

**SUPREME COURT OF NIGERIA**  
27H FEBRUARY, 1996. SC.275/1991  
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI,**  
**M. E. OGUNDARE, Y. O. ADIO, A. I. IGU, JJSC.**

FELIX OKOLIEZEONWU ..... PLAINTIFF/APPELLANT  
AND

1. CHIEF CHARLES A. ONYECHI....DEFENDANTS/RESPONDENT  
2. CITY BISCUITS MANUFACTURING COMPANY LTD

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*ACTIONS - Reliefs - Where plaintiff did not claim any pecuniary relief - Whether it was rightly awarded.*

*COMPANY LA W - Subscribers - Contention that the signature against the subscriber's name is not his - How the defendant should discharge the onus of proof*

*COMPANY LA W - Subscribers - Where a party produces a copy of the Memo & Articles of Association - Containing his name and other requirements - Whether he is to be deemed a subscriber.*

*JUDGMENTS - Consequential Order - Whether an unclaimed relief granted - Is a consequential order.*

**FACTS**

The plaintiff/appellant and the 1st defendant/respondent were directors and subscribers to the Memorandum and Articles of Association of the 2nd respondent Company. Plaintiff contributed immensely to the formation and actual operation of the Company. 1st defendant ran the Company as the managing director for so long without any account to the plain tiff. He then instituted an action against the defendants before the Federal High Court Enugu claiming inter alia, joint membership and ownership of the 2nd defendant. He also sought for an order directing that an account of the management of the said 2nd defendant be rendered.

The 1st defendant sought to establish that plaintiff is not a subscriber to the Company, as the signature appearing against his name was that of the late Solicitor that incorporated the company. The trial Court dismissed all the plaintiff's claim save one and granted pecuniary relief that was not claimed. His appeal to the Court of Appeal was dismissed. Plaintiff has further

appealed to the Supreme Court raising four issues.

**ISSUES FOR DETERMINATION**

*“1. Whether the Court of Appeal was right in affirming the judgment of the trial court in its interpretation and construction of the relevant statutory provisions of the 1968 companies decree governing the incorporation of the private limited company with share capital having regard to the accepted findings by the trial court.*

*2. Whether the 1st and 2nd Respondents were not estopped from denying the status of the Appellant as Member, Shareholder and Director of the 2nd Respondent.* Etc. see p. 389

**HELD** (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

*Whether a party is to be deemed a subscriber*

I. I am clear in my mind that the finding runs against the grain of the documentary evidence before the two courts below. It is not disputed that the name of the Plaintiff appears on the Memorandum and the Article as a subscriber, And against that name appears a signature and description and the number of shares taken. The same goes for the 1st Defendant. Mrs. Uche Offia-Nwali whose signature, name, address and occupation are contained on Exhibit FOE 15 was witness to the signatures appearing against the names of the 1st Defendant and Plaintiff. There is thus full compliance with the provisions of section 5 of the Act. By producing in evidence Exhibit FOE 15, the plaintiff has discharged the onus on him to prove he is a subscriber to the Memorandum and Articles of Association of the 2nd Defendant. The maxim is: omnia praesumuntur rita esse acta. (p. 392 F)

*Contention about subscriber’s signature*

2. Now, the 1st Defendant alleges that the signature against the name of the Plaintiff on Exh. FOE 15 is not that of the Plaintiff but that of Mrs. Offia Nwali. By this allegation the onus shifted on the Defendants to prove that Plaintiff did not sign against his name. And by deposing that Mrs. Offia Nwali signed against plaintiffs name purporting it to be that of the plaintiff, when at the same time she signed as “witness to the above signature”, 1st Defendant is alleging forgery against Mrs. Offia-Nwali. To discharge the burden on the Defendants, therefore, the 1st Defendant must prove beyond reasonable doubt that it was Mrs. Offia-Nwali, rather than the Plaintiff, who appended the signature standing against the name of the Plaintiff on Exhibit FOE 15. Did they discharge this burden on them? I rather think not. (p. 393 B)

*Actions - Reliefs*

3. A court has no power to grant to a party any relief that he has Not specifically claimed. While a court can award less than what is claimed by a party it cannot award more. As the Plaintiff did not claim any pecuniary relief, it was wrong to award him one. (p. 397 H)

*Consequential Order*

4. This rule only empowers a court to make a consequential and the substantive order; A consequential order is one that gives effect to the judgment it follows; it cannot detract from it. The pecuniary award made in the case on hand cannot by any stretch of imagination be described as consequential to a dismissal of Plaintiffs claims (1) - (4). Indeed it detracts from it. On this ground alone, the award ought to be set aside. (p. 398 H)

**NOTABLE POINTS OF INTEREST**

**OGUNDARE.JSC**

*1. Defendant alone cannot subscribe to a legal company*

In one breadth, he says Plaintiff was not a subscriber to Exh. FOE 15. If this were so, he would be the only subscriber. And as section 1(1) of the Companies Act required at least two subscribers to incorporate a private limited liability company, the existence of the 2nd Defendant as a limited liability company would be illegal. Its certificate of incorporation Exh. FOE 2 ought to be called in by the Corporate Affairs commission and celled. But 1st Defendant in another breadth wants to uphold the legality of the existence of the 2nd Defendant. (p. 395 G)

**BELGORE.JSC**

*2. Court is not to help prove a fact*

I cannot see the rational behind trial court's efforts in comparing the signature in Memorandum and Articles of Association with that of the Plaintiff. The Defendants, by merely asserting that Plaintiff never signed is not enough to discharge the onus of proof. The function of the court is not to help prove, the burden to prove is on the one who asserts. Plaintiff insisted that he signed, and from him he has no further burden of proving. (p. 401 A)

**IGUH.JSC**

*3. Concurrent findings - When to be interfered with*

It is trite that this court will not interfere with the findings of fact made by both the High Court and the Court of Appeal where there is sufficient evidence in support of such findings and where there is no substantial error apparent on

the record of proceedings, such as miscarriage of justice or violation of some principle of law or procedure. Where, however, such findings are shown to be perverse or patently erroneous or where the court has drawn wrong conclusions from accepted credible evidence adduced before it and a miscarriage of justice will result if they are allowed to remain, the Supreme Court, without doubt, has the duty to interfere. (p. 404 F)

#### *4. Dissimilarity in signatures - Legal effect*

It has to be stressed that at no time did the plaintiff disown any of the signatures alluded to by the court below. On the contrary, they were all submitted by the plaintiff as his signatures. I accept the plaintiffs contention that mere dissimilarity in signatures is neither conclusive evidence nor a rational basis to ground a finding that such signatures were in fact not made by one and the same person particularly when the authorship of such signatures is accepted by one and the same person. The Court of Appeal was therefore in gross error by affirming the speculative and unsubstantiated opinion of the trial court that because of the alleged dissimilarity in the Signatures, the plaintiff was not the maker of the signature on Exhibit FOE 15 (p. 407 C)

### **REPRESENTATION**

Dr.J. O. Ibik, SAN with M.V.C. Ozioko for the appellant

Chief (Dr.) E. Ume, SAN with L. Afolabi for the 1st and 2nd respondents

### **CASES REFERRED TO**

Ekpenyong v. Inyong (1975) 2 SC.71, 80-81

Ahang v. Effium (1976) 1 SC 31

Obioma v. Olomu (1978) 3 sc 1

Obayagbona v. Obazee (1972) 5 Se. 247

Adeosun v. Babalola (1972) 5 SC. 292, 302

Chikwendu v. Mbamali (1980) 3—4 S.C. 31 at 75

Lamai v. Orbih (1980) 5-7 S.C. 28

Woluchem v. Gudi (1981) 5 S.C. 291 at 326

Kola v. Coker (1982) 12 S.C. 252

Igwego v. Ezeugu (1992) 6 N.W.L.R. (Part 249) 561 at 585

Johnson v. Maja 13 W.A.C.A. 290

Kalio v. Daniel-Kalio (1975) 2 S.C. 15 at 17-19

Union Beverages v. Owolabi (1988) 2 N.W.L.R. (Part 68) 128 at 133 .

Makanjuola v. Balogun (1989) 3 N.W.L.R. (Part 108) 192 at 206

Olurotimi v. Ige (1993) 12 KLR 80

**STATUTES & RULES REFERRED TO**

Companies Act 1968 ss. 26(1), 1 & 2, 5, 16 Evidence Act Cap. 112 LFN 1990 ss. 191, (1) 137 Federal High Court Civil Procedure Rules O.XLVII

B

**LEAD JUDGMENT BY OGUNDARE JSC**

There existed an organisation known as the Ufuma Practical Pleading Band with headquarters at Ufuma in the Aguata Local Government Area of Anambra State. It had a branch in Kano where the 1st Defendant in these proceedings lived for many years. Sometimes in June 1978 seven members of this organisation met and agreed among themselves to plan and finance the formation of a company to manufacture biscuits. The Plaintiff and the Defendant were among these seven members series of meetings were held and contributions made towards the objective. It would appear, however, that the financial burden of the formation of the company fell mostly on the Plaintiff and the 1st Defendant. A legal practitioner, Mrs. Uche Offia-Nwali (now dead) was briefed by the 1st Defendant to incorporate the company. She filed the necessary documents required by the Companies Act, 1968 for the incorporation of a private company with limited liability. Among these documents were the Memorandum and Articles of Association of the proposed company and Form C.O.7 (Particulars of Directors). On 19th October 1978, the company - City Biscuits Manufacturing Company Limited - was incorporated and a certificate of incorporation was issued on that day by the Registrar of Companies. This Company is the 2nd Defendant in these proceedings.

Following the incorporation of the company, the members met on a number of occasions to raise funds to enable the company go into business. It would appear that the 1st Defendant throughout acted as the Chairman, Managing Director and Secretary to the company for he summoned meetings, presided at such meetings and prepared and signed the minutes of such meetings.

By a circular letter dated 27th September 1980, the 1st Defendant requested the other members to

*“Indicate.....in writing within the next two weeks ..... whether you are continuing or withdrawing .....”*

The plaintiff replied indicating his intention to continue his participation in the project. It would appear that the other five members discontinued with further participation for there is no evidence in these proceedings that they reacted positively to the circular letter.

The Plaintiff made various contributions running into thousands of

Naira, by cheques made out in the name of the 2nd Defendant. He also secured land at Onitsha for the erection of the company's factory. The 2nd defendant needed loan for its take-off. An application was made by the company in 1981 to the International Merchant Bank (Nig.) Ltd. (3rd Defendant in these proceedings) for a loan. A total amount of NI ,000,000.00 (One million Naira) as loan and current line facility was approved by the 3rd Defendant. It was the Plaintiff who mortgaged his house as security for loan. The factory went into production in March 1983. B

From this stage on, the 1st Defendant took complete control of the affairs of the 2nd Defendant. The Plaintiff was no longer consulted or informed about the going-on in the company. In September 1985 the 3rd defendant at the behest of the 2nd Defendant, forwarded plaintiffs title deeds to the 2nd Defendant. The documents were not released to the Plaintiffs but kept by the 1st and 2nd Defendants. C

Displeased with the turn of events, the Plaintiff, by originating summons issued in the Federal High Court, Enugu, instituted the proceedings leading to this appeal claiming from the 1st, 2nd and 3rd Defendants as hereunder D

*"1. A DECLARATION that the Memorandum and Articles of Association with which the 2nd Defendant CITY BISCUITS MANUFACTURING COMPANY LIMITED WAS REGISTERED and filed on the 28th day of September 1978 with the Registrar of Companies at Lagos contains the only provisions regulating the operations of the 2nd Defendant since incorporation till date. E*

*2. A DECLARATION that the plaintiff together with the 1st defendant under and by virtue of the Memorandum and Articles of Association dated 14th September, 1978 and filed on the 28th September, 1978 with the Registrar of Companies at Lagos are joint members and owners of the 2nd defendant Company that is CITY BISCUITS MANUFACTURING COMPANY LIMITED. F*

*3. An order directing the 1st (and 3rd) defendant(s) (severally) to render an account of the management, operations as well as financial investments of one and the other with the 2nd defendant company since its incorporation in 1978. G*

*4. An order of this Honourable Court directing a meeting of the defendant/company to be held within 30 days of the Order for the sole purpose of appointing Secretary and Auditor outside the present subscriber/directors of the 2nd defendant/company. H*

*5. An. Order of this Honourable court directing the 3rd defendant to release the following documents in respect of Plot No. 58 VIP Rest House*

*GRA Onitsha Mortgaged on behalf of the 2nd defendant company by the plaintiff that is to say:*

*(i) A building lease registered as No. 93 at page 93 in Volume 676 at the Enugu Land Registry.*

*(ii) A power of attorney registered as No. 82 at page 82 in volume 733 at the Enugu Land Registry; and*

*(iii) Agreement for sale made on 19th February 1975 between Celestine Obi Olisa of 27 Venn Road, South Onitsha and Felix Ezeonwu of 23 Iboku Street, Odoakpu, Onitsha.*

*And for such further or further orders as the Honourable Court may deem fit to make in the circumstances. “*

The summons was supported by an affidavit Sworn to by the Plaintiff and a number of documents were annexed as exhibits FOE 1-18 to the affidavit.

The 1st Defendant swore to and filed a counter-affidavit, an official D of the 3rd Defendant also swore to and filed a counter-affidavit. These counter-affidavits had annexed to them a number of documentary exhibit, Learned counsel for the parties addressed the court. The learned trial Judge (Ofili, J.) after a review and appraisal of the affidavit evidence before him and the submissions of learned counsel, dismissed plaintiffs claims 1-4. He granted claim E 5 against the 1st and 2nd Defendants. Notwithstanding the dismissal of claims 1-4, the learned trial Judge, however, awarded the Plaintiff a total sum of N129,065.37 which he ordered the 1st Defendant to refund to the Plaintiff being refund of “various remittances made by the plaintiff to the 1st defendant” with 5% simple interest.

F Being dissatisfied with this judgment, the Plaintiff appealed unsuccessfully to the Court of Appeal (Enugu Division). He has now further appealed to this court upon five original and six additional grounds of appeal. Pursuant to the rules of this court the Plaintiff on the one hand and the 1st and 2nd Defendants on the other hand filed and exchanged their respective written G Briefs of argument, In view of the judgment of the trial court on claim 5 against which there has been no appeal either to the court below or this court the 3rd Defendant are no longer involved in the proceedings. Hence, they did not file any Brief nor appeared at the hearings in the court below and this court.

H The following four questions are set out in the Plaintiff/ Appellant’s Brief as calling for determination in this appeal:

*“1. Whether the Court of Appeal was right in affirming the judgment of the trial court in its interpretation and construction of the relevant statutory provisions of the 1968 companies decree governing the incorpo*

ration of the private limited company with share capital having regard to the findings by the trial court.

2. Whether the 1st and 2nd Respondents were not estopped from, denying the status of the Appellant as Member, Shareholder and Director of the 2nd Respondent. .

3. Whether it was right to hold that minutes relied upon by the Appellant were inadmissible. B

4. Whether having regard to the comments of the Court of Appeal *cm* inappropriateness of both the form of proceedings and the conduct Of the trial only on conflicting affidavit evidence alone it was right to have affirmed the award of pecuniary compensation not specifically claimed rather than order a retrial or striking out the case. “ C

The questions for determination set out in the Defendants/Respondents’ Brief are not dissimilar.

QUESTIONS (1) and (2):

It is convenient to take these two questions together. They both together raise the principal issue in controversy between the parties and that is, whether the Plaintiff was a subscriber to the Memorandum and Articles of Association of the 2nd Defendant. For if he was a subscriber, he would by virtue of section 26(i) of the Companies Act, 1968 (applicable to these proceedings) be a member of the 2nd Defendant and would be entitled to the declarations and orders sought by him. D E

From the affidavit evidence adduced at the trial, the following facts stand unchallenged:

1. That Plaintiff and 1st Defendant and five others agreed to form a company’ for the purpose of manufacturing biscuits; F

2. That the names of the Plaintiff and 1st Defendant appear on the Memorandum and Articles of Association of the 2nd Defendant (Exhibit FOE 15) with a signature against each name;

3. That the signatures against the two names were attested to by late Mrs. Uche Offia-Nwali, the legal practitioner engaged to incorporate the 2nd Defendant; G

4. That Mrs. Offia-Nwali also filed Form C.O.7- Particulars of Directors (Exhibit FOE 16). This form contained the names of the Plaintiff and 1st Defendant as Directors of the 2nd Defendant and was signed by the 1st Defendant as Director and another person (presumably Mrs. Offia-Nwali) as Secretary; and H

5. That on the strength of these documents, the 2nd Defendant was incorporated on 19th October 1978 and a certificate of incorporation (Exhibit FOE 2) was issued and signed by the Registrar of Companies.

The Plaintiff contends that he is a subscriber to the Memorandum and Articles of Association of the 2nd Defendant and therefore a member of the company. He claims that he is also a director of the company. He relied on Exhibits FOE 15 and FOE 16 in proof of his case. He contends that Exhibit FOE 15 satisfied the statutory requirements provided for in sections 1 and 2 of the Companies Act 1968 relating to the formation of a private company with limited liability in terms as to the minimum number of subscribers, the minimum numbers of shares taken by such subscribers and the manner for indicating such number of shares. He also contends that Exhibit FOE 15, ex facie, satisfies the requirements of section 5 of the Act. He further contends that Exhibit FOE 16 clearly establishes that he is a director of the 2nd Defendant. It is Plaintiffs contention that he has furnished prima facie proof that he was a subscriber. At the oral hearing before us, Dr. Ibik SAN learned leading counsel for the Plaintiff submits that the concurrent findings of the two courts below to the effect that Plaintiff was not a subscriber is perverse and ought to be set aside by this court.

It is further contended that by Exhibits FOE 7 and 17, the 1st Defendant is estopped from saying that Plaintiff was not a subscriber.

In his counter-affidavit, the 1st Defendant deposed, inter alia as follows:

*“(9) That the plaintiff is not a member of the Board of Directors of the 2nd Defendant.*

*(10) That the plaintiff never subscribed to the Memorandum and Articles of Association, nor a shareholder of the 2nd defendant even though he contributed unspecified amounts of money towards the incorporation expenses of the 2nd defendants or attended its meetings.*

*(11) That even though the plaintiffs’ name was printed in the original Memorandum and Articles of Association the plaintiff did not subscribe to it.*

*(12) That the person whose signature appears as subscriber under the name of the plaintiff is the solicitor engaged to file the registration documents, late Mrs. Offia-Nwali.*

*(13) That the plaintiff’s signature in the affidavit attached to the originating summons is clearly not that appearing over the printed word DIRECTOR in exhibit ‘FOE 15’ of the plaintiff.* “

The 1st and 2nd Defendants contend that Plaintiff did not controvert the above depositions which must be taken as proved and has, therefore, failed to prove that he signed or subscribed to Exhibit FOE 15 as required by section 5 of the Act and could, therefore, not take advantage of section 26(1). It is urged on the court not to disturb the concurrent finding of the two courts

below that the plaintiff was not a subscriber to Exhibit FOE 15.

On estoppel, it is contend for the Defendants that Exhibits FOE 7 and 17 would not estop the Defendants as one could not hide under estoppel to avoid complying with the requirements of the law.

Dr. Ume, SAN learned leading counsel for the 1st and 2nd Defendants concedes it that Exhibit FOE 15 prima facie complied with section 5 of the Act but argues that the onus was on the Plaintiff to prove that he signed against his name in Exhibit FOE 15. B

In finding that the Plaintiff was not a subscriber to Exhibit FOE 15 the learned trial Judge observed:

*“ A cursory look at page 5 of exhibit FOE 15 certainly does not show that the plaintiff subscribed to the memorandum as provided by the Act. Let us take notice of the documents before this court under the authority of Craven v. Smith 1869 4 Law Report, Exchequer at 146. Exhibit FOE 5 is a letter written to Mr. CA. Onyechi, Reference No. DAFEIJOIC8ICB/112 - 79 of 24/7/79 signed by. O. Ezeonwu. The signature therein does not in any way resemble his signature on page 5 of Exhibit FOE 15. ”* C D

*Further, Exhibit FOE 8 is a letter written to the Chairman and Managing Director of the second defendant company on the 11th of October 1980, by Felix O. Ezeonwu, the plaintiff. His signature therein is drastically different from his purported signature in Exhibit FOE 15. Learned Counsel for the plaintiff maintains that the signature referred to “in section 5 of the Companies Decree is not the same as what the ordinary man knows. What it means is the name of the subscriber ... I do not subscribe to learned counsel’s view on the import of section 5. See Re South Blackpool Hotel Co. MIGOTTI’S CASE CH. (1867), LR 4 EQ 238. ”* E F

*It is observed and curious enough too, that the plaintiff at no time averred in his affidavit that he signed Exhibit FOE 15 which is the main bone of contention, or that his name is in the book of the second defendant as a shareholder and the number of shares he holds in the company. In view of paragraphs 11-16 of the first and second defendants’ counter affidavit, one should have expected the plaintiff to counter the averments made by the defendants - these averments have not been specifically or generally denied and so are deemed to be admitted .”* G

In affirming the finding of the trial court, the court below observed, per Chigbue JCA: H

*To satisfy, therefore, the requirement of S.5, the shareholder has to prove that he signed the memorandum in the presence of someone who attested to his signature and that the signature thereon was his own. Exh.15*

is the copy of the Memorandum and Article of Association with the purported signature of the appellant but when the trial courts examined and compared the signature on Exh. FOE 5 a letter written by the appellant to one Mr. A. C. Onyechi it was found by the trial Judge to be drastically dissimilar. The same comparison was further made with the appellant letter to the 1st Respondent on 11 October 1980 and was also found to be different. The subscription of ones name and signature on the Memorandum and Articles of Association was one of the legal requirements to satisfy the provisions of S.5 of the Company Act.

The Respondent's case is that the appellant did not sign Exh. FOE 15. Their averments to this effect as contained in paragraphs 11-16 of their counter-affidavit stood uncontroverted by the appellant and that being so should therefore be deemed to have been admitted - see *ACB Ltd. v. Attorney-General of Northern Nigeria* (1969 NMLR 231 and *Commissioner of Works Benue v: Devcon Ltd.* (1988) 3 NWLR 407/420. “

Later in his judgment the learned Justice of Appeal observed:  
 “ ..... it has been established that the appellant never subscribed his signature to the memorandum and Article of Association of the company in accordance with S.5 of the Company Acts. The appellant never denied this fact as deposed in the respondent's counter-affidavit - see paragraphs 11 - 16. Such non-denial should be deemed as admission of facts contained thereto. “

The attitude of this court to concurrent findings of the two courts below has been restated in numerous cases that it is now well settled. It is sufficient to say once again that this court will not disturb such concurrent findings unless they are shown to be perverse. The two courts below found in this case that the Plaintiff was not a subscriber to Exhibit FOE 15. Is this finding perverse?

I am clear in my mind that the finding runs against the grain of the documentary evidence before the two courts below. As Dr. Ume rightly concedes, Exhibit FOE 15 prima facie shows compliance with section 5 of the Act which provides:

“5. The memorandum shall bear the same stamp as if it were a deed, and be signed by each subscriber in the presence of at least one witness who shall attest the signature. “

It is not disputed that the name of the Plaintiff appears on the Memorandum and the Article as a subscriber. And against that name appears a signature and description and the number of shares taken. The same goes for the 1st Defendant. Mrs. Uche Offia-Nwali whose signature; name address and occupation are contained on Exhibit FOE 15 was witness to the signatures

appearing against the names of the 1st Defendant and Plaintiff.

There is thus full compliance with the provisions of section 5 of the Act. By producing in evidence Exhibit FOE 15, the plaintiff has discharged the onus on him to prove he is a subscriber to the Memorandum and Articles of Association of the 2nd Defendant. The maxim is: *omnia praesumuntur rita esse acta*. See also: Section 191(1) of the Evidence Act. Cap. 112 Laws of the Federation, 1990. B

Now, the 1st Defendant alleges that the signature against the name of the Plaintiff on Exh. FOE 15 is not that of the Plaintiff but that of Mrs. Offia-Nwali. By this allegation the onus shifted on the Defendants to prove that Plaintiff did not sign against his name. See: Section 137 of the Evidence Act which provides: C

“137. (1) *In civil cases the burden of first proving the existence or non existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.*

(2) *If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the pleadings have been dealt with.* “ D

And by deposing that Mrs. Offia-Nwali signed against plaintiffs name purporting it to be that of the plaintiff, when at the same time she signed as witness to the above signature”, 1st Defendant is alleging forgery against Mrs. Offia-Nwali. To discharge the burden on the Defendants, therefore, the 1st Defendant must prove beyond reasonable doubt that it was Mrs. Offia-Nwali, rather than the Plaintiff, who appended the signature standing against the name of the Plaintiff on Exhibit FOE 15. E

Did they discharge this burden on them? I rather think not. As against 1st Defendant’s bare depositions are Exhibits FOE 16 and 17. Exh. 16 is form C07 signed by the 1st Defendant and in which he named the plaintiff and himself as Directors of the 2nd Defendant “Appointed by the subscribers the Memo & Articles of Association with effect from 14th, September 1978.” Exhibit 17 is a letter dated July 28, 1979 written by the 1st Defendant to the Plaintiff in which he wrote: F

“You must understand that both of us as subscribers to the Memorandum and Articles of Association of the company have a great deal of responsibility to ensure that the project takes off as soon as possible.” (underlining is mine) G

There is also paragraph 24 of his counter-affidavit where 1st Defend H

ant deposed:

“24. That when it became obvious that the plaintiff and 1st defendant cannot work together in the 2nd defendant, in view of his persistent witch-hunting and sustained unfounded reports of criminality to the Police and Suit No. FHCIE113185, the 1st defendant offered to refund to the plaintiff his financial contributions after tedious negotiations both pre and post incorporation outlays with interest but the plaintiff refused.”

More revealing is Exhibit “CAOI” annexed to 1st Defendant’s counter affidavit written by 1st Defendant’s lawyer to Plaintiffs lawyer. It reads

“Twin House (1st Floor)

4, Old Hospital Road,

P.O. Box 2198,

Onitsha, Nigeria.

8th September, 1986.

Mr. C.O. Akpangbo S.A.N.,

39 Bedewirhp; Street, Uwani,

Enugu.

Dear Sir,

SUIT NO. FHC.E

Further to my letter of the 16th July 1986 making suggestions for amicable settlement of this matter in terms of monetary compensation we hereby in further evidence of our desire to settle this matter like to state as follows:-

(a) The plant and machinery of the company even if sold has to be shared out to directors in the proportion of their share holding which is not yet ascertained as far as your client is concerned.

(b) Your client knows that City Biscuits Ltd is a tenant of another company that owns the premises he wants valued where City Biscuits operates.

(c) No businessman who invested in a company ever hopes to recoup himself 100% of his outlay within two to three years unless it is a smuggling business.

Finally in the interest of peace would you persuade your client to accept a total payment of N200, 000.00 in final settlement of this matter, so everybody can face other problems.

Please let me hear soonest, I am travelling overseas on health grounds on Wednesday 10th September hoping to be back Deo Voleue before 16/9/86.

Yours ‘faithfully,

(Sgd.)

P.G.E. Umeadi S.A.N.

*Counsel for Defendants*

It is crystal clear that the courts below in coming to their finding that the Plaintiff was not a subscriber to Exhibit FOE 15, failed to advert their minds to the salient facts pointed out by me above and also wrongly laced on the plaintiff the burden of disproving 1st Defendant's allegation as to who appended the signature on Exh. FOE 15 against plaintiff's name. Had they properly directed themselves not only would they have found that Plaintiff was a subscriber and therefore, a member of the 2nd Defendant but that he was since its incorporation a director of the company. It was the failure to properly consider the evidence before them that made Chigbue, JCA to observe, as he did, that-

*"Appellant having failed to produce at least a witness who attested to his signature he had not discharged the burden placed on him to the effect that he signed Exh. FOE 15. "*

It is so patent on Exhibit FOE 15 that Mrs. Offia-Nwali was the sole witness to the signature of both the 1st Defendant and the Plaintiff. And she had died at the time proceedings commenced.

Among the things held against the Plaintiff by the courts below is his failure to tender a share certificate or the register and other books of the 2nd Defendant to show that he was a member of the company. In the light of the observation of Uwaifo JCA that

*"The 1st respondent was fully in control of the running of the company. He kept the relevant documents under his armpit. It seems to me he took advantage of his position. He saw how the company prospered. He played on the intelligence of the appellant and edged him out of the company. "*

how would the courts below expect plaintiff to produce those books and documents? There is no evidence that shares have been allotted since incorporation.

The conduct of the 1st Defendant towards his Praying Band brethren, particularly the Plaintiff, leaves much to be desired. His conduct has been roundly condemned by the two courts below. I do not need to add to what has already been said by them. He seems to want to eat his cake and have it. In one breadth, he says Plaintiff was not a subscriber to Exh. FOE 15, If this were so, he would be the only subscriber. And as section 1(1) of the Companies Act required at least two subscribers to incorporate a private limited liability company, the existence of die 2nd Defendant as a limited liability company' would be illegal. Its certificate of incorporation Exhibit FOE 2 ought to be called in by

the Corporate Affairs commission and cancelled. But 1st Defendant in another breadth wants to uphold the legality of the existence of the 2nd Defendant. That is the irreconcilable situation his greed and insincerity has led him.

From all I have been saying above the conclusion I reach is that from the evidence adduced in this case the reasonable findings to make are

- B (a) that the plaintiff was a subscriber to the Memorandum and Articles of Association of the 2nd Defendant (Exh FOE 15) and, therefore, a member of the company by virtue of section 26(10 of the Act; and
- (b) that the Plaintiff has since the incorporation of the 2nd Defendant been a director and remains one, although wrongly precluded by the 1<sup>st</sup> defendant
- C from the running of the company.

QUESTION4:

I shall now touch briefly on Question 4. The trial court awarded to the Plaintiff a total sum of N129,065.37. In doing so the learned trial judge reasoned:

- D “..... *Be that as it may, I have no hesitation in applying order XLVII to ask the first defendant to refund each and every beat (sic) of money remitted to him by the plaintiff from July, 1979 to 1983 .....*”

*The Plaintiff appealed to the Court of Appeal against this award on ground that he did not claim it. That court in rejecting the complaint observed, per*

- E *Chigbue, JCA:*

*“The main claims which called for declaratory reliefs are set out in 1-5 AND the alternative claim was couched as follows:-*

*‘AND for such further or further orders as this Honourable Court deem fit to make in the circumstances.’*

- F *This alternative claim was an omnibus or a general prayer. It implies that if the appellant could not prove his case on the substantive reliefs sought, he called the trial court to exercise its inherent or equitable jurisdiction by granting any other reliefs but such reliefs were not expressly stated by the appellant. It is trite law that a party is bound by his pleadings as court*

- G *will not adjudicate on issues not pleaded. See Northern Brewery Ltd. v. Mohammed (1973) 1 NWL,R 19; Amegokwue v. Okadigbo (1973) 4SC 113; George v. Flur Mills f1963) 1 All NLR 71177; George v UBA, (1972) 8-9 se. 2641275; Idahosa v. Oransaye (1959) 4 FSC 166 and Obi, Ezenwani v. Nkeadi Onwordi & Ors. (1986) NSC;C 9141929. I agree that the reliefs granted were*

- H *not spelt out but the omission to do so was as a result of the fact that tilt action in itself was commenced by Originating Summons which failed too to specify ‘such further or further orders’ wished the court to make but by simply inviting the court to make ‘further and or other orders as the court may deem fit’, the appellant played into the hands of the trial court and*

*But happily enough the reliefs granted in the case were made within Jurisdiction of the court. I refer to Order XL VII rule 2 of the Federal Court (Civil Procedure) Rules 1976 which provides as follows:-*

*‘Subject to particular rules, the court may in all cases and matters, make any order which it considers necessary for doing justice, whether such orders has been expressly asked for by the person entitled to benefit from the orders or not.’* B

*‘With due respect I find myself unable to share the appellant’s counsel expression that ‘the parties and only the parties set the agenda and it is not the business of the court to play the role of father Xmas by giving out to the parties what was never asked for. ‘To me courts are perfectly justified to consequential orders as the justice of the case demands. In this case the court granted the reliefs within its jurisdiction and the appellant having failed in his main reliefs the trial court was right in making orders to meet the justice and equity of the case. I think the orders granted appeared incidental even though they were not specifically stated - See Ogbe v. Esi 9 W.A.C.A. 76; Nimanteka Associates v. M. Construction (1987) 2 NWLR (Pt. 56) p. .267/278 per Nnaemeka-Agu JCA. In the case of Laibru Ltd. v. Building & Civil Engineering Contractors (1962) 1 All NLR 387 it was observed that* C D E

*Where a Notice of Appeal fails to pray for a particular relief which FSC decisions should be granted but prayers in general terms’ for any further or other order or orders as the court may deem fit to make in the circumstances.’* E

*FSC on appeal may under such prayer granted the appropriate relief,’ as if it had been expressly prayed for in the appeal. In such an application for equitable relief, the substance and not the form ought to be regarded. “* F

It is the contention of the Plaintiff that as the award of pecuniary was not asked for by him and is not incidental to the specific reliefs he at the trial, it is arbitrary and unjustifiable having been raised and determined by the trial court suo motu without affording the parties an opportunity of being heard on it, contrary to the rules of natural justice and hearing. G

The Defendants contend on the other hand, that Order XLVII rule the Federal High Court (Civil Procedure) Rules and the general prayer Originating Summons vest in the court discretionary and equitable to make the award of pecuniary relief in this case. H

A court has no power to grant to a party any relief that he has not specifically claimed. While a court can award less than what is claimed by a

party it cannot award more - See Ekpenyong & Ors. v. Inyong & (It (1975) 2SC.71, 80-81 where Ibekwe JSC (as he then was) delivering the judgment of this court observed:

“Secondly, we think that, as the reliefs granted by the learned trial judge were not those sought by the applicants, he went beyond his jurisdiction when he purported to grant such reliefs. It is trite law that the court is without the power to award to a claimant that which he did not claim this principle of law has, time and again, been stated and re-stated by this court that it seems to us that there is no longer any need to cite authorities in support of it. We take the view that this proposition of the law is not only good law, but good sense. A court of law may award less, and not more than what the parties have claimed. Afortiori, the court should never award that which was never claimed or pleaded by either party. It should always be borne in mind that a court of law is not a charitable institution, its duty in civil cases, is to render unto everyone according to his proven claim.”

See also Abang v. Effium & Ors. (1976) 1 SC.17, 31; Obioma & Ors. v. OIomu & Ors. (1978 3 SC 1. In Chief Registrar High Court of Lagos State v. VAMOS Navigation Ltd. (1976 1 SC. 33, 40-41, a case not too dissimilar to the case on hand Madarikan, JSC delivering the judgment of this court said:

“It is clear from the application before the lower court that the relief sought by the applicants was for an order of prohibition. The learned President having, rightly in our view, come to the conclusion that he could not grant that relief, it was not open to him to proceed to order payment of demurrage which was not claimed by the applicants. (See Ekpenyong & Ors.)

;; o«. v. Nyong & Ors. (1975) 2Sc. 71 at page 80). “  
As the Plaintiff did not claim any pecuniary relief, it was wrong to award him one.

The courts below predicated the award on the exercise of the discretion given the trial court by Order XLVII rule 2 of the Federal High Court (Civil Procedure) Rules, 1976 which provides

“Subject to particular rules, the court may in all cases and matters, make any order which it considers necessary for doing justice, whether such orders has been expressly asked for by the person entitled to benefit from the order or not. “

This rule only empowers a court to make a consequential and not a substantive order. A consequential order is one that gives effect to the judgment it follows; it cannot detract from it - see: Obayagbona v. Obazee (1972) 5SC. 247. The pecuniary award made in the case on hand cannot It any stretch of imagination be described as consequential to a dismissal of plaintiffs claims

(1) \_ (4). Indeed it detracts from it. On this ground alone, the award ought to be set aside.

But that is not the end of the matter. None of the parties was heard on the propriety of making the award before the learned trial Judge suo motu made the award. This court has often frowned on this practice - See: Adeosun v. Babalola (1972) 5 SC 292, 302 where this court, per Sir Udo Udoma, JSC, observed:

*“As a general rule this court has always regarded with disfavour the practice of a court giving a decision on a point not argued before it. In OBAZEE OGAMIEN & ANOR v. OBABON OGAMIEN (1967) NMLR 245, this court said at pages 248 and 249:-*

*This Court has pointed out on several occasions that it is wrong for a judge to give a decision on a point which opportunity was not afforded counsel to argue at the hearing and particularly a point which throughout the hearing was not raised. “*

This case clearly manifests the wisdom of this rule. Had the learned trial judge heard the parties before deciding to make the pecuniary award in favour of the Plaintiff and against me 1st Defendant he would not have found as he did in the passage following

*“The underlisted are various remittances made by the plaintiff to the 1st defendant at the request of the 1st defendant .... “*

I say this because plaintiffs cheques with which he made various remittances were drawn in favour of the 2nd Defendant after its incorporation - See : paragraphs 7, 12 and 14 of Plaintiffs affidavit and Exhibits FOE 10 & 12 annexed thereto. If pre-incorporation expenses incurred by the Plaintiff would not bind the 2nd Defendant what of the heavy remittances made direct to it after its incorporation? Were they not meant for capitalisation?

After all, the equity of the company is put at N250,000.00 as evidenced by exhibit FOE 15.

The conclusion I reach is that Question 4 must be answered in Plaintiffs favour.

In view of the conclusion I have reached on Questions 1, 2 and 4, I do not consider it necessary to go into Question 3. The conclusion I finally reach is that this appeal succeeds and it is allowed by me. I set aside the judgments of the two courts below, together with the order for costs made by the Court of Appeal and in their stead I enter judgment for the Plaintiff in the following terms:

1. I DECLARE that the Memorandum and Articles of Association with which the 2nd Defendant, City Biscuits manufacturing Company Limited was registered and filed on the 28th day of September 1978 with the Registrar

of Companies at Lagos contains the only provisions regulating operations of the 2nd Defendant since incorporation till date.

2. I DECLARE that the Plaintiff and the 1st Defendant are the only joint members and owners of the 2nd Defendant, that is City Biscuits Manufacturing Company Limited.

B      3. I ORDER the 1st and 2nd Defendants to render an account within 30 days of the management, operations and finances of the 2nd defendant since its incorporation in 1978 to date.

4. I ORDER the 1st Defendant to call a meeting of the 2nd defendant/ company to be held within 30 days of the date hereof for the purpose among C other things of appointing secretary and auditor outside the present subscriber/directors of the 2nd Defendant/company, that is, Plaintiff and 1st Defendant and to do all other things as the law may require to be done at an Annual General Meeting of the Company.

I award to the Plaintiff NI ,00.00 costs of the trial, NI ,000.00 costs of the appeal D in the court below and NI,000.00 costs of this appeal to be paid the 1st Defendant personally to the Plaintiff.

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**BELGORE JSC**

E      The plaintiff on his claims - 4 of the originating summons has set out clearly the part he and 1st Defendant/Respondent played in forming 2<sup>nd</sup> Defendant/Respondent as it private company. They are the sole subscribers to the formation of 2nd Defendant. The Plaintiff/Appellant provided security by mortgaging his landed property to finance the take off of the 2nd Respondent.

F      The memorandum and Articles of Association of the 2nd defendant/Respondent carried the names of Plaintiff/Appellant and 1st defendant/Respondent as sole subscribers on the strength of which the company was registered in accordance with Companies Act 1968; thus the two became members of the company. ‘Their solicitor, Mrs Uche Offiah Nwali signed as a witness to the

G      signatures of Plaintiff and 1st Defendant on the Memorandum and Articles of Association thus indicating after registration that the two were members of 2nd Defendant, by the provisions of sections 1 and 2 of Companies Act 1968, the minimum number of members of a private limited company, minimum number of shares and manner of indicating such numbers 2nd Defendant/Respondent

H      was fully registered as a company. As a Respondent seemed to contend that the witness, Mrs Offiah Nwali, did not sign and that exhibit FOE 15 contained a forged signature of Mrs Offiah Nwali, who had died in 1983, 2nd Respondent then could not legally exist because if it was not registered it could not carry on business as it does, a fortiori if number of members on Memorandum and

Articles of Association is less than two. The 1st Respondent, curiously insists that the company exists and wants only to say that plaintiff is not a member. In that the onus is on him to prove it; he failed to do so. Section 5 Companies Act 1968 was certainly complied with because I cannot see the rational behind trial court's efforts in comparing the signature in Memorandum and Articles of Association with that of the Plaintiff. The Defendants, by merely asserting that Plaintiff never signed is not enough to discharge the onus of proof. The function of the court is not to help prove, the burden to prove is on the one who asserts. Plaintiff insisted that he signed, and from him he has no further burden of proving.

It is for the above reason and the reasons in the judgment of my learned brother, Ogundare, J.S.C. with which I am in full agreement that regretably find the decision of the two lower courts were manifestly in error and I have to allow this appeal. I also set aside the decision of Court of Appeal which affirmed the judgment of trial Federal High Court. I make D tht' same orders as contained in the Judgment of ogundare, J .S.C.

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#### **KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother Ogundare J.S.C. I agree with his reasoning and conclusion. Clearly there is merit in the Plaintiff/Appellant's appeal and I will also allow it. I make the same orders as contained in the lead judgment.

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#### **ADIO JSC**

I have had the opportunity of reading, in draft, the judgment just read by my learned brother ogundare, J.S.C., and I agree with his reasoning and conclusion which I adopt as mine. I allow the appeal and abide by the consequential orders, including the orders for costs.

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#### **IGUH JSC**

I have read, in advance, the lead judgment just delivered by my learned brother, Ogundare, J .S.C. and I agree entirely that there is merit in this appeal and that the same should be allowed.

The background facts of the dispute between the ..... I need not recount them all over again. It suffices to state that following the 'disagreement between the parties, the plaintiff on the 3rd day of February, 1989 com

menced an action against the defendants by originating summons claiming as follows:-

- “1. A declaration that the Memorandum and Articles of Association will, which the 2nd defendant, CITY BISCUITS MANUFACTURING COMPANI LIMITED was registered and filed on the 28th day of September, 1978 will the Registrar of Companies at Lagos contains the only provisions regulating the operations of the 2nd Defendant since incorporation till date.
- 2. A declaration that the Plaintiff together with the 1st defendant under and by virtue of the Memorandum and Articles of Association dated 14th September, 1978 and filed on the 20th September, 1978 with the Regis/III of Companies at Lagos, are joint owners of the 2nd defendant company that is, CITY BISCUITS MANUFACTURING COMPANY LIMITED.
- 3. An order directing the 1st and 3rd defendants severally to render an account of the management, operations as well as financial involvements of one and the other with the 2nd defendant company since its incorporation in 1978.
- 4. An Order of this Honourable Court directing a meeting of the 2nd defendant/company to be held within 30 days of the Order for the sole purpose of appointing Secretary and Auditor outside the present subscriber/directors of the 2nd defendant/company.
- .. 5. An Order of this Honourable court directing the 3rd defendant to release the following documents in respect of Plot NO.58 VIP Rest House GRA Onisha Mortgaged on behalf of the 2nd defendant company by the plaintiff that is to say:

- (i) a building lease registered as No. 93 at page 93 in volume 675 at the Enugu Land Registry.
- (ii) a Power or Attorney registry as No. 82 at page 82 in volume 733 at the Enugu Land Registry; and
- (iii) Agreement for sale made on 19th February, 1975 between Celestine Ob; ousa of’P Venn Road, South Onitsha and Felix Ezeonwu of 23 Iboku Street, Odookpu, Onitsha.

AND for such further or further orders as the Honourable Court may deem fit to make in the-circumstances. “

The trial was conducted and resolved on affidavit evidence of the parties. The learned trial Judge, Ofili, J. in a considered judgment at the end of trial on the 23rd day of February, 1990 refused the reliefs claimed. He however entered judgment suo motu for the plaintiff by ordering the 1st defendant to pay within 14 days to the said plaintiff, the sum of N129,065.37 with 5 interest representing what the learned trial Judge described as the total amount remitted by the plaintiff to the 1st defendant in connection with the incorporation

and running of the 2nd defendant company.

Dissatisfied with the said decision of the Federal High Court, the plaintiff appealed to the Court of Appeal, Enugu Division, which on the 17th day of July, 1991 dismissed the same, describing the judgment of the court as “unassailable”. It is against this judgment of the Court of Appeal that the plaintiff has further appealed to this court. B

The main issue between the parties is whether or not the appellant is a member or director of the 2nd defendant company and, in particular, whether he subscribed to the Memorandum and Articles of Association of the said company. C

It is contention of the plaintiff that he and the 1st defendant subscribed to and are the only directors and members of the 2nd defendant company, to wit, City Biscuits manufacturing Company Limited. The said company was incorporated on the 19th day of October, 1978 by virtue of the Memorandum and Articles of Association, Exhibit FOE 15, dated the 14th September, 1978 but filed with the Registrar of Companies at Lagos on the 28th September, 1978. D

For the 1st and 2nd defendants, it was submitted that the plaintiff is neither a member nor a director of the 2nd defendant company in that the said plaintiff at no time subscribed to the Memorandum and Articles of Association of the company and could not therefore seek the reliefs claimed in the action. They further argued that the court and the Court of Appeal were: ad idem that the plaintiff neither subscribed to Exhibit FOE 15 or is he a member of the 2nd defendant company and this court was urged not to interfere with the said concurrent findings of fact of both courts below. E F

Dealing with the said issue, the Court of Appeal, per the judgment of Chigbue, J.C.A., with which Uwaifo and Katsina-Alu, J.C.A. concurred, in affirming the decision of the trial court reasoned thus:-

*The question which comes to mind is how does one become a shareholder of a company. The answer could be found by referring to S.5 of the Companies Act 1968 which provides:-* G

*“The Memorandum shall bear the same stamp as if it were a deed, and be signed by each subscriber; in the presence of at least one witness who shall attest the signature. “ (Underlining is mine)*

*See Orojo on company Law and practice P 55 where the learned author gives the same definition and goes further to explain that the names, address and description of the subscriber shall be stated followed with the signature. To satisfy, therefore, the requirement of S:5, the shareholder has to prove that he signed the memorandum in the presence of somebody who* H

attested to his signature and that the signature thereon was his own. Exh. FOE 15 is the copy of Memorandum and Articles of Association with the purported signature of the appellant but when the trial court examined and compared the signature on Exh. FOE 5, a letter written by the appellant to one Mr. A. C. Onyechi, it was found by the trial Judge to be drastically  
B dissimilar. The same comparison was further made with the appellant's letter to the 1st Respondent on 11th October, 1980 and was also found to be different. The subscription of ones name and signature on the Memorandum and Articles of Association was one of the legal requirements to satisfy the provisions of S.5 of the Companies Act."

C      A little later in the judgment, the Court of Appeal continued as follows:-  
*"Appellant having failed to produce at least a witness who attested to his signature, he had not discharged the burden placed on him to the effect that he signed Exh. FOE 15. The mere fact that he was at one time or the other being described as a Director either by the various meeting and or  
D minutes of such meetings did not make him so....."*

It concluded by holding that to qualify the plaintiff as a shareholder, he had to subscribe his name and signature in Exhibit FOE 15. These, it claimed, the plaintiff failed to establish.

E      With the greatest respect, I find it difficult to accept the views of the court below that the plaintiff failed to establish his membership of the 2nd defendant company or that he subscribed to the Memorandum and Article of Association of the 2nd defendant company, Exhibit FOE 15.

F      Before, however, I proceed to examine the issue, it is material to point out that the said findings which were originally made by the trial court and affirmed by the Court of Appeal were not based on the credibility of the viva voce evidence of any witness. On the contrary, they were reached on the basis of documents before the trial court.

G      It is trite that this court will not interfere with the findings of facts made by both the High Court and the Court of Appeal where there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record of proceedings, such as miscarriage of justice or violation of some principle of law or procedure. Where, however, such findings are shown to be perverse or patently erroneous or where the court has drawn wrong conclusions from accepted credible evidence adduced before it and a  
H miscarriage of justice will result if they are allowed to remain, the Supreme Court, without doubt, has the duty to interfere. See *Cbikwendu v. Mbamali*.(1980) 3-4 S.C. 31 at 75, *Lamai v. Orbih* (1980) 5-7 S.C 28, *Woluchem v. Gudi* (1981) 5 S. . 291 at 326, *Kola v. . Coker* (1982) 12 SC 252, *Igwegu v. Ezego*

v. Ezeugu (1992) 6 N.W.L.R (Part 249) 561 at 585 etc.

But there is a distinction between the finding of a specific fact based on the credibility of a witness, of the one part, and a finding of fact which is an inference drawn from facts specifically established or from the construction or interpretation of documents tendered before 'the court, of the other part. In the case of the latter, the appellate court is in as good a position as the court to evaluate such documentary evidence and will more readily form an independent opinion than in the case of the former which involves an evaluation of the evidence of witnesses where the finding could be founded on their credibility or bearing. See *Okpiri v. Jonab* (1961) All N.L.R. 102 at 104-105, *Lawal v. Dawodu* (1972) 8-9 S.c. 83 at 114-115, *Balogun v. Agboola* (1974) 10 S.C. 111 at 118, *woluchem v. Gudi* supra at 295-296. 326-329. As I have observed, the concurrent findings of fact under attack were based on documents and not from the credibility of any witnesses. Against this background, I will now proceed to consider the issue under resolution.

In the first place it is not in dispute that prior to the incorporation of the 2nd defendant company, the plaintiff and the 1st defendant had met and agreed to incorporate the 2nd defendant as a biscuit manufacturing company in which both of them would become shareholders and directors. The parties are also in agreement that they retained the services of a legal practitioner, to wit, Mrs. Uche Offiah-Nwali, now deceased, for the incorporation of the company. There is next the certified true copy of the Memorandum and Article of Association of the. 2nd defendant company which is Exhibit FOE 15 in the proceedings.

Again, it is not in dispute that Exhibit FOE 15 satisfied all the statutory requirements stipulated under sections 1 and 2 of the Companies Act, 1968 relating to the formation of private limited liability company. These requirements include such issues as the minimum number of the subscribers, the minimum number of shares taken by such subscribers etc. More importantly, section 5 of the said Act which provides that each subscriber shall sign the Memorandum in the presence of at least one witness who shall attest the signature is clearly satisfied ex facie by the signatures of the two subscribers whose names and addresses are therein printed at the two last page of Exhibit FOE 15. The names and addresses of the said subscribers are therein indicated as Mr. Charles Onyechi of 11 Beriut R Kano, Managing Director, with one share and Mr. Felix Ezeonwu of 16B Moore Street, Onitsha, Director, also with one share respectively. Their signatures are also clearly indicated as duly witnessed by their solicitor, Mrs. Uche Offiah-Nwali, now deceased.

Attention must be drawn to Exhibit FOE 16 from the Registration of Companies in Lagos which is a certified true copy of Form C.O.7 being particulars of directors and of any change therein pursuant to section 191(4) of the Act. This shows the names of both the plaintiff and the 1st defendant as the first directors of the 2nd defendant company as from the 14th September, 1978. There is also the letter, Exhibit FOE 17, dated the 28th July 1979 written and signed by the 1st defendant and addressed to the plaintiff. In it, the 1st defendant confirmed that both himself and the plaintiff subscribed to the Memorandum and Articles of Association of the 2nd defendant company. Said the 1st defendant -

“ ..... You must understand that both of us as subscribers to the Memorandum and Articles of Association of the company have a great deal of responsibility to ensure that the project takes off as soon as possible .....”

(Underlining supplied for emphasis)

The above documents speak eloquently for themselves and it is my considered view that the plaintiff furnished adequate evidence in prima facie proof of his subscription to Exhibit FOE 15 and membership of the 2nd defendant company. It is my further view that the court below was in gross error to have failed to accord full effect to the above evidence in proof of the plaintiff’s subscription and membership of the company and to have consequently held that the said plaintiff did not subscribe to Exhibit FOE 15.

One of the main reasons given by the court below for holding that the plaintiff did not establish he subscribed to Exhibit FOE 15 is the fact that the plaintiff failed to call the attesting witness to testify on the point. With profound respect, this line of thought on the part of the court below seems to me completely faulty and totally misconceived. In my view, the plaintiff, having furnished prima facie proof that he was a subscriber to Exhibit FOE 15, the burden of introducing evidence in rebuttal shifted the defendants to establish their denial that the plaintiff did not sign the document. See Babafunke Johnson & Another v. Akinola Maja and others 13 W.A.C.A. 290. I agree entirely with Dr. Ibik S.A.N. that the mere ipse dixit assertion of the defendants as contained in their counter-affidavit only cannot be regarded as such rebuttal evidence in that Exhibit FOE 15 is in law not an ordinary document but a deed pursuant to the provisions of section 16 of the Companies Act, 1968. Besides, the decision of the court below that the plaintiff’s failure to call the evidence of “at least a witness who attested to his signature” meant that he had not discharged the onus on him is, with respect, a decision in total disregard of the uncontroverted facts that only one witness who attested Exhibit FOE 15,

Uche Offiah Nwali, had died before the proceedings instituted.

There is next the second reason for which the court below was obliged to hold that the plaintiff did not subscribe to Exhibit FOE 15. Said the court of Appeal -

*“Exhibit FOE 15 is the copy of the Memorandum and Article of Association with the purported signature of the appellant but when the trial court examined and compared the signature on Exh. FOE 5 a letter written by the appellant to one Mr. A. C. Onyechi it was found by the trial Judge to drastically dissimilar. The same comparison was further made with the appellant’s letter to the 1st Respondent on 11 October 1980 and was also found to be different. The subscription of ones name and signature on the memorandum and Articles of Association was one of the legal requirements to satisfy the provisions of S.5 of the Companies Act. “*

It has to be stressed that at no time did the plaintiff disown any of the signatures alluded to by the court below. On the contrary, they were all admitted by the plaintiff as his signatures. I accept the plaintiffs contention that mere dissimilarity in signatures is neither conclusive evidence nor a rational basis to ground a finding that such signatures were in fact not made by one and the same person particularly when the authorship of such signatures is accepted by one and the same person. The Court of Appeal was therefore in gross error by affirming the speculative and unsubstantiated opinion of the trial court that because of the alleged dissimilarity in the signatures, the plaintiff was not the maker of the signature on Exhibit FOE 15.

On the issue of whether the defendants were not estopped from denying the status of the plaintiff as a member, shareholder and director of the 2nd defendant company, the following facts inter alia are pertinent -

1. Exhibit FOE 7 dated the 27th September, 1980 and signed by the 1st defendant as the Chairman and Managing Director of the 2nd defendant company duly shows the names of the plaintiff and the said 1st defendant as directors of the 2nd defendant company as required by law.

2. By Exhibit FOE 17 dated the 28th July, 1979, the 1st defendant wrote to the plaintiff as follows:-

*“ .....You must understand that both of us subscribed to the Memorandum and Articles of Association of the Company, and have a great deal of responsibility to ensure that the project takes off as soon as possible ..... “*

(Underlining supplied for emphasis)

In the face of the above admission, it seems to me clear that the Court of Appeal was in a serious error when it declined to hold that the 1st and

second defendants were estopped from denying the locus standi of the plaintiff as a subscriber, member and director of the 2nd defendant company.

B On the award of pecuniary relief to the plaintiff by the trial court, it cannot be, disputed that this was neither asked for nor incidental to the specific reliefs claimed by the plaintiff before the trial court. The issue was raised and determined suo motu by the trial court without affording the parties any opportunity of being heard thereupon contrary to the rules of natural Justice and fair bearing.

C In this regard, it cannot be over-emphasized that a court of law must not grant to a party a relief which he has either not claimed or is more what he has claimed. See Ekpenyong v. Nyong (1975) 2 S.C. 71 at 81-82, Kaliov. Daniel-Kalio (1975) 2 S.C. 15 at 17-19, Union Beverages v. Owelah (1988) 2 N.W.L.R. (Part 68) 128 at 133, Makanjuola v. Balogun (1989) 3 N.W.L.R. (part 108) 192 at 206, Olurotimi v. Ige (1993) 8 N.W.L.R (Pall 111) 257 at 271 etc. I entertain no doubt that the award of the gratuitous pecuniary relief made to the plaintiff by D the trial court and affirmed by the court below was completely arbitrary, unjustifiable and erroneous on point of law.

E It is for the above and the more elaborate reasons contained in the lead judgment of my learned brother that I, too, allow this appeal. The judgments of the trial High Court and the court below, together with the orders for costs therein made are hereby set aside and in their stead judgment is entered for the plaintiff in terms contained in the lead judgment. I endorse the order for costs therein made.

F

G

H