

SUPREME COURT OF NIGERIA
TUESDAY 2ND JULY, 1996. SC. 24/1993
CORAM:- S. M. A. BELGORE, I. L. KUTIGI,
M. E. OGUNDARE, U. MOHAMMED, Y. O. ADIO, JJSC

CHIEF BELONWU UGOCHUKWU PLAINTIFF/APPELLANT

AND
COOPERATIVE & COMMERCE
BANK (NIGERIA) LIMITED DEFENDANT/RESPONDENT

APPEALS - Reversal - Of trial court's judgment by the Court of Appeal - Whether against the weight of evidence.

COURTS - Extra judicial exercise - By the trial court in supplying missing evidence - Whether award derived therefrom - Was properly set aside.

JUDGMENTS - Award of higher amount - Than what was claimed - Is not proper.

JUDGMENTS - Claim not made - Where the amount awarded to the defendant was not claimed - Whether it will be set aside.

LAND USE ACT - Consent of the governor - Considering the applicable statutes - Whether validly given.

MORTGAGES - Legal mortgage - Consent endorsed thereon by the Commissioner of Works and Housing - Whether proper.

MORTGAGES - Finding of lower courts - That the property in issue was mortgaged - Whether to be disturbed

PLEADINGS - Admission - Plea that defendant is not in a position to admit or deny a particular paragraph - Whether tantamount to an admission - That removes the plaintiff's burden of proof - In the circumstances of this case.

FACTS

The plaintiff/appellant has been a customer of the defendant/respondent. The parties relationship led to a grant of N30,000.00 loan facility to the plaintiff who mortgaged his landed property known as No. 239

Cameroun Road Aba to the defendant. Defendant realized in 1988 that plaintiff was owing it N1,047,249.00 and was not repaying the loan. Defendant communicated an intention to sell the said mortgaged property. Plaintiff then filed an action seeking inter alia, a declaration that the legal mortgage is null and void and an injunction restraining the defendant from exercising any right under the mortgage. Plaintiff made a non clarified claim of N4,625,604.77 less any amount which the court may find due to the defendant.

The trial court gave judgment for the plaintiff and awarded a sum higher than the amount claimed after supplying part of the evidence. It also held that the legal mortgage in issue was null and void for containing consent endorsed by the commissioner instead of the governor. Defendant's appeal to the Court of Appeal was successful. The two lower courts awarded, the sum of N652,326.89 to the defendant which it never claimed. Plaintiff has now appealed to the Supreme Court raising five issues.

ISSUES FOR DETERMINATION

(i) Whether upon a calm view of the pleadings, the evidence and the relevant statutory provisions, the Court of Appeal's decision that appropriate and requisite consent had been obtained for the validation of Defendant's Deed of Legal Mortgage, Exhibit 3 is sustainable.

(ii) Whether the Defendant's Exhibit 3 the legal Mortgage, is referable to the Plaintiffs property at No. 239 Cameroun Road Aba, so as to be enforceable against that property by way of exercise of a right of sale at the Defendant's instance based on Defendant's Exhibit 3 even if there was the requisite consent. Etc., see p. 1273

HELD (Unanimously dismissing the appeal while setting aside the amount awarded to the defendant/respondent per lead judgment of **KUTIGI JSC**)

Consent of the governor - Whether validity given

1. It was also clearly pointed out in the judgment that even before Legal Notice No. 4 of 1979 was enacted, section 4(b) of the Land Use Act empowered the Military Governors until other provisions were made in that behalf, to administer land under their control and management, in accordance with the provisions of the applicable State Land Law or Land Tenure Law as the case may be, with such modifications as would bring those laws into conformity with the Land Use Act or its general intendment. To that extent, the consent given under the Imo State Land Law would equally have been validly given. (p. 1276 G)

Legal mortgage - Consent endorsed thereon

2. So that in whichever way one looks at it in the circumstances of this case, the consent endorsed on the legal Mortgage, Exhibit 3 by the Commissioner of Works and Housing of Imo State on the 12th May 1978 was validly and properly made. It is ironic that the plaintiff who is the beneficiary under the said deed of mortgage is the one seeking to declare same a nullity. (p. 1277 D)

Mortgages - Finding of lower courts

3. The High Court therefore rightly found on the evidence before it, that the plaintiff mortgaged the property No. 239 Cameroun Road, Aba, when he executed Exhibit 3. The Court of Appeal agreed with that finding and C in tilling has been advanced before us to disturb it. I will accept it too. (p. 1278 E)

Pleadings - Admission

4. In a situation which I have set out above, such a pleading cannot amount to an admission, but a clear denial of that paragraph of the Statement of Claim. The Court of Appeal was therefore wrong when it said the Defendant did not traverse para. 20 of the Statement of Claim. It is settled that each paragraph of a Statement of Defence must not be considered in isolation but in conjunction with other paragraphs, so that the issues joined in the pleadings can be properly ascertained. The Plaintiff therefore, had the burden of proving that the Defendant was indebted to him in the sum of N4,625,607.77 or any lesser sum as pleaded in paragraph 20 of his Statement of Claim. (p. 1280 C)

Courts - Extra judicial exercise

5. The Court of Appeal commenting on this extra-judicial exercise carried out by the learned trial judge said on page 243 thus - *"Furthermore, I see nothing wrong in the trial court's receipt in evidence of Plaintiff's Exhibit 4-16 i. e. exhibits evidencing lodgments in the Defendant bank..... This is with the proviso that the sum total on the tellers agreed with the sum pleaded by the Plaintiff. This he did not make out at the trial Furthermore, it is not function of a trial judge by his own exercise and ingenuity as happened this case to supply the evidence or carry out the mathematics of arriving at the answer which only evidence, tested under cross-examination could supply and attest"*. I think the Court of Appeal was right. It was also right to have set aside the award of N4,716,915.36 made to the plaintiff above as n it-suit of the extra-judicial exercise which was in any way never proved by the Plaintiff against the Defendant. (p. 1282 A)

Award of higher amount

6. I must also add here immediately that while the plaintiff's claim is for N4,625,604.88 (see paras. 20 and 22 of the Amended Statement of Claim above), the High Court awarded it the sum of N4,716,915.36 which is higher or more than the amount claimed. It is settled that a Court is without power to award to a claimant what he does not claim. A court of law may only award less but not more than what the parties have claimed. (p. 1282 D)

Claim not made

7. In the same vein I can say straight away that the Court of Appeal was wrong when after setting aside the award made to the Plaintiff by the trial court, it proceeded to make the award of N652,326.86 which the learned trial judge had by his own arithmetic and calculations in chambers found to be owed by the Plaintiff to the Defendant. The short answer as explained above, is that the Defendant had not claimed anything before the learned trial judge. It did not file any counter-claim against the Plaintiff. The award made by the lower courts in favour of the Defendant was a grave error which must therefore be set aside. It must be remembered that the High Court used the award it made, in favour of the Defendant as a set-off to reduce the amount owed by the Defendant to the plaintiff to N3,973,277.91 (see Order No. (IV) of the judgment of the High Court above). I therefore hold that the Court of Appeal was right in holding that the plaintiff failed to prove the Defendant's indebtedness to him as claimed. The Court of Appeal was however wrong to have made the award of N652,326.86 in favour of the Defendant which it never claimed. (p. 1282 F)

Appeals - Reversal

8. The last issue (v) which is whether the decision reached by the Court of Appeal reversing the judgment of the High Court is not against the weight of evidence, would appear to have been answered already in my consideration of the other four issues earlier on. It was certainly not against the weight of evidence to have reversed the decision rendered in favour of the plaintiff. It was however improper for the courts to have awarded anything to the Defendant who had no claim before them. And to that extent his appeal succeeds in part and fails in part. (p. 1283 A)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Whether validity of consent can be challenged by the appellant

The holder of a right of occupancy, evidenced by a certificate of occu

pancy, is the one to seek consent of the Governor to alienate, transfer, mortgage etc. There is no doubt the consent given on Exhibit 3 was at the Instance of the appellant who was in need of fund from the respondent by way of mortgage. It is not from him one must hear that the consent he obtained was void. (p. 1283 E) B

2. Equity - Need to come with clean hand

There is no denial of the fact that there was a mortgage of the house at Cameroun Road, Aba for which the appellant received a loan. The allegation that it was not in respect of No. 239 but in respect of No. 240 is that of the appellant as plaintiff. The burden was on him to prove and he failed to adduce evidence to discharge this burden. Assuming that he did, it is clear he received a loan and mortgaged a property and if that property is not No. 239 Cameroun Road, Aba, he then deceived the respondent bank. In that case no clean hand and no equity will come to his aid. (p. 1283 H) D

REPRESENTATION

Chief U. N. Udechukwu and Mgbemena for Appellant

Chief J. C. Ifegbunandu for Respondent

E

CASES REFERRED TO

Savanah Bank v. Ajilo (1989)1 NWLR (Pt. 97) 305

Olaloye v. Balogun (1990)5 NWLR (Pt. 148) 24 at 26

Ejikeme v. Okonkwo (1994) 13 KLR 55

Afroflot Soviet Airlines v. U.B.A. Ltd (1986) 5 S.C. 217

Queen v. Wilcox (1961)All NLR 631

Owe v. Oshinbajo (1960)1 All NLR 74

Lewis & Peat v. Akhimien(1976) 7 S.C. 157

Ekpenyong v. Nyong (1975) 2 S.C. 71

F

STATUTES REFERRED TO

Land Use Act ss. 4(b), 45(1)

Evidence Act s. 73(1)

G

LEAD JUDGMENTS BY KUTIGI JSC

H

By paragraph 22 of his Amended Statement of Claim the plaintiff claimed against the defendant as follows: -

“A. Declaration that the Deed of Legal Mortgage purportedly made between the plaintiff as Mortgagor and the defendant as Mortgagee regis

tered as No. 39 at page 39 in volume 208 of the Land Registry in the office at Owerri is otiose, null and void or in any event unenforceable against the plaintiff's property at No. 239 Cameroun Road, Aba.

B *B. An injunction perpetually restraining the defendant by itself or through privies acting on its behalf from exercising any rights pursuant to the said mortgage by way of sale or otherwise of the plaintiff's property known as No. 239 Cameroun Road, Aba.*

C *C. Declaration that upon a proper account taken, the plaintiff is not owing the defendant the sum of N1,047,249.00 as claimed by the defendant in its letter of the 22nd of July, 1988 addressed to the plaintiff.*

D. The sum of N73,217.54 being refund due to the plaintiff on account of cancelled letters of credit and excess debit on letters of credits processed by the defendants as plaintiff's Bankers on behalf of the plaintiff.

D *E. The sum of N4,625,604.77 less any sum which the defendant may prove or which the court may find due to the defendant arising from its loan or other charges against the plaintiff."*

E After the filing and exchange of pleadings the case proceeded to trial. At the hearing the plaintiff gave evidence for himself while one witness testified on behalf of the defendant bank.

F The facts are quite simple. The plaintiff was a good customer of the defendant for many years who enjoyed overdraft and loan facilities amongst others. The plaintiff used the facilities to import goods from overseas and the defendant would raise letters of credit on behalf of the plaintiff in favour of the plaintiff's overseas customers. It was also the practice for the defendant to debit plaintiff's account with amount in excess of the invoice value of any consignment with the understanding that when the Bill of Exchange was raised in favour of the overseas customer, any balance not utilised in the remittance was credited to the plaintiff as a refund. In aid of the above arrangement, the defendant sometime in 1978, granted the plaintiff at the plaintiff's request, an overdraft or loan facility of N30,000.00 at a fixed interest rate of 9 per centum per annum secured by a mortgage of the plaintiff's property at No. 239 Cameroun Road, Aba. The defendant realising in 1988 that the plaintiff was owing it N1,047,249.00 and that he was not repaying the loan, informed him of its intention to exercise its right under the Mortgage Deed to sell the plaintiff's property at No. 239 Cameroun Road, Aba. This prompted the plaintiff to file the suit claiming the reliefs set out above.

H At the end of the trial, the learned trial Judge gave judgment in favour of the plaintiff when he concluded on pages 109 - 110 of the record

thus -

“(i) It is hereby declared that the Deed of Legal Mortgage, purportedly made between the plaintiff, as mortgagor, and the defendant, as mortgagee, registered as No. 39 at page 39 volume 208 of the Land Registry in the office at Owerri, is otiose, null and void and unenforceable against the plaintiff’s property at No. 239 Cameroun Road, Aba, registered as No. 26 at page 26 in Volume 751 of the Lands Registry in the office at Enugu new Owerri.

(ii) The defendant, by itself or through privies acting on its behalf, is hereby restrained perpetually from exercising any rights pursuant to the said mortgage by way of sale or otherwise of the plaintiff’s property known as No. 239 Cameroun Road Aba.

(iii) It is hereby declared that the plaintiff is not owing the defendant the sum of N1,047,249.00 or, subject to this judgment, any amount at all.

(iv) Taking into account the sum of N652,326.86 and after setting it off in favour of the defendant against the plaintiff, it is hereby declared that defendant owes the plaintiff the sum of N3,973,277.91 (Three million, nine hundred and seventy three thousand, two hundred and seventy seven naira ninety kobo).

(v) Defendant will pay to plaintiff costs fixed at N1,000.00 (One thousand naira) which costs include plaintiff’s out-of-pocket expenses and all court fees incidental to these proceedings.

Judgment for plaintiff.”

Aggrieved by the above decision, the defendant appealed to the Court of Appeal, Port Harcourt Judicial Division. In an unanimous judgment the Court of Appeal allowed the appeal. The judgment of the High Court and its order for costs were set aside. The plaintiff was ordered to pay the sum of N652,326.86 to the defendant being the amount established by the defendant against the plaintiff at the trial.

Dissatisfied with the judgment of the Court of Appeal, the plaintiff has appealed to this court. The parties filed and exchanged briefs of argument which were adopted at the hearing.

Chief Udechukwu learned counsel for the plaintiff has submitted seven issues as arising for determination in this appeal. These issues can be conveniently reduced to five as follows -

(i) Whether upon a calm view of the pleadings, the evidence and the relevant statutory provisions, the Court of Appeal’s decision that appropriate and requisite consent had been obtained for the validation of defendants Deed of Legal Mortgage, Exhibit 3, is sustainable.

(ii) Whether the defendant's Exhibit 3, the Legal Mortgage, is referable to the plaintiff's property at No. 239 Cameroun Road, Aba, so as to be enforceable against that property by way of exercise of a right of sale at the defendant's instance based on defendant's Exhibit 3, even if there was the requisite consent.

(iii) Whether upon a calm view of the pleadings and evidence, the Court of Appeal was right to hold the plaintiff did not prove the defendant's indebtedness to him as claimed.

(iv) Whether upon a calm view of the pleadings, the evidence and legal principles involved in the case the award of N652,326.86 made by the Court of Appeal in favour of the defendant is justifiable.

(v) Whether the decision reached by the Court of Appeal reversing the judgment of the High Court is not against the weight of evidence.

Issues (i) & (ii) which deal with the Deed of Mortgage (Exhibit 3), will be treated together. It was submitted that the Court of Appeal was in error when it held that the appropriate and requisite consent had been obtained to validate the Deed of Mortgage. Counsel said while the plaintiff pleaded non-compliance with the provisions of the Land Use Act as regards consent, the defendant pleaded compliance with the provisions of Imo State Land Law in that regard. He referred to para. 10(3) of the Amended Statement of Claim and para. 4(ii) of the Statement of Defence. He said although the sole witness for the defendant said in evidence that "*an application was made for Governor's consent before Exhibit 3 was executed*", the witness did not say whether or not the consent was granted. That the Court of Appeal over-looked the fact that Exhibit 3 was made on 12th May 1978, and was therefore subject to the provisions of the Land Use Act No.6 of 1978 which came into operation on 29th March, 1978. He said the consent which must therefore be obtained is the one prescribed under section 22 of the Land Use Act and not the Commissioner's consent prescribed under the State Land Law. It was contended that on the authority of *Savannah Bank v. Ajilo* (1989) 1 NWLR (Pt.97) 305, the Court of Appeal ought to have declared Exhibit 3 null and void as found by the trial court.

It was also contended that even if the requisite and appropriate consent was obtained to validate Exhibit 3, Exhibit 3 *ex facie* is not referable to the plaintiff's property at No. 239 Cameroun Road, Aba. That there being no nexus between the Deed of Mortgage and No. 239 Cameroun Road, the defendant cannot exercise any right under the mortgage deed in respect of that property. He said Exhibit 3 relates only to No. 240 Cameroun Road, Aba, and not to No. 239 Cameroun Road. It was argued that once there is a document evidencing sale of land or a mortgage for that matter,

oral evidence of the sale or mortgage would be excluded and the question as to what land was sold or mortgaged has to be settled by reference to the document only. He referred to the cases of *Olaloye v. Balogun* (1990) 5 NWLR (Pt.148) 24 at 26, *Abiodun v. Adehin* (1962) 2 SCNLR 305; (1962) 1 All NLR 550 at 555. He said although the plaintiff did not deny that he offered his No. 239 Cameroun Road to the defendant as security for the loan, the defendant can only exercise its right of sale under a Deed of Mortgage relating to No. 239 Cameroun Road only and no other. Exhibit 3 relates to No. 240 and not to No. 239 Cameroun Road, Aba. B

Chief Ifebunandu, learned counsel for the defendant responding said the Court of Appeal gave adequate treatment and consideration to both the Imo State Land Law and the Land Use Act with regard to Exhibit 3 and rightly came to the conclusion that the necessary consent was obtained for the execution of Exhibit 3. He said it is common ground that the Commissioner for Works and Housing endorsed his consent on Exhibit 3. That it was properly done because by Legal Notice No.4 of 1979 published in the Imo State Gazette, the Military Governor/Administrator of Imo State had delegated his authority to give consent under section 22 of the Land Use Act as empowered by section 45(1) of the same Act, to the Honourable Commissioner for Works and Housing of Imo State with effect from 29th March 1978. He said the plaintiff had failed to prove his alleged non-compliance with the Land Use Act. That the case of *Savannah Bank v. Ajilo & Anor* (supra) relied upon by the plaintiff does not apply here because in that case no consent was obtained in respect of the deed in question. He said Exhibit 3 herein was valid and has got all the requirements of a deed of legal mortgage and enforceable against the plaintiff. He referred to the case of *Ejikeme v. Okonkwo* (1994) 8 NWLR (Pt.362) 266; (1994) SCNJ 131 at 139. C D E F

It was also submitted that the argument of the plaintiff that the deed of mortgage does not refer to No. 239 Cameroun Road, Aba, is not tenable. That although the plaintiff pleaded that No. 239 was not the property mortgaged, he led no evidence to that effect, but rather admitted in his evidence on page 44 of the record that *"No. 239 Cameroun Road is my property. I secured the loan from the bank by way of mortgage of the property."* He said this admission knocks the bottom out of the plaintiff's claim that the deed does not refer to No. 239 but to No. 240 Cameroun Road. The Court of Appeal was therefore right in rejecting plaintiff's claim that the deed, Exhibit 3, did not refer to property known as No. 239 Cameroun Road, Aba. There was no doubt in the mind of the parties that it was the property referred to as No. 239 Cameroun Road, Aba that was in issue in Exhibit 3. G H

It is true that while the plaintiff pleaded non-compliance with the provisions of the Land Use Act as regard consent for Exhibit 3, the defendant pleaded that consent of the Commissioner for Works and Housing was obtained in accordance with the provisions of the Imo State Land Law. But the learned trial judge in his judgment declared the Deed of Mortgage (Exhibit 3) as "null and void and unenforceable and of no effect whatsoever." What were his reasons? On page 101 of the record, he said thus -

"The law in force applicable to and relevant to the validity of defendant's Exhibit 3, the Deed of Mortgage is the Land Use Act 1978. The consent which should be obtained was that of the Governor; not any commissioner. There is no evidence that the Governor delegated the authority to give consent to the Commissioner. Any such delegation must be evidenced in writing or by notice. The law providing that consent of the Governor must be had is mandatory. See Savannah Bank of Nigeria Ltd. & Anor v. Ajilo & Anor (1989) 1 NWLR (Pt.97) 305.

Exhibit 3, the Deed of Mortgage is null and void and of no effect whatsoever. The Deed of Mortgage is unenforceable against the plaintiff's property at No. 239 Cameroun Road, Aba, registered as No. 26 at page 26 in Volume 751 of the Lands Registry in the Office at Enugu now Owerri."

On appeal to the Court of Appeal, it was observed thus -

"On the finding above that there is no evidence that the Governor delegated the authority to give consent to the Commissioner and that any such delegation must be evidenced in writing or by Notice, such a notice was published in the Imo State of Nigeria Gazette as Imo State Legal Notice No.4 of 1979. In it the Military Governor (Military Administrator) of Imo State was empowered pursuant to section 45(1) of the Land Use Act to delegate his powers to give the said consent to the Commissioner for Works and Housing with effect from 29th day of March 1978 when the Land Use Act come into force

It is pertinent to point out that section 73(1)(a) of the Evidence Act enjoins the trial court to take judicial notice of the said Imo State Legal Notice No.4 of 1979."

It was also clearly pointed out in the judgment that even before Legal Notice No.4 of 1979 was enacted, section 4(b) of the Land Use Act empowered the Military Governors until other provisions were made in that behalf, to administer land under their control and management, in accordance with the provisions of the applicable State Land Law or Land Tenure Law as the case may be, with such modifications as would bring those laws into conformity with the Land Use Act or its general intendment. To that extent, the consent given under the Imo State Land Law would equally have been validly given.

Section 4 of the Land Use Act reads -

"4. Until other provisions are made in that behalf and subject to the provisions of this Act, land under the control and management of the Governor under this Act shall be administered -

(a) In the case of any state where the Land Tenure Law of the former Northern Nigeria applies, in accordance with the provisions of that law; and

(b) in every other case, in accordance with the provisions of the State Land Law applicable in respect of the State Land in the State, and the provisions of the Land Tenure Law or the State Land Law, as the case may be, shall have effect with such modifications as would bring those laws into conformity with this Act or its general intendment."

And section 45(1) of the same Act provides -

"45.(1) The Governor may delegate to the State Commissioner all or any of the powers conferred on the Governor by this Act, subject to such restrictions, conditions and qualifications, not being inconsistent with the provisions, or general intendment, of this Act as the Governor may specify."

So that in whichever way one looks at it in the circumstances of this case, the consent endorsed on the Legal Mortgage, Exhibit 3 by the Commissioner of Works and Housing of Imo State on the 12th May 1978 was validly and properly made. It is ironic that the plaintiff who is the beneficiary under the said deed of mortgage is the one seeking to declare same a nullity. He pleaded amongst others that -

(1) The contents of the mortgage deed were not explained to him;

(2) he was an illiterate, and that the provisions of the Illiterates Protection Law were not complied with;

(3) Undue influence; and

(4) non-compliance with the provisions of the Land Use Act, 1978.

The trial High Court found against him on all except (4) above. On appeal, the Court of Appeal overruled the High Court on (4) as explained above. I think the Court of Appeal was right.

As to whether or not Exhibit 3 is referable to the plaintiff's property at No. 239 Cameroun Road, Aba, it is sufficient to say although the plaintiff pleaded in paragraph 11 of his Amended Statement of Claim that Exhibit 3 is not referable to premises at No. 239 Cameroun Road, Aba, he led no evidence to that effect at the trial. He did not say it is referable to No. 240 or to any property at all. In his evidence before the High Court he said -

"The defendant gave me a loan of N30,000.00 (Thirty Thousand Naira) to finance the Letters of Credit. The loan was by way of overdraft

facilities. I executed documents to that effect.....

No. 239 Cameroun Road, Aba, is my property. I secured the loan from the bank by way of mortgage of the property."

Under cross-examination he said -

B *"I took the title deed to the bank because of the N30,000.00 credit facility the bank granted me. I did not make any evaluation report of the property. It was the bank who made it. I knew when the bank was making it. The bank gave me N30,000.00 as a result of the evaluation report."*

The plaintiff therefore definitely knew that he was mortgaging No. 239 Cameroun Road, Aba, to the defendant.

C Defendant's single witness also testified on page 45 of the record and said as follows-

"I know the plaintiff. He is our customer at the Milverton Branch of the bank. The bank granted him an overdraft of N30,000.00 first.

D *The grant was in 1978. To secure the facility he mortgaged his property at No. 239 Cameroun Road, Aba."*

And the High Court in its judgment on page 95 found thus -

E *"I do not believe the plaintiff that he was such a stark illiterate as he purported to paint himself. He was literate. He executed defendant's Exhibit 3 with the full knowledge that he was using his property as a security for the loan of N30,000.00 he applied for from the defendant."*

The High Court therefore rightly found on the evidence before it, that the plaintiff mortgaged the property No. 239 Cameroun Road, Aba, when he executed Exhibit 3. The Court of Appeal agreed with that finding and nothing has been advanced before us to disturb it. I will accept it too.

F Issues (i) & (ii) are therefore both answered in the affirmative.

Issues (iii) & (iv) deal with proof of indebtedness by the parties herein. They will be considered together.

G Chief Udechukwu submitted that in view of Exhibits 4 - 16 tendered by the plaintiff without objection from the defendant, the onus shifted to the defendant to show how the funds represented by those teller Exhibits were applied. He said the Court of Appeal was wrong to have put that burden on the plaintiff.

H It was also submitted that upon a calm review of the pleadings and evidence, the Court of Appeal was wrong to hold that the plaintiff did not prove the lodgment of the sum of N4, 625,604.77 into his account with the defendant. That this view ran counter to the view that paragraph 20 of the Statement of Claim was not denied and must be taken to have been admitted. He said the banktellers (Exhibits 4 - 16), showed on their faces that the defendant received the payments in dispute. He referred to the

cases of *Aeroflot Soviet Airlines v. U.B.A. Ltd.* (1986) 3 NWLR (Pt.27) 188; (1986) 5 S.C. 217; *Odulaja v. Haddad* (1973) 1 All NLR 191; *Fashanu v. Adekoya* (1974) 1 All NLR 35s and *Ashonofe v. O.S.N. Ltd.* (1978) 1 FCA 123. That the High Court rightly gave effect to Exhibits 4 - 16 by doing arithmetical calculations necessary to ascertain their evidential value. B

It was further submitted that on a calm of the record, the award of N652,326.86 by the Court of Appeal in favour of the defendant was unjustifiable. He said the defendant had no counter-claim before the court and it is trite law that the court cannot award to any party what that party did not claim.

Chief Ifeunandu in reply, said the Court of Appeal was right when it held that the plaintiff had failed to establish that the defendant is indebted to him. That although the plaintiff pleaded in paragraph 20 of the Statement of Claim that between 1980 and 1983, he made a total lodgment of N4,625,604.77 he led no evidence to prove the amount. He said Exhibits 4 - 16 were mere teller booklets and no evidence was led of the dates, payer or the amount in each teller. He referred to the case of *Aeroflot v. UB.A. (supra)*. That the learned trial Judge was wrong to have descended into the arena to sort out and add up the various amounts in the various teller booklets to arrive at the amount given in his judgment and that the Court of Appeal rightly rejected that exercise of the learned trial Judge. He cited the cases of *Bornu Holding Co. Ltd. v. Bogoco* (1971) 1 All NLR 324; *Duriminyia v. Commissioner of Police* (1961) NRNLR 70; *Wilcox v. Queen* (1961) 2 SCNLR 296; (1961) All NLR 631; *Owe v. Oshinbajo* (1965) 1 All NLR 72. He said as the plaintiff did not offer any evidence on the various sums of money lodged in various Exhibits 4 - 16, the trial court by its action did not give the parties the opportunity to be heard on the various sums of money relevant to each exhibit. D E F

On the N652,326.86 awarded to the defendant by the Court of Appeal, learned counsel submitted that it was the necessary consequential order following the setting aside of the judgment of the trial High Court which accorded with the provision of Order 3 rule 23 of the Court of Appeal Rules under which the court below can make any order that ought to have been made by the trial court. G

It is evident from the record that the plaintiff actually pleaded in paragraph 20 of the Statement of Claim that between 1980 and 1983 he made total lodgments of N4,625,604. 77 and that he will rely on the relevant paying-in-tellers and or the Statement of Accounts sent to him by the defendant. The defendant in the opening paragraph of the Statement of Defence said - H

“Save as hereinafter expressly admitted the defendant denies each and every allegation of fact contained in the plaintiff’s Statement of Claim as if the same were set out seriatim and specifically traversed. “

B And thereafter in paragraph 11 of the body of the Statement of Defence said that -

“the defendants are not in a position to admit or deny paragraph 20 of the statement of claim and the defendants will put the plaintiff to the strictest proof thereof.”

C Counsel for the plaintiff submitted that para 11 of the Statement of Defence is tantamount to an admission of the averments in para 20 of the Statement of Claim relying on *Lewis & Peat v. Akhimien* (1976) 7 S.C. 157. That submission to me was certainly not the ratio in *Lewis & Peat*. In a situation which I have set out above, such a pleading cannot amount to an admission, but a clear denial of that paragraph of the Statement of Claim. The Court of Appeal was therefore wrong when it said the defendant did not traverse para. 20 of the Statement of Claim. It is settled that each paragraph of a Statement of Defence must not be considered in isolation but in conjunction with other paragraphs, so that the issues joined in the pleadings can be properly ascertained. (See *Pan Asian African Co. Ltd. v. NICON. (Nig.) Ltd.* (1982) 9 S.C. 1 at 45 - 48.

E The plaintiff therefore, had the burden of proving that the defendant was indebted to him in the sum of N4,625,607.77 or any lesser sum as pleaded in paragraph 20 of his Statement of Claim.

F The next question now is - How did the plaintiff prove defendant’s indebtedness to him as averred in the pleadings? On page 42 of the record, the plaintiff said amongst others thus -

G *“The defendant issued me with tellers with which I made deposits into the account. The tellers are in duplicate. These are the tellers with which I made payments. Counsel seeks to tender a book of tellers containing 47 tellers. No objection. Book of tellers from 8/9/81 to 29/12/81 admitted as plaintiff’s Exhibit 4. This is another booklet of tellers with which I made payments to the account. Counsel seeks to tender it. No objection. Booklet from 3/3/80 to 9/4/80 admitted as plaintiff’s Exhibit 5. This is another booklet I used to make payments. Counsel seeks to tender it. No objection. Booklet of 45 pages from 5/1/82 to 9/3/82 admitted as plaintiffs Exhibit 6 “*

H And so on and so forth. The evidence continued in this mode until the final booklet of tellers was tendered as Exhibit 16. Chief Ifebugandu was therefore right when he said the plaintiff merely tendered teller booklets (Exhibit 4 - 16), to prove the indebtedness. Clearly there was no evidence of

dates, the payer and the amount involved in each teller in the various booklets which constituted Exhibits 4 - 16 (see *Aeroflot v. U.B.A.* (supra)).

The Court of Appeal on page 238 of the record had this to say on this mode of proof adopted by the plaintiff at the trial -

"However, in seeking to prove at the trial in the court below that he lodged N4,625,604.77 into this account No. 1466 with the appellant on bank tellers vide Exhibit 4 - 16, no effort was made to state the amounts represented in each of these exhibits or in each booklet containing the duplicate tellers in authentication thereof. This type of lumped up and uncertified calculations of money represented on entries such as those on Exhibits 4 to 16 tendered at the instance of the respondent has since by settled law been deprecated as not the ideal way of proving monetary transactions or entries in the case of Muhammadu Duruminiya v. Commissioner of Police (1961) NNLR 70 and Bornu Holding Co. Ltd. v. Alhaji Hassan Bogoco (1971) 1 All NLR 324 at 333."

I say again that it was only the plaintiff who testified on his own behalf. And he ended his evidence on page 45 of the record without stating what amount he was able to show or prove that the defendant owed him as represented by his teller booklets (Exhibits 4 - 16). It was therefore the learned trial Judge himself who decided to sort out the various amounts in the various tellers and other exhibits and did all his calculations in his Chambers to arrive at the figures or amounts given in his judgment. He said on page 103 that -

"In this case, ascertained amounts in evidence which were creditable to the account of the plaintiff, which the defendant, as his banker, owed him as debt, and for which the defendant was accountable to the plaintiff are as follows:

- (I) From plaintiff's Exhibit No.1 - N72,928.16
- (II) From plaintiff's Exhibit No.3 -
- (a) Letter dated 24/11/77 N9,804.00
- (b) Letter CB/FED/LC/78 - 56 N8,578.43
- (III) From plaintiff's Exhibit Nos. 4 - 16 N4,625,604.77
- Total N4,716, 915.36

Ascertained amounts in evidence debit to the account of the plaintiff, which the plaintiff, as its customer, owed the defendant are as follows:

- (I) Paragraph 7 of the Statement of Claim and paragraph 4 of the Statement of Defence - N30,000.00

(II) Paragraph 13 of the Statement of Defence and plaintiff's Exhibit No. 17 N622,326.86

N652,326.86"

The Court of Appeal commenting on this extra-judicial exercise carried out by the learned trial Judge said on page 243 thus -

"Furthermore, I see nothing wrong in the trial court's receipt in evidence of plaintiff's Exhibits 4 - 16 i.e. exhibits evidencing lodgments in the defendant bank....."

This is with the proviso that the sum total on the tellers agreed with the sum pleaded by the plaintiff. This he did not make out at the trial. Furthermore, it is not the function of a trial Judge by his own exercise and ingenuity as happened in this case to supply the evidence or carry out the mathematics of arriving at the answer which only evidence, tested under cross-examination could supply and attest. See Ikenye v. Ofune (1985)2 NWLR (Pt.5) 1 at 12, Aeroflot v. U.B.A. (supra)."

I think the Court of Appeal was right. It was also right to have set aside the award of N4,716,915.36 made to the plaintiff above as a result of the extra-judicial exercise which was in any way never proved by the plaintiff against the defendant.

I must also add here immediately that while the plaintiff's claim is for N4,625,604.88 (see paras. 20 and 22 of the Amended Statement of Claim above), the High Court awarded it the sum of N4, 716,915.36 which is higher or more than the amount claimed. It is settled that a court is without power to award to a claimant what he does not claim. A court of law may only award less but not more than what the parties have claimed (see Ekpenyong & Ors. v. Nyong & Ors. (1975) 2 S.C. 71; Bonny Ors. v. Yougha & Ors. (1969) 1 All NLR 396).

In the same vein I can say straight away that the Court of Appeal was wrong when after setting aside the award made to the plaintiff by the trial court, it proceeded to make the award of N652,326.86 which the learned trial Judge had by his own arithmetic and calculations in chambers found to be owed by the plaintiff to the defendant. The short answer as explained above, is that the defendant had not claimed anything before the learned trial Judge. It did not file any counterclaim against the plaintiff. The award made by the lower courts in favour of the defendant was a grave error which must therefore be set aside. It must be remembered that the High Court used the award it made, in favour of the defendant as a set-off to reduce the amount owed by the defendant to the plaintiff to N3,973,277.91 (see order No. (IV) of the judgment of the High Court above).

I therefore hold that the Court of Appeal was right in holding that the plaintiff failed to prove the defendant's indebtedness to him as claimed.

The Court of Appeal was however wrong to have made the award of N652,326.86 in favour of the defendant which it never claimed.

The last issue (v) which is whether the decision reached by the Court of Appeal reversing the judgment of the High Court is not against the weight of evidence, would appear to have been answered already in my consideration of the other four issues earlier on. It was certainly not against the weight of evidence to have reversed the decision rendered in favour of the plaintiff. It was however improper for the courts to have awarded anything to the defendant who had no claim before them. And to that extent his appeal succeeds in part and fails in part.

To sum up, the appeal by the plaintiff against the decision of the Court of Appeal dismissing his claims against the defendant is hereby affirmed. Plaintiff's appeal against the award of N652,326.88 made to the defendant by the Court of Appeal is however allowed. The award in favour of the defendant is accordingly set aside. Plaintiff's claims are dismissed in toto.

The defendant is entitled to the costs of this appeal which is assessed at N1,000.00 (One Thousand Naira) only against the plaintiff.

BELGORE JSC

Section 45(1) Land Use Act empowers the State Governor to delegate his powers of consent to a State Commissioner. Exhibit 3 has endorsed on it the necessary consent as statutorily required by the State Commissioner for Works and Housing. The holder of a right of occupancy, evidenced by a certificate of occupancy, is the one to seek consent of the Governor to alienate, transfer, mortgage etc. There is no doubt the consent given on Exhibit 3 was at the instance of the appellant who was in need of fund from the respondent by way of mortgage.

It is not from him one must hear that the consent he obtained was void. *Solanke v. Abed* (1962) 1 SCNLR 371; (1962) 1 All NLR 230; *Oilfield Supply Centre v. Johnson* (1987) 2 NWLR (Pt.58) 625; *Savannah Bank (Nig.) Ltd. v. Ajilo* (1989) 1 NWLR (Pt.97) 305. The appellant, being the holder of the right of occupancy over the house, i.e. No. 239 Cameroun Road, Aba, was to seek consent and it is unconscionable for him to turn round and maintain that the consent of the Governor he obtained was flawed, having received valuable consideration i.e. the loan, from the respondent.

There is no denial of the fact that there was a mortgage of the house at Cameroun Road, Aba for which the appellant received a loan. The allegation that it was not in respect of No. 239 but in respect of No.

240 is that of the appellant as plaintiff. The burden was on him to prove and he failed to adduce evidence to discharge this burden. Even assuming that he did, it is clear he received a loan and mortgaged a property and if that property is not No. 239 Cameroun Road, Aba, he then deceived the respondent bank. In that case he has no clean hand and no equity will come to his aid.

As for the contention that Exhibit 3 is void, it is an untenable submission. The Evidence Act in S.73(1) thereof enjoins courts to take judicial notice of all enactments and rules and notices in the official gazettes. Legal Notice No.4 of 1979 of Imo State is clear in its intendment in relation to S. 45(1) of the Land Use Act. Thus the consent in Exhibit 3 given by the Commissioner for Works and Housing, was perfectly valid.

I find no merit in this appeal and for the above reasons and the fuller reasons in the judgment of my learned brother, Kutigi, J.S.C. which I had the privilege of reading in advance, I also dismiss it with N1,000.00 costs to the respondent.

OGUNDARE JSC

I have had the privilege of a preview of the judgment of my learned brother Kutigi, J.S.C. just read. I agree with him that the appeal in the main be dismissed and the judgment of the court below affirmed except as regards the award of N652,326.86 made in favour of the defendant which, not being claimed by the defendant, is hereby set aside. I dismiss plaintiff's claims in toto.

I abide by the order for costs made in the lead judgment.

I need only to say a few words of my own. Plaintiff by paragraph 22 of his amended Statement of Claim, claimed as hereunder:

"A. Declaration that the Deed of Legal Mortgage purportedly made between the plaintiff as Mortgagor and the defendant as Mortgagee registered as No. 39 at page 39 in volume 208 of the Land Registry in the office at Owerri is otiose, null and void or in any event unenforceable against the plaintiff's property at No. 239 Cameroun Road, Aba.

B. An injunction perpetually restraining the defendant by itself or through privies acting on its behalf from exercising any rights pursuant to the said mortgage by way of sale or otherwise of the plaintiff's property known as No. 239 Cameroun Road, Aba.

C. Declaration that upon a proper account taken, the plaintiff is not owing the defendant the sum of N1,047,249.00 as claimed by the defendant in its letter of the 22nd of July, 1988 addressed to the plaintiff.

D. The sum of N73,217.54 being refund due to the defendant on account of cancelled letters of credit and excess debit on letters of credit

processed by the defendants as plaintiff's Bankers on behalf of the plaintiff.

E. The sum of N4,625,604.77 less any sum which the defendant may prove or which the court may find due to the defendant arising from its loan or other charges against the plaintiff."

He testified in support of his case and called no witness other than himself. He testified as hereunder:

"The defendant is my bank. I have an account at defendant bank at Milverton Avenue Aba. The Account with the defendant is current. My relationship with the defendant since I opened the account has been good and cordial. I am an importer of goods from overseas. It is the defendant that opens letters of credit for me for the business The defendant gave me a loan of N30,000.00 (Thirty Thousand Naira) to finance the letters of credit. The loan was by way of overdraft facilities. I executed documents to that effect. It is plaintiff's counsel at Enugu called Barrister Okoye who was then the Chief Executive of the defendant who gave me the documents to execute. The documents were executed at Barrister Okoye's Office at Enugu. The document was not read to me when I executed it. I cannot read and write in English. I am illiterate. It was at the Bank that I learnt how to sign my signature. What constitutes my signature is I write B and I shed - with vertical strokes. No. 239 Cameroun Road, Aba is my property. I secured the loan from the bank by way of mortgage of the property. I do not owe the defendant N1,047,247.00. The documents of mortgage are not binding on me. The conditions were not explained to me. The defendant is not right to sell my property. The defendant is threatening to sell it. I do not owe the bank any amount at all. The defendant is owing me. I ask the court to make an order for an independent accountant to determine how much the bank owes me. I also ask the court to declare the deed of legal mortgage null and void."

Cross-examined the plaintiff deposed:

"I do not owe the bank at all. I want an independent accountant to determine how much the bank is owing me."

To further questions he answered -

"I took the title deed to the bank because of the N30,000.00 credit facility the bank granted to me."

The only witness for the defendant testified inter alia as follows:

"I know the plaintiff. He is our customer at the Milverton Branch of the bank. The bank granted him an overdraft of N30,000.00 first. The grant was in 1978. To secure the facility he mortgaged his property at 239 Cameroun Road Aba."

In the light of the evidence of the above two witnesses, it is difficult to see how it could be said that the property mortgaged by the plaintiff to the defendant is not No. 239 Cameroun Road, Aba.

Further on plaintiff's claims A and B, it was the duty of the plaintiff, as mortgagor, to seek the consent of the Governor for him to mortgage his property to the defendant. That is what the law says - see: The Land Use Act. For him to turn round a few years after executing the mortgage deed (and when as a result of his default the mortgagee, that is, the defendant sought to exercise its rights under the mortgage deed) to assert that the mortgage deed was null and void for lack of the Governor's consent, is, to say the least, rather fraudulent and unconscionable. It has become a vogue these days for mortgagors in similar circumstances to fall upon the decision of this court in *Savannah Bank v. Ajilo* (1989) 1 NWLR (Pt.97) 305 as a vehicle to escape from their liability under the mortgage deeds they have entered into. I think that is an unfortunate development and I do not think that that case, that is, *Savannah Bank v. Ajilo* (supra) decides such a thing. In any event, I hope some day this court will have an opportunity to revisit that case. To allow a mortgagor to resile from his liability on the ground of his failure to do that which the law enjoins him to do will only result in paralysis of economic activities in this country. This court, I dare say, will not allow such a situation to arise.

However, on the face of the deed of mortgage tendered in these proceedings it is stated that consent was given by the Commissioner. This, in my respectful view suffices. In the light of all the evidence therefore. I cannot see how plaintiff's claims A and B can succeed.

The evidence adduced by the plaintiff does not support any of the other claims either. The court below in my respectful view rightly dismissed all the claims and I can see no justification for interfering with its decision.

Consequently I too dismiss this appeal with costs as assessed in the lead judgment of my learned brother Kutigi, J.S.C.

MOHAMMED JSC

I also agree with the opinion of my learned brother, Kutigi, J.S.C. in the judgment, just read, that the Court of Appeal was right in setting aside the judgment of the trial High Court in the suit filed by the appellant against the respondent. I agree also that there is no basis for the award of N652,326.86 which the Court of Appeal made in favour of the respondent. The defendant did not claim that amount and there is no evidence to support such award.

It has been settled through several authorities by this court that a court is without power to award to a party that which he did not claim. It is therefore a serious error committed by the lower court to award a relief which the respondent did not apply for either through a direct claim or a counter-claim. *Etim Ekpenyong and 3 Ors. v. Inyang Efiong Nyong and 6 ors.* (1975) 2 S.C. 71 at 81-82 and *Union Beverages Ltd. v. Owolabi* (1988) 2 NWLR (Pt.68) 128; (1988) 1 NSCC 96 at 99. B

I therefore concur in dismissing the main appeal and in setting aside the award of N652,326.86 made by the Court of Appeal in favour of the respondent. I abide by all the consequential orders made in the lead judgment. C

ADIO JSC

I have had the advantage of reading, in draft, the judgment just read by my learned brother, Kutigi, J.S.C., and I agree that the appeal succeeds in part and fails in part to the extent stated in the lead judgment of my learned brother: I abide by the consequential orders, including the order for costs. D

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