was submitted that the court below was in error to
 have reversed the decision of the trial court which was based on preponder-
 ance of evidence before it. It was argued that the 1st respondent offered no
 evidence at the trial and cannot be heard to complain on weight of evidence.
 Learned counsel referred to paragraphs 14-18,19,23 and 23A of the amended
 C statement of claim of the appellant which were not displaced by Exhibits” 15”,
 “17” and “6”. Since the 1st respondent offered no evidence to rebut those
 paragraphs of the statement of claim, they were deemed to have been admitted
 by it. He cited the cases of Ewarami v. A.C.B. Ltd. (1978) 4S.C. 99 at 108;
 Tildesley v. Harper (1877) 7 Ch.D. 403 and Omoregbe v. Lawani (1980) 3-4 S.C.
 D 108 at 117.

In reply to the above contentions, the learned counsel for the 1st
 respondent submitted as follows:-

E *“1. That on a proper construction of Exhibit “6”, it cannot be said
 that the 1st respondent accepted Exhibit” 14” which is an arrangement
 between the appellant and the 2nd respondent.*

*2. That in Exhibit “6” the 1st respondent gave two conditions to the
 2nd respondent under which it would accept that the latter would liquidate
 the debt owed it by the 3rd respondent and until the conditions were fulfilled
 F by the 2nd respondent and accepted by the 1st respondent, it could not be
 said that the 1st respondent had accepted the offer made by the 2nd respon-
 dent.*

*3. That the 2nd respondent never replied to Exhibit “6” and Ex-
 hibit “12” dispelled any doubt as to the stand of the 1st respondent on
 G Exhibit “14”.*

*4. That in any case, Clause 12 of Exhibit “17” permitted the 1st
 respondent to enter into arrangement of any nature with any other person
 liable in respect of the principal debt without its right being affected under
 the guarantee.*

H *5. That the only issue in the case is whether Exhibit “6” could be
 interpreted to mean acceptance of Exhibit “14” by the 1st respondent and
 that Exhibit “12” is additional evidence which supplements Exhibit “6”.*

6. That non-joinder of the appellant in Exhibit” 19” could not

justify the order for the release of his property in Exhibit "15" because the 1st respondent has a right to sell the mortgaged properties as unpaid mortgagee under Exhibit "15" without recourse to the court.

7. That The acts of the 1st respondent which were held by the trial court to amount to estoppel by conduct, namely, Exhibit "6", non-joinder of appellant in the suit leading to the judgment in Exhibit "19" and the alleged payments made by the appellant to Societe Generale Bank Ltd. do not constitute estoppel by conduct. B

8. That even though the 1st respondent did not call any evidence, it furnished enough credible evidence which were sufficient to rebut the claim of the appellant that his obligations under Exhibits "15" and "17" were waived. C

9. That these were done by tendering Exhibits "15" and "17" through the appellant and extracting other oral evidence from him through cross-examination by counsel for the 1st respondent. D

10. That Exhibit "14" could not affect the obligations under Exhibits "15" and "17" because it was a domestic arrangement between the appellant and the 2nd respondent and did not refer to Exhibits "15" and "17".

11. That the meeting which gave birth to Exhibit "14" could not bind the 3rd respondent nor its members and could not also bind the 1st respondent who was not a member of the 3rd respondent company." E

The cases of Ingyengierfaka v. Giadom (1974) Nigerian Commercial Law Report 528 and Purohit v. Indian Building Contractors, Ltd. (1964) 1 ALR Comm. 226 were cited.

12. That an agreement for a composition will not prevent the creditor from suing unless a fund has been provided giving him some benefit, and creating a disadvantage to the other, so as to amount to a consideration. Counsel cited De Souza v. Mandavia & or. (1964) 1 ALR Comm. 414 and Stackhouse v. Barnston 32 E.R. 925. F

The entire case is based on documentary evidence and the determination of the appeal will be based on the legal effect given to the documents tendered and admitted in evidence. The most important of the exhibits are 15, 17, 16, 18, 14, 10, 6, 9, 12 and 19. G

I will start with Exhibit 14 which is the beginning of the controversy giving rise to the present proceedings. It provides: H

"This Agreement is Made the 3rd day of July, 1987 between Alhaji B.A. Lawal.....of the first part AND Alhaji Subair A. Atanda.....of the second part.

Whereas:-

1. The parties hereto are both directors of Sabal Technical and Engi

neering Company Ltd. of No. 12-14 Brown Street, Aguda, Surulere, Lagos.....

B 2. The parties being desirous to share the liabilities of the company owning to poor performance of the company among other reasons.

3.....

IT IS HEREBY AGREED AS FOLLOWS:-

C 1. That all debts including the loan account and interest thereon owed by the company with the Union Bank of Nigeria Ltd. at Murtala Muhammed Way, Ilorin shall become the liability of Alhaji Subair A. Atanda and the same shall become payable by him solely and singularly.

D 2. That all debts including the loans account and interest thereon owed by the company with Societe Generale Bank of Nigeria Ltd. at Ibrahim Taiwo Road, Ilorin shall become the liability of Alhaji B.A. Lawal and the same shall become payable by him solely and singularly

E By a letter dated 21/8/87, the second respondent wrote to the 1st respondent (Exhibit "10") stating in part:-

"However, it has been resolved that I shall be responsible for liquidating the debt owed by SABAL TECH & ENG. CO. LTD. I wish to state further that I would not want the matter to be handled yet by the Bank Solicitors.

F *In the light of the foregoing, I am prepared to liquidate whatever is owed your Bank by the above named company by monthly instalment payment of N5,000.00 (Five thousand Naira) beginning from the end of October, 1987.*

G *Yours faithfully,*
sgd.
Alhaji Subairu Atanda."

H By a letter dated 11/9/87 (Exhibit "6"), the 1st respondent replied the 2nd respondent as follows:- "We refer to your letter dated 21st August, 1987 and shall be pleased to receive a copy of your company's Board Resolution wherein you were said to be responsible for liquidating the debt owed by SABAL TECH & ENG CO. LTD.

While we appreciate your willingness to repay the debt of the above named company, we wish to mention that the proposed monthly repayment instalment of N5,000.00 is not enough to care for monthly interest charges talkless of reducing the principal debt. A higher figure is preferable.

Your early reply is necessary to avoid the legal action threatened in our Solicitor's letter dated 29th June, 1987."

There was no reply to this letter.

By a letter dated 23/9/87 (Exhibit "9"), the appellant in his capacity as B the managing director of the 3rd respondent wrote to the 1st respondent. It reads in part: -

"I write to bring to your notice that the Directors of the above named company as a result of poor business fortunes have agreed to share the debts outstanding against the company and assigned same to individual C directors. Under the deed of settlement dated 3rd July, 1987 all the debt due to your bank, U.B.N. Ltd. are now the sole liability of Alhaji Subaru A. Atanda, a copy of the agreement is attached herewith.

By this, all other directors are discharged from further liabilities.

Please acknowledge receipt." D

The first respondent promptly replied by a letter dated 28/9/87 (Exhibit "12") in the following terms:-

"The Managing Director,

Sabal Technical & Engineering Co. Ltd.,

197, Abdul Azeez Attah Road, E

Ilorin.

Dear Sir,

Re: Notice of Assignment/Sharing of Debt

Reference to your letter dated 23rd September, 1987 on the above. F We hereby inform you that the purported notice of assignment/sharing of debt is not acceptable to the bank. Please note that we still maintain the joint and several liability of all your directors as well as the company until the debt is fully repaid.

Yours faithfully, G

sgd.

Sub-Manager."

Now, on a proper construction of Exhibits "14", "10", "6" and "11" among others, was the liability of the appellant under Exhibits "15" and "17" (the deed of legal mortgage and the guarantee) discharged? The main question here is whether the 1st respondent approved or accepted the terms of H Exhibit "14". The learned trial Judge concluded that the parties including the first respondent accepted the arrangement in Exhibit "14" and the said Exhibit "14" discharged the appellant from his liability to the 1st respondent. The

court below reversed the conclusion.

Exhibit "14" was an agreement entered into by the appellant and the 2nd respondent in which they purported to share the liabilities of the 3rd respondent between themselves. The 1st respondent was not a party to it. When the B 1st respondent received Exhibit "10", it sought clarification of the purported agreement by writing Exhibit "6" which was addressed to the 2nd respondent and demanded a copy of the resolution of the 3rd respondent approving the sharing arrangement. The 1st respondent in Exhibit "6" further stated that the proposed monthly repayment instalment of N5,000.00 was not even enough C to take care of the monthly interest charges let alone reducing the principal debt.

The two points raised in Exhibit "6" did not on a proper construction of it, amount to an acceptance of Exhibit" 14" by the 1st respondent. Even if it is conceded that Exhibit "6" was a conditional acceptance (which was not the D case), at best, it was a conditional acceptance which was dependent on the production of the resolution of 3rd respondent company authorising the sharing of its liabilities and an upward review of monthly instalmental payment acceptable to the 1st respondent. There was no reply to Exhibit "6"

I agree with the court below that Exhibit "6" was a counter offer or a E qualified acceptance which could not give rise to a binding agreement between the parties. See Sulaiman & Bros. Haus Mehr of Hamburg (1957) SCNLR 261; (1957) 2 FSC 60 and Odunsi v. Boulos (1959) SCNLR 591; (1959) 4 FSC 234, in addition, Exhibit 12 put any controversy over Exhibit 14 to rest. It was a rejection of Exhibit 14.

F There was no misapprehension on the part of the court below of the purport of Exhibits "6" and" 12". The construction placed on the exhibits by the court below cannot in my view be impeached.

That court while construing Exhibits" 14", "6" and" 12" said:-
..... for avoidance of doubt, even without the 3rd respondent's G Board Resolution having been furnished to the appellant as requested by it, per Exhibit "6", whatever hesitation or ambiguity that lingered in the mind of any body in relation to the appellant's view on Exhibit 14 was clearly dispelled by Exhibit 12

In the result, I hold that on a proper construction of Exhibits 6 and 12, H one is driven to the irresistible conclusion that the appellant did not impliedly or expressly accept the arrangement under Exhibit 14. The evidence before the court in this regard clearly supports this conclusion."

The finding by, the learned trial Judge that the appellant did not receive Exhibits "11" and "12" did not put an end to the question whether the

1st respondent accepted the terms set out in Exhibit 14. When the 2nd respondent testified in the trial court as 1st defendant, he stated that the appellant sent him a letter from the 1st respondent. He photocopied it and sent the original back to the appellant and that the plaintiff had the original of Exhibit 12. The 2nd respondent was not cross-examined on this assertion. The 2nd respondent as 1st defendant in the court of trial averred in paragraph 17 of his joint statement of defence with the 3rd respondent that the 1st respondent wrote Exhibit 12 to the appellant in reply to Exhibit 9 which the appellant wrote to the 1st respondent in respect of Exhibit 14. Notice was given to the appellant to produce the original of Exhibit 12. B

With this averment coupled with the evidence of the 2nd respondent on Exhibit 12 which was not challenged, one is at pains to see how the learned trial Judge came to the conclusion that Exhibit 12 was not received by the appellant. That finding was unsound and the court below disregarded it. See Commissioner for Works & Housing v. Lababedi & ors. (1977) 11-12 S.C. 15 and Chief Ebba v. Chief Ogodo & or. (1984) 1 SCNLR 37.2; (1984) 4 S.C. 84. D

As to estoppel by conduct and waiver, it was submitted on behalf of the appellant that acting on Exhibit 14 the appellant started to liquidate the 3rd respondent's liability to Societe Generale Bank (Nigeria) Ltd. and paid a total of N42,000.00 as shown in Exhibits 2, 3 and 4 while the 2nd respondent paid N38,000.00 to the 1st respondent. E

In addition, the 1st respondent instituted Suit No. KWS/324/89 against the 2nd and 3rd respondents which led to the judgment contained in Exhibit 19 without joining the appellant in the proceedings.

It was argued that these acts of the 1st respondent induced the appellant to believe that the rights under Exhibits 15 and 17 would not be enforced against him. The 1st respondent should not be allowed by the court to enforce those rights without placing the parties in the same position as they were, he contended. F

Exhibit 6 did not show that the 1st respondent accepted the arrangement set out in Exhibit 14. There is also nothing in Exhibits 6, 9, 10 and 14 to show that the 1st respondent agreed to or acted on Exhibit 14. The 1st respondent's rejection of Exhibit 14 was communicated to the 3rd respondent whose directors were the appellant and the 2nd respondent (Exhibit 12). G

Despite the rejection of Exhibit 14 by the 1st respondent and the clear wording of the said exhibit, the learned trial Judge found that the conduct of the appellant amounted to either estoppel or waiver. H

The doctrine of estoppel is that where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then,

once the other party has taken him at his words and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous relations as if no such promise or assurance had been made by him. See Tika-Tore Press Ltd. v. Abina & ors. (1973) 12 S.C. 79 at 91-94.

When the appellant made payment to Societe Generale Bank (Nigeria) Ltd., the 1st respondent had not been shown Exhibit 14 nor the resolution of the Board of Directors of the 3rd respondent approving or authorising the arrangement. Again, when the appellant made payments on 13/11/87 (Exhibit 3) and 27/7/88 (Exhibit 4), the 1st respondent had informed the 3rd respondent and its directors (appellant and 2nd respondent) that Exhibit 14 was unacceptable to it.

From the foregoing, there was nothing done by the 1st respondent which could have misled the appellant. The appellant was also in a position to find out the reaction of the 1st respondent to Exhibit 14 being the managing director of the 3rd respondent to whom Exhibit 12 was addressed. A person who is in a position to find out the true situation but chooses not to cannot complain that the conduct led to his detriment or peril. See Caroline Morayo v. Okiade & ors (1940) 8 WACA 46.

The 1st respondent never abandoned or relinquished its right under Exhibit 15 or 17. Exhibits 6, 12 and 14 did not amount to any surrender of the right of the 1st respondent under Exhibit 17 nor varied Exhibit 17.

Exhibit 14 was silent on Exhibits 15 and 17 (The legal mortgage and the guarantee) entered into between the 1st respondent and the appellant and in particular Clause 2 of Exhibit 15 and Clause 6 of Exhibit 17. Clause 6 of Exhibit 17 reads:-

"This guarantee is to be applicable to the ultimate balance that may become due to you from the Principal, and until payment of such balance the undersigned shall not be entitled to participate in any security held or money received by you on account of such balance or to stand in your place in respect of any such security or money."

Clause 2 of Exhibit 15 reads in part:-

Subject to the proviso for redemption following namely that if all moneys herein before covenanted to be paid shall be paid accordingly then the term hereby created shall cease."

Exhibits 6, 12 and 14 did not affect the liability of the appellant as provided in Exhibits 15 and 17. Exhibit 14 neither modified Exhibits 15 and 17 nor increased the liability of the appellant under them.

The judgment (Exhibit 19) which is against the 2nd and 3rd respondents did not amount to a release of the appellant. The appellant was still liable and had not discharged his joint and several liability with the 2nd respondent.

Clause 12 of Exhibit 17 gave the 1st respondent power to enter into arrangements of any nature with any other person liable in respect of the principal debt without its rights under Exhibit 17 being affected. In the light of the above clause, the appellant cannot question his non-joinder in the suit which resulted in Exhibit 19. I am therefore of the view that the court below was right in holding that the learned trial Judge did not apply the doctrine of estoppel and the principle of waiver correctly. B

It was contended that the court below gravely erred in reversing the decision of the trial court which was based on preponderance of evidence before it; that the 1st respondent called no evidence in support of his pleadings and should have been deemed to have abandoned its statement of defence. The case of International Bank for West Africa Ltd. v. Oguma Associated Co. (Nig.) Ltd. (1986) 2 NWLR (Pt.20) 124 was cited. C

Evidence, as used in judicial proceedings, has several meanings. In one sense, it means the testimony whether oral, documentary or real which may legally be received in order to prove or disprove some fact in dispute. Evidence in a judicial proceeding does not consist of oral evidence alone and proof of a fact can be documentary. The case between the parties was mainly documentary. The 1st respondent tendered various documents through the appellant and his witnesses in support of its pleading. The 2nd respondent also gave evidence part of which supported the case of the 1st respondent. The 1st respondent through cross examination of the appellant by its counsel extracted answers which supported its case. It is not in every case that a party must adduce oral evidence to establish his claim or disprove a claim against him since that can be done in other ways short of going into the witness box. Indeed, he need not be physically present in court if he is represented by a legal practitioner. See the unreported judgment of this court in SC.126/1992: Cross River State Newspapers Corporation v. Oni & ors, delivered on 20/1/95; But now reported in (1995) 1 NWLR (Pt.371) 270; British & French Bank Ltd. v. Solal-El-Assad (1967) NMLR 40 and Kehinde v. Ogunbunmi & ors (1968) NMLR 37. The case of International Bank For West Africa Ltd. v. Oguma Associated Companies (Nigeria) Ltd. supra decided that pleadings do not amount to evidence and that a party wishing to establish his claim must plead and prove it. Proof in the context does not mean proof by oral evidence alone. The court below construed the exhibits tendered and legally admitted in the trial court together with the oral evidence adduced before coming to its decision. Its decision was right. D E F G H

The appeal therefore fails. I can find no merit in it and I hereby dismiss it with N1s,000.00 costs to the 1st respondent.

BELGORE JSC

I read in advance the lead judgment of my learned brother, Ogwuegbu, J.S.C. with which I am in full agreement. It is fundamental to our system that a party who asserts must prove. It is however the responsibility first and foremost for a plaintiff to prove his case and thereafter also rely on the weakness of the defence to consolidate what he has proved. But the question is what is the proof of an averment in pleadings? Pleadings simpliciter are facts on which a party relies for his case and not the evidence. The evidence to support the facts in the pleadings can be viva voce or can be by way of documentary evidence available in court or both. (Kehinde v. Ogunbunmi & ors (1968) NMLR 37). Certainly what is pleaded must be proved by evidence, but evidence need not always be by physical presence of the person who asserts once there are ample and legally admissible documentary evidence to prove the averment in the pleadings. Therefore for the above reasons and fuller reasons in the judgment of my learned brother, Ogwuegbu, J.S.C. I also dismiss this appeal and give the same consequential orders as contained in the judgment.

E

OGUNDARE JSC

I have had an advantage of reading before now the judgment of my learned brother Ogwuegbu, J.S.C. just delivered. For the reasons given by him, which I hereby adopt as mine I too dismiss this appeal and affirm the judgment of the court below dismissing appellant's claims in the court of trial. I abide by the order for costs made in the lead judgment of my learned brother.

G

ONU JSC

In the High Court of Kwara State holding at Ilorin, the 1st respondent herein as plaintiff, sued the present appellant (Alhaji Bamidele Akano Lawal) with 2nd respondent (Alhaji Subairu Atanda) and the 3rd respondent, a company whose joint promoters and directors appellant and 2nd respondent were, jointly and severally as follows:-

"1. A declaration that the plaintiff was discharged and/or relieved of all liabilities whatsoever to the 2nd defendant for any debt howsoever in relation to debt owed it by the 3rd defendant by reason of an agreement

dated 3/7/87.

2. *A declaration that the parties having acceded to, acted upon and implemented the said agreement of 3/7/87, are Estopped in law and equity from going back on the said agreement, as they are deemed to have waived their other rights.*

3. *An order directing the immediate release of the plaintiff's title documents and properties at numbers 1-3 Oremeji Idofian Road, Ilorin to the plaintiff by the 2nd defendant."*

The facts of the case, briefly stated, are that the 3rd respondent, who was granted credit facilities by the 1st respondent were provided collateral securities by the appellant with three of his landed properties - Nos. 1-3 Oremeji Idofian Road, Ilorin while those of 2nd respondent proffered as securities were the latter's landed properties on the same road (Nos. 4-7 Oremeji Idofian Road, Ilorin) held under Customary Rights of Occupancy.

As a result of a disagreement between the appellant and the 2nd respondent, both agreed to share their debt liabilities to their two creditor-banks, Societe Generale Bank (Nig.) Ltd. based in Lagos and Ilorin to be made on behalf of 3rd respondent by the appellant, while that owed to the 1st respondent by 3rd respondent was to be disbursed by the 2nd respondent. The agreement reached by the appellant and 2nd respondent in this regard vide Exhibit 14, had its contents made known to the 1st respondent by a letter dated 21st August, 1987 vide Exhibit 10, the terms of the latter being to liquidate 3rd respondent's debt by N5,000.00 monthly instalments.

By letter i.e. Exhibit 6, dated 11/9/87, the first respondent wrote in response to Exhibit 10 and demanded for a resolution of the 3rd respondent wherein the decision to assign its liabilities to the appellant and the 2nd respondent was reached. The 1st respondent also requested that the 2nd respondent should increase the instalment he proposed to pay monthly. In response to Exhibit 6, Exhibit 9 was written on behalf of the 3rd respondent by the 2nd respondent to the 1st respondent informing the 3rd respondent about the resolution to assign the liabilities. Acting on Exhibit 14 and because of the correspondences vide Exhibits 10, 6 and 9, the appellant and the 2nd respondent started liquidating the liabilities assigned to them respectively. However, because the 2nd respondent at a point in time defaulted in his repayment schedule, the 1st respondent filed suit No. KWS/324/87 against him and 3rd respondent, (leaving out the appellant as per Exhibit 14) and got judgment (Exhibit 19) against both of them. Acting pursuant to the judgment (Exhibit 19) thus obtained, 1st respondent advertised all the properties mortgaged to it as per Exhibits 15 and 16 for sale by public auction of appellant's properties

together with those of the 2nd respondent: This was what led to the suit giving rise to the appeal herein.

At the trial which followed the exchange of pleadings, the appellant testified and called witnesses while the 1st respondent adduced no evidence.

B At the conclusion of hearing, judgment was entered in favour of the appellant with all three reliefs sought by him being granted accordingly. Aggrieved by the decision, the 1st respondent appealed to the Court of Appeal sitting in Kaduna, which allowed the appeal by setting aside the decision of the trial court. The appellant has now appealed to this court, filing six grounds attacking the decision. The parties exchanged briefs of argument in accordance with the rules of court. Three issues distilled from the six grounds of appeal were identified by the appellant for determination.

They are:-

(i) Whether the Court of Appeal was right in disturbing the finding of the trial court that the 1st respondent accepted the arrangement contained in Exhibit 14.

(ii) Whether the Court of Appeal was right in holding that the trial court did not properly apply the doctrine of estoppel and waiver to the facts of the case.

E (iii) Whether the Court of Appeal was right in reversing the decision of the learned trial lower court on whether in the circumstances of the case, the appellant proved his case on the balance of probability in view of the fact that the 1st respondent did not adduce any evidence.

F The 1st respondent adopted all three issues formulated at the instance of the appellant. In addition, a purported fourth issue which, in my opinion, does not look like one, was albeit proffered at respondent's instance to wit: that Exhibit 14 is not relevant to Exhibits 17 and 15 and therefore cannot discharge the appellant from his obligations under Exhibits 17 and 15.

G At the hearing of this appeal on 28th November, 1994 learned counsel on either side adopted the appellant's and 1st respondent's brief respectively and expatiated thereon. I propose to deal with the three issues proffered by the appellant which I prefer to the four highlighted by the 1st respondent, in their order of sequence, as follows:-

H ISSUE 1: In arguing this issue, it is well to recall the appellant's claim as made out in the trial court. It is that the 1st respondent accepted Exhibit 14 by writing Exhibit 6 and by not joining him (appellant) in the case culminating in the judgment, that is, Exhibit 19. It is also his contention that the 1st respondent having accepted Exhibit 14, waived its right to sue him (appellant) for the

debt he guaranteed in Exhibits 17 and 15. The question that relevantly arises from the above statement is: Is Exhibit 6 an acceptance of Exhibit 14, moreso in the face of Exhibit 12?

Exhibit 6 addressed to the appellant stated in part thus:-

"We refer to your letter dated 21st August, 1987 and shall be pleased to receive a copy of your company's Board Resolution wherein you were said to be responsible for liquidating the debt owed by SABAL TECH. & ENG. CO. LTD. While we appreciate your willingness to repay debt of the above named company, we wish to mention that proposed monthly repayment instalment of N5,000.00 is not enough to care for monthly interest charges talkless of reducing the Principal Debt. A higher figure is preferable. Your early reply is necessary to avoid the Legal action threatened in our Solicitor's letter dated 29th June, 1987."

Exhibit 12, which was written to the Managing Director of 3rd respondent and headed "Re: Notice of Assignment/Sharing of Debt" stated inter alia as follows:

"We hereby inform you that the purported notice of assignment "sharing of debt" is not acceptable to the Bank. Please note that we still maintain the joint and several liability of all your Director as well as the company until the debt is fully repaid."

The purport of Exhibit 6 clearly portrays that 1st respondent took note of the willingness of the 2nd respondent to settle the debt incurred by 3rd respondent, a debt 2nd respondent was liable to pay under Exhibits 18 and 16 that the 1st respondent rejected the offer by the 2nd respondent to liquidate the debt by N5,000.00 monthly instalments; that it (1st respondent) was demanding for a copy of the resolution in which the Board of the 3rd respondent resolved that 2nd respondent alone was to settle the debt of the 3rd respondent. As the 2nd respondent never replied to Exhibit 6 nor supplied the Board of 3rd respondent's resolution, it cannot be said that the 1st respondent had accepted the offer made by the 2nd respondent in his letter dated 21/8/87 vide Exhibit 10, to single handedly liquidate the debt of the 3rd respondent. Indeed, it is dear that by its reaction, the

1st respondent had made a counter offer. In effect, it had not accepted the contents of Exhibit 10 since, "acceptance" to be valid, must conform with the offer. In Osborn: the Concise' Law Dictionary, Fifth edition "Acceptance" is defined as "The act of assenting to an offer.

Acceptance of an offer to create a contract must be made while the offer still subsists by the offeree who must know of the offer; it must conform with the offer, and must either be communicated to the offeror, or the requisite act must be done." See also Union Bank of Nigeria Limited v. Ozigi (1991) 2

NWLR (Pt.176) 677 where the concepts of loans and overdrafts granted by a Bank to a customer, founded on negotiations through offer and acceptance, were fully illustrated by the Court of Appeal (per Ogundere, J.C.A.) from Attorney-General, Kaduna State & ors. v. Atta & ors. (1986) 4 NWLR (Pt.38) 785. There, the learned Justice opined at page 794 of the report thus:-

B *"It is trite law that the formation of a contract is not governed by rigid but by flexible rules, namely, that there must be a definite offer, by one party called the offeror and communicated to the other party called the offeree who accepts the offer; unless the offeror, the first party dispenses with such communication. See Ajayi Obe v. The Executive Secretary Family Planning Council of Nigeria (1975) 3 S.C. (1975) 3 S.C.1 Offer and acceptance constitute an agreement provided that the two parties reached a consensus ad idem, that is the intention of both parties on what is agreed is identical. Thus, in Majekodunmi & anor v. National Bank of Nigeria Ltd. (1978) 3 S.C. 119 at 127 the Supreme Court (per Fatayi- Williams, J.S.C. as he then was) opined thus:-*

D *'An Acceptance of an offer may be demonstrated by the conduct of the parties as well as by their words or by documents that have passed between them.'*

E *See also Carlil v. Carbolic Smoke Ball Company (1893) 1 Q.B.D. 256 at 269."*

F A qualified acceptance or a counter offer as happened in the present case, cannot give rise to a binding agreement between the parties. For instance, in the similar case of Messrs Sulaiman and Bros v. Hans Mehr of Hamburg (1957) SCNLR 261; (1957) 4 FSC 60, it was held that *"where an agreement is subject to confirmation by a party to it and that party does not confirm it simpliciter, but adds further conditions the agreement reverts to the state of negotiation, and until the new terms are accepted by the other party, there can be no binding contract"*. See also Hyde v. Wrench (1840) 3 Beav. 334; Hart P. Mills (1846) 15 LJ. EX.200 and Odunsi v. Boulos (1959) SCNLR 591; (1959) 4 FSC 234. Significantly enough, in Exhibit 6, the 1st respondent added further conditions for acceptance of Exhibit 14, and the 2nd respondent did not accept them. The court below was therefore justified when it held:-

H *"On a proper construction of Exhibits 6 and 12, one is driven to irresistible conclusion that the appellant did not impliedly or expressly accept the arrangement under Exhibit 14. The evidence before the court in this regard clearly support this conclusion."*

The denial by the appellant therefore that he never received Exhibit 12 is of no consequence since the appellant's case is founded on the allegation that the 1st respondent agreed with the 2nd respondent alone to settle

the debt owed by the 3rd respondent to it (1st respondent). Thus, both 1st and 2nd respondents whom the appellant claimed had agreed on Exhibit 14, and on which appellant based his claim for invoking the sanction of estoppel by conduct against the 1st respondent, told the trial court that the 1st respondent never accepted Exhibit 14; hence, the basis or foundation for the claim of the appellant thus collapsed. B

It is to be emphasised that the 2nd respondent is liable to the 1st respondent under Exhibits 16 and 18, these documents being a Deed of Legal Mortgage and a Guarantee to secure the debts owed by 3rd respondent to the 1st respondent. C

The reason given by the trial court that the conduct of the 1st respondent amounted to an acceptance of Exhibit 14 because the name of the appellant was not expressly stated in the suit against the 3rd respondent for the recovery of the debt owed by the 3rd respondent founded on Exhibit 19, is clearly erroneous. The trial court went on to hold “it even waived its rights to sue the plaintiff”. With utmost respect, the 1st respondent at no time waived its right to sue the appellant, for, in Clause 9 of Exhibit 17 (Guarantee), he signed that any judgment obtained against the 3rd respondent shall be conclusive and binding on him. Besides, in Clause 12 of Exhibit 17, 1st respondent agreed that the appellant could enter into arrangements of any nature with any other person (including the 2nd respondent) liable in respect of the principal debt without the appellant’s right being affected under the guarantee. The non-joinder of the appellant in the case that ended in Exhibit 19, therefore, cannot justify the order for the release of his mortgage properties since he (appellant) was bound by the judgment (Exhibit 19) under Clause 9 of Exhibit 17. Indeed, the 1st respondent even has a right to foreclose or sell his mortgaged properties without recourse to court as an unpaid mortgagee under Exhibit 15; so also the 1st respondent was entitled to sue the appellant for the unpaid debt at any time since guarantee is joint and several. Thus, to release the securities to the appellant before 1st respondent had exhausted all its rights against him under Exhibits 15 and 17 would prejudice the 1st respondent and occasion a miscarriage of justice. This issue is accordingly answered in the affirmative. D E F G

ISSUE 2: The issue herein asks whether the Court of Appeal was right in holding that the trial court did not properly apply the doctrine of estoppel and waiver to the facts of the case. H

In the first place, my consideration of issue 1 above applies with equal potency to the issue herein.

Secondly, despite the clear language of Exhibit 12 which rejected the

arrangements for debt sharing in Exhibit 14, and in spite of the bond signed by the appellant in Clause 9 of Exhibit 17 in which he held himself bound by any judgment obtained against the 3rd respondent, the learned trial Judge still held that the conduct of the 1st respondent in all circumstances of this case, amounted to estoppel and a waiver of rights. These acts were said to consist of:-

(i) Exhibit 6 written by the 1st respondent to the 2nd respondent (not to the appellant),

(ii) Non-joinder of the appellant in the suit that culminated in Exhibit 19, and

(iii) Payments said to have been made by the appellant to Societe Generale Bank in Exhibits 2, 3 and 4.

The question therefore is: Do these acts constitute estoppel by conduct. To answer this question, it is necessary to emphasise that the essentials of estoppel include change of position of parties. If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will not be enforced, those persons will not be allowed by a court of Equity to enforce the rights without, at all events, placing the parties in the same position as they were before. See *Birmingham and District Land Co. v. London and North Western Railway Co.* (1889)40 Ch.D. 268 at 286; *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947) K.B. 130; *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas.439; *Tika-Tore Press Ltd. v. Abina* (1973) 1 All NLR (Pt.11) 244 and *Ude v. Osuji* (1990) 5 NWLR (Pt.151) 488 at 509. See also *Principles of Equity* by M.I. Jegede at pages 227-231. Thus, the essentials of estoppel include change of position of parties so that the party against whom estoppel is invoked has received a profit or benefit or that a party invoking estoppel has changed his position to his detriment. The learned trial Judge as well as the appellant have contended that Exhibit 14 was accepted by all the parties without demur and therefore, the appellant was discharged from his liability to the 1st respondent. As already pointed out in my treatment of Issue 1, 1st respondent by Exhibit 12 rejected the domestic arrangement between the appellant and 2nd respondent contained in Exhibit 14 dated 3/7/87. Exhibit 12 was written on 28/9/88 which was in response to Exhibit 9 dated 23/9/88. When appellant made payment to Societe Generale Bank Nigeria Ltd. on 24/8/87, 1st respondent had not been shown a copy of Exhibit 14 nor the 3rd respondent's Board Resolution demanded by it in Exhibit 6 which is sine qua non to the authenticity of Exhibit 14. Furthermore, when appellant made further instalmental payments on 13/11/87 and 27/7/88, 1st respondent had unequivocally informed the 3rd respondent and its directors - appellant and 2nd respondent - that Exhibit 14

was unacceptable to it. The reason why the three payments made by the appellant cannot be said to have amounted to change of his position resulting to his detriment is because, as at the time of the alleged payments, the domestic arrangement under Exhibit 14 had been disapproved by the 1st respondent. Furthermore, Exhibit 12 was a letter addressed to the 3rd respondent whose managing director appellant was. Even if Exhibit 6 was not very explicit and originally misled the appellant (and this is not conceded), he could have made inquiries. It is a firmly established principle of law that where conduct misleads a person who is in a position to find out the true situation but chooses not to, the person can no longer be heard to complain. See *Caroline Morayo v. Okiade & ors* (1940) 8 W.A.C.A 46. As Exhibit 12 was unequivocal that the arrangement under Exhibit 14 was unacceptable to the 1st respondent, the learned trial Judge did not properly apply the doctrine of estoppel by conduct to the circumstances of the instant case. Similarly, the learned trial Judge, in my view, wrongly raised the principle of waiver against the 1st respondent. See *Ezomo v. Oyakhire* (1985) 1 NWLR (Pt.2) 195. Since the liability under Exhibit 17 or Exhibit 15 has not been finally settled nor modified in anyway by the appellant, his obligation to the 1st respondent to fully redeem the 3rd respondent's indebtedness to it (1st respondent) remained intact.

This issue is also answered in the positive and so resolved against the appellant.

ISSUE 3 asks whether the Court of Appeal was right in reversing the decision of the learned trial lower court on whether in the circumstances of the case the appellant proved his case on a balance of probabilities in view of the fact that the 1st respondent did not adduce any evidence.

The appellant's contention here is that the court below gravely erred in law in reversing the decision of the trial court which was based on the preponderance of evidence before it. That not only did appellant file a comprehensive amended statement of claim, he also testified and called witnesses to buttress his claim. That, although, 1st respondent filed a copious statement of defence, he called no evidence in support thereof and thus deemed to have abandoned its pleadings which thereby were not taken to constitute evidence vide *International Bank for West Africa Ltd. v. Oguma Associated Companies (Nig.) Ltd.* (1986) 2 NWLR (Pt.20) 124 at 143 C.A., a case affirmed by this court and reported in (1988) 3 SCNJ (Pt.1) 13. Appellant further contended that having offered no evidence, the 1st respondent cannot be heard to complain on weight of evidence. The cases of *Mobil Oil (Nig.) Ltd. v. Abolade O. Coker* (1975) 3 S.C. 175; (1975) NSCC 108 at 112 and *Odufunade v. Rossek* (1962) 1 All NLR 98, (1962) 1 SCNLR 170 were called in aid thereof. After referring us to several paragraphs in appellant's amended statement of claim, to wit: paragraphs 14, 15, 16, 17, 18, 23 and 23A, other documentary evidence and the

findings of the trial court which were material, unchallenged and unrebutted as proffered by the appellant and deemed admitted without much ado, the court below it is submitted, misapprehended the issue at stake and came to a wrong conclusion.

B I must observe firstly, that it is erroneous on the part of the appellant to suggest that the 1st respondent did not call any evidence at the trial. The 1st respondent furnished the following credible evidence which sufficiently rebutted the claim of the appellant that his (appellant's) obligations under Exhibits 15 and 17 had been waived.

C Firstly, in its Amended Statement of Defence, particularly in paragraphs 4, 5, 6, 7, 8 and 9, the 1st respondent countered all the claims made by appellant in his Amended Statement of Claim.

Secondly, at the trial, 1st respondent tendered through the appellant himself Exhibit 15, to wit: the Deed of Legal Mortgage signed by the appellant D and Exhibit 17, the guarantee signed by the appellant that he would not repossess his landed properties mortgaged to the 1st respondent until the debt guaranteed in Exhibit 17 and secured with property in Exhibit 15 have been fully repaid in discharge of 3rd respondent. Thirdly, also at the trial, counsel for the 1st respondent cross examined the appellant and elicited the following E vital answers:-

"I wrote Exhibit 9 to the bank. Exhibit 12 was written to the same address from where Exhibit 9 was issued, Exhibit 12 referred to exhibit 9.....Exhibit 6 is not addressed to me but I received a copy of it.

Exhibit 15 contains my signature. It was executed on 24/11/77. F Union Bank was not represented where Exhibit 14 was executed. The 3rd defendant still exists As an individual I did not pay any debt owed the Union Bank by Sabal

The agreement that I should repay Societe Generale is not between me and Union Bank. The Union Bank never at any time told me that my G liability to the bank under exhibit 15 and 17 was discharged. Exhibit 9 was dated 23/9/87; Exhibit 2 being 24/8/87 while Exhibit 4 being 27/7/88, Exhibit 12 was dated 28/9/87. Exhibit 3 was dated 13/11/87."

Moreover, the 2nd respondent who is the only co-director of the appellant in 3rd respondent/company testified that the 1st respondent had H not waived her right against the appellant under Exhibits 15 and 17. He further said:-

"The Union Bank Ilorin refused to accept the agreement since two people took the loan jointly and secured it jointly. The plaintiff then sent me to that letter from the Bank."

This then takes to me the point whether as all the necessary material facts were before the trial court on the pleadings in the instant case, it was not right for the learned trial Judge to have struck out or dismissed the appellant's case instead of embarking on the trial to a conclusion. As Oputa, J.S.C. in the case of Chief Mrs. R. Akintola & anor. v. Mrs. C.F.A.D. Solano (1986) 2 NWLR (Pt.24) 598 at 623 admonished:-

"It is high time our trial courts (and counsel) for the plaintiff especially) begin looking critically at the pleadings and where appropriate giving judgment on the pleadings if no triable issue of fact has been raised. There the plaintiff's case should be considered on his pleadings and the applicable law. Where the plaintiff's statement of claim does not disclose a cause of action - that is where, even if all the allegations of fact therein averred are established yet still the plaintiff would not be entitled to the relief sought, there instead of filing a statement of defence, the defendant should move the court to have the case dismissed."

I most respectfully endorse the above observation which could have properly been applied to dismiss the appellant's case, thus stopping it on its journey on appeal to this court. It is in this wise that while I agree that pleadings do not constitute evidence (See IBWA Ltd. v. Oguma Associated Companies (Nig.) Ltd. (supra) but documentary evidence does, it is evident from the pleadings of the parties in the instant case, supplemented by the documentary evidence tendered by the respondent as well as the oral evidence elicited from the appellant during cross examination by learned counsel for the 1st respondent, that the 1st respondent adduced sufficient evidence in rebuttal of the appellant's claim in relation to waiver of his obligations under Exhibits 15 and 17. In this regard, I cannot but endorse as a valid and correct the statement of the law enunciated by the court below when in its judgment it said:-

"Whether the defence must call witnesses to establish its case or not is a matter of procedural strategy best left to the decision of seasoned counsel. Where, as in this case, and as may be gathered from the pleadings, the appellant's case rests substantially on documentary evidence which had been tendered in the course of the trial through the plaintiff or his witnesses it is plainly needless for the appellant to field its own witnesses. In such circumstances, it is fallacious for the adversary (the 1st respondent herein) to imagine that the appellant has abandoned its statement of defence. International Bank for West Africa Ltd. case (supra) is undoubtedly a good authority that where the defence offers no evidence either through the plaintiff, or his witnesses and fails to call defence witnesses in this regard, the evi

dence in support of plaintiff's case stands unchallenged and uncontradicted. The trial court is obliged to enter judgment in favour of the plaintiff. That is not the position in this case. It is surprising that learned counsel was unable to appreciate that the documentary evidence tendered through 1st respondent's witnesses and the 2nd respondent seriously dented 1st respondent's case, particularly the effect of Exhibit 14 vis-a-vis the guarantee, Exhibit 17, and the Deed of Legal Mortgage, Exhibit 18."

It is because the court below, while not making it its function to interfere with the findings of fact of the trial court, but where, as in the instant case, such findings are not supported by the evidence or are shown to be wrong, the disturbance of the conclusion arrived at thereby by that court will be upheld by this court sitting on a further appeal. See *Mogaji v. Odofin* (1978) 4 S.C. 91 at 93; *Chukwueke v. Nwankwo* (1985) 2 NWLR (Pt.6) 195; *Ebba v. Ogodo* (1984) 4 S.C. 84 at 98 and *Abdullahi v. The State* (1985) 1 NWLR (Pt.3) 523 at 528.

My answer to this issue is accordingly given in the positive. For the above reasons and the fuller ones given in the judgment of my learned brother Ogwuegbu, J.S.C. a preview of which I had the advantage of having before now, I too dismiss the appeal. I abide by the consequential orders including those for costs awarded in the lead judgment.

ADIO JSC

I have had the advantage of reading, in draft, the judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and agree that the appeal should be dismissed. Accordingly, I dismiss it with N1,000.00 to the 1st respondent.

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H