

SUPREME COURT OF NIGERIA
11TH JULY, 1997. SC. 38/1991
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, E. O. OGWUEGBU,
S. U. ONU, Y. O. ADIO, JJSC.

A. K. FADLALLAH	APPELLANT
AND		
AREWA TEXTILES LIMITED	RESPONDENT

APPEALS - Reversal - Error of lower court - Will not ground a reversal - Unless the error affected the decision crucially.

APPEALS - Retrial - Wrongful rejection of admissible evidence - Where miscarriage of justice is occasioned - Retrial will be ordered - Even if it was not prayed for.

EVIDENCE - Burden of proof - Burden of proving a particular fact - Is on the party who asserts.

EVIDENCE - Burden of proof - In civil cases - The onus of proving particular facts is fixed by the pleadings - Onus of adducing further evidence - Is on the person who will fail.

EVIDENCE - Relevant facts - Documents that go to support relevant averments in the pleadings - Are relevant and admissible.

PLEADINGS - Relevant documents - pleaded in paragraphs other than the one that was struck out - Should attract court's consideration - For a fair determination of the main issues.

PRACTICE & PROCEDURE - Orders of court - Must be confined to the terms of the application - As court must maintain a balance - And not make a case for either party.

FACTS

In the High Court of Justice, Kaduna State, the appellant claimed against the respondent the refund of the sum of N804,362.10 being money deposited by the Appellant, a textile merchant with the Respondent for the supply and delivery of textile materials in the form of cash, cheques and bank drafts. The appellant also claimed interest on the said sum. The Respondent

denied the claim and produced proforma invoices, sales invoices, and delivery notes to support its allegation that supplies had been made to the Appellant. The learned trial Judge after giving consideration to the evidence before her and the submission of counsel to the parties gave judgment in terms of appellant's claims.

The Respondent being dissatisfied with the judgment of the trial court appealed to the Court of Appeal which allowed its appeal, set aside the judgment of the trial court and ordered a retrial by another judge of the Kaduna High Court. The Appellant has now appeal to the supreme court, which had to determine the appeal based on the 3 issues raised by the respondent.

ISSUES FOR DETERMINATION

"(1) Whether the Court of Appeal was right in raising suo motu the issues of the rejected cheques when neither the grounds of appeal nor the issues for determination before them directly or indirectly made any reference to the rejected cheques.

(2) Whether the Court of Appeal was right in holding that the proforma invoices, delivery notes and waybills were wrongly rejected by the trial court, and were relevant documents which were admissible in evidence and formed part of Respondent's defence to the suit.

(3) Whether there were sufficient grounds for the court below to set aside the judgment of the trial court and to order a retrial of the suit."

HELD (Unanimously dismissing the appeal per lead judgment of **ADIO JSC**)
Burden of proving a particular fact

1. The burden of proving that he deposited the aforesaid amount with the respondent for the aforesaid purpose was on the appellant. That is because the burden of proving a particular fact is on the party who asserts it. That was the reason for the averment, by the appellant, in his pleading (Amended Statement of Claim and Reply to Statement of Defence) in which the particulars of the cheques and bank drafts in question were given. (p. 1535 A)

In civil cases - Onus is fixed by the pleadings

2. The appellant, after making the relevant averments and leading evidence to prove them, the burden would then shift and be on the respondent to prove that it supplied textile materials to the appellant for the payment of the aforesaid sum. That is because, in civil cases, the onus of proving particular facts is fixed by the pleadings. It does not remain static but shifts from side to side. The onus of adducing further evidence is on the person who will fail if such evidence is not adduced. The foregoing requirement accounted for the aver-

ments in the Amended Statement of Defence of the respondent relating to the particulars of the cheques in question and to the particulars of the delivery notes and other relevant documents pertaining to the delivery of the textile materials by the respondent to the appellant. (p. 1535 C)

Pleadings - Relevant documents

3. The court below could not have been in a position to fairly and effectively determine the main issues in the case without giving consideration to all the relevant documents, including the cheques and delivery notes in question particularly when they were mentioned or pleaded in some paragraphs in the pleadings other than paragraph 8 of the Amended Statement of Defence which had been struck out. For the avoidance of doubt, on the question of the cheques and delivery notes in question being pleaded in paragraphs in the pleadings other than paragraph 8 of the Amended Statement of Defence which had been struck out, one may refer to: paragraph 7 of the Amended Statement of Defence. (p. 1535 H)

Evidence - Relevant facts

4. In any case, as the relevant averments in the appellant's Amended Statement of Claim and his Reply to the Amended Statement of Defence were about the payments which he allegedly made by cheques and as the relevant averments in the Amended Statement of Defence of the respondent were about the textile materials which it allegedly delivered to the appellant in return for the said sum paid by the appellant, the cheques used by the appellant in making the payments and the delivery notes showing the textile materials delivered by the respondents to the appellants were relevant and admissible. Each of them was tendered as evidence of the facts pleaded either in the Amended Statement of Claim, the Amended Statement of Defence or the Reply to the Amended Statement of Defence. (p. 1536 B)

Orders of court - Must be confined to the application

5. The order which a court may make in response to the application made to it must be confined strictly to the terms of the application because a court, in civil cases, does not make for a party a case which the party does not make for itself. The court must maintain a balance between the parties and not make a case for either of them. The learned trial Judge could be said to be prima facie right in declining to admit pro-forma invoices to which paragraph 8 of the Amended Statement of Defence related. She, however, could not as a consequence of the failure of the respondent to supply further and better particulars of the proforma invoices mentioned in paragraph 8 of the amended Statement

of Defence reject cheques in respect of which the appellant did not apply for further and better particulars. The learned trial Judge was, therefore, wrong in law to refuse to admit the cheques in question particularly when they were pleaded in paragraph 5 of the Amended Statement of Claim and paragraph 8 of the Reply to the Amended Statement of Defence. (p. 1538 C)

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When error of lower court will not ground a reversal

6. If one takes the view that the court below erred in law in failing to specifically ask the parties to address it in relation to the cheques in question before coming to a decision on the effect of the rejection of the cheques by the learned trial Judge, success of a ground of appeal alone is not sufficient to warrant a reversal of a decision unless the error in law affected the decision in a crucial way. It is not every slip committed by a court that will result in an appeal against a judgment being allowed. An error or slip that may have the result of the appeal being allowed must be fatal in the sense that it must have occasioned a miscarriage of justice. In the present case, it cannot reasonably be said that the slip or error, if any, had occasioned a miscarriage of justice. (p. 1538 H)

Appeals - Retrial - When to be ordered

7. The damage had been done by the rejection of the cheques and delivery notes and there was no way of remedying the situation than to order a new trial as the court below had done. A retrial may be ordered, in an appropriate case, even if the parties do not ask for it. See Iyaji v. Eyigebe, (1987) 3 N.W.L.R. (Pt. 61) 523. A retrial will be ordered where, as in this case, the trial court wrongly rejected admissible evidence and such wrong rejection has occasioned a miscarriage of justice to the party who adduced the evidence wrongly rejected. As rightly held by the court below, the rejection of the evidence, in this case, occasioned a miscarriage of justice to the respondent and the court below was right to set aside the judgment of the learned trial Judge and to order a retrial. (p. 1539 E)

NOTABLE POINT OF INTEREST

OGWUEGBUJSC

1. Retrial - When to be ordered

H An order for a new trial can be made where there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the court is unable to say that there has been no miscarriage of justice. The rejection of the documents sought to be tendered

by the defence can result in failure of justice and the court below was perfectly right to order a retrial. (p. 1543 B)

REPRESENTATION

T. Ayanniyi Esq., for the appellant
Mrs. O. Adekoya for the respondent

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CASES REFERRED TO

Ike v. Ugboaja (1993) 9 KLR 62
Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 79 at p. 84
Odubeko v. Fowler (1993) 11 KLR 106
Kuti v. Balogun (1978) 1 S.C. 53, 60 - 61
Ezeoke v. Nwagbo (1988) 1 N.W.L.R. (Pt. 72) 618
Torti v. Ukpabi (1984) 1 S.C.N.L.R. 214
Oyediran v. Adebiosu (1992) 6 N.W.L.R. (Pt. 249) 550
Bakare v. Apena (1986) 4 N.W.L.R. (Pt. 33) 1
Johnson v. Williams 2 WACA 248
Onifade v. Olayiwola (1990) 7 NWLR (Part 161) 130

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LEAD JUDGEMENT BY ADIO JSC

In the High Court of Justice, Kaduna State, Kaduna Judicial Division, the appellant's claim against the respondent was for a refund of the sum of N804,362.10, being money deposited by the appellant with the respondent for the supply and delivery of textile materials by the respondent to the appellant between October, 1981 and 1982 in the form of cash, cheques and bank drafts. The appellant also claimed interest at the rate of 10 percent on the said sum from November, 1982 until payment.

The appellant, who was a textile merchant, used to buy textile materials from the respondent. For that purpose, he used to deposit cheques and bank defats with the respondent. The respondent used to issue invoices and waybills in relation to the textiles supplied to the appellant pursuant to the transactions. According to the appellant, the total amount which he deposited with the respondent was N804,362.10 but the respondent did not supply any textiles to him in relation to the payment/deposit of the aforesaid sum. The respondent denied the claim. It produced proforma invoices, sales invoices, waybills and delivery notes to support its allegation that textile goods for the full amount deposited with or paid by the appellant to respondent were delivered to the appellant. It also alleged that some of the cheques issued by the appellant and deposited with the respondent were returned by the banks unpaid and other cheques issued by the appellant were used to off-set the

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relevant amounts on the unpaid or returned cheques.

Cudjoe, J. (as she then was) after giving consideration to the evidence before her and to the submissions made by the learned counsel for the parties, gave judgment for the appellant for the sum of N804,362.10 with interest at the rate of 10 percent per annum from November, 1982, to the date of judgment and thereafter at the rate 10 percent until the judgment debt was fully paid.

Dissatisfied with the judgment of the learned trial Judge, the respondent lodged an appeal against it to the Court of Appeal. The court below allowed the appeal and ordered a retrial de novo before another Judge of the High Court. The court below held that the learned trial Judge was wrong in not allowing the respondent to produce the documents mentioned and pleaded in paragraph 7 of the Amended Statement of Defence. These documents were relevant to the respondent's case and their rejection was prejudicial to the defence of the respondent. The court also held that the rate of interest on the amount claimed to the date of judgment was unjustifiable. Dissatisfied with the judgment of the court below, the appellant has lodged an appeal against it to this court. In accordance with the rules of this court, the parties have filed and exchanged briefs. The appellant filed an appellant's brief and the respondent filed a respondent's brief. The appellant filed a Reply brief.

When the appeal came before us for hearing the learned counsel for each of the parties made oral submissions to us.

The preliminary objections raised by the respondent were argued by its learned counsel. They were upheld by this court after hearing the learned counsel for the appellant, on the point. As a result, grounds 2 and 4 of the grounds of appeal and issues 2 and 4 raised in the appellant's brief were struck out for being incompetent. The four issues left out of the six issues set down for determination in the appellant's brief, raised questions similar to the questions raised by the three issues set down for determination in the respondent's brief and which are as follows:-

"(1) Whether the Court of Appeal was right in raising *suo motu* the issues of the rejected cheques when neither the grounds of appeal nor the issues for determination before them directly or indirectly made any reference to the rejected cheques.

(2) Whether the Court of Appeal was right in holding that the proforma invoices, delivery notes and waybills were wrongly rejected by the trial court, and were relevant documents which were admissible in evidence and formed part of Respondent's defence to the suit.

(3) Whether there were sufficient grounds for the court below to set aside the judgment of the trial court and to order a retrial of the suit."

The question raised under the 1st, 2nd and 3rd issues will be considered together. The appellant in paragraph 5 of the Amended Statement of Claim averred that he deposited a total sum of N520,644.33, in the form of drafts and cheques, with the respondent in 1981 and 1982 for the sale and delivery of textile materials to the appellant by the respondent. Particulars of the various cheques and bank drafts were given in the same paragraph of the Amended Statement of Claim, including the dates of the drafts or cheques and the amounts. In dealing with the averments, the respondent in paragraph 8 of the Amended Statement of Defence, averred that some of the cheques in question were used by the respondent to off-set the cheques issued by the appellant to the respondent which were returned unpaid but were used by the appellant to pay for textiles earlier supplied and delivered by the respondent to the appellant. The cheques in question, according to the particulars given in the Amended Statement of Defence, were cheques number 006324, 6910, 006412, and 007295. The appellant then applied, by a motion on notice for an order requiring the respondent to supply him (the respondent) with further and better particulars of paragraph 8 of the Amended Statement of Defence. The respondent was ordered to supply to the appellant, particulars of the relevant proforma invoices, waybills and delivery notes relating to the delivery of the alleged textile materials. When the respondent failed to comply with the order, paragraph 8 of the Amended Statement of Defence was, on the application of the appellant, struck out. Subsequently, when the respondent sought to tender the said cheques and other documents during the trial, the learned trial Judge rejected them.

The court below duly considered the question whether the documents (cheques, proforma invoices etc.,) mentioned in paragraph 8 of the Amended Statement of Defence, which was struck out by the learned trial judge, were properly rejected by the learned trial judge when they were tendered during the hearing of this case before the learned trial judge. After giving due consideration to the submissions of the learned counsel to the parties, the learned Justice who read the lead judgment of court below stated, inter alia, as follows:-

"At this stage I will examine the proforma invoices and the cheques that were not admitted in evidence and find out whether or not they were mentioned in paragraph 7 of the Statement of Defence I have compared the invoice and also the cheques rejected by the learned trial judge and I am satisfied that those documents rejected by the learned trial Judge were pleaded in the particulars mentioned in the said paragraph 7 of the Statement of Defence."

The learned Justice of the court below carried out the examination

and after setting out particulars of the cheques, the amounts, date, and the serial numbers of the proforma invoices stated further, Inter alia, as follows:-

"It is clear that the foregoing rejected documents were actually pleaded by the Defence in his Amended Statement of Defence as shown above. They are therefore relevant to the case of the Appellant/Defendant. I agree with learned SAN that it will appear to be prejudicial to the case of the appellant if those documents did not form part of his defence.

I am therefore of the opinion that the decision of the learned trial Judge in rejecting those documents should be interfered with in the interest of justice. Ground one is therefore meritorious and will succeed."

C The submission made for the appellant was that as paragraph 8 of the Amended Statement of Defence, in which the cheques numbers 006324, 6910, 007295, were pleaded had been struck out, those cheques and the proforma invoices, delivery notes and waybills of the delivery of goods purported to have been used in appropriating the said cheques were, therefore, D inadmissible. It was further submitted that, in the circumstance, the learned trial Judge was right in rejecting the aforesaid documents when the respondent sought to tender them. It was further argued that it was wrong for the court below to raise the issue about the aforesaid cheques and to determine the issue without calling on the learned counsel for the parties to address the E court on it.

In the case of the respondent, the submission made for it was that the submissions made for the appellant were misconceived. It was pointed out that a careful examination of the pleadings (the Amended Statement of Claim, the Amended Statement of Defence and the Reply to the Statement of F Defence) showed that the cheques and other documents in question were pleaded copiously in several paragraph therein. The appellant's pleadings (Amended Statement of Claim and the Reply to the Statement of Defence) mentioned or referred in several paragraphs to the aforesaid cheques and other documents and, in the same way, the respondent's (Amended Statement G of Defence) also mentioned or made reference to them. It was then contended that it was wrong to argue that the cheques and other documents in question were not pleaded or were not before the court below merely because paragraph 8 of the Amended Statement of Defence had been struck out. It was, in any case, pointed out that on the basis of the pleadings of both parties the H appellant's case was that he requested and paid by cheques or bank drafts for certain goods to be supplied by the respondent, and the respondent's defence was that it supplied the goods paid for by the appellant with the cheques in question and the delivery notes etc. concerning the supply of the goods were all relevant.

The appellant's claim was for the sum of N804,362.10, being money deposited by him with the respondent in the form of cash, cheques and bank drafts. It was alleged that the money was deposited with the respondent so that the respondent might supply and deliver some textile materials to the appellant and that the respondent failed to deliver the textile materials. **The burden of proving that he deposited the aforesaid amount with the respondent for the aforesaid purpose was on the appellant. That is because the burden of proving a particular fact is on the party who asserts it.** See Okubule v. Oyagbola, (1990) 4 N.W.L.R. (pt. 147) 723; and Ike v. Ugboaja, (1993) 6 N.W.L.R. (Pt. 301) 539. **That was the reason for the averment, by the appellant, in his pleading (Amended Statement of Claim and Reply to Statement of Defence) in which the particulars of the cheques and bank drafts in question were given. The appellant, after making the relevant averments and leading evidence to prove them, the burden would then shift and be on the respondent to prove that it supplied textile materials to the appellant for the payment of the aforesaid sum. That is because, in civil cases, the onus of proving particular facts is fixed by the pleadings. It does not remain static but shifts from side to side. The onus of adducing further evidence is on the person who will fail if such evidence is not adduced.** See Nigerian Maritime Services Ltd., v. Afolabi, (1978) 2 S.C. 79 at p. 84; and H.M.S. Ltd., v. First bank, (1991) 1 N.W.L.R. (Pt. 167) 290. **The foregoing requirement accounted for the averments in the Amended Statement of Defence of the respondent relating to the particulars of the cheques in question and to the particulars of the delivery notes and other relevant documents pertaining to the delivery of the textile materials by the respondent to the appellant.** If, as rightly contended by the learned counsel for the respondent, for the determination of the relevant issues involved in the case, that is, the amount deposited by the appellant with the respondent and the quantity and value of the goods delivered by the respondent to the appellant, the court below gave consideration to the cheques issued by the appellant for payment and to the delivery notes relating to the goods delivered by the respondent to the appellant, mentioned in the averments in the pleadings, it cannot be rightly said that the court below was wrong in giving consideration to the documents in question especially when the references to the documents in question were contained in several paragraphs of the pleadings filed by both parties, other than paragraph 8 of the Amended Statement of Defence which had been struck out. **The court below could not have been in a position to fairly and effectively determine the main issues in the case without giving consideration to all the relevant documents, including the cheques and delivery notes in question particularly when they were mentioned or pleaded in some paragraphs in the pleadings other than**

paragraph 8 of the Amended Statement of Defence which had been struck out. For the avoidance of doubt, on the question of the cheques and delivery notes in question being pleaded in paragraphs in the pleadings other than paragraph 8 of the Amended Statement of Defence which had been struck out, one may refer to: paragraph 7 of the Amended Statement of Defence; paragraph 5 of the Amended Statement of Claim; and paragraphs 3, 4, 5, 9, 10, 11, 13, 15 and 16 of the Reply to the Amended Statement of Defence. In any case, as the relevant averments in the appellant's Amended Statement of Claim and his Reply to the Amended Statement of Defence were about the payments which he allegedly made by cheques and as the relevant averments in the Amended Statement of Defence of the respondent were about the textile materials which it allegedly delivered to the appellant in return for the said sum paid by the appellant, the cheques used by the appellant in making the payments and the delivery notes showing the textile materials delivered by the respondents to the appellants were relevant and admissible. Each of them was tendered as evidence of the facts pleaded either in the Amended Statement of Claim, the Amended Statement of Defence or the Reply to the Amended Statement of Defence. See the decision of this court in Thanni v. Saibu, (1977) 2 S.C. 89 at p. 116 and the decision of this court in Monier Construction Co. Ltd. v. Azubuike, (1990) 3 N.W.L.R. (Pt. 136) 74 at p. 86.

The particulars of the proforma invoices which were tendered and were rejected by the learned trial Judge by reason only of paragraph 8 of the Amended Statement of Defence having been struck out, were set out at page 11 of the judgment of the court below. A careful comparison of those particulars with the particulars of the pro-forma invoices pleaded by the respondent under paragraph 7 of the Amended Statement of Defence showed that each of the proforma invoices rejected by the learned trial Judge was pleaded under paragraph 7 of the Amended Statement of Defence. I have carried out the comparison of the particulars and I have come to the same conclusion. Further, the appellant and the respondent joined issue on the proforma invoices pleaded by the respondent in paragraph 7 of the Amended Statement of Defence as shown by paragraphs 3 and 4 of the Reply to the Amended Statement of Defence which read as follows:-

"3. In answer to paragraphs 6 and 7, the plaintiff avers that no goods were delivered to him before payment was made and that invoices Nos. 28245, 28258, 28254, and 28288 on which cheque/draft No. 005832 for N100,000 was appropriated by the defendant, are also the invoices used to appropriate the other cheque No. 102864 for N59,916.91.

4. In further answer to paragraph 7 of the Amended Statement of Defence the plaintiff avers that he never made or authorized any confirma-

tion of order on which all the invoices on which the cheque No. 005832 for N100,000 was appropriated as alleged and that no invoices bearing these numbers were raised in his favour by the defendant."

Paragraph 7 of the Amended Statement of Defence, in which the respondent pleaded all the proforma invoices which the learned trial Judge rejected, was not struck out and the position was the same in the case of paragraphs 3 and 4 of the Reply to the Amended Statement of Defence in which the appellant joined issue with the respondent in relation to the aforesaid pro-forma invoices. In the circumstance, the learned trial Judge erred in law in rejecting the aforesaid proforma invoices relating to matters upon which the parties joined issue in their pleadings. The foregoing was not all. It is not correct to say, as stated in paragraph 4.8 of page 8 of the appellant's brief, that the court below suo motu raised the issue of the rejected cheques by proceeding to examine the cheques along with the proforma invoices, because issue (i) in the three issues set out for determination in the brief of the respondent in this appeal, that was the appellant in the court below, was as follows:-

"(i) Whether documents pleaded under paragraph 7 of the Appellant's Amended Statement of Defence were admissible in evidence."

An issue warranting the consideration of the pro-forma invoices pleaded in paragraph 7 of the Amended Statement of Defence was raised before the court below by the respondent that was the appellant in that court. With reference to the cheques which were also rejected by the learned trial Judge, the rejection of the cheques by the learned trial Judge cannot be sustained in law. What really led to the striking out of paragraph 8 of the Amended Statement of Defence was the alleged failure of the respondent to supply the particulars of the pro-forma invoices allegedly used by the respondent in supplying textile materials to the appellant. The particulars which the respondent was ordered to provide, which it failed to provide, and as a result of which paragraph 8 was struck out, were the particulars of the proforma invoices and not particulars of the aforesaid cheques mentioned in paragraph 8 of the Amended Statement of Defence. So, on the basis of the averment in the aforesaid paragraph the proforma invoices could no longer be produced by the respondent. However, the pro-forma invoices were also pleaded in other paragraphs of the pleadings filed by the parties and I have already dealt with that aspect of the matter. The situation was completely misconceived by the learned trial Judge in the case of cheques in question pleaded in paragraph 8 of the Amended Statement of Defence. The respondent could not legally be prevented from producing the cheques in question by reason only that he failed to supply further and better particulars of the relevant pro-forma invoices. The appellant never requested the respondent to furnish further and

better particulars of the cheques in question. The application of the appellant, as shown by a copy thereof at page 29 of the record of proceedings, was as follows:-

"(a) an order directing the defendant/respondent to supply to the plaintiff/applicant further and better particulars of paragraph 8 of the Amended Statement of Defence as to the pro-forma invoice(s), Sales invoice(s) and Waybill with which the goods mentioned therein were sold and delivered.

(b) such further and or other order as this Honourable Court may deem fit to make in the circumstances."

The order which a court may make in response to the application made to it must be confined strictly to the terms of the application because a court, in civil cases, does not make for a party a case which the party does not make for itself. The court must maintain a balance between the parties and not make a case for either of them. See Odubeko v. Fowler, (1993) 7 N.W.L.R. (pt. 308) 637. The learned trial Judge could be said to be prima facie right in declining to admit pro-forma invoices to which paragraph 8 of the Amended Statement of Defence related. She, however, could not as a consequence of the failure of the respondent to supply further and better particulars of the proforma invoices mentioned in paragraph 8 of the amended Statement of Defence reject cheques in respect of which the appellant did not apply for further and better particulars. The learned trial Judge was, therefore, wrong in law to refuse to admit the cheques in question particularly when they were pleaded in paragraph 5 of the Amended Statement of Claim and paragraph 8 of the Reply to the Amended Statement of Defence.

The legal position then is that, even if one takes the most favourable view of the appellant's case, the best that one can say is that the court below should have asked the learned counsel for the parties to address it in relation to the cheques in question. I have pointed out earlier in this judgment that in order to fairly and effectively deal with the main issues in this case it was necessary for the court below to deal with and consider the cheques and the proforma invoices pleaded, averred or mentioned in the pleadings of the parties. This court in Kuti v. Balogun (1978) 1 S.C. 53, 60 - 61 stated, inter alia, as follows in respect of a situation like this:-

"There could be instances however when a point which has not been raised is material to the determination of the appeal. When a court of appeal feels inclined to raise such point, parties must be given opportunity to make their comments thereupon before the court takes a decision on the point."

If one takes the view that the court below erred in law in failing to

specifically ask the parties to address it in relation to the cheques in question before coming to a decision on the effect of the rejection of the cheques by the learned trial Judge, success of a ground of appeal alone is not sufficient to warrant a reversal of a decision unless the error in law affected the decision in a crucial way. See Ayoola v. Adebayo & Ors., (1969) 1 All N.L.R. 159 at p. 164. **It is not every slip committed by a court that will result in an appeal against a judgment being allowed. An error or slip that may have the result of the appeal being allowed must be fatal in the sense that it must have occasioned a miscarriage of justice.** See Ezeoke v. Nwagbo, (1988) 1 N.W.L.R. (pt. 72) 618. **In the present case, it cannot reasonably be said that the slip or error, if any, had occasioned a miscarriage of justice.** As I have shown C above, as a matter of law, the rejection of the cheques and the proforma invoices in question by the learned trial Judge could not be sustained in law, in any case.

I have earlier in this judgment pointed out that the main issues in this case could not fairly and effectively be determined without consideration and D taking into account all the relevant cheques, delivery notes and other relevant documents. It has also been shown that the cheques and the delivery notes in question which the learned trial Judge rejected were wrongly rejected. They constituted a very important part of the defence of the respondent. In my view, even if the learned counsel for the parties had been asked to address the E court below on the question of the cheques and the delivery notes rejected by the learned trial Judge, the decision of the court below on the point would have been the same. **The damage had been done by the rejection of the cheques and delivery notes and there was no way of remedying the situation than to order a new trial as the court below had done. A retrial may be F ordered, in an appropriate case, even if the parties do not ask for it.** See Iyaji v. Eyigebe, (1987) 3 N.W.L.R. (Pt. 61) 523. A retrial will be ordered where, as in this case, the trial court wrongly rejected admissible evidence and such wrong rejection has occasioned a miscarriage of justice to the party who adduced the evidence wrongly rejected. See Ezeoke v. Nwagbo, (1981) 1 G N.W.L.R. (pt. 32) 686. **As rightly held by the court below, the rejection of the evidence, in this case, occasioned a miscarriage of justice to the respondent and the court below was right to set aside the judgment of the learned trial Judge and to order a retrial.**

The appeal does not succeed and it is hereby dismissed with N1,000 H costs. The judgment of the court below remitting this case to the High Court for retrial de novo by another High Court Judge other than Cudjoe, CJ is affirmed.

UWAIS CJN

I have had the opportunity to read in draft the judgment read by my learned brother Adio, JSC. I entirely agree that the appeal has merit.

The learned trial Judge, Cudjoe, J. (as she then was) acted wrongly to have refused to admit the documents tendered by the Respondent as defendant on the basis that paragraph 8 of the Amended Statement of Defence which contained averments on the documents had earlier been struck out. This had been shown to be a misconception of the pleadings in the amended Statement of Defence since there were other paragraphs thereof in which reference was made to the rejected documents.

C In my opinion, the Court of Appeal rightly held that there was a miscarriage of justice in the refusal of the learned trial Judge to admit the documents in question; and it properly ordered that since there was a mis-trial the case should be heard de novo before another Judge of the High Court.

For these and the fuller reasons contained in the judgment of my D learned brother Adio, JSC. I too hereby dismiss the appeal and affirm the decision of the Court below with N1,000.00 costs to the Respondent.

BELGORE JSC

E At conference we agreed to dismiss the appeal and I read the lead judgment of Adio, J.S.C., with which I agreed and I adopt it as mine. I dismiss this appeal for the same reasons.

OGWUEGBU JSC

F I had the advantage of reading in draft the judgment just delivered by my learned brother Adio, JSC. and I agree with his reasoning and conclusion.

The circumstances leading to this appeal can be traced to the striking out of paragraph 8 of the amended statement of defence and the rejection by the learned trial judge of the pro forma invoices, delivery notes and way bills which the defendant company sought to tender through one Peter Agono - D.W.1.

H Paragraph 8 of the amended statement of defence is a reply to paragraph 5 of the statement of claim. They read thus:

Paragraph 5 of the statement of claim:

"5. The plaintiff further avers that in 1981 and 1982, he delivered to the defendant drafts and cheques totaling N520,644.33 as deposit against allocation, sale and delivery of textile materials by the defendants."

The number, date and amount of each cheque/draft was set out in this paragraph.

Paragraph 8 of the amended statement of defence:

"8. The defendant further avers that some of the cheques stated by the Plaintiff in paragraph 5 of the claim were used by the Defendant to credit the Plaintiff's returned cheques for goods earlier on duly delivered to the Plaintiff, particulars of which are given herein below: The Defendant shall at the hearing of this suit lead evidence to show same."

The particulars of four cheques were set out in that paragraph of the amended statement of defence. That was the paragraph struck out by the learned trial judge on the application of the plaintiff when the defendant failed to supply the plaintiff with further and better particulars of the pro forma invoices, sales invoices and way bills with which the goods were sold and delivered. With the striking out of paragraph 8 of the amended statement of defence, the door was not closed to the use which the defence can make of the cheques, pro forma invoices and way bills pleaded in the other paragraphs of the amended statement of defence. The learned trial judge was of the contrary view.

The learned trial judge at the close of the evidence and addresses of counsel gave judgment against the defendant in the sum of N804,362.10 with interest. The defendant being aggrieved by the decision appealed to the Court of Appeal and complained of the rejection by the learned trial judge of the said documents evidencing the delivery of textile materials to the plaintiff. The court below allowed the defendant's appeal and remitted the case to the High Court, Kaduna for trial de novo by another judge of the High Court. The plaintiff who was dissatisfied with the judgment of the court of Appeal appealed to this court.

The plaintiff/appellant's claim against the defendant/respondent is for the sum of N804,362.19 being money deposited with the defendant for the supply of textile materials between October, 1981 and 1982 in the form of cash, cheques and bank drafts and that the defendant refused, failed or neglected to allocate or deliver to him any of the textile materials.

The defendant averred in its amended statement of defence that while dealing with the plaintiff in the business of textiles, the practice was for the plaintiff to place order for the goods from the defendant, take delivery of the goods and make payment for the goods delivered. It was further averred that payments were made by post dated cheques which were returned unpaid to the defendant and that the payments were duly covered by the pro forma invoices, delivery notes and way bills of the defendant. The defendant gave the particulars of the deliveries in its amended statement of defence. It further averred that the payments mentioned by the plaintiff in paragraph 7 of the

statement of claim were for goods delivered by the defendant to the plaintiff. It claimed that the cheque for N141,858.93 was represented to off-set the plaintiff's indebtedness to it which, at that time, stood at N482,800. 351/2.

The plaintiff in paragraph 16 of his Reply to the amended statement of defence averred as follows:

B *"16. The plaintiff will at the trial rely on the following documents and hereby gives the defendant notice to produce same -*

(a) Pro forma and sales invoices of the defendants Nos.

(b) The way bills with which the goods covered by invoices referred to in sub-paragraph (a) above were delivered."

C The plaintiff in paragraphs 3 and 4 of his Reply to the amended statement of defence joined issue with the defendant on the pro forma invoices. From these paragraphs of the pleadings referred to above, it is clear that pro forma invoices, way bills, delivery notes and the cheques must be in evidence and evaluated along with any other evidence which the parties may

D wish to call before the court can come to a just determination of the case. The rejected documents having been fully pleaded by the defence, they are relevant to its case. In civil proceedings, for a document to be admissible, it should not only be pleaded, it should also be relevant. In other words, it should be logically relevant to the issue in contest though not conclusive.

E Every fact which is pleaded and which is relevant to the case of either of the parties ought to be admitted in evidence. In this case the learned trial judge considered the weight to be attached to the documents instead of their relevance which ought to have been considered at that stage of the proceedings. See Ogunbiade v. Sasegbon (1966) N.M.L.R. 233, Torti v. Ukpabi (1984)

F 1 S.C.N.L.R. 214 and Oyediran v. Adebiosu 11 & Ors. (1992) 6 N.W.L.R. (pt. 249) 550. I agree with the court below that the documents are relevant and were wrongly rejected by the learned trial judge. I also agree that the rejection of the documents was capable of pre-judging the defendant's case. The defendant would appear to have been obstructed in putting across his case.

G Pleadings should be considered in their totality and not in water tight compartments because a paragraph in the pleading could cover more than one issue in the case.

 As to the court below not calling on the parties to address it on the rejected cheques before ruling on their relevance, counsel for both parties H canvassed the issue fully in their briefs of argument and in oral submissions. That being the case, the defendant cannot now complain that the court below raised the issue suo motu without giving him an opportunity to reply on it. Proof of sale and delivery of the textile materials in respect of which the plaintiff paid N804,362.19 would involve the admission in evidence of the cheques,

pro forma invoices, way bills and delivery notes so that all the facts would be before the court. I therefore reject the complaint of the plaintiff that he was not heard on the cheques before the court below decided on their relevance. The parties were heard on their briefs as well as in oral argument at the hearing of the appeal.

An order for a new trial can be made where there has been an error in B law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the court is unable to say that there has been no miscarriage of justice. See Bakare v. Apena (1986) 4 N.W.L.R. (Pt.33) 1 and Abibu v. Binutu & Or. (1988) 1 NSCC 55 at 63. The rejection of the documents C sought to be tendered by the defence can result in failure of justice and the court below was perfectly right to order a retrial.

For the above reasons and the fuller reasons contained in the lead judgment of my learned brother Adio, J.S.C. I too dismiss the appeal. I endorse the consequential orders including the order as to costs made in the D lead judgment.

ONUJSC

Having been privileged to have a preview of the lead judgment just E read by my learned brother Adio, JSC, I am of the view that the appeal lacks merit and it accordingly fails.

In as much as it became apparent to the Court of Appeal that certain documents to wit: cheques, waybills, delivery notes, bank drafts and more particularly cheques, proforma invoices and delivery notes, which constituted the fulcrum upon which the case between the parties in the appeal F herein revolved, and was fought as clearly disclosed in their pleadings. In particular are paragraphs 5 and 7 of the Amended Statement of Claim vis a vis paragraphs 6, 7, and 8 of the Amended Statement of Defence, (the latter which had been wrongly, in my view, struck out) and the Reply to the Amended G Statement of Defence in paragraphs 3 and 4, the answer to the crucial and decisive issue No. 3 formulated by the appellant as arising for determination, which asks:

3. *"Whether there were sufficient grounds for the court below to set aside the judgment of the trial court and to order a retrial of the suit."* H could not be anything else but in the affirmative.

In paragraphs 5 and 7 of the Statement of Claim it is pleaded thus:

"5. *The plaintiff further avers that in 1981 and 1982, he delivered to the defendant drafts and cheques totalling N520,644.33 as deposit against*

allocation, sale and delivery of textile materials by the defendants.

PARTICULARS

<u>Date</u>	<u>Cheque or draft No.</u>	<u>Amount</u>
(i) 28/10/81	005832	N100,000.00
(ii) 28/11/81	002866	79,235.78
B (iii) 28/11/81	102864	59,916.91
(iv) 29/12/81	102867	51,491.64
(v) 29/12/81	006324	70,000.00
(vi) 31/12/81	6910	10,000.00
(vii) 12/1/82	006412	100,000.00
C (viii) 23/4/82	007295	50,000.00

7. The plaintiff further avers that he also delivered to the defendant the following three cheques as deposit for textile materials to be sold and delivered to him by the defendant.

PARTICULARS

<u>D</u>	<u>Cheque Number</u>	<u>Amount</u>
1.	776	N70,680.13
2.	788	35,083.25
3.	802	36,095.55

totalling the sum of N141,858.93 drawn against the plaintiff's account with Savannah Bank of Nigeria Limited."

Paragraphs 5, 6 and 7 (paragraphs 8 having been struck out) of the Amended Statement of Defence in which issue was joined on the cheques, proforma invoices etc averred as follows:-

"5. The Defendant further contends that the plaintiff in making payments for goods delivered to him as per paragraph 4 above always made same by post dated cheques. The said post dated cheques ended up being returned unpaid to the Defendant. The Defendant shall lead evidence to show same at the hearing of this suit.

6. The Defendant in answer to paragraph 7 of the claim denies that the stated payments were for deposit against allocation, sale and delivery and states that the payments were for goods duly delivered by the defendants to the plaintiff.

7. The Defendant further and in addition to paragraphs 6 states that the said payments were duly covered by proforma invoices, delivery notes and way bills of the Defendant, and the goods duly delivered particulars of which are given herein below."

In paragraphs 3 and 4 of the Reply to the Amended Statement of Defence which pleaded the proforma invoices wrongly rejected by the learned trial Judge even though issues were joined thereon by the parties it was averred

thus:

"3. In answer to paragraph 6 and 7 the plaintiff avers that no goods were delivered to him before payment was made and that invoices Nos. 28245, 28258, 28254, and 28288 on which the cheque/draft No. 005832 for N100,000.00 was appropriated by the defendant, are also the invoices used to appropriate the other cheque No. 102864 for N59,916.91. B

4. In further answer to paragraph 7 of the Amended Statement of Defence the plaintiff avers that he never made or authorized any confirmation of order on which all the invoices on which the cheque No. 005832 for N100,000 was appropriated as alleged and that no invoices bearing those numbers were raised in his favour by the defendant." C

If the answer to issue No. 3 is in the affirmative as indeed it must perforce be, it gives meaning, force and justification to the conclusion arrived at on appeal by the court below which after due consideration of the appeal brought before it by the present respondent herein, said inter alia -

"At this stage I will examine the proforma invoices and the cheques D that were not admitted in evidence and find out whether or not they were mentioned in paragraph 7 of the Statement of Defence I have compared the invoice and also the cheques rejected by the learned trial judge and I am satisfied that those documents rejected by the learned trial Judge were pleaded in the particulars mentioned in the said paragraph 7 of E the above Statement of Defence."

And after carrying out the examination hereinbefore referred to by setting out the particulars of the cheques, amounts, date and the serial numbers of the proforma invoices and seeing for itself that some admissible documents were wrongly rejected, further added as follows:- F

"It is clear that the foregoing rejected documents were actually pleaded by the Defendant in his Amended Statement of Defence as shown above. They are therefore relevant to the case of the Appellant/Defendant. I agree with learned SAN that it will appear to be prejudicial to the case of the Appellant if those documents did not form part of his defence. G

I am therefore of the opinion that the decision of the learned trial Judge in rejecting those documents should be interfered with in the interest of justice. Ground one is therefore meritorious and will succeed."

The court below in the exercise of the powers conferred upon it by section 16 of the Court of Appeal Act, Cap. 43 1976, would appear clearly, in my opinion, H to have arrived at the above view after a dispassionate consideration of the issues raised, joined and argued by the parties in their pleadings and evidence. Having myself read the record, I agree with the appellate court for interfering with the trial court's appraisal of the facts therein since they are

unreasonable and perverse. See Johnson v. Williams 2 WACA 248; Akinloye v. Eyiola (1968) NMLR 92; Lawal v. Dawodu (1972) 1 All NLR (Part 2) 270 AT 373; Obisanya v. Nwoko (1974) 1 All NLR (Part 1) 420 at 428 and Kankara v. Imonikhe (1974) 1 All NLR (part 1) 383 at 393, to mention but a few or that the trial court did not properly appraise the evidence adduced before it before B arriving at the conclusion it did.

In such a situation, the appropriate order to make in the circumstances, is a retrial. In the instant case where clearly the trial court failed to resolve several material issues before it especially in relation to certain cheques and way bills as hereinbefore demonstrated, the proper order to make is a C retrial. See Onifade v. Alhaji Olayiwola (1990) 7 NWLR (Part 161) 130; (1990) 11 SCNJ 10 at 20; Okpiri v. Jonah (1961) 1 All NLR 102; Armels Transport Ltd. v. Martins (1970) All NLR 27 and Adeyemo v. Arokopo (1988) 2 NWLR (Part 79) 703.

For the above reasons and the more comprehensive ones contained D in the judgment of my learned brother Adio, JSC I too dismiss this appeal and make similar consequential orders inclusive of that remitting the case to the trial court for hearing de novo as well as costs contained therein.

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