

**SUPREME COURT OF NIGERIA**  
21ST FEBRUARY, 1997. SC. 161/1989  
**CORAM:- A. B. WALL, M. E. OGUNDARE, U. MOHAMMED,**  
**Y. O. ADIO, A. I. IGUH, JJSC.**

JOHN ANDY SONS & CO. LTD. .... APPELLANT  
AND  
NATIONAL CEREALS RESEARCH INSTITUTE ..... RESPONDENT

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**APPEALS** - *Concurrent findings - About nature of contract - Whether justified by the evidence considered.*

**CONTRACTS** - *Agreement between the parties - Where found to be Exhibit 2 - And there was no evidence of agreement to review - It is wrong for court to base computation of damages - On a different exhibit.*

**CONTRACTS** - *Breach of contract - Where there was no breach of contract - Whether appellant's claim to payment on quantum meruit - Has any basis.*

**CONTRACTS** - *Quantum meruit - Where there was no evidence on which to conduct the exercise - Trial court should not give an order - That the parties should determine quantum meruit out of court.*

**DAMAGES** - *Remitting case to trial court - For the award of damages - Is unnecessary in this case.*

**JUDGMENTS** - *Functus officio - Ones an issue has been determined - The judge becomes functus officio after the judgment - And cannot reopen the matter.*

**JUDGMENTS** - *Findings - Of trial judge in respect of an exhibit - Should not be disregarded by that judge - Unto making a wrongful award.*

**FACTS**

The plaintiff/appellant and the defendant/respondent entered into a contract for the appellant to construct a laboratory block for the respondent at Uyo in 1978. The appellant claimed before the High Court a total sum of N 1,000,000.00 as special and general damages for the respondent's breach of the contract. The trial court found that the parties entered into contract for the construction of 1/4 laboratory, that the appellant did not handle some aspects

of the construction, that the agreement between the parties is Exhibit 2. By this funding there was no breach of contract that entitles the appellant to recover damages. But the trial court relied on Exhibit 42, a different document (bill of quantities) solely produced by the appellant vide one firm. It Ordered the parties to go and determine payment to be made to the appellant on the basis of quantum meruit, failing which any of the parties should reopen the issue before the court. It also awarded some small amount to the appellant. Being dissatisfied, appellant appealed while the respondent cross appealed to the Court of Appeal. The lower court dismissed the appellant's appeal and upheld the respondent's cross appeal. Appellant has further appealed to the Supreme Court raising 4 issues.

**ISSUES FOR DETERMINATION**

*"1 Whether upon a correct interpretation of Exhibits 3, 4, and 5, the contract between the Appellant and the Respondent was for the construction of 1/2 or 1/4 Laboratory.*

*2. Whether the Court of Appeal was right in law in not awarding any amount in favour of the Appellant in respect of plumbing work on a quantum meruit basis or in the alternative remitting the case back to the trial court for the assessment of the amount due to the Appellant in respect of the plumbing work."* Etc, see p. 448

**HELD** (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)  
**Concurrent findings**

1. Issue 1 was raised and canvassed in the Court of Appeal and is being re-canvassed before this court. The issue of whether the appellant contracted for the construction of whole, half or one quarter of the laboratory revolves around the facts in this case, as correctly pronounced by the trial court and the Court of Appeal in their judgments respectively. The argument put forward by learned counsel for the appellant is nothing but a misconception of the principle of law applicable. The concurrent findings of fact on the issues are justified by the evidence considered and accepted and I see no reason to interfere with them. (p. 450 H & 452 H)

**Breach of contract**

2. The learned trial Judge found that there was no breach of contract. The appellant through P.W. 1 also testified that as at 4th December, 1980, that was after inspection of the site in company of the defendant on 27th November, 1990, there was nothing left to be paid, then the issue of payment being made to the appellant by the respondent on quantum meruit basis was a non

- issue and could not and ought not to have arisen at all. (p. 454 G)

***Contracts - Quantum meruit***

3. The learned trial Judge then proceeded to give the following directive to the parties: -

*“On this ground, I have to invite both counsel representing both parties in this suit to go into a fresh negotiation and endeavour to arrive at some acceptable sum of money to be paid to the plaintiff on the basis of Quantum Meruit. Where they fail to arrive at any agreement, this aspect of the case can be revived in this Court by any of the parties.”*

This order is not only wrong but absurd and unwarranted having regard to the previous findings of the learned trial Judge that there was no evidence before him to conduct the exercise, even if he had wanted. (p. 456 B)

***Functus officio***

4. After the judgment he was functus, officio in the matter and could not re-open it again in order, to take fresh evidence from the parties to make the quantum meruit award. Once an issue or issues have been raised and determined by the court between the litigating parties, the court becomes functus officio to either direct or allow the parties to re-open the same issues before it for relitigation. (pp. 456 D & 457 A)

***Judgments - Findings***

5. This was not the end of the blunder committed by the learned trial judge. He disregarded his findings on Exhibit 2 and fell back on Exhibit 42 to make his calculation which made him to award N10,062.26 to the appellant. If he had adhered to the original figure of N228,250.00 as contained in Exhibit 2, he would come to conclusion that appellant was paid an excess of N441.43 by the respondent as given in evidence by D.W. 2. (p. 456 E)

***Agreement between the parties***

6. I have said previous in this judgment that Exhibit 2 was the agreement and the bill of quantities agreed upon by the appellant and the respondent for the construction of 1/4 of the laboratory. This was also the finding made by the learned trial judge and affirmed by the Court of Appeal. As there was no evidence that the parties agreed to review the contract sum in Exhibit 2, the learned trial Judge was fatally wrong to base his calculations and computation on Exhibit 42. (p. 457 D)

***Damages - Remitting case to trial court***

7. As for Issue No. 4 there was no need in my view, for the Court of Appeal to remit the case to the trial Court for the award of damages under paragraph 47 (b) and (e) of the Further Amended Statement of Claim for the following reasons: -

1. Based on Exhibit 2, there was nothing left to be paid to the plaintiff as the correct calculations showed that he was over-paid.

2. There was no finding by the trial Court and the Court of Appeal that there was a breach of contract which could have entitled the appellant to award of damages. I therefore answer Issues 3 and 4 in affirmative. (p. 457 D)

**REPRESENTATION**

No appearance for the Appellant

Chief A. T. Sokan for the Respondent

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**CASES REFERRED TO**

Sage v. Northern States Marketing Board (1972) 1 SC 28 at 46

Omorie v. Idugiemwanye (1985) 2 NWLR (Pt. 5) 41

Adebanjo v. Brown (1990) 3 NWLR (Pt. 141) 611

E Appleby v. Myers (1967) L.R. 2 C.P. 651 at 659 - 660

Shodehinde v. Registered Trustees of Ahmadiyya Movement in Islah (1980) 1 SC 163 AT 182

Nnajofo v. Ukonu (1985) 2 NWLR 9 pt. 9) 686

**F STATUTE REFERRED TO**

Evidence Act s. 76

**LEAD JUDGMENT BY WALI JSC**

The plaintiff's claim against the defendant as contained in the Writ of Summons dated 24th October, 1981 and filed on 26th October, 1981 in the High Court of Justice, Cross River State, holden at Uyo is as follows:-

*"N1,000,000 (One Million Naira) being special and general damages for breach by the defendant of a contract (for the construction of a laboratory block at Uyo in Cross River State) made between the plaintiff and the defendant in 1978."*

*The defendant denied the plaintiff's claim.*

*Pleadings were ordered, filed and exchanged. They were settled after several amendments, and in paragraphs 47 and 48 of the Further Amended Statement of claim, the plaintiff particularised his claim as fol-*

lows:

# *PARTICULARS OF BREACH*

(a) Deduction by the Defendant of the contract from that of a whole laboratory by a letter dated 1st February, 1978, thereby purportedly reducing the cost of the contract from N963,257.45 to N456,500.00.

(b) A further reduction by the Defendant of the aforementioned B contract to 1/4 laboratory by a letter dated 28th February, 1978, thereby further purportedly reducing the cost of the contract to N228,250.00.

(c) The sub-contracting out to others of the ceiling work and the electrical installation of the laboratory building even without reference to the plaintiff. C

(d) The Defendant's failure to pay Architect's payment certificates in accordance with terms of the contract.

(e) The Defendant's failure to make payment of the arrears and also the final payment.

The plaintiff says that as a result of the Defendant's said breach of D contract it (plaintiff) has suffered a great loss and damage.

## *Particulars*

### *Special damages*

1. Cost of contract (vide letter of 5th May, 1981 from Asa Partnership to the plaintiff)	327,052.92	E
Add Retention Fee	6,671.93	
	333,724.85	
Less Tax	3,559.38	F
	330,165.47	
Less sum paid on certificate		
Nos. 1,2,3,4,5 and 6 as per		
Defendants relevant cheques	=82,913.74	
NET SPECIAL DAMAGES	247,251.73	G
GENERAL DAMAGES	752,748.27	

*TOTAL* =1,000,000.00

WHEREFORE the plaintiff claims against the Defendants as fol- H  
lows:

(1) N1,000,000.00(One Million Naira) being special and general damages for breach by the defendant of a contract (for the construction of a laboratory block at Uyo in Cross River

*State) made between the plaintiff and the defendant in 1978.*

(2) *An order that the defendant do issue to the plaintiff forthwith an official certificate of pay and tax covering the tax of N3,559.38 deducted from sums payable to the plaintiff."*

B Evidence was led by the parties to prove the averments in their respective pleadings in the course of which several documents were tendered and admitted in evidence; and at the end of the exercise, learned counsel appearing for the parties submitted written addresses as directed by the court.

C The learned trial judge (Ecoma) after a painstaking consideration of the case put up by each party, concluded as follows:-

*"In sum, I hold the view that the plaintiff is entitled to some of the claims I have enumerated above and in that sense, it may be correct to say that this suit partially succeeds. I do not think it would be right to hold as*  
D *Chief Sokan, counsel for the Defendant had submitted that the plaintiff having failed to prove its claim as spelt out in their Further Amended Statement of Claim, this claim should be dismissed in its entirety.*

*Having said that I shall now proceed to make the following orders of this court namely:-*

E (1) *That for the claim under paragraph 47 (b) of the Further Amended Statement of Claim, counsel on both sides and their parties shall go into a fresh negotiation and arrive at some acceptable sum of money to be paid to the plaintiff on the basis of Quantum Meruit. That where counsel fail to arrive at any agreement, either party can revive this aspect of the claim in*  
F *this court. That in addition to the above, the Defendant shall pay to the plaintiff the sum of N10,062.26k as shown in this judgment.*

(2) *That for the claim under paragraph 47 (e) of the Further , Amended Statement of Claim, the plaintiff and its counsel shall meet the defendant and its counsel for reconciliation and final account. Where there*  
G *is a disagreement, either party shall be at liberty to revive this aspect of the claim in this court.*

(3) *That for the claim under paragraph 48(1) of the plaintiff's Further Amended Statement of Claim the defendant shall pay to the plaintiff the following sums of monies:-*

H (a) *For preliminaries N37,250.00*

(b) *For scaffolding N19,812.00*

(4) *That for the claim under paragraph 48(2) of the Further Amended Statement of Claim, it is hereby ordered that the defendant do issue to the plaintiff an official certificate (a) of pay and (b) of tax covering the sum of*

N3,559.38

*(5) That each party will bear its cost of this action."*

Dissatisfied with the judgment of the trial court, the plaintiff lodged an appeal in the Court of Appeal against it. The defendant also cross-appealed.

In compliance with the Rules of the Court of Appeal, the parties B settled exchanged briefs of argument. The Court of Appeal after considering the reliefs filed and the oral submissions in elaboration thereof dismissed the appeal and allowed the cross-appeal. In dismissing the appeal and allowing cross-appeal, the Court of Appeal pronounced as follows:-

"I am satisfied therefore that the trial judge correctly found that the C contract entered into between the appellant and respondent was for construction of 1/4 laboratory at Uyo.

Having so found, all that the trial judge had to do was to proceed to make consequential pronouncements that the breaches of contract which the appellant complained of in paragraph 47(a) and (b) had not been made out as D required for the appellant to succeed,.....If the trial judge had been able to find that appellant proved any of the breaches complained of in the said paragraph 47 (a - c) he would then need to relate such proven breaches to any of the heads of pecuniary damages claimed in paragraph 48.

In paragraph 48, the appellant set out the amount it claimed as the E contract value. It added the retention fee of N6,671.93 and deduction tax of N3,559.39. This left a sum of N330,165.47 from which appellant deducted N82,913.74 which it claimed had been paid to it by respondent. It then arrived at a net sum of N247,251.73 which it claimed as special damages.

It is therefore difficult to understand why the trial judge made the F utterly irregular orders that the parties and their counsel should go and further negotiate and that if they could not agree they could 'revive' the case in court. The judge it would seem had confused himself unwillingly. Having found that the appellant did not show a breach of contract, the need to compensate G appellant for any such breach would not arise and there was nothing over which parties needed to enter into further negotiation .

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*"The position then as I have found it is that there was no need for the trial judge to have made the orders of reference back to parties which he did and that in any case the orders were irregular and ought not to have H been made."*

It is to be noted that the respondent/cross-appellant did not formulate issues in the brief he filed in the court of Appeal in response to the appellant's brief which also contained his brief in support of the cross-appeal.

The Court of Appeal treated the non-formulation of the issues as adopting the issues formulated in the appellant's brief and proceeded to consider, and dispose of the appeal and the cross-appeal on that basis.

The plaintiff has now appealed to this court against the judgment of the Court of Appeal.

B Henceforth the plaintiff and the defendant will be referred to in this judgment as the appellant and the respondent respectively.

In compliance with the Rules of this court, parties filed and exchanged briefs of argument.

C Learned counsel for the appellant did not appear in court on the day the appeal came for hearing to present oral argument. But since he had filed the appellant's brief, his appeal was treated as argued on the brief he had already filed. See order 6 rule 8(6) of the Supreme Court Rules, 1985 and *Odotola v. Kayode* (1994) 2 NWLR (pt. 324) 1.

D Learned counsel for the respondent adopted his brief of argument and urged the court to dismiss the appeal.

In the brief filed by the appellant four issues are formulated for determination while the respondent also raised five issues in his brief. The five issues filed by the respondent are subsumed in the appellant's four issues and for that reason I shall adopt the appellant's issues in resolving the appeal.

E But for the purpose of ease of reference I shall reproduce hereunder the issues formulated by the appellant and the respondent in their respective brief:-

#### A. ISSUES IN THE APPELLANT'S BRIEF

F 1. *Whether upon a correct interpretation of Exhibits 3, 4, and 5, the contract between the Appellant and the Respondent was for the construction of 1/2 or 1/4 Laboratory ..*

G 2. *Whether the court of Appeal was right in law in not awarding any amount in favour of the Appellant in respect of plumbing work on a quantum meruit basis or in the alternative remitting the case back to the trial court for the assessment of the amount due to the Appellant in respect of the plumbing work.*

H 3. *Whether the court of Appeal was right in law in not increasing by N50,000.00 the sum of N10,062.26 which the trial judge found to be the balance due to the Appellant when the court of Appeal found as of fact that the trial judge made an arithmetical error in his computation of deductions under Exhibit 42 by inflating the total sum deducted by N50,000.00.*

4. *Whether the court of Appeal was right when after setting aside the orders made by the trial judge referring the claims under paragraph 47 (b) and (e) of the Further Amended Statement of claim to the parties and*



*their counsel for negotiations, it refused to remit the case back to the trial court for the assessment of the damages due to the plaintiff under those heads.”*

#### B. ISSUES IN THE RESPONDENT'S BRIEF

(1) *Whether the contract awarded the appellant by the Respondent was for the construction of a full laboratory or ‘bd or ‘bc Laboratory.* B

(2) *Whether there was any breach of contract at all in this transaction of the award by the Respondent of the 114 Laboratory.*

(3) *Whether the court of Appeal was right when after setting aside the orders made by the trial court referring the claims under paragraph 47 (b) and (e) of the Further Amended Statement of claim to the parties and their counsel for negotiations it refused to remit the case back to the trial court for the assessment of the damages due to the plaintiff under those heads.* C

(4) *Whether the Court of Appeal was right in law in not increasing by N50,000.00 (Fifty Thousand Naira) the sum of N10,062.26 which the trial judge found to be the balance due to the appellant in spite of the arithmetical error made by the trial judge in his computation of deduction under Exhibit 42.* D

(5) *Whether the Appeal Court was right in law for not awarding any amount in favour of appellant in respect of plumbing work on a quantum meruit basis.”* E

Issue 1 of the appellant's brief covers issues 1 and 2 of the respondent's brief.

It was the submission of learned counsel for the appellant that the court of Appeal was wrong in its conclusion that there was no valid contract for the construction of ‘bd laboratory as it failed to properly consider and construe Exhibits 3, 4 and 5 jointly. Learned counsel referred to Exhibits 3, 4 and 5 respectively and made the following submissions:’97 F

1. That a careful examination of Exhibit 3 would confirm the appellant's contention that its purport was to award the construction of 1/2 laboratory and that the modification referred therein did not relate to the quantum of the contract but to the details of the construction to be done as necessitated by the reduction in the quantum from one whole to 1/2 laboratory. G

2. That Exhibit 5 did not purport to cancel Exhibit 3, but on the contrary reinforced it since the modifications mentioned in Exhibit 3 were to be collected from Exhibit 5 which emanated from the respondent and dealt with the stages of the execution of the contractual work. Learned counsel submitted that “the words” “pending further instructions” contained in Exhibit 5 H

show that Exhibit 5 did not contain any final instruction while the word “mean-while” used in the same document can only mean “in the interim” which in turn mean that ultimately the parties will still execute the contract fully by the construction of 1/2 laboratory as per Exhibit 3, but that for now let us start with 1/4 laboratory because of the circumstances beyond the control of the respondent.

3. That when Exhibit 3 was accepted by Exhibit 4, what was accepted was the construction of 1/2 laboratory subject to certain modifications to be agreed upon by the parties.

Learned counsel submitted that the cases of *Winn v. Bull* (1877) 7 Ch. D. 29 B and *Odunsi v. Boulos* (1959) SCNLR 591; (1959) 4 FSC 234 were misconstrued or quoted out of context by the courts below. He said the proper and relevant cases to guide the court in construing Exhibits 3, 4, and 5 together are *Ali Sage v. Northern States Marketing-Board* (1972) 1 SC 28 at 46 and *Aouad v. Kessrawani* (1956) SCNLR 83; (1956) 1 FSC 35 at 36.

In answer to the preceding submissions, learned counsel for the respondent referred to portions of the evidence adduced in this case and submitted that both the trial court and the court of Appeal were right in their respective conclusions that the appellant was awarded the construction of 1/4 of laboratory at Uyo and no more. He referred to the two letters dated 1st February and 28th February, 1978 which were tendered and admitted in evidence as Exhibits 3 and 5 respectively and submitted that the only contract entered between the parties was for the construction of a 1/4 laboratory as evidenced by Exhibit 2. He therefore urged this court to affirm the findings of the trial court and the court of Appeal on this issue as they were amply supported by the evidence adduced. The following cases were cited and relied upon - *Overseas construction Ltd. v. Creek Ent. Ltd.* (1985) 3 NWLR (pt. 13) 407, *Olubode v. Salami* (1985) 2 NWLR (pt.1) 282 and *Omoriegie v. Idugiemwanye* (1985) 2 NWLR (pt. 5) 41.

In view of Exhibit 2, the Bill of quantities which also contained the formal agreement signed by the parties, Exhibits 3, 4 and 5 read together could not be construed as a formal contract between the appellant and the respondent. The amount quoted in Exhibit 2 and agreed to by the parties to wit N228,250.00 if related to paragraph 47(a) and (b) of the Further Amended Statement of claim wherein the amount of N963,257.45 and N456,500 were quoted for the construction of the laboratory as a whole and 1/2 the laboratory respectively, belied the appellant’s claim that he agreed to and signed for the construction of the laboratory as a whole.

**Issue 1 was raised and canvassed in the court of Appeal and is being re-canvassed before this court. The issue of whether the**

**appellant contracted for the construction of whole, half or one quarter of the laboratory revolves around the facts in this case, as correctly pronounced by the trial court and the court of Appeal in their judgments respectively.** In the judgment of the trial court the issue raised now was exhaustively and correctly dealt with in the following excerpt from that judgment:-

*"In the instant case, the plaintiff said he was given the contract documents that is, the bills of quantities and the building plans along with a proforma agreement to be executed blank with the intimation that if the plaintiff won the contract, both the duly completed agreement and the contract documents would be sent to plaintiff as a completed agreement. But the duly completed agreement was not sent to him. So that when the plaintiff wrote Exhibit 4 there was yet no agreement binding on the parties. I rather feel inclined to believe D. W.2. Chief O. A. Aderibigbe when he said in court that the contract documents namely, Drawings, Bills of Quantities, and Proforma agreement were given to the plaintiff blank for the purpose of inserting rates in the Bills of Quantities and return same with the drawings and only the proforma agreement blank as it is normally the procedure and also that it is not true that the Defendant caused the plaintiff to execute the said agreement blank because the agreement could not have been executed before as at the time of the return as at the plaintiff was not sure of winning the contract at the time.*

*I also agree with the submission of counsel for the plaintiff, that the Director who wrote Exhibit 3 is official representative of the Defendant and can legally commit the Defendant and that the act of the Director is deemed to be that of the Defendant. Ordinarily, the Defendant would be caught by Section 150 of the Evidence Act and it would be held that the plaintiff had relied upon the representation made by the Director and started to work on 1/2 laboratory expending money and time on the construction. If therefore there was a valid contract subsisting between the plaintiff and the Defendant when Exhibits 3 and 4 were written, then the plaintiff would have treated Exhibit 5 as amounting to a breach of contract. He could then have stopped work on the 1/2 laboratory and sued for a breach of contract. I hold the view that the phrase "subject to agreement on certain modifications" as contained in Exhibit 3 did not make Exhibit 3 to constitute a valid contract. Exhibit 5 had further reduced the contract to 1/4 laboratory at the contract price of N228,250.00. As I had said earlier, when the plaintiff company received Exhibit 5 it should have treated the contract as having been breached by the Defendant, but it proceeded to build 1/4 laboratory, if it stood its ground, it should have sued for a breach of contract. Apart from*

building, the plaintiff also took out an Insurance Policy on the 'bc laboratory. The obvious conclusion to be arrived at here is that at that stage, the plaintiff seemed to have waived whatever rights it was entitled to in law for which it could not complain of the breach by the defendant for reducing the contract from full laboratory to 1/2 laboratory and finally to 1/4 laboratory.

Having said that, it seems to me that I have now to consider Exhibits 2 and 49 in relation to Exhibits 3, 4, and 5. I had earlier said that Exhibit 2 is the bill of quantities and contained therein is the agreement signed by the parties. Exhibit 2 is dated 28th of March, 1978. It is for a contract to build 1/4 laboratory at Uyo at a cost of N228,250.00. After Exhibits 3, 4 and 5 had come into existence between 1st February, 1978 and 28th February, 1978, Exhibit 2 was signed. Exhibit 2 is the formal agreement binding both parties. I agree with the submission of Chief Sokan, counsel for the Defendant that in view of Exhibit 2, Exhibits 3, 4 and 5 do not constitute a contract but an invitation to treat."

The court of Appeal in affirming the findings above opined thus:-

"Now on the facts available before the lower court. I must say there was a measure of insincerity in the standpoint of the appellant. The appellant through its Managing Director who testified as P. W. 1 said that it had pre-1978 signed the contract agreement on 31/1/78 when it submitted the tender documents to respondent and before exhibits 3 and 5 came into existence. This is plainly untrue. The appellant in fact signed pages (i) and (ii) of Exhibit 2 on 28/3/78. The appellant in handwriting of its representative affixed the date 28/3/78 below the signature. Exhibits 3, 4 and 5 came into existence on 1/2/78, 4/2/78 and 28/2/78 respectively, so that the appellant by signing Exhibit 2 on 28/2/78 (sic) knew that the contract was for 'bc laboratory at a cost of N228,250.00 which details were stated in Exhibit 2.

Further the appellant on 1/4/78 did ensure the construction project as required by clause 20 of Exhibit 49, for N228,250.00. In Exhibit 41A the building was referred as 1/4 laboratory.

I am satisfied therefore that the trial judge correctly found that the contract entered into between the appellant and respondent was for the construction of 1/4 laboratory at Uyo."

**The argument put forward by learned counsel for the appellant is nothing but a misconception of the principle of law applicable. The concurrent findings of fact on the issues are justified by the evidence considered and accepted and I see no reason to interfere with them. See Adebajo v. Brown (1990) 3 NWLR Cpt.141 661. Ajuwon v. Adeoti (1990) 2 NWLR (pt. 132)**

271, Omoboriowo v. Ajasin (1984) 2SCNLR 108 and Etowa Enang & ORS. v. Fidelis Adu (1981) 11-12 SC 25..

Issue 1 is therefore resolved against the appellant in favour of the respondent.

Issue 2: This cover" issue 3 of the respondent's brief. Learned counsel for the appellant referred to portions of the court of Appeal judgment on pages 310 and 311 of the record of proceedings and submitted that the court of Appeal did not advert its mind to the relevant principle of law on quantum meruit award. He contended that the statement by the Court of Appeal that:

*"It is not right that this court should evaluate the disputed evidence on the point which depends on the credibility to be accorded the witnesses which we have ourselves not seen."*

Is neither here nor there since the plumbing work in dispute is a physical thing that can only be resolved by a visit to the locus in quo and not just by the evidence of witnesses Viva Voce. Learned counsel referred to s. 76 D of the Evidence Act and cited the cases of Appleby v. Nyers (1967) L. R. 2 C. P 651 - 660, Seismograph Service v. Akporovo (1974) 6 SC 119 at 128 and Ezewani v. Onwordi (1986) 4 NWLR (pt. 33) 27 at 46. He urged this court to allow the appeal on this issue and make the necessary award on quantum meruit for the plumbing work. E

In answer to the appellant's submissions learned counsel for the respondent submitted as follows in his brief:-

*"The Respondent submits that there is no need for the trial judge to make his two orders of reference back to the parties having adjudicated on all the items of damages claimed by the appellant under the contract. The Respondent argues that, the evidence adduced by the Respondent Quantity Surveyor on page 154 'Lines 1-19, page 155 lines 26-31, page 156 lines 19 support the fact that nothing is left to be decided upon. The Valuation of the Quantity Surveyor of the Respondent that is Exhibit 42 was the one used for the purpose and comprises of all the items in Exhibits 6 & 6A that is the Architectural and Engineering Design of a 1/4 laboratory which had been priced in Exhibit 2 which is the Bills of Quantities. The items not done by the Appellant were those enumerated in page 155 Lines 25 - 31, page 156 Lines 1- 4. The above was supported by the appellant on page 92 Lines 14-18. From the above the work done was already paid for and so there was nothing left to which the appellant is entitled. The trial judge orders of Reference therefore were wrong."* F G H

Learned counsel contended that where there was no settlement of the case in the course of hearing the duty of the court was to adjudicate and that it would

be fatally wrong for the court after delivering its judgment to make an order that the parties should go and negotiate on any matter litigated upon with a rider that if they could not agree they could “come back to the court to revive the dispute”. He cited in support of his contention the decision of this court in Chief Iman y, p, O. Shodeinde & Ors, v. Registered Trustees of Ahmadiyya B Movement-In-Islam (1980) 1 SC 163 at 182, (1980) ANLR Mat 75 - 76 particularly where it adopted and endorsed the opinion of Thesiger L. J in Re St Nazaire and Co. (1879) 12 Ch. D 88, at 101 and Nnajofo v. Ukonu (1985) 2NWLR (pt. 9) 686 at 688.

It appears to me that the question to be resolved in relation to this C issue is not as wide as the parties presented it. It was settled by the learned trial judge which was affirmed by the court of Appeal that the appellant was awarded a contract for the construction of 1/4 of laboratory at N228,250.00. It was also agreed by the parties and as found by the trial court that the following part of the works were not done by the appellant-

- D
1. Electrical Installations
  2. Suspended Ceiling
  3. Installation Of Water Tank
  4. Central Air Conditioning.

What seemed to be indispute was the plumbing work. The evidence E of P. W.1 who is the Managing Director of the appellant on this point was:

*“On 27th November, 1980, I went to the site with the defendant ‘the plumbing of the building had been, I was told to do the plumbing. I do not know if it is one of the price cost items.”*

P. W. 2 in his evidence and in Exhibit 42 listed the items that were not F done among which was plumbing work which was item (b) and described as plumbing installation and over head tank and was put at N12,500.00.

The total amount paid to the appellant on Exhibit 18-18F i. e (Certificates 1 - 6) was N129,372.98. P. W. 1 said under cross-examination.

*“all the amount under certificates 1- 6 would total N 129,372.98. G But this is not what I had received. As at 4th December, 1980, there was also nothing left to be paid.”*

*On the 27th November, 1980, I went to the site with the defendant the plumbing of the building had been done.”*

**The learned trial judge found that there was no breach of H contract. The appellant through P. W.1 also testified that as at 4th December, 1980, that was after inspection of the site in company of the defendant on 27th November, 1990, there was nothing left to be paid, then the issue of payment being made to the appellant by the respondent on quantum meruit basis was a non - issue and could**

**not and ought not to have arisen at all.**

As correctly worked out by the respondent and accepted by the trial court in its judgment at page 228:-

*"In Exhibit 42 the following items had not been done-*

<i>(a)Fitting and Fixtures at ....</i>	<i>N25,000.00</i>	
<i>(b)Plumbing installation and overhead tank</i>	<i>-12,500.00</i>	<b>B</b>
<i>(c)Central air conditioning</i>	<i>25,000.00</i>	
<i>(d)Electrical installation plus 3% profit</i>	<i>-8,317.38</i>	
<i>Plus 5% profit</i>	<i>415.87</i>	
<i>Plus 21/2% gen. &amp; sp. attendance</i>	<i>-207.94</i>	
<i>(e Suspended ceiling</i>	<i>10,500.00</i>	<b>C</b>
<i>Plus clerk work</i>	<i>6,000.00</i>	
<i>TOTAL</i>	<i>=137,941.19"</i>	

For the sake of repetition, I quote hereunder again the findings of learned trial judge:

*"I had earlier said that Exhibit 2 is the bills of quantities and contained therein is the agreement signed by the parties. Exhibit 2 is dated 28th of March 1978. It is for a contract to built 1/4 laboratory at Uyo at a cost of N228,250.00"*

That was the contract the cost of which was contained in the bill of quantities for the construction of 1/4 laboratory at Uyo. Although at a later stage there was a dispute as regards the bill of quantities, which gave rise to preparing other bills of quantities by both the appellant and the respondent, there was nothing to show from the evidence adduced that there was agreement to alter the original contract sum as contained in Exhibit 2 and the learned trial judge concluded thus on the issue;

*"The only contract executed is in respect of a quarter laboratory for N228,250.00 I hold the view that any revaluation by the plaintiff should have been carried out with the knowledge and consent of these consultants (i.e. respondent's consultants) the plaintiff should not have engaged the services of an independent Expert Witness the 4th P. W. who had to produce the figures of N327,052.92k as shown in Exhibit 22."* (the words in brackets supplied by me).

xxxxxxxxxxxxxxxxxxxx

*"The plaintiff did not state what amount of money constituted the financial commitments. It is difficult for this court, at this stage, without any evidence, to carry out any assessment of what financial loss, if any, the plaintiff had suffered."*

This in my view, could, have been the end of the appellant's case, but the learned trial judge went off the track and further stated thus:-

“Even if for one moment I hold that the extra expenditure was outside the terms of the contract. I would rather still hold that the plaintiff could still be compensated not because a claim in quantum meruit represents an agreement reached between the parties, but because the law will compel the defendant not to disappoint (Sic) the plaintiff of the “fruit of his labour” as B I had earlier said.”

The learned trial judge then proceeded to give the following directive to the parties:-

“On this ground, I have to invite both counsel representing both parties in this suit to go into a fresh negotiation and endeavour to arrive at C some acceptable sum of money to be paid to the plaintiff on the basis of quantum meruit. Where they fail to arrive at any agreement, this aspect of the case can be revived in this court by any of the parties.”

This order is not only wrong but absurd and unwarranted having regard to the previous findings of the learned trial judge D that there was no evidence before him to conduct the exercise, even if he had wanted. After the judgment he was functus officio in the matter and could not re-open it again in order to take fresh evidence from the parties to make the quantum meruit award. See Shodeinde & Ors. v. Ahmadiyya Movement in Islam (supra).

E This was not the end of the blunder committed by the learned trial judge. He disregarded his findings on Exhibit 2 and fell back on Exhibit 42 to make his calculation which made him to award N 10,062.26 to the appellant. If he had adhered to the original figure of N228,250.00 as contained in Exhibit 2, he would come to conclusion that appellant was paid an excess of N441,43 by the respondent F as given in evidence by D. W. 2.

It is also to be borne in mine that the learned trial judge had said in the judgment that:

G “5 The plaintiff also alleges at paragraph 47(e) of the Further amended Statement of claim but (sic) the defendant had failed to make payment of the arrears and also the final payment. The plaintiff and its witnesses did not testify to the effect that any payment of arrears are due to the plaintiff.”

Having regard to all that I have enumerated, the court of Appeal was justified H in its conclusion on the issue which is now being recanvassed before this court, that -

“It is therefore difficult to understand why the trial judge made the utterly irregular orders that parties and their counsel should go and further negotiate and that if they could not agree they could revive the case in court.



*The judge it would seem had confused himself unwillingly. Having found that the appellant did not show a breach of contract, the need to compensate appellant for any such breach would not arise and there was nothing over which the parties needed to enter into further negotiation. “*

**Once an issue or issues have been raised and determined by the court between the litigating parties, the court becomes functus officio to either direct or allow the parties to re-open the same issues before it for relitigation.** See *Nnajofofor v. Ukonu* (1985) 2 NWL R (pt. 9) 686 particularly at 688.

This issue is therefore answered against the appellant.

Issues 3 and 4 These two issues encompass issues 4 and 5 of the respondent's brief. I need only to comment briefly on them as they have adequately been taken care of by my findings and conclusion on issue 2 of the appellant's brief.

The gravamen of the appellant's complaint under issue 3 was against the court of Appeal's failure to increase the sum of N10,062.26 by N50,000 when it found as a fact that the trial judge made an arithmetical error in his computation of deductions made under Exhibit 42 by inflating the total sum deducted by N50,000.00

**I have said previously in this judgment that Exhibit 2 was the agreement and the bill of quantities agreed upon by the appellant and the respondent for the construction of 1/4 of the laboratory. This was also the finding made by the learned trial judge and affirmed by the court of Appeal. As there was no evidence that the parties agreed to review the contract sum in Exhibit 2, the learned trial judge was fatally wrong to base his calculations and computation on Exhibit 42.** It was the learned judge that concluded, after reviewing the evidence adduced by the parties that -

*“The only contract executed is in respect of a quarter laboratory for N228,250.00.”*

P. W. 1, the Chairman and Managing Director of the appellant agreed that all the amount of certificates 1 - 6 had been paid and that there was nothing left to be done. But he was still making claim for an outstanding amount as he said in his evidence under cross-examination that “the contract we adopted was N327,052.92k. This was not accepted by the learned trial judge.

**As for issue No.4 there was no need in my view, for the court of Appeal to remit the case to the trial court for the award of damages under paragraph 47 (b) and (e) of the Further Amended Statement of claim for the following reason:-**

**1. Based on Exhibit 2, there was nothing left to be paid to the plaintiff**

as the correct calculations showed that he was overpaid.

**2. There was no finding by the trial court and the court of Appeal that there was a breach of contract which could have entitled the appellant to award of damages.**

**I therefore answer issues 3 and 4 in affirmative.**

B With all the issues raised and canvassed being resolved against the appellant, the appeal fails and it is accordingly dismissed. The judgment and orders of the court of Appeal are hereby affirmed. N1,000.00 costs is awarded to the respondent against the appellant.

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C

**OGUNDARE JSC**

I agree with the judgment of my learned brother, Wali J.S.C. just delivered. I adopt same as mine. I have nothing more to add. I too dismiss the appeal and abide by the order for costs contained therein.

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**MOHAMMED JSC**

I also agree that this appeal ought to fail for the reasons given in the judgment of my learned brother, Wali, J.S.C. I have had the privilege to read the judgment in draft before now. The appeal is dismissed. I abide by the order made on costs.

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**ADIO JSC**

F I have had the advantage of reading, in draft, the judgment just delivered by my learned brother, Wali, J. S. c., and I agree that the appeal fails. I too dismiss it and I abide by the consequential orders, including the order for costs.

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**IGUH JSC**

I have had the privilege of reading, in draft, the leading judgment just delivered by my learned brother, Wali, J. S. C., and I agree that there is no merit whatever in this appeal.

H Consequently, I too, dismiss it and affirm the judgment of the court below.

I endorse the order as to costs contained in the said leading judgment.