

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 1996. SC. 254/90
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, E. O.
OGWUEGBU, U. MOHAMMED, S. U. ONU, JJSC.

LEONARD EZEAFULUKWE APPELLANT
AND
JOHN HOLT LIMITED RESPONDENT

APPEALS - Evidence - Where not evaluated by the trial court - Whether appellate court should interfere.

CONTRACTS - Competence to sue - Where plaintiff failed to prove he is a party to the contract - Competence to sue is not established.

CONTRACTS - Privity of contract - General rule thereto.

FACTS

The plaintiff/appellant filed an action against the defendant/respondent before the Aba High Court claiming the sum of N50,000.00 as general and special damages for breach of contract and warranty or in the alternative for total failure of consideration in respect of 577 cartons of small geisha. Plaintiff alleged that the said cartons of geisha which he purchased from the defendant were rotten and unmerchantable. The defendant averred it never had any transaction with the plaintiff. It was only one Mich. Or M. Ezeafulukwe that purchased tinned mackerel fish from the defendant as borne out from the invoice.

Trial Court found for the plaintiff though he failed to establish privity of contract. Defendant's appeal to the Court of Appeal was upheld. Being dissatisfied, plaintiff has now appealed to the Supreme Court raising 4 issues one of which the apex court considered sufficient.

ISSUES FOR DETERMINATION

"(i) Whether the Court of Appeal ought to have reversed the finding of fact of the learned trial judge that it was the plaintiff with whom the Defendant contracted, when the said finding of fact has not been shown to be perverse or manifestly unreasonable. Etc see p. 303

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

Privity of contract

1. The main issue in this appeal which alone may determine the fate of the appeal is issue 1.

It is based on privity of contract and the competency of the appellant to sue in this matter. The general rule, known as the doctrine of privity of contract is that only a party to a contract may sue or be sued on a contract. (p. 304 B)

Evidence - Where not evaluated by trial court

2. It is quite evident that the learned trial judge had not evaluated the evidence adduced before him before he inferred that the appellant was the one to whom the respondent sold the tinned geisha fish. Having failed to evaluate the facts in the evidence properly it is open to the Court of Appeal to interfere and do the evaluation. (p. 306 C)

Contracts - Competence to sue

3. I therefore agree with the respondent's counsel that the appellant had not established through evidence that he and "Mich" or "M" Ezeafulukwe were one and the same person. The Court of Appeal in this regard is right in its decision that the appellant had failed to establish his competency to sue as plaintiff in this matter. Issue 1 is therefore resolved in favour of the respondent. (p. 306 E)

NOTABLE POINTS OF INTEREST***MOHAMMED JSC******1. When a party is declared incompetent to sue - His claim is not justiciable***

Issue 1 is based on competency to sue. Since I agree that the appellant is not competent to sue in respect of the tinned geisha fish against the respondent any further decision in this appeal shall be a mere academic exercise. Where a party is declared incompetent to sue his claim is not justiciable and any decision made in respect of that claim is null and void. This decision has therefore disposed of this appeal. (p. 306 G)

OGWUEGBU JSC***2. Only a party to a contract can sue***

The identity of the plaintiff is crucial to the action. The appellant is not a party to the action which he is seeking to enforce. Unless he could prove this, he is not competent to sue. It is a fundamental principle in the law that only a person who is a party to a contract can sue on it and if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other

person at the promisor's request. (p. 310 E)

ONU JSC

3. When locus to sue is in issue

Indeed, it is settled law that where a party's standing to sue as in the instance case is in issue, the question is whether the person whose standing in issue is a proper person to request an adjudication of the issue and whether the issue itself is justiciable. (p. 314 D)

REPRESENTATION

C G. U. E. Peter-Okoye (Mrs.) for the Appellant
Respondent not represented

CASES REFERRED TO

Quo Vadis Hotels v. Commissioner (1973) 6 SC 71
Kayode Okuola v. O. Ishola (1982) 7 S.C. 413 at 450
Brantuo v. Poko (1938) 4 W.A.C.A. 210
Benmax v. Austine Motors & Co. Ltd. (1955) A.C. 370
Akindola v. Oluwo (1962) 1 All N.L.R. 255 (Reprint)
Federal Commissioner for Works & Housing v. Lababedi (1977) 11-12 S.C. 15
Chief Frank Ebba v. Chief Ogodo (1984) 4 S.C. 84
Omoregie v. Idugiemwanye (1985) 2 N.W.L.R. (Pt.5) 41
Ikpeazu v. A.C.B Ltd (1965) N.M.L.R.
Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge (1915) A.C. 847

LEAD JUDGMENT BY MOHAMMED JSC

This is an appeal from the judgment of the Court of Appeal, Port-Harcourt Division, in which the lower court set aside the judgment of Aba High Court and dismissed the claim filed by the appellant. The appellant is Mr. Leonard Ezeafulukwe and he filed this action against John Holt Limited.

In the statement of claim the appellant averred that he entered into a contract agreement with John Holt Limited to purchase tinned geisha mackerel fish in tomato sauce. In the agreement, the appellant purchased 650 cartons of small size geisha and 160 cartons of large size geisha, all valued at N12,790.00. In his pleadings, the appellant further averred that on reaching Kumba, in the Republic of Cameroon, where he had his main store, he discovered that 577 cartons of the tinned fish which he purchased from the respondent were rotten and unmerchantable. The appellant re-

turned to Nigeria and requested for the return of the purchase money for the 577 cartons which were certified bad. When the respondent turned down his request and refused to refund his money he filed an action in Aba High Court and claimed N50,000.00 being special and general damages for breach of contract. The claim as pleaded in paragraph 17 of the statement of claim is as follows:

“general and special damages for breach of contract and warranty or in the alternative for total failure of consideration in respect of 577 cartons of small size geisha as follows:-

(a) Cost of 577 cartons of tinned geisha mackerel at the rate of N15.00 per carton of 100 tins = N8,655.00.

(b) Loss of profit being the difference between the cost price and selling price of N27.50 per carton = N7,212.50.

(c) General Damages = N34,132.50

Total = N50,000.00”

The defendant denied the claim. Pleadings were called and delivered and at the end of the hearing the learned trial judge granted items 17(a) and 17(b) of the plaintiff's claim.

Dissatisfied with the decision of the trial court, the respondent filed an appeal before the Court of Appeal. In a well considered judgment, the Court of Appeal allowed the Appeal and dismissed the claim of the appellant. It is against the decision of the Court of Appeal that the appellant came before this court on five grounds of appeal. The following five issues have been formulated by learned counsel for the appellant for the determination of the appeal:

“(i) Whether the Court of appeal ought to have reversed the finding of fact of the learned trial Judge that it was the plaintiff with whom the Defendant contracted, when the said finding of fact has not been shown to be perverse or manifestly unreasonable.

(ii) Whether the contract which was entered into on the 5th of July 1979 and goods appropriated from a large stock on 12th July, 1979 was or was not a contract of sale of unascertained goods, and a fortiori a sale of goods by description.

(iii) Whether the Court of Appeal was correct when it held that the Appellant made his selection and can therefore not rely on the judgment of the Respondent.

(iv) Whether Respondent can rely on a clause in its sales invoice which states that “received in good condition all goods shown on this invoice No.....” to exempt itself from liability, even when the goods were seen by the Appellant seven days after signing the sales Invoice.

(v) Whether the Court of Appeal was correct when by speculating on how the fish were conveyed to and stacked in Cameroon, it held that the finding of fact of the learned trial judge that it was the same fish that was destroyed in the Cameroons is perverse or manifestly unreasonable”.

The five issues raised by the respondent, although couched in different terminologies, are to all intents and purposes similar to the issues formulated by the appellant.

The main issue in this appeal which alone may determine the fate of the appeal is issue 1. It is based on privity of contract and the competency of the appellant to sue in this matter. The general rule, known as the doctrine of privity of contract is that only a party to a contract may sue or be sued under that contract. Before I proceed let me consider the facts as given by the parties in the evidence.

In the pleadings the appellant averred in paragraph 4 of the Statement of claim as follows:

“By contract entered into at Aba on or about the 5th day of July, 1979, the defendant agreed to sell to the plaintiff tinned mackerel fish in tomato sauce made up as follows:-

(a) 650 cartons of 100 tins per carton of small size geisha at N 15.00 per carton N9,750.00

(b) 160 cartons of 48 tins per carton of large size geisha at N 19.00 per carton N3,040.00

Total N 12,790.00

In paragraph 5 of the Statement of defence respondent denied entering into any agreement with the appellant for the supply of tinned mackerel fish. The respondent denied categorically that they sold any goods to the appellant. In paragraph 6 of the statement of defence respondent averred that the only person who purchased tinned mackerel fish from the company was one Mr. Ezeafulukwe or Mich. Ezeafulukwe but NOT the appellant. Also in paragraph 20 of the Statement of defence the respondent pleaded that it would contend at the trial that the appellant being a stranger to any alleged contract between the respondent and Mich. or M. Ezeafulukwe cannot derive any benefit or liability from the contract.

In view of these averments it is clear that the appellant had been put on notice on the issue of identity and therefore privity of contract between him and the respondent. Since the appellants name which was given in the writ is Leonard Ezeafulukwe it is incumbent upon him to prove before the trial court that he and M. Ezeafulukwe or Mich. Ezeafulukwe are one and the same person. In the course of his testimony before the trial court appellant was cross-examined thus:

“Put: “You are not Mike Ezeafulukwe who bought the goods from the defendants.”

Ans: “With the question of “Mike Ezeafulukwe” which they wrote first, John Holt knows why they put “M” and got me confused by saying that it does not matter. This will be confirmed by the Venture Manager”.

The Venture Manager was not called to give evidence. However one Mr. Vincent Okonkwo testified for the defence and he told the trial court that he was a manager of the respondent. In his evidence, he said that he knew one Mike Ezeafulukwe who once came to John Holt and purchased some quantities of geisha. He explained that he had seen the appellant only in the court when the appellant came to testify. He said he did not know him before. In his address, counsel for the respondent submitted that the appellant was a stranger to the contract between the respondent and Mike Ezeafulukwe. As such the appellant cannot maintain an action against the respondent based on the contract of purchase of geisha tinned fish. Counsel further submitted that Mr. Leonard Ezeafulukwe did not establish any relationship between himself and Mike Ezeafulukwe.

In his judgment, learned trial judge considered the issue of identify of the appellant and concluded that he was satisfied that it was the appellant with whom the respondent contracted on 5th July, 1979 in Aba for the purchase and sale of the fish in both exhibits 1 and 5.

The Court of Appeal dealt with this issue when it considered the appeal filed by the respondent against the judgment of the trial High Court and in a considered finding the Court resolved as follows:

“Having admitted that he the plaintiff signed his name as Mich Ezeafulukwe when he is not, it would have been obvious that the plaintiff on record was at least an impersonator or impostor. I therefore reject the submission of Chief Onyiuke when he said:

“Consequently the fact that the plaintiff signed as Mich Ezeafulukwe to avoid inconsistency on the face of the cash sales Invoice/Sale Invoice/ Sale Order which had already been headed M. Ezeafulukwe becomes immaterial vis-a-vis the effect of the contract”.

I am sure if *“Mich” is the first name of the respondent, there could have been no answer to this submission. As pointed out already “M” does not represent “Mich” alone. In fact respondent ought to have been re-examined why he signed “Mich”. On the other hand he was specifically cross-examined about his identity and the names “Mich Ezeafulukwe”. I also reject the submission that the discrepancy can be likened to a misnomer”.*

The issue of identity of the appellant had to be resolved by the learned trial judge since the defence had put up a strong case questioning

competency of the appellant to sue in this matter. The appellant mentioned one Mr. Onunekwu, the Venture Manager, as the person who sold the tinned fish to him. He said that Mr. Onunekwu would confirm to the court that when he saw his name written with initial “M” he raised objection. But he was told not to worry because the same B was on cash basis and that he could collect the goods and go away if he paid cash. The appellant however failed to call Mr. Onunekwu to testify on this vital point.

The learned trial judge, without resolving the confusion between the names “Mich” and Leonard, concluded in his judgment that it was the appellant with whom the respondent company contracted for the purchase of the C tinned geisha fish. The Court of Appeal found that a lot had been said about the identity and competency of the appellant that the onus was on him to establish that he was competent to sue as plaintiff and claim against the respondent. See *Quo Vadis Hotels v. Commissioner* (1973) 6 S.C. 71. It is quite D evident that the learned trial judge had not evaluated the evidence adduced before him before he inferred that the appellant was the one to whom the respondent sold the tinned geisha fish. Having failed to evaluate the facts in the evidence properly it is open to Court of Appeal to interfere and do the evaluation. In the case of *Kayode Okuoja v. O. Ishola* (1982) 7 S.C. 314 at 350 this court held:

E “if the learned trial judge has drawn the wrong inferences from the primary facts found, then, the Court of Appeal is in a good position as the court of first instance, See also *Brantuo v. Poko* (1938) 4. W.A.C.A. 210”.

I therefore agree with the respondent’s counsel that the appellant had not established through evidence that he and “Mich” or F “M” Ezeafulukwe were one and same person. The Court of Appeal in this regard is right in its decision that the appellant had failed to establish his competency to sue as plaintiff in this matter. Issue 1 is therefore resolved in favour of the respondent.

G Issue 1 is based on competency to sue. Since I agree that the appellant is not competent to sue in respect of the tinned geisha fish against the respondent any further decision in this appeal shall be a mere academic exercise. Where a party is declared incompetent to sue his claim is not justiciable and any decision made in respect of H that claim is null and void. This decision has therefore disposed of this appeal. It is accordingly dismissed. I affirm the judgment of the Court of Appeal. The respondent is entitled to the costs of this appeal which I assess at N1,000.00.

BELGORE JSC

I agree with the judgment of my learned brother Mohammed J.S.C., that the appellant has no competence to sue the respondent in any contract as there was no contract of any form between him and respondent. I also, for the reasons contained in the judgment of Mohammed J.S.C., have no reason to interfere with the sound decision of the Court of Appeal. I also dismiss this appeal with N1,000.00 as costs against the appellant in favour of respondent.

B

KUTIGI JSC

I read in advance the judgment of my learned brother Mohammed J.S.C., just delivered. I agree with him that there is no merit in the appeal which therefore ought to be dismissed. It is accordingly dismissed with N1,000.00 costs to the Respondent.

C

D

OGWUEGBU JSC

The judgment just delivered by my learned brother, Mohammed, J.S.C., was made available to me in draft. I agree with his reasoning and conclusion.

E

The main question in this appeal is whether the appellant whom the defendant/respondent contend is a stranger to an alleged contract can derive any benefit or liability from the said contract. The issue in other words involves the doctrine of privity of contract.

The plaintiff/appellant instituted an action in the Aba Judicial Division of the High Court of Imo State against the defendant claiming as follows:-

F

“17. By reason of the premise the plaintiff claims against the defendant general and special damages for breach of contract and warranty or in the alternative for total failure of consideration in respect of the 577 cartons of 577 cartons of tinned geisha as follows:

G

(a) Cost of 577 cartons of tinned small geisha mackerel at the rate of N15.00 per carton of 100 tins N8,655.50

(b) Loss of profit being the difference between the cost price and selling price of N27.50 per carton N7,212.50

(c) General damages N34,132.50 Total N50,000.00

H

The appellant's case is that he entered into a contract at Aba on or

about 5/7/79 with the defendant whereby the latter agreed to sell to him tinned mackerel fish in tomato sauce. He bought and paid for 650 and 160 cartons of small and large sizes of the said geisha fish at N15.00 and N19.00 per carton respectively. The defendant acknowledged the receipt of payment in a Cash Sales Invoice.

B The appellant took delivery and proceeded to Kumba in the Republic of Cameroons where he lives and carries on business. He sold 577 cartons of the small size geisha to his customers in Kumba who returned them five days later because they were rotten. They claimed from him the purchase price and the cost of transportation of the rotten 577 cartons of fish which he paid. He thereafter instituted this action and claimed as stated
C above.

The defendant's case on the issue of privity of contract is contained in paragraph 5, 6, 7, 8 and 20 of the statement of defence filed on 14:10:80. They read as follows:

D *"5. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Statement of Claim are denied by the Defendants, the Defendants further say that the Plaintiff did not enter into any agreement with the*

Defendant for the supply of the alleged tinned mackerel fish or at all. The Defendants deny categorically that they sold any goods to the Plaintiff.

E *6. In further answer to paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Statement of Claim the Defendants say that on or about the 3rd day of July, 1979, one M. Ezeafulukwe or Mick. Ezeafulukwe, NOT the Plaintiff approached the Defendants in their establishment at Aba and offered to buy some quantity of tinned fish.*

F *7. The Defendants prepared a list of the quantity of fish which the said M. Ezeafulukwe offered to buy together with the prices and delivered it to him with an instruction that the said M. Ezeafulukwe shall be responsible for sorting and transport. The document No. WAT/M/72 dated 3/7/79 will be founded upon at the trial.*

G *8. The said M. Ezeafulukwe on the 5th day of July, 1979 with WAT/M/72 went to the Defendant's Warehouse at Port-Harcourt and was shown the store where the goods were stacked he examined and selected 650 cartons of 1000/155 Geisha and 160 cartons of 48/425 Geisha and left.*

H *20. The Defendants will at the trial contend that the Plaintiff being a stranger to any alleged contract between the Defendants and Mick or M. Ezeafulukwe cannot derive any benefit or liability from the contract."*

At the close of pleadings, the case proceeded to trial. In the end, the learned trial judge Nsofor, J., as he then was entered judgment for the plaintiff/appellant in respect of items 17(a) and 17(b) of the statement of

claim. The defendant who was not satisfied with the decision appealed to the Port Harcourt Division of the Court of Appeal. That court allowed the defendant's appeal and the plaintiff has appealed to this court.

Five issues were formulated by the appellant as arising for determination in the appeal. The first and the main issue which may have a decisive effect on the appeal reads:

"Whether the Court of Appeal ought to have reserved the finding of fact of the learned trial judge that it was Plaintiff with whom the Defendant contracted, when the said finding of fact has not been shown to be perverse or manifestly unreasonable"

The other four issues are subsidiary and are dependent on the resolution of first Issue.

The identity of the plaintiff/appellant is in issue. The Plaintiff on record is Leonard Ezeafulukwe. The appellant tendered Exhibit 5 - the Cash sales Invoice at the trial. It was issued to "M. Ezeafulukwe. The recipient of the goods (customer) was "Mich Ezeafulukwe". In his examination-in-chief, the plaintiff/appellant stated:

It is not true that the defendants did not sell the fish to me as they say. The defendant sold the fish directly to me. The use of the initial "M" instead of my correct initial "L" is the matter known to the defendant. At the earliest opportunity when my Invoice was prepared I raised an objection with the defendant for the use of the initial "M" in my name."

In cross-examination of the plaintiff the following question and answer appear in the record of appeal:

"Put: You are not Mike Ezeafulukwe who bought the goods from the defendants.

Ans: "With the question of "Mike Ezeafulukwe" which they wrote first, John Holt knows why they put "M" and got me confused by saying that it does not matter. This will be confirmed by the Venture Manager."

The appellant stated that the initial "M" was written on Exhibit 5 by the defendant. The appellant admitted signing the name "Mich Ezeafulukwe" as the recipient of the goods in Exhibit 5. One wonders why he did not simply sign "M. Ezeafulukwe" to be consistent with his story that the defendant wrote "M. Ezeafulukwe" in Exhibit 5. I find it difficult to appreciate why the appellant whose first name is "Leonard" should sign "Mich" when the defendant only wrote "M". The appellant did not give evidence that he sent "Mich Ezeafulukwe" to collect the goods on his behalf.

The competence of the appellant to institute this action was in issue. The onus is on him to establish that he is competent to sue as plaintiff

in as much as the defence was saying that it had no contract with it. The learned trial judge as rightly found by the court below made no attempt to resolve the difference between the names “Mich” and “Leonard” before he came to the conclusion that it was the plaintiff with whom the defendant contracted. It is obvious in this case that the finding of fact made by the learned trial judge did not flow from the evidence. It is no business of an appeal court to substitute its view of the evidence for that of the learned trial judge who had the singular opportunity of listening to the witnesses and watching their performances. It is settled law that such findings of fact or the inference drawn from them may be questioned in certain circumstances. See *Benmax v. Austin Motors & Co. Ltd.* (1955) A.C. 370, *Akinola & Or. v. Fatoyinbo Oluwo & Ors.* (1962) 1 SCNLR (1962) All N.L.R. 224 (Reprint, and Federal Commissioner for Works & Housing v. Lababebi & 15 Ors. (1977) 11-12 S.C. 15.

It will interfere where the facts found by the court of trial are wrongly applied to the circumstances of the case, or where the inference drawn from those facts are erroneous or where the findings of fact are not reasonably justified or supported by the credible evidence given in the case. See *Chief Frank Ebba v. Chief Warri Ogoto & Ors.* (1984) ISCNLR 372; (1984) 4 S.C. 84 and *Omoriegie v. Idugiemwanye* (1985) 2 NWLR. (Pt. 5) 41.

In this case, my examination of the evidence shows that the learned trial judge was in error when he held that it was the appellant who made the contract with the respondent. He made no attempt to resolve the difference between “Mich” and “Leonard”.

The identity of the plaintiff is crucial to the action. The appellant is not a party to the action which he is seeking to enforce. Unless he could prove this, he is not competent to sue. It is a fundamental principle in the law that only a person who is a party to a contract can sue on it and if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor’s request. See *Ikpeazu v. A.C.B. Ltd.* (1965) NMLR. 374 and *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* (1915) A. C. 847.

The court below is in as a good position to evaluate the evidence as the court of trial. The appellant is not competent to institute this action.

The conclusion which I have come on the first issue for determination has rendered it unnecessary to decide the other issues. I too hereby dismiss the appeal with N1,000.00 costs to the respondent.

ONUJSC

Having been privileged to read in draft before now the judgment of my learned brother Mohammed, J.S.C. I agree with him that this appeal lacks merit and ought to be dismissed.

In expatiating on the case in which, of the five issues the Appellant submitted for our determination, to wit:

“1. Whether the Court of Appeal ought to have reversed the findings of fact of the learned trial Judge that it was the Plaintiff with whom the Defendant contracted when the said finding of fact has not been shown to be perverse or manifestly unreasonable.

2. Whether the contract which was entered into on the 5th of July, 1979 and goods appropriated from a large stock on 12th July, 1979 was or was not a contract of sale of unascertained goods by description.

3. Whether the Court of Appeal was correct when it held that the Appellant made his selection and can therefore not rely on the judgment of the Respondent.

4. Whether the Respondent can rely on a clause in its sales invoice which states that “received in good condition all goods shown on this invoice No.....” to exempt itself from liability, even when the goods were seen by the Appellant seven days after signing the sales invoice.

5. Whether the Court of Appeal was correct when by speculating on how the fish were conveyed to and stacked in Cameroons, it held that the finding of fact of the learned trial Judge that it was the same fish that was destroyed in the Cameroons is perverse or manifestly unreasonable.”

I deem it pertinent to restrict my comments to only issue No. 1 which in my view, dealing with privity of contract as between the parties herein, would be sufficient to dispose of the appeal.

I will begin by first stating the genesis of the case. It all began in the High Court of former Imo State, Aba Judicial Division as then constituted, where the plaintiff/appellant instituted an action claiming in his statement of claim against the defendants/respondents, as follows:-

“17. By reason of the premise the plaintiff claims against the defendant general and special damages for breach of contract and warranty or in the alternative for total failure of consideration in respect of the 577 cartons of small size tinned geisha as follows:

(a) Cost of 577 cartons of tinned small geisha mackerel at the rate of N15.00 per carton of 100 tins = N8,655.00

(b) Loss of profit being the difference between the cost price and selling price of N27.50 per carton = N7,212.50

(c) General damages N34,132.50

Total N50,000.00"

On the issue of privity of contract I need only set out paragraphs 5, 6, 7, 8 and 20 of the defendants/respondents' statement of defence to show how the defendants/respondents joined issues with the plaintiff/appellant to bring the matter to the fore. The paragraphs state:

B *"5. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Statement of Claim are denied by the Defendants. The Defendants further say that the Plaintiff did not enter into any agreement with the Defendant for the supply of the alleged tinned mackerel fish or at all - The Defendants deny categorically that they sold any goods to the Plaintiff.*

C *6. In further answer to paragraphs 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Statement of Claim the Defendants say that on or about the 3rd day of July, 1979, one M. Ezeafulukwe or Mich. Ezeafulukwe, NOT the Plaintiff approached the Defendants in the establishment at Aba and offered to buy some quantity of tinned fish.*

D *7. The Defendants prepared a list of the quantity of fish which the said M. Ezeafulukwe offered to buy together with the prices and delivered it to him with an instruction that the said M. Ezeafulukwe Shall be responsible for sorting and transport. The document No. WAT/M/72 dated 3/7/79 will be founded upon at the trial.*

E *8. The said M. Ezeafulukwe on the 5th day of July, 1979 with WAT/M/72 went to the Defendant's Warehouse at Port Harcourt and was shown the store where the goods were stacked he examined and selected 650 cartons of 1000/155 Geisha and 160 cartons of 48/425 Geisha and left.*

F *9. The Defendants will at the trial contend that the Plaintiff being a stranger to any alleged contract between the Defendants and Mick or M. Ezeafulukwe cannot derive any benefit or liability from the contract".*

G The case went to trial and the learned trial Judge, Nsofor, J., as he then was found in plaintiff/appellant's favour. The defendants/respondents being aggrieved, appealed against that decision to the Court of Appeal sitting in Port Harcourt. The court below, in what I consider to be a well considered judgment, set aside the decision of the trial court and proceeded to dismiss the plaintiff/appellant's claims in their entirety.

H Dissatisfied with this decision, the plaintiff/appellant has appealed to this court on five grounds. The purport of issue 1 which I have already set out above, calls into question the identity of the plaintiff/appellant. This is because as plaintiff, the appellant went by the name Leonard Ezeafulukwe whereas the preponderance of available evidence before the trial court and by extension, the Court of Appeal, disclosed or portrayed him as either "M. Ezeafulukwe" or "Mich. Ezeafulukwe" See Exhibit 5 - the Cash Sales In

voice. The recipient of the goods (i.e. defendants/respondents' customer) for instance, was "Mich. Ezeafulukwe". In his testimony before the trial court he (plaintiff/appellant) said inter alia:

"It is not true that the defendants did not sell the fish to me as they say. The defendant sold the fish directly to me. The use of the initial "M" instead of my correct initial "L" is the matter known to the defendant. At the earliest opportunity when my invoice was prepared I raised an objection with the defendant for the use of the initial "M" in my name."

Be it noted that the plaintiff/appellant could not be either "M" or "Mich Ezeafulukwe" without amending the Statement of Claim. Thus when the plaintiff/appellant was subjected to cross-examination, the following questions and answers emerged:

"Put: You are not Mike Ezeafulukwe who bought the goods from the defendants?"

Ans: With the question of "Mike Ezeafulukwe which they wrote first, John Holt knows why they put "M" and got me confused by saying that it does not matter. This will be confirmed by the Venture Manager".

As plaintiff/appellant eventually admitted that he signed "Mich. Ezeafulukwe" when the defendants/respondents only wrote "M" and further admitted sending no one called Mich. Ezeafulukwe" to collect the goods from the defendants/respondents on his behalf, the learned justices of the Court of Appeal were in my view, justified in reversing the decision of the trial court which, based on the record placed before it had found for the plaintiff/appellant. This is because, although appeal courts do not normally disturb findings of facts arrived at by the courts below or are indeed or should be reluctant or slow in doing so, based upon errors apparent from the printed record of proceedings, the Appeal Court will however rise to the call of duty as in the instant case and in the interest of justice, to disturb, alter, reserve or set aside the lower court's findings of facts if on the printed record such, findings cannot be supported or are not proper conclusions and inferences to be drawn from the evidence. See *Kuforiji v. V.Y.B. Nigeria Ltd.* (1981) 6 - 7 S.C. 40 at 84; *George Okafor & Ors. v. Eze Idigo III & Ors.* (1984) NSCC. 360 (1984) 1 SCNLR 481; *Amasa & Ors. v. Kososi & Ors.* (1986) 4 NWLR (Part 33) 57 and *Obodo v. Ogba* (1987) 2 NWLR (Part 54) 1.

When therefore, in the instant case the Court of Appeal (per Olatawura, J.C.A. (as he then was) held (with O. Kolawole and B. A. Omosun, JJ.C.A., concurring) inter alia that-

".... It is difficult to understand why a man whose real name is "Leonard" should sign "Mich" when according to him, it was only "M." the appellant (now respondent) wrote" and later further down in the judg-

ment that

“There are many lacunae in the evidence of the respondent as to the identity of the fish bought and the ones destroyed, the way it was carried and stacked after it got to the Cameroon ...” (Parenthesis is mine).

its reversal of the case, in my opinion, is unimpeachable in as much
 B as the learned trial Judge failed to resolve the phenomenon created by the
 difference between “Mich” and “Leonard.” In the view of the Court of
 Appeal, the plaintiff/appellant was no more than a pretender, a stranger to
 the entire transaction or a charlatan. I cannot agree more. The identity of
 the plaintiff appellant being crucial to the action and his competence to sue
 C having been punctured and jettisoned based upon the preponderance of
 evidence adduced, the plaintiff/appellant’s lack of competence to institute
 the action herein in the evaluation of the court below became palpable.
 See Ajao & Anor. v. Sonola & Anor. (1973) 5 S.C. 119 at 123; Sokpui II
 v. Agbozo III 13 WACA. 241 at 242; Skenconsult (Nig.) Ltd. & Anor. v.
 Godwin Sedondi Ukey (1981) 1 S.C. 6 and Okoye v. Lagos State Govern-
 D ment (1990) 3 NWLR (Pt. 136) 115 at 125. He lacked the locus standi to
 sue. Indeed, it is settled law that where a party’s standing to sue as in the
 instant case is in issue, the question is whether the person whose standing is
 in issue is a proper person to request an adjudication of the issue and not
 whether the issue itself is justiceable. See Oloriode v. Oyebe (1984) 1 SCNLR
 E 390; (1984) 5 S.C. 1 at 28; (1984) 1. S.C.N.L.R.390 and Okoye v. Lagos
 State Government (1990) 3 N.W.L.R. (Pt. 136) 115 at 124.

For the above reasons and the fuller ones stated in the judgment by
 my learned brother Mohammed, J.S.C., with which I had expressed my
 concurrence, I too, will dismiss this appeal and make the same consequen-
 F tial order as contained therein.

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