

SUPREME COURT OF NIGERIA
12TH DECEMBER, 1995, SC. 209/89
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, Y. O. ADIO, A. I. IGUH, JJSC.

KOSSEN (NIG.) LIMITED & ANOR APPELLANTS
AND	
SAVANNAH BANK OF NIG. LIMITED RESPONDENT

BANKING - Fraud - Whether there is sufficient evidence - To establish fraudulent payment of money

BANKING - Fraud - Discovered in respect of certain accounts - Whether there is direct and positive evidence - To make the respondent entitled to the amount in issue

EVIDENCE - Documents - Extracts from a banker's book - Conditions under which they are admissible as exhibits.

PRACTICE & PROCEDURE - Writ of summons - Irregularity - Complaint about irregularity in the writ - When held to be too late.

RES JUDICATA - Applicability - Decision that is not on the merits - Whether res Judicata can be grounded thereon thereon.

FACTS

In 1984, a fraud was discovered in respect of two accounts at the plaintiff's/respondent's Jos branch to the tune of N732,106.23. The matter was reported to the Police. Meanwhile, the respondent commenced proceedings in the Jos High Court against 5 defendants. The appellants were the 2nd and 3rd defendants in the suit. The amount in question was claimed as money had and received to the plaintiff's use or in the alternative as being money obtained by the defendants from the respondent by deceit. The 2nd appellant, one Mr. Julius Babuje Pusmut, who was the respondent's credit officer, was the central figure in the fraud.

The trial court found in favour of the respondent and awarded the sum of N729,003.84. The appellants appealed to the Court of Appeal which dismissed the appeal. Being dissatisfied appellants have further appealed the Supreme Court raising 8 issues.

ISSUES FOR DETERMINATION

1. Whether the trial is not a nullity in view of the fact that the suit was not commenced in accordance with the provisions of the Plateau State High Court Civil procedure Rules; namely; by an application to the Registrar for writ of summons.

2. Whether the trial Court had jurisdiction to entertain the suit in view of the non-compliance with the said Plateau State High Court Civil Procedure Rules.

3. Whether Exhibits 2-19 are inadmissible documents which ought to have been rejected, and whether their admissibility materially affected the outcome of the suit.

4. Whether the trial Court had jurisdiction to entertain suit No. HJ/73/85 at a time when the Respondent's appeal against the Ruling in suit No. HJ/74/85 was still pending in the Court of Appeal, Jos.

5. Whether the principle of RES JUDICATA would apply to rent suit No. HJ/73/85 a nullity having regards to the validity of the order of dismissal of suit No. HJ/4/85 before the outcome of the appeal against the said order.

6. Whether the trial Court properly relied on Exhibit 29 which it had marked "rejected" in entering judgment in favour of the Respondent.

7. Whether the trial court had a legal duty to speculate having regards to the amount claimed by the Respondent.

8. Whether there was proper basis for an award of the sum N729,003.84 to the Respondent.

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

Writ of summons - Irregularity

1. In the case in hand the appellants did not complain about the alleged irregularity until the suit was on appeal to the Court of Appeal. They took part in all proceedings before the trial court and, in my view, it is too late in the day for them to complain about the non-compliance with Order 2 Rule 1 of High Court Civil Procedure Rules of Plateau State. For the above reasons I find no merit in the arguments in support of issues 1 and 2. (p. 2107 F)

Documents - Extracts from a banker's book

2. The argument of the learned counsel for the appellants in respect of exhibits 24 - 28 is very weak for the simple reason that those exhibits are extracts a bankers' book. They are admissible if certain conditions have been fulfilled. That condition shall be the oral evidence showing that the exhibits are extracts from bankers' book, kept by the banker and that the figures copied out had been compared with the original and found correct. Since the appellants' counsel had not raised any objection when the exhibits were tendered this court will not entertain any complaint on their admissibility. (p.2109C)

Res Judicata - Applicability

3. It is elementary to state that a decision not on the merits could not qualify as a defence through the principle of Res Judicata. It is instructive on provisions of Section 53 of the Evidence Act in order to point out how a judgment could be a conclusive proof as against the parties and their privies. The appellants' counsel in his brief submitted that Suit No. HJ/4/85 preliminarily dismissed. This means that it was dismissed before the hearing on its merit. Such a decision is not a judgment for it to be cited for the defence of Res Judicata. (p. 2109 F)

Fraud - Whether there is sufficient evidence

4. Turning to issue 6, I agree that there was enough evidence from the witnesses and other exhibits tendered which established that the sum N73,106.23 was fraudulently paid into account No. 1664 belonging to Alhaji Muhammadu Kano. Exhibits 25 to 28 are Statements of Accounts for account No. 1664. I have held above in this judgment that those exhibits were properly admitted in evidence. The owner of the account testified and told the trial court that he did not pay any money into his account and that the balance remained N10,000.00. Therefore even without reference to exhibit 29 the learned trial Judge would still come to the same conclusion. (p. 2110 A)

Fraud - Discovered in respect of certain accounts

5. The submissions of the appellants' counsel in support of issues 7 and 8 disclosed no material ground upon which I could disturb the concurrent findings of the two lower courts. The evidence of PW3 is straight on the amount which both accounts 2808 and 1664 were owing them when the fraud was discovered. The total amount found to have been siphoned through the fraudulent use of those two accounts was N729,003.84.

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The evidence is direct and positive and I agree with the Court of Appeal that the trial High Court is right in entering judgment in favour of the respondents. (p. 2110 C)

B NOTABLE POINT OF INTEREST
MOHAMMED JSC

1. Noncompliance with rules of court

It is write to say that non-compliance with rules of Court will not necessarily result in the judgment given in the case being set aside and it is also clear that once a step is taken in the proceedings by a party complaining about the breach of the rules of court he is said to have waived the breach.

(p. 2107 A)

D REPRESENTATION

Mr. Martin Omohwo for the appellants

Mr. Segun O. Odowu for the respondent

CASES REFERRED TO

- E Chukwunta v. Chukwu (1953) 14 WACA 341 and sections 48 and 53
Onyema v. Oputa (1987) 6 S.C 362 at 407
Oke v. Aiyedun (1980) 4 S.C. 61 at 94 - 95
Salati v. Shehu (1986) 1 S.C. 322 at 374
Adebayo v. Johnson (1969) 1 All N.L.R. 176 at 190 - 191
F Jozebson Industries Co. v. R. Lauwers Import-Export (1988) All N.L.R. 310 at 333
Alade v. Olukade (1976) 1 All N.L.R. 67 at 73 - 74
Raimi v. Akintoye (1986) 3 N.W.L.R. (Part 26) at page 97

G STATUTES & RULES REFERRED TO

High Court Civil Procedure Rules of Plateau State 1976 O. 2 r.1
Evidence Act s. 226(1); 96(1) (a); 53

H LEAD JUDGMENT BY MOHAMMED JSC

The plaintiff, now respondent, is a commercial bank with a branch office at No. 21 Murtala Mohammed Way, Jos. In 1984, when it was observed that the account books of the respondent's branch in Jos could not balance, the headquarters raised a task force of auditors and dispatched

them to Jos on an assignment to reconcile the books of the respondent's branch there. At the end of the reconciliation a fraud was discovered involving the operation of customers accounts Nos. 2808 and 1664. The matter was reported to the police.

Meanwhile, on 7th May, 1985, the respondent, as plaintiff, commenced proceedings in the Jos High Court against five defendants. The appellants, in this appeal, were the 2nd and 3rd defendants in the Suit. In the action the respondent claims the sum of N732,106.23 against the defendants jointly and severally being money had and received to the plaintiff's use. In the alternative the respondent claims from the five defendants jointly and severally the sum of N732,106.23 being money obtained by the defendants from the respondents by deceit.

The second appellant, Mr. Julius Babuje Pusmut, is the central figure in the action which led to this appeal. Mr. Pusmut was the 3rd defendant before the trial court. Mr Pusmut was the credit officer of the Jos Branch of the respondent bank. He occupied that position between January, 1981 to July, 1983. His function was to consider loans to customers of the respondent. He could also approve cheques for payment as well as interview credit customers and examine their books. Mr Pusmut was initially given power to approve payment of cheques up to the limit of N20,000.00. This power was later increased to N40,000.00.

When the task force investigated the books of Jos Branch of the respondent they came across two accounts, viz Nos. 2808 and 1664. There are two other accounts which the task force unveiled and which were discovered to have been used in transferring the money cashed or paid out fraudulently from accounts Nos. 2808 and 1664. The accounts which were used in other banks are No. 016276 at the First Bank, Jos and an account whose number was not given in the evidence at the Union Bank, Bank Street, Jos. Account No. 016276 was opened under a fictitious name of one Alhaji Ali Damina. It was found during police investigation that Mr. Pusmut, the 2nd appellant, introduced "*Alhaji Ali Damina*" to PW.1 who was a staff of the First Bank and eventually the account was opened. PW. 15, police Superintendent, Mark Panmak Sodo, who investigated the case discovered, through the photograph used in opening account No. 016276 that he knew the person who opened the account and that his real name was Mallam Ali Gunok. When confronted, Mallam Gunok admitted, opening the account and that it was Mr. Pusmut the 2nd appellant who directed him to do so.

The second account which was opened at the Union Bank was owned by Kossen (Nigeria) Limited, the 1st appellant. The company was

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floated by the 2nd appellant. It was shown through the evidence that it commenced business in December, 1983 but by the end of the month the company lodged in its account the sum of N401,151.00. The 2nd appellant testified before the trial court that the 1st appellant traded in maize, beer, cement, rice and concrete blocks. However, during his investigation, P.W.15 found that the 1st appellant was allocated some bags of cement by the Benue Cement Company about 7 times between March, 1983 and April 1984. He also found that it was allocated 200 cartons of beer a week. The allocation was stopped in June, 1983.

Account No. 2808 was opened on 16th July, 1982 in the Jos Branch of the respondent where the 2nd appellant worked as a credit officer. It was discovered that no approval was given before the account was opened. It was shown to have been opened in the name of one Alhaji Sale Mohammed. The trial court found that Mr. Pusmut, the 2nd appellant, was the person who opened this account and used a fictitious name of Alhaji Sale Mohammed. The Court of Appeal, quite correctly, agreed with this finding. The main features which the trial court found about account 2808 are:-

"1. All transactions were withdrawals from the account; there were no corresponding deposits.

2. The account was operated as an overdraft account, but no overdraft was granted to the owner of the account.

3. At every occasion on which a large sum of money was withdrawn, the balance on the account instead of showing over-drawn balance would show credit balance which never existed.

4. All the withdrawals were in large sum of money which could only be approved by Senior Officers of the Bank".

Evidence was given, by P.W.11 and P.W.18 that a total sum of N615,880.00, were paid out to the 2nd appellant on account No. 2808. Exhibits of cheques were tendered to show that all payments drawn from account No. 2808 were authorised by the 2nd appellant and most of the money were paid directly to him by the cashiers.

Another account was used in withdrawing large sums of money from the Jos branch of the respondent. This is account No. 1664. The account was owned by Alhaji Mohammadu Kano P.W.4. Alhaji Mohammadu Kano once approached the 2nd appellant when he was in need of a new cheque book. He had by then N10,000.00 in his account No 1664. The 2nd appellant gave him a form to sign but P.W.4 could only sign in arabic. In his judgment, the 2nd appellant was found by the learned trial Judge to have used this account in fraudulently withdrawing a total sum of N62.386.00 from that account.

In sum, after the learned trial Judge had meticulously considered all the evidence adduced by the parties, in this suit, he concluded his well considered judgment by finding in favour of the respondent and against the defendants jointly and severally in the sum of N729,003.84. He also directed that interest shall be paid at the rate of 10% from the date of the judgment. Dissatisfied with the judgment, the 2nd and 3rd defendants appealed to the Court of Appeal Jos Division. After making a considerable finding and analysing all the salient issues raised in that appeal the Court of Appeal found no merit in the appeal and dismissed it.

Kossen Nigeria Limited and Mr. Julius Babuje Pusmu have now appealed to this court. The following issues have been formulated by the learned counsel for the appellants.

“1. Whether the trial is not a nullity in view of the fact that the suit was not commenced in accordance with the provisions of the Plateau State High Court Civil Procedure Rules; namely; by an application to the Registrar for Writ of Summons.

2. Whether the trial Court had jurisdiction to entertain the suit in view of the non-compliance with the said Plateau State High Court Civil procedure Rules.

3. Whether Exhibits 2-19 are inadmissible documents which ought to have been rejected, and whether their admissibility materially affected the outcome of the suit.

4. Whether the trial Court had jurisdiction to entertain Suit No. HJ/73/85 at a time when the respondent's appeal against the ruling in suit No. HJ/4/85 was still pending in the Court of Appeal, Jos.

5. Whether the principle of RES JUDICATA would apply to render suit No. HJ/73/85 a nullity having regards to the validity of the order of dismissal of Suit No. HJ/4/85 before the outcome of the appeal against the said order.

6. Whether the trial court properly relied on Exhibit 29 which it had marked “rejected” in entering judgment in favour of the respondent.

7. Whether the trial court had a legal duty to speculate having regards to the amount claimed by the respondent.

8. Whether there was proper basis for an award of the sum of N729,003.84 to the respondent.”

The issues raised by the learned counsel for the respondent, although couched in different words are the same as the above. In his argument in support of issues 1 and 2 Learned Counsel for the appellant submitted that the respondent initially filed a suit No. HJ/4/85 against the appellants and 3 others claiming the sum of N800,000.00 from them being

money had and received to the respondents use. On the 7th of May, 1985 the suit was preliminarily dismissed. Thereupon the respondent filed an appeal in the Court of Appeal, Jos. While the appeal was still pending the respondent, without filing an application for issuance of writ as required by order 2, Rule 1 of the High Court Civil Procedure Rules, filed a fresh suit B against the same parties and seeking the same relief as sought in Suit No.HJ/4/85. Learned Counsel for the appellant objected to the hearing of the new suit but the learned trial Judge opted to go on with the hearing.

Learned counsel for the appellant argued that the whole proceedings before the High Court was a nullity because the court had no jurisdiction to try it. Counsel argues that under Order 2 Rule 1 of Plateau High Court Civil Procedure Rules, 1976 it has been provided thus:

“Every suit shall be commenced by an application to the Registrar for the issue of a writ of summons”.

Mr. Martin Omohwo further submitted that having regards to the D said Rule a High Court of Justice, Plateau State, could only be vested with jurisdiction to entertain a claim if the claim is commenced by an application to the Registrar for the issue of a writ of summons. He cited the cases of Oke v. Aiyedun (1980) 4 S.C. 61, at 94-95 and Salati v. Shehu (1986) 1 S.C. 322 at 374; (1986) 1 NWLR (Pt.15) 98 where this court held that a E case must come before the court initiated by due process of law and upon the fulfillment of any condition precedent to the exercise of jurisdiction.

Counsel further argued that any defect in competence is fatal and the proceedings concluded thereto is a nullity. He cited the case of Onyema v. Oputa (1987) 6 S.C. 362 at 407; (1987) 3 NWLR (Pt.60) 259. Finally F Mr. Omohwo submitted that the order of dismissal of Suit No. HJ/4/85 was valid and subsisting even when the respondent's appeal against same was pending before the Court of Appeal since a judgment liable to appeal remains final until it is set aside by a higher court- Chukwunta v. Chukwu (1953) 14 WACA 341 and sections 48 and 53 of the Evidence Law.

G In reply to the above submissions learned counsel for the respondent, quite correctly, pointed out that there is difference between jurisdiction over subject matter which is unlimited and covered by the 1979 Constitution and procedural jurisdiction. I will add, although I abhor them, all ouster clauses in a statute or Decree as part of jurisdiction which cannot be H expanded or compromised. But procedural jurisdiction could be waived or acquiesced in by the affected party. Mr. Idowu, Learned Counsel for the respondent submitted further that where wrong procedure was adopted in commencing a suit or an action and no objection to the procedure was timeously raised by the opposite party, when the proceedings based on

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such wrong procedure is valid. See Adebayo v. Johnson (1969) 1 All NLR
176 at 190 - 191.

It is trite to say that non-compliance with rules of court will not necessarily result in the judgment given in the case being set aside and it is also clear that once a step is taken in the proceedings by a party complaining about the breach of the rules of court he is said to have waived the breach. This was the decision of this court in the case of Jozebson Industries Co. v. R. Lauwers Import-Export (1988) All NLR 310 at 333; (1988) 3 NWLR (Pt.83) 429. In that case the particulars of the breach of the rules of court were given as follows:

“The claim and writ of summons issued in respect of this suit did not contain the name and the place of abode of the plaintiff, as required by the mandatory provisions of ORDER 11 Rule 2 of the High Court Rules, Cap. 61 Laws of Eastern Nigeria applicable to Anambra State and thus renders the claim and the writ incompetent and defective.

(ii) The omission of the name and place of abode of the plaintiff in the claim and on the writ of summons before the court was in clear breach of Order 11 rule 2 of the High Court Rules which provides that “The Writ of Summons shall contain the name and place of abode of the plaintiff...” “*(Italics is mine for emphasis)*

Also, in the case of Chief Okumagba Eboh and Six ors. v. Ogbotemi Akpotu (1968) 1 All NLR 220 at 221 this court held:

“It is not every irregularity that can nullify entire proceedings and it may well be open to a party claiming by virtue of an irregularity to contend that such irregularity does not materially affect the merits of the case or engender a miscarriage of justice or that in any case it was much too late for the other party to complain about such irregularity.” In the case in hand the appellants did not complain about the alleged irregularity until the suit was on appeal to the Court of Appeal. They took part in all proceedings before the trial court and, in my view, it is too late in the day for them to complain about the non-compliance with Order 2 Rule 1 of High Court Civil Procedure Rules of Plateau State. For the above reasons I find no merit in the arguments in support of issues 1 and 2.

Learned Counsel for the respondent raised a preliminary objection that ground 3 is not competent because in the particulars of that ground the appellants did not indicate that *“had such evidence been excluded the judgment would have no “leg” upon which to stand”* I think the Learned counsel for the respondent is extending the provisions of section 226 (1) of the Evidence Act beyond its ordinary meaning. For the avoidance of doubt I shall reproduce section 226 (1) of the Evidence Act. It reads:

“The wrongful admission of evidence shall not of itself be a ground

for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted."

Learned Counsel for the appellant quite correctly submitted that
 B the above provision did not make it mandatory for ground of appeal complaining of wrongful admission of evidence to be supported by particulars of error indicating that "had such evidence been excluded the judgment would have no *"leg"* upon which to stand. Ground 3 is a ground of law and the particulars of error given viz: exhibits 2 - 19 (inclusive) 23 - 28 (inclusive)
 C and 33 being secondary evidence were inadmissible and the lower court ought to have so held - explained the error which the appellant sought to argue concerning the admission of those exhibits. I therefore overrule the preliminary objection raised by the respondent's counsel against ground 3.

The issue concerning the admission of Exhibits 2 - 19, 23 - 28 and
 D 33 had been contested at the Court of Appeal and that court had, quite correctly, in my view, dismissed the ground upon which issue 3 had been raised. Repeating the same argument in the appellant's brief, Mr. Omohwo submitted that the Court of Appeal was in error to hold that those Exhibits were admissible. Learned counsel argued that all the Exhibits were photo-
 E copies and the police who were said to be holding the originals were not served with notice to produce. Mr. Omohwo submitted also that Exhibits 23 - 28 are not photocopies of the original, but entries copied into separate sheets from the original audit sheets by P.W.3. Thus their admissibility does not have root in section 96(1) (a) of the Evidence Law and therefore they
 F should be expunged from the record.

In a reply to the above submission learned counsel for the respondent agreed that Exhibits 2-19 and 23 are photocopies, but Exhibits 24 - 28 are extracts from the respondents audit sheets. They are statement of accounts for accounts 2808 and 1664. Counsel submitted that the Exhibits
 G were pleaded in paragraphs 17, 31 and 49 of the Amended Statement of Claim. Mr. Idowu conceded that at the time Exhibits 2 - 19 were tendered, there was no proof that 'Notice to Produce' had been served on the person bound to produce them. I agree with Mr. Idowu that the lapses in tendering them before serving a Notice to produce does not vitiate its admissibility
 H because they were used extensively by the appellants and no objection was raised save a feeble one. See *Abolade Alade v. Salawu Olukade* (1976) 1 All NLR (Pt. 1) 67 at 73 - 74.

In his evidence P.W.15 the police superintendent who was holding the originals of Exhibit 2 - 19 and 23 told the court that he was served with

a notice to produce the documents. However, Learned counsel for the respondent submitted that the 2nd appellant had identified all the Exhibits and his signature on them. He also authorised for the payments of all those cheques. Mr. Idowu referred to an unreported decision of this court which held that such documents could be accepted as having been properly admitted. This is the case of Caralletti Giovanni v. Bonaso Luigi (S.C 402/67) B of 31/10/69 where Fatayi Williams J.S.C. (as he then was) stated thus; *"The matter does not, however rest there. The defendant/appellant in his own testimony admitted, when the copy of the Declaration to him (Exh.9) was shown to him, that he wrote and signed it, and was the same as the original in all respect, in view of this admission, we are bound to hold that C the document could have been properly admitted in evidence at that stage of the proceedings. To hold otherwise would amount to a denial of Justice based on a technicality which to our minds, is glaringly untenable"*.

I think the argument of the learned counsel for the appellants in respect of Exhibits 24 - 28 is very weak for the simple reason that those D Exhibits are extracts from a bankers' book. They are admissible if certain conditions have been fulfilled. That condition shall be the oral evidence showing that the Exhibits are extracts from a Bankers book, kept by the banker and that the figures copied out had been compared with the original and found correct. Since the appellants counsel had not raised any objec- E tion when the Exhibits were tendered this court will not entertain any complaint on their admissibility. In Raimi v. Akinfoye (1986) 3 NWLR (Pt.26) at page 97 this court held that where certain documents are admissible in evidence upon fulfillment of certain conditions or under certain circumstances, an appellant who fails to object to their admissibility in the trial F court cannot do so in the Appeal Court. This issue also fails.

Issue 4 is based on the principle of Res Judicata. It is quite plain that the argument of the appellants on this issue is untenable. It is elementary to state that a decision not on the merits could not qualify as a defence through the principle of Res Judicata. It is instructive to refer to the provisions of Section 53 of the Evidence Act in order to point out how a judgment could be a conclusive proof as against the parties and their privies. That Section reads:

"Every judgment is conclusive proof, as against parties and privies of acts directly in issue in the case, actually decided by the court and H appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved."

The appellants' counsel in his brief submitted that Suit No. HJ/4/85 was preliminarily dismissed. This means that it was dismissed before the hearing on its merit. Such a decision is not a judgment for it to be cited for the defence of *res judicata*.

Turning to issue 6, I agree that there was enough evidence from B the witnesses and other Exhibits tendered which established that the sum N723,106.23 was fraudulently paid into account No. 1664 belonging to Alhaji Mohammadu Kano. Exhibits 25 to 28 are Statements of Accounts for account No. 1664. I have held above in this judgment that those Exhibits were properly admitted in evidence. The owner of the account testified C and told the trial court that he did not pay any money into his account and that the balance remained N 10,000.00. Therefore even without reference to Exhibit 29 the learned trial Judge would still come to the same conclusion over the payment of N723,106.23 into account No. 1664.

The submissions of the appellants' counsel in support of issues 7 D and 8 disclosed no material ground upon which I could disturb the concurrent findings of the two lower courts. The evidence of P.W.3 is straight on the amount which both accounts 2808 and 1664 were owing the respondent when the fraud was discovered. The total amount found to have been siphoned through the fraudulent use of those two accounts was 729,003.84. E The evidence is direct and positive and I agree with the Court of Appeal that the trial High Court is right in entering judgment in favour of the respondents and against the appellants and three others jointly and severally.

This appeal has no merit at all. All the technical issues raised are of no consequence. The appeal is dismissed. The judgment of the Court of F Appeal which affirmed the decision of the trial High Court is hereby affirmed. I award N1,000.00 costs in favour of the respondent.

BELGORE JSC

G I agree with the judgment of my learned brother, Mohammed J.S.C. that this appeal has no merit. For the reasons succumbly adumbrated in the said judgment which I also adopt, I dismiss this appeal and make the same order as to costs.

H

OGUNDARE JSC

I have had an advantage of a preview of the judgment of my learned brother Mohammed, J.S.C. just read. I agree with him that this appeal is totally lacking in merit. I however, like to add a few words of my own.

On Issues (1) and (2) raised in the appellants' Brief in submitting that the trial before the trial High court was a nullity, it is contended by the appellants that there was non-compliance with Order 2 Rule 1 of the High Court Civil Procedure Rules (1978) of Plateau State which provides:

"Every suit shall be commenced by an application to the Registrar for the issue of a writ of summons."

I must admit I do not understand the complaint of the appellant on these issues. I say this because the action in the High Court of Plateau State was commenced by a civil summons issued at Jos on the 7th day of May 1985 and duly signed by a Judge of the High Court of that State. All the defendants including the appellants were served with the writ as well as the Statement of Claim. Indeed by a motion dated 16th day of July 1985 Mr. R.D. Gumut learned counsel acting for the present appellants who were 2nd and 3rd defendants in the action prayed the trial court for extension of time within which to file a statement of defence. This prayer was granted in consequence of which they filed their statement of defence to the action. D
Wherein then is the non-compliance being complained of? Are they now saying that there was no application to the Registrar before the writ was issued? If that is their contention, there is no evidence on record to support this contention. With the issue of the writ of summons in this case there is the presumption that an application was made by the plaintiff to the Court Registrar for the issue of the summons. The maxim is *omnia praesumuntur rite esse acta*. This presumption has not been rebutted by the appellants in this case. E

Assuming without conceding, that an application was infact not made to the Registrar by the plaintiff before the issue of the civil summons, this F
would only amount to an irregularity which the appellants ought to have raised timeously before taking any fresh step in the action after becoming aware of the irregularity. That is not the case here. I agree with the court below that it was too late for them to raise the point on appeal. See *Adebayo v. Johnson* (1969) 1 All NLR 176 where at page 190 this Court observed: G

*"Even if the procedure adopted by the applicant Adebayo were wrong, we think that it is now much too late in the day for the directors to complain about it. They failed to challenge the correctness of the procedure at the commencement of the proceedings or on their entry into the case and sought unsuccessfully to get the Statement of Delinquencies filed H
by the applicant Adebayo struck out. Clearly in those circumstances the adoption of a wrong procedure would be no more than an irregularity, and would not render the entire proceedings a nullity as was submitted by learned counsel for the director Kamson: so unless a miscarriage of justice is thereby*

alleged and proved, the proceedings would not be struck out. See in re Kellock (1887) 56 L.T.R. 887; also Allen v. Oakey (1890) 62 L.T.R. 724.” See also Noibi v. Fikolati (1987) 1 NWLR (Pt.52) 619; Ezomo v. Oyakhire (1985) 1 (Pt.2) NWLR 195.

On Issue (3), all exhibits complained of come under the category B of documents that are admissible upon fulfilment of certain conditions: they are not documents whose admissibility is totally prohibited by law. These documents having been admitted at the trial without objection and were used extensively by the appellants in the course of the proceedings, they cannot now seek to vitiate their admissibility. See Abolade Alade v. C Salawu Okulade (1976) 1 All NLR (Pt.1) 67 where this Court, per Idigbe J.S.C., observed at page 72-75:

“In this Court, however, learned counsel for the appellant has argued that although exh. B1 was put in evidence by counsel for the appellant and although exh. B was received in evidence without objection by or D on behalf of the appellant it was still open to him (the appellant), in this court, to object to these exhibits since it is the duty of this Court to exclude inadmissible evidence which was erroneously received in evidence during the trial. In support of this proposition learned counsel for the appellant cited the cases of Ajayi v. Fisher 1 F.S.C. 90: (1956) SCNLR 299 and Esso E West Africa Incorporated v. Alli (1968) NMLR. 414 at 423. There is no doubt, however, that a court is expected in all proceedings before it to admit and act only on evidence which is admissible in law (i.e. under the Evidence Act or any other law or enactment relevant in any particular case) and so if the court should inadvertently admit inadmissible evidence it has F a duty generally not to act upon it. When, however, inadmissible evidence is tendered it is the duty of the opposite (or adverse) party or his counsel to object immediately to the admissibility of such evidence; although if the opposite party should fail to raise objection in such circumstances the court in civil cases may (and, in criminal case, must) reject such evidence ex G proprio motu. On appeal, however, different considerations arise where a party failed to take objection to inadmissible evidence in the court of trial. It has frequently been stated (as, indeed, learned counsel for the appellant has done) that where a matter has been improperly received in evidence in the court below, even when no objection has been there raised, it is the duty H of the court of appeal to reject it and to decide the case on legal evidence. The case frequently relied upon for this proposition is Jacker v. The International Cable Company Ltd. (1888) 5 T.L.R. 13, In criminal cases, however, the party in default can, it seems, raise, at any stage (this includes, the ‘appeal stage’) the question of admissibility of inadmissible evidence. How-

ever, in civil cases where the trial has been before a Judge and jury the wrongful admission of evidence cannot be made a ground of appeal unless the appellant had formally objected to the evidence at the trial. In a trial by a Judge alone, as in the case in hand, a distinction must be drawn between those cases where the evidence complained of is in no circumstances admissible in law and where the evidence complained of is admissible under certain conditions. In the former class of cases the evidence cannot be acted upon even if parties admitted it by consent and the court of appeal will entertain complaint on the admissibility of such evidence by the lower court (although the evidence was admitted in the lower court without objection); in the latter class of case, if the evidence was admitted in the lower court without objection or by consent of parties or was used by the opposite party (e.g. for the purpose of cross-examination) then it would be within the competence of the trial court to act on it and the court of appeal will not entertain any complaint on the admissibility of such evidence. Dealing with the first class of cases, this Court, in *Minister of Lands, Western Nigeria v. Dr. Nnamdi Azikiwe and others* - SC, 169/68 of 31/1/69. - observed: - 'The document now marked exh. 2 is not a certified true copy but a photostat copy and is therefore inadmissible as secondary evidence of a public document which it purports to be. There was no objection as to its admissibility when it was produced but it is not within the competence of parties to a case to admit by consent or otherwise a document which, by law, is inadmissible. (See *Owoyin v. Omotosho* (1961) 1 All NLR 304, 308, (1961) SCNLR 57; *Alashe v. Olori Ilu* (1964), 1 All NLR 390, 397; also *Yassin v. Barclays Bank DCO* (1968) 1 All NLR 171; (1968) NMLR 380. Dealing with the latter class of cases, however, this court in *Cavallotti F Govianni v. Bonaso Luigi* SC 402/67 of 31/1 0/69 held that a document (a photo copy) which did not comply with section 96 (1) (b) of the Evidence Act and which had been admitted without objection by the appellant was legal evidence upon which the court could properly act. (See also *Chukwurah Akunne v. Mathias Ekwunno and other.* (1952) 14 WACA 59. Accordingly, in those cases where the evidence complained of is not, by law, inadmissible in any event a party may, by his own conduct at the trial, be precluded from objecting to such evidence on appeal- See *Gilbert v. Endean* (1878) 9 Ch.D. 259 where Cotton L.J. made the following observation:-

But I must add this: where in the court below the evidence not being strictly admissible, not being that on which the court can properly act, if the person against whom it is read does not object but treats it as admissible, then before the court of appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not

admissible. See (1878) 9 Ch. D at 269."

On issues (4) and (5) the appellants' contention is to the effect that the respondent's earlier suit HJ/4/85 having been dismissed, the trial court would have no jurisdiction to try the second action HJ/73/85 leading to this appeal on the ground that the respondent was estopped per rem B judicatum from re-litigating the cause of action dismissed in HJ/4/85

Following the dismissal in limine of their action HJ/4/85 the respondent appealed to the Court of appeal against the order of dismissal. While that appeal was pending, they instituted the action leading to this appeal. The present appellants as 2nd and 3rd defendants moved the trial C court to dismiss or strike out the action on the ground that the said action was substantially the same as suit No. HJ/4/85 which was dismissed on 7th May, 1985. The motion was argued and ruling was reserved. By the time the ruling was given on 2/10/85, the Court of Appeal had decided the respondent's appeal in HJ/4/85 and had allowed it. The Court of Appeal D set aside the order of dismissal and substituted therefor an order striking out the suit No. HJ/4/85. The result of the appeal was brought to the notice of the trial Judge on 30/9/85 by counsel for the parties. In his ruling on the appellants' motion, the learned trial Judge observed as follows:

"In the first place the Court has inherent jurisdiction to stay proceedings in this case pending the determination of the Appeal in respect of E suit No. HJ/4/B5. Secondly, the Court could as well strike out this suit. The adjournment of ruling pending the outcome of the appeal has operated as a stay.

The effect of striking out the suit would be that the plaintiff being F aggrieved would bring another action on the same facts. This is the main reason why ruling in this motion was adjourned to 30th September 1985 to enable the court to know the outcome of the appeal, the parties having intimated to the Court that judgment in the appeal would be delivered on the 25th September, 1985. I accept the words of counsel for the applicants G and Mr. Idowu that judgment in the appeal has been delivered. The effect of that judgment is the death and burial of suit No. HJ/4/85. That suit is now dead.

The striking out of this suit would have been logical in the circumstances. Such an approach would however, be an exercise in the applica- H tion of technical rules which does not enhance the justice of this matter. The interest of justice demands that this case should be decided on its merit."

I have nothing to fault in the approach of the learned trial Judge. Even if he had struck out the present suit, the respondent would still have

been at liberty to commence a new action following their success at the Court of Appeal in respect of the suit No.HJ/4/85. I find no substance whatsoever in the appellants' complaint. It is pertinent to note that this complaint was not even raised in the court below. They are only raising it for the first time in this Court. And no leave was sought nor obtained to do so.

B

All the other issues raised in this appeal have been adequately dealt with by my learned brother in his lead judgment. They deal essentially with concurrent findings of fact by the two courts below; I see no reason to interfere with those findings of fact.

This appeal is completely devoid of any merit and I have no hesitation whatsoever in dismissing it. I abide by the order of costs made by my learned brother Mohammed, J.S.C.

ADIO JSC

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I have had the advantage of reading, in draft, the judgment just delivered by my learned brother, Mohammed, J.S.C., and for the reasons given by him, which I adopt as mine, I too dismiss the appeal, I abide by the consequential orders, including the order for costs.

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IGUH JSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Mohammed, J.S.C. and) agree with him entirely that this appeal lacks substance and must be dismissed.

F

On the concurrent findings of both the trial court and the court below, it is plain that this is a clear case of massive fraud contrived by the appellants following which callosal sums of money were unlawfully siphoned out from the account of the respondent bank to the unjust enrichment and benefit of the said appellants.

G

Although the case is entirely civil, and in civil matters the preponderance of probability may constitute sufficient ground for a verdict, this general rule is subject to the statutory provision in section 138(1) of the Evidence Act. Accordingly where the commission of a crime by a party to any proceeding is directly in issue in any cause or matter, civil or criminal, it must be proved beyond reasonable doubt. In the present case, the perpetration of criminal acts being directly in issue, the plaintiff/respondent, to succeed, must establish its case beyond all reasonable doubt. See Okuarume v. Obabokor (1966) NMLR 47, Benson Ikoku v. Enoch Oli (1962) All NLR

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194, Nwobodo v. Onoh (1984) 1 S.C.N.L.R. 1 and Anyah v. A.N.N. Ltd. (1992) 6 NWLR (Pt. 247) 319 at page 333.

Both the trial court and the court below were satisfied that plaintiff/respondent's case against the appellants was proved beyond all reasonable doubt. I must state that there is absolutely no reason to fault this finding B which I fully endorse in view of the overwhelming evidence on record in support thereof. See Chinwendu v. Mbamali (1980) 3-4 SC 31 at page 75, Woluchem v. Gudi (1981) 5 SC 291 at 326, Ibrahim v. Shagari (1983) 2 SCNLR 176, Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561 at page 585.

But for all manner of trifling technicalities raised by the appellants, C most of which lacked substance and, at all events, occasioned no miscarriage of justice, the appellants established no defence of whatever nature for their criminal conduct. This appeal lacks substance and I, too, dismiss it with costs as assessed in the lead judgment.

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