

SUPREME COURT OF NIGERIA

18TH JULY, 1997. SC. 45/1991

**CORAM:- M. E. OGUNDARE, E. O. OGWUEGBU, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC**

DR. J. N. UDOM DEFENDANT/APPELLANT
AND
E. MICHELETTI AND SONS LTD. PLAINTIFF/RESPONDENT

APPEALS - *Claim that was rejected by trial court - Where not cross-appealed against - Respondent cannot raise issues that have no relevance to the ground of appeal.*

APPEALS - *Briefs - Use of the words "two briefs" by the Court of Appeal - Did not occasion a miscarriage of justice.*

CLAIMS - *Specific claim - Set-off claim by the defendant - For a specific period - Court is without jurisdiction to award what is not claimed.*

CONTRACTS - *Time - That was originally of the essence of the contract - Where waived subsequently - Fresh notice to complete work within a stipulated time - Would become necessary.*

CONTRACTS - *Revocation - Contract that was kept alive by defendant for plaintiff's benefit - Should not be revoked without notice to the plaintiff.*

FACTS

The defendant/appellant Dr. Udom who is a medical practitioner entered into a written building contract in 1966 with the plaintiff/respondent for the construction by the plaintiff of two separate houses on the defendant's land. The agreed contract price was N27,000.00 and the plaintiff was expected to complete the work in 30 weeks from 31st October, 1966, while the defendant was expected to pay within 15 months from the commencement date.

However, the building was not completed before the out-break of the Nigerian Civil War. After the war ended, there were exchange of letters by the parties over the state of the account and state of the works. The defendant did not make any payments to the plaintiff until sometime in 1973, eight years after the commencement of work and three years after the war ended, when the defendant paid N6,000.00 only out of the total contract price. The defendant refused to make any further payment where upon the plaintiff sued for the

balance of the contract price. The plaintiff's claim was dismissed at the High Court. Upon appeal to the Court of Appeal, the decision of the High Court was reversed and judgment entered in favour of the plaintiff in the sum claimed. Against this judgment of the Court of Appeal, the defendant has now appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

"(1) Was the Court of Appeal right in entering judgment for the respondent in the sum of N21,800 when the respondent did not complete the building Contract and without materials and shed used by the respondent in the construction work?

(2) Was it right for the Court of appeal to introduce into the appeal before it and to consider questions as to the appellant seizing the buildings and proceeding to complete the same without giving notice to the respondent to complete the building works and on conjecturing as to what the respondent might have done if it had such notice?

(3) Even though the appellant had kept the contract alive by paying N6,000.00 towards the contract price and by requesting in his letter of 9th August, 1973, Exhibit 'D', for a meeting with a representative of the respondent to discuss the building contract, was he not entitled to recover from the respondent the loss he had already suffered by the respondent's breach in not completing the building contract on the 28th day of May, 1967?

(4) Was the Court of Appeal right in considering and in determining the appeal before it on what it held to be 'the two appellant's briefs' in the appeal?"

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

Claims - Special claim

1. In effect, the set-off limited to the above pleaded N24,000.00 representing the rent the Defendant would have earned by the end of June, 1972 and nothing beyond that period, was the only remedy employed by him to discharge or reduce the plaintiff's claim against him. Since he had claimed for a specific period, to wit: 1967 to 1972 and there was no amendment of his pleading to include any period outside 1972, the Court below held, rightly in my view, as follows:

"Further, the respondent had not claimed any set-off for 1975. He had limited his claim to 1972. A court is without jurisdiction to award what is not claimed. I believe it is this difficulty the lower court was trying to overcome by awarding the sum of N4,800.00 as general damages when in fact respondent had claimed rents from 1967 to 1972 as special damages.

This awarded ought not to stand." (p. 1699 F)

Appeals - Claim that was rejected

2. The trial court did not consider plaintiff's claim for the materials left on the site which the Defendant used in the construction of the houses. Thus, that aspect of the claim would appear clear to have been rejected. The Defendant did not cross-appeal on the point and the court below made no pronouncement on it. It is trite law that where a respondent as in the instant case has not filed a cross-appeal or at least given a respondent's Notice, the role of the appellate court is strictly limited to seeing whether or not the decision of the court below is correct. Indeed, such a respondent has not got an unrestrained or unbridled freedom of raising issues for determination which have no relevance to the grounds of appeal filed. (p. 1700 A)

Time - That was originally of the essence

3. In view of the foregoing pieces of evidence the trial court having held that although time was originally of the essence of the contract, the time so fixed had ceased to be applicable because of waiver. Since the Defendant in effect had made a promise not to insist on his strict legal right, he should have before embarking on completing the job himself give the plaintiff notice to complete the work within a stipulated time. (p. 1701 C)

Contracts - Revocation

4. Thus, in the instant case, because the Defendant had kept the contract alive for the benefit of the plaintiff and himself, it was wrong to have suddenly gone into the buildings to commence work on his own without notice to the plaintiff. The court below in holding the above view was, in my opinion, not introducing matters which did not arise in the case. (p. 1702 A)

Appeals - Briefs

5. In the case in hand, and from the Defendant's Brief, all that he is complaining about appears to be the use of the words "two briefs". The Defendant, as it were, did not complain that he was deprived of a fair consideration of his own side of the appeal. On the contrary even without filing a Respondent's amended brief to meet the supplementary brief and the further additional grounds of appeal of the plaintiff, he was nevertheless allowed to make oral submissions on them. In my opinion, the issue now being raised cannot avail the Defendant unless it can be shown that there has been a substantial error in procedure which clearly led to a miscarriage of justice. (p. 1704 E)

NOTABLE POINTS OF INTEREST**OGWUEGBU.JSC***1. Contracts - How time can again become of the essence*

The appellant by his own act made the time of completion no longer of the essence of the contract. Having granted the respondent the indulgence, he thereby waived his rights as to the breach which had occurred. He cannot go back on his agreement without giving the respondent reasonable notice. If he had given reasonable notice of extension of period of completion, time would have once more become of the essence of the contract and this would have entitled him to sue for the money he spent in completing the works if the respondent failed to do so. (p. 1707 D)

2. Contracts - Waiver of right to insist on completion before payment

By taking possession of the uncompleted buildings without any notice to the respondent, the appellant had waived his right to insist that the respondent must complete the whole work before payment. It was the duty of the appellant to cross-claim for the amount expended in completing the buildings. The respondent did not abandon the contract. This is not a case where a plaintiff abandoned a contract and the circumstances are not such as to give the defendant no option whether he would take the benefit of the work or not. (p. 1708 B)

REPRESENTATION

Appellant absent. Not represented

Chief A. O. Mogboh, S.A.N. with A. Haruna Esq. for the Respondent

CASES REFERRED TO

Hoenig v. Isaacs (1952) 2 ALL E.R. 176

Bolton v. Mahadeva (1972) 2 ALL E.R. 1322

Sumpter v. Hedges (1898) 1 Q.B. 673

Nzekwu v. Nzekwu (1989) 2 NWLR (Part 104) 373 at 430

Williams v. Daily Times (1990) 1 NWLR (Part 124) 1 at 28 and 54

Nwokoro v. Onuma (1990) 3 NWLR 22 at 42

Makanjuola v. Balogun (1989) 3 NWLR (Part 108) 192 at 205

Ekpenyong v. Nyong (1975) 2 S.C. 71 at 80-81

STATUTE & RULES REFERRED TO

Court of Appeal Act 1976 s. 16

Court of Appeal Rules O. 1 r. 20(4) & (5), O.3 r. 23, O. 6 rr. 4(ii), 5, 9(a)

BOOK REFERRED TO

Chitty on Contract 24th Ed. para. 1472 p. 693

LEAD JUDGMENT BY ONU JSC

This is an appeal against the decision of the Court of appeal, Enugu B Judicial Division (Coram: Macaulay, Oguntade and Uwaifo, JJ.C.A) delivered on the 24th day of November, 1988 wherein that court set aside the judgment of the High Court delivered in the case on the 16th day of January, 1980, and entered judgment for the Defendant/Respondent/Appellant (hereinafter simply referred to as Defendant).

C The historical background of the case giving rise to the appeal may be summarized as follows:-

The Defendant, who is a medical practitioner by profession, entered into a written building contract with the plaintiff/Appellant/Respondent (hereinafter referred to as plaintiff) for the construction by the plaintiff of two D separate houses at the Defendant's leasehold property situate at plot "T" Lugard Avenue Extension, GRA; Enugu known as Nos. 6 and 8 Federal Crescent, GRA., Enugu. The agreed contract price was then N27,000.00 (twenty-seven thousand naira) and the plaintiff was expected to complete the work in 30 weeks from 31st October, 1966. While the completion of the houses ought E to have been on or before 28th May, 1967, the Defendant was to pay for their cost within 15 months from the commencement date. Be that as it may, the buildings were not completed before the out-break of the Nigerian Civil War.

Soon after the War ended, there were exchange of letters by the parties over the state of the account and over the state of the works. However, F in 1973, eight years after the commencement of work, the Defendant made the first payment to the plaintiff. This was admitted by the Defendant who while testifying before the trial court said in answer to a question.

"Q. In 1973 you paid the plaintiff only N6, 000.00

A. Yes, it is true that that was the only payment I made for the G construction of the two houses."

On account of the Defendant refusing to make further payments, the plaintiff instituted the action giving rise to the instant appeal, claiming against the Defendant the sum of N21,800.00 (twenty-one thousand eight hundred naira as the balance of the contract price.

H The Defendant in his defence not only pleaded but maintained that the plaintiff's action was statute-barred; that plaintiff was in breach of the building contract although he was entitled to a set-off against the contract price.

After the exchange of pleadings by the parties and the case went to

trial, the High court (Coram: Araka, C.J.) in a considered judgment held that the plaintiff had not shown that it had completed the buildings, adding that since it had not quantified in monetary terms the work that remained to be done, it could not recover. It was further held that the Defendant could not insist that the work be completed according to the contract since he had waived his rights under Exhibit K - letter dated 5th August, 1972 from the Defendant to the plaintiff in respect of the Contract. The Defendant was beside not adjudged to be entitled to loss of rent for the years 1967 to 1972 but the trial court nonetheless proceeded to award him N4,800 representing general damages for loss of rent for 1975 - a year outside the period claimed by him. C

Being aggrieved by the trial court by the trial court's decision, the plaintiff appealed to the court below which after a careful consideration of the case entered judgment for the plaintiff in the sum of N21,800.00. As earlier stated, the only payment made by the Defendant for the two houses was in February, 1973 when he paid plaintiff N6,000.00. Besides, on his own showing and as found by the trial court, the Defendant had let the houses to tenants since 1976 and had been collecting rents for upwards of 16 years without paying to plaintiff N21,800.00 adjudged by that court. D

It is against this judgment that the Defendant has now appealed to this Court premised on a Notice of Appeal containing six grounds. E

The parties subsequently exchanged briefs of argument in accordance with the rules of this court. The Defendant submitted the following four questions for our determination, to wit:

"(1) Was the Court of Appeal right in entering judgment for the respondent in the sum of N21,800 when the respondent did not complete the building Contract and without giving credit to the appellant for his materials and shed used by the respondent in the construction work? F

(2) Was it right for the Court of appeal to introduce into the appeal before it and to consider questions as to the appellant seizing the buildings and proceeding to complete the same without giving notice to the respondent to complete the building works and on conjecturing as to what the respondent might have done if it had such notice? G

(3) Even though the appellant had kept the contract alive by paying N6,000.00 towards the contract price and by requesting in his letter of 9th August, 1973, Exhibit 'D', for a meeting with a representative of the respondent to discuss the building contract, was he not entitled to recover from the respondent the loss he had already suffered by the respondent's breach in not completing the building contract on the 28th day of May, 1967? H

(4) *Was the Court of Appeal right in considering and in determining the appeal before it on what it held to be 'the two appellant's briefs' in the appeal?"*

The plaintiff on the other hand, proffered five issues as arising for our determination. They are:-

B "1. *Was the Court of Appeal justified in awarding the respondent the balance of the contract price.*

2. *Would the court of Appeal be right in considering and giving credit to the Appellant for his materials and shed used by the respondent in the construction when the appellant did not cross-appeal against the findings on that aspect.*

C 3. *Having kept the contract alive by the payment of N6,000.00 in 1973 and also having waived the issue of performance as to time of completion, and since the Court of Appeal and the trial; Court have found that appellant did not issue a reasonable notice going to insist on performance within a particular period, would it be correct still to award damages for failure to complete the work within a particular period.*

D 4. *Did the Court of Appeal introduce matters not canvassed in the court below.*

E 5. *What injustice, if any, did the appellant suffer as a result of the Court of Appeal using the words "the two appellant's brief" in the appeal.*

At the hearing of the appeal on 12th May, 1997 the Defendant who had hitherto filed his Brief was absent as though shown to have been served the Hearing Notice, Pursuant to Order 6 Rule 9 (6) of the Supreme Court Rules the appeal thereon was taken as having been argued on the Appellant's brief. F Learned Senior Advocate for the plaintiff Chief Mogboh, after adopting his Brief, expatiated briefly thereon orally.

In my consideration of this appeal wherein all issues will be taken together by me, I wish to adopt the issues submitted by the Defendant as satisfactory enough to dispose of the contentions by the parties. Arguing all G four Defendants' issues which overlap the five proffered by the plaintiff together, G.R.I. Egeonu, Esq., SAN for the Defendant contended as follows in his Brief.

That the plaintiff filed its initial Appellant's brief in the Court of Appeal on the 13th day of December, 1984 vide pages 72-93 of the record of H appeal. That on 22nd day of October, 1987, the respondent filed a Motion in the court below praying for leave to file and argue further additional grounds of appeal and "to amend the appellant's brief accordingly and to deem the appellant's brief attached hereto as properly filed and served." Further, that two issues for determination were set out in the plaintiff's brief filed on the

22nd day of October, 1987; the first issue related to the further additional ground at page 105 of the record appeal while the second issue related to the second issue related to the second additional ground of appeal in its Motion filed in the court below on the 9th day of July, 1984. We were referred to pages 67-70, particularly page 70 of the record of appeal. It was thereupon submitted that it was clear that the brief of argument filed by the plaintiff in the court below on 22nd October, 1987, was not just in respect of the further additional ground of appeal as set out at page 105 but covered all the issues the plaintiff as Appellant, in the court below, wanted that court to determine in the appeal before it.

During the hearing of the appeal before the court below on the 27th day of September, 1988, it was further argued, the counsel for the plaintiff specifically adopted his client's said Brief filed on 22/10/87 and no more. It therefore submitted that the court below was wrong in considering and in determining the appeal before it on what it called "the two appellant's briefs." By so doing, it was contended, the Court below introduced into the appeal matters which were not covered by the two issues in the said Brief of 22/10/87 and this occasioned a miscarriage of justice.

It was further maintained that the plaintiff instituted this suit on the 22nd day of February, 1974, and claimed against the Defendant the sum of N21, 800.00 as balance of the contract price though it had not completed the building contract and had not given credit to the Defendant for his materials and shed which it used for the construction work. The plaintiff claimed the said balance of N21,800.00 on the basis that it had concluded the building contract as agreed by both parties vide paragraph 6 of the Amended statement of Claim. But the condition for payment of the contract price, it was further argued, was that the construction works must have been completed vide paragraphs 4 and 5 of the Statement of Claim and also as stipulated in Exhibit 'A' - the building contract itself.

Furthermore, it was maintained, at the trial it was established that the plaintiff never completed the construction works which it contracted under Exhibit 'A' to carry out for the Defendant whereas it was a condition of the contract that the building contract was to have been completed on the 28th day of May, 1967 and the Defendant was to let out the buildings to raise the money to pay the contract price.

After being referred to some passages in the trial court's judgment and the conclusion arrived at by the court below on appeal, it was contended that the plaintiff did not prove its case as to be entitled to the sum, of N21,800.00 awarded to it by the Court below. As the court below had set aside the judgment of the trial court in its entirety, it was further argued, it (plaintiff) was

bound by section 16 of the Court of Appeal Act, 1976, Order 1 Rule 20(4), (5) and Order 3 Rule 23 of the Court of Appeal rules, 1981, as amended, to give the judgment that ought to have been given in the case.

The three English cases of Hoenig v. Isaacs (1952) 2 All E.R. 176, H. Dakin & Co Limited v. Lee (1916) 1 K.B. 586 and Bolton v. Mahadeva (1972) 2 All E.R. 1322, it was pointed out, do not support the decision arrived at by the court below. It was then pointed out that in Hoenig's Case (supra) and Dakin's Case (supra), which were cases of completed contracts in which there were defects, the English Court did not award the plaintiffs therein the full balances of the contract prices but rather reduced balances of amounts necessary to remedy the defects. And in the Mahadeva Case (supra), it was maintained, the English Court held that the plaintiff therein could not recover the balance of the price as the cost to remedy the defects of the completed contract showed that the contract was not substantially performed. After pointing out that the case of Sumpter v. Hedges (1898) 1 QB. 673 is a case in point, it was further submitted that the court below would have dismissed the plaintiff's claim, adding that even if any award could have been made by the court below, the award should have been limited to the value of the work done less the value of the Defendant's materials and structure used by the plaintiff and also less the loss suffered by the Defendant as a result of the plaintiff's failure to complete the building contract on the 28th day of May, 1967.

Our attention was next drawn to the plaintiff's Amended Statement of claim in the record of appeal and it was contended that it (plaintiff) never raised any issue whether in its pleadings or evidence that the Defendant seized the building works and went on to complete the same without giving it notice of his intention to do so and that the plaintiff never made any issue as to what it would have done if it had such notice. After pointing out how the court below dealt with the above matters in several passages of its judgment, it was maintained that the court below then went on to make for the plaintiff a case it neither pleaded nor canvassed at the hearing. These matters, it was contended, did not arise and could not have arisen as the plaintiff instituted the suit giving rise to the appeal herein in 1974 on the basis that it had completed the building contract: the Defendant having served the plaintiff the Notice of set-off based on its non-completion of the building contract and that it was not until 1976 that the appellant went on to complete his buildings and to carry out the external works. It was therefore submitted that the court below was wrong in the course it took as it adversely affected the just determination of the appeal before it.

The following cases were called in aid, viz:

- (i) African Continental Seaways Ltd. v. Nigerian Dredging Roads

and General works Ltd. (1977) 5 S.C. 235

(ii) Chukwuma Okwudili Ugo v. Amanchukwu Obiekwe & Anor. (1989) 1 NWLR 567.

(iii) F.A. Akinbobola v. Plisson Fisko Nigeria Ltd. & ors. (1991) 1 NWLR (part 167) 270.

(iv) Federal Capital Development Authority v. Alhaji Musa Naibi B (1990) 3 NWLR (part 138) 270.

It is well settled, it is further argued, that where a party to a contract has committed a breach of the contract, the innocent party has the option to treat the contract as at an end or to keep the contract alive and claim damages for the loss he had suffered as a result of the breach. Chitty on contract 24th C Edition paragraph 1472 at page 693 was called in aid, adding that the fact that the Defendant kept the contract alive in this case did not deprive him of his rights to damages for the loss he suffered as a result of the plaintiff's failure to complete the building contract on the 28th day of May, 1967.

In the premise, the Defendant urged us to allow the appeal, set aside D the judgment of the court below and restore the judgment of the trial High Court.

It is common ground that the plaintiff's claim in February, 1973 against the Defendant was for the sum of N21,800.00 being balance of the contract price. The Defendant gave notice of a set-off as borne out at pages 4, 5 and 6 E of the appeal record and the Statement of Defence wherein he merely stated that the plaintiff agreed to give him credit for the value of the materials deposited on the site although he did not claim for them specifically except in paragraph 13 of the Statement of Defence wherein he pleaded thus:

"The defendant is therefore entitled to a further set-off of N24,000.00 F against the contract price under the Buildings contract for the construction of the defendant's buildings at plot "T" Lugard Avenue Extension, Enugu." **In effect, the set-off limited to the above pleaded N24,000.00 representing the rent the Defendant would have earned by the end of June, 1972 and nothing beyond that period, was the only remedy employed by him to discharge or G reduce the plaintiff's claim against him. Since he had claimed for a specific period, to wit: 1967 to 1972 and there was no amendment of his pleading to include any period outside 1972, the Court below held, rightly in my view, as follows:**

"Further, the respondent had not claimed any set-off for 1975. He H had limited his claim to 1972. A court is without jurisdiction to award what is not claimed. I believe it is this difficulty the lower court was trying to overcome by awarding the sum of N4,800.00 as general damages when in fact respondent had claimed rents from 1967 to 1972 as special damages.

This awarded ought not to stand."

The trial court did not consider plaintiff's claim for the materials left on the site which the Defendant used in the construction of the houses. Thus, that aspect of the claim would appear clear to have been rejected. The Defendant did not cross-appeal on the point and the court below made no pronouncement on it. It is trite law that where a respondent as in the instant case has not filed a cross-appeal or at least given a respondent's Notice, the role of the appellate court is strictly limited to seeing whether or not the decision of the court below is correct. Indeed, such a respondent has not got an unrestrained or unbridled freedom of raising issues for determination which have no relevance to the grounds of appeal filed. See Nzekwu v. Nzekwu (1989) 2 NWLR (part 104) 373 at 430; Oguma Associated Companies (Nigeria) Ltd v. I.B.W.A. Ltd (1986) 1 NWLR (part 73) 658 at 681; Williams v. Daily Times (1990) 1 NWLR (part 124) 1 at 28 and 54 and Edokpolo & Co. Ltd. v. Sem-Edo Wire Ltd (1989) 4 NWLR (part 116) 473. In the latter case this Court held at page 493 as follows:-

"Appellant must show in the judgment sought to be reversed that the views expressed by the court below is wrong. It is only on such consideration that an appellate court can examine in the light of the grounds of appeal whether the judgment appealed from is right or wrong. The appellate court is entitled to have the benefit of the opinion of the judges in the judgment of the court below. It is the opinion appealed against, which is affirmed or reversed. Hence, without the benefit of such opinion an appellate court will be extremely reluctant to interfere."

In any event, the court below in the instant case considered this issue adequately when it held, inter alia, thus:

"But it is difficult to set-off this amount from the contract price when the court has not been given details of total amount spent by the defendant in completing the work so that this amount and the costs of the said building materials and temporary shed might be deducted from the contract price. In any judgment, any award made in favour of the defendant without details of the expenditure incurred by him in completing the works will be arbitrary and wrong."

In the case in hand, since the Defendant did not cross-appeal against those findings and conclusions, they are in my respectful view, deemed as correctly made and cannot now be re-opened. The Defendant as it were, accepted those findings and conclusions, hence there was no cross-appeal. This court cannot interfere without having the benefit of the opinion of the court below.

The Defendant in an attempt to justify the steps he took after the

alleged breach of the building contract had this to say:-

"The plaintiffs have not up till today handed to me the keys in respect of those buildings. As at June, 1972, there were some doors still not fixed to the building, some critical windows not put in the houses, toilets and drains not done at all, fencing and excavation not made. I got all these fitted to the houses."

B

In the cross-examination of the Defendant the following matter was elicited.

"Q. Did you write to the plaintiff that you will put in the house windows and toilets?"

A. I did not."

In view of the foregoing pieces of evidence the trial court having held that although time was originally of the essence of the contract, the time so fixed had ceased to be applicable because of waiver. Since the Defendant in effect had made a promise not to insist on his strict legal right, he should have before embarking on completing the job himself give the plaintiff notice to complete the work within a stipulated time. The trial court further held that it is only after such notice had been given to the plaintiff and it failed to respond that the Defendant would be entitled to claim for the sum spent on completing the work. Thus, the court below was in my view, justified to hold as follows:-

C

"When both plaintiff and the defendant are silent as to the value of works done by either side before the buildings were completed it becomes difficult, if not impossible for the court to assess damages on the basis of quantum meruit."

E

The respondent has not cross-appealed against the above finding. I accept therefore that it was correctly made."

The learned Justices of the court below further elucidated on the point by quoting from the learned authors of Chitty on Contracts 24th Edition paragraph 1472 at page 693 on election to continue a contract to the effect that -

"Election to continue contract: It should be noted however that an innocent party is not ordinarily bound to treat the contract as discharged. He may at his option, elect to treat the contract as a continuing contract or to say that the breach by the other party has discharged his liability. If he chooses the former course, he can still sue for damages for any loss sustained as a result of the breach. But the contract, with all its terms and conditions remains alive for the benefit of the Wrong doer as well as himself. Each party is entitled to hold the other to his bargain and to continue to tender due performance on his part."

G

H

The learned Justices continued by saying inter alia thus:

"Since the respondent had waived the question of performance by appellant in respect of time of completion and since respondent did not

serve a reasonable notice showing that he meant to hold appellant to its time, the respondent therefore kept the contract alive both for himself and the appellant."

Thus, in the instant case, because the Defendant had kept the contract alive for the benefit of the plaintiff and himself, it was wrong to have suddenly gone into the buildings to commence work on his own without notice to the plaintiff. The court below in holding the above view was, in my opinion, not introducing matters which did not arise in the case. In this wise, I hold the firm view that despite the Defendant's denial that if he did any extra work in the buildings it was in 1973 in view of Exhibit K written on 5th August, 1972 wherein the plaintiff had agreed to carry out minor repairs to the walls and fixed furniture, plus the repainting. If on the 20th July, 1972 the doors etc were not there, the Defendant would have stated so in his letter. That the Defendant endeavoured strenuously to have the two houses, the subject - matter of the suit giving rise to this appeal built for him at no cost to Statement of Defence he pleaded that the action was statute barred - a plea which if successful would have enabled him to own the houses for free without paying for their construction and to have successfully estopped plaintiff from pursuing its rights under the contract. Indeed, when the Defendant found that he could not pursue this line because of the first payment he made in 1972, he tried other methods. The court below put the matter succinctly thus:

"The Respondent claimed to have spent his own money to complete the contract. He claimed for the cost of the materials which he said Appellant used in doing the job. He claimed for loss of rent."

The Defendant neither gave evidence as to the date when he unilaterally took over the building nor did he make any claim for the amount allegedly expended by him in completing the job. Indeed, he claimed for the loss of rent had suffered but he limited such claim to 1972. The trial court albeit awarded him up to 1975 which he did not claim. The court below in setting aside that award held that the trial court had no jurisdiction to so decide.

See Awijó v. Olunlade (1975) 1 NMLR 82; Tako Tometi v. Ajaguna & ors. (1975) 1 NMLR 122; Chief registrar v. Vamos (1971) 1 S.C. 33 and Awoyegbe v. Ogbeide (1988) 1 NWLR (part 73) 695. I too so hold.

On whether the court below was right in considering and determining the appeal before it on what it held to be "the two appellant's briefs" or put in another way, what injustice, if any, did the Defendant suffer as a result of the court below using the words "the two appellant's briefs" in the appeal? My comment is as follows:-

It is pertinent to point out firstly that the plaintiff filed a brief of argument on 13th December, 1984 vide pages 72-93 of the Record. Before this,

leave of court was sought and obtained to file and argue additional grounds of appeal. The Defendant on receipt of the said brief filed his brief of argument on 28th January, 1975. However, on 22nd October, 1989, the plaintiff (then Appellant) further sought and obtained leave of court (court below) to file and argue further additional grounds of appeal and to amend the brief already filed. The Defendant as can be discerned from the Record, did not reply to this latest brief despite the statement credited to his (Defendant's) counsel Mr. Egonu (S.A.N.) to the effect that

"We are not opposing but we are asking for costs of N500.00. I shall have to re-write the respondent's brief."

On 27th September, 1988 when the appeal came up for hearing in the court below Defendant's counsel Mr. Egonu (S.A.N.) said:

"Arising from the leave given to Appellant to file an amended brief, I should file an amended respondent's brief. Unfortunately through mere inadvertence, I did not file it. However I have only little to add to the brief filed earlier. If the court would grant "me leave, I should be able to advance oral argument in addition to the brief already filed."

The Record does not show that the leave sought was granted, albeit the Defendant's Counsel's argument following his application shortly thereafter is indicative that he was granted leave to argue on the contents of the amended brief in addition to his earlier brief dated 28th January, 1985. The Defendant was given full opportunity to address on all the plaintiff's briefs, thus leading the court below to comment on the two briefs as follows:

"I may here observe that arising from the late filing by appellant of a 'further ground of Appeal' the Appellant filed two briefs of argument, the later sequential or supplemental to the earlier one. I am therefore to consider the arguments canvassed in the two appellant's briefs. I hope counsel will guide (sic) against the occurrence (sic) in the future as it may easily mislead."

What the above amounts to, in my view, is that while the method adopted by the plaintiff may be untidy and may mislead but it has not occasioned any injustice to the Defendant as he who did not file any amended Respondent's Brief was nonetheless allowed to advance argument in reply to the issues canvassed in the two Briefs pursuant to Order 6 rules 4(ii) and 5 as well as Order 6 rule 9(a) Court of Appeal Rules, 1981 as amended by the 1984 Rules. The judgment of the court below was devoted to a consideration of the issues canvassed by both Defendant and plaintiff in their respective Briefs. No where did the court below consider any issues outside those raised in the grounds of appeal (both original, additional and further additional grounds) canvassed in the two Briefs of argument filed by the plaintiff. The Defendant

had adequate opportunity to, and did in fact, reply fully to those issues in his Brief as well as in the oral argument of his counsel. The court below was therefore obliged to consider the written and oral arguments of the parties and to give its decision thereon. And this it did.

For the avoidance of doubt, order 6 rules 4(ii) and 5 as well as rule B 9(a) Court of Appeal Rules (bid) provide as follows:-

"4.

(ii) *The respondent's brief shall answer all material points of substance contained in the appellant's brief and contain all points raised therein which the respondent wishes to concede as well as reasons why the appeal C ought to be dismissed.*

It shall mutatis mutandis, also conform with rules 3(a), (b), (c), (d), and (e) above.

5. *The appellant may also, if necessary, within 14 days of the service on him of the respondent's briefs but not later than three clear days D before the date set down for the hearing of the appeal, file and serve or cause to be served on the respondent reply brief which shall deal with all new points arising from the respondent's brief*

.. .. .

9(a) *Oral argument will be allowed at the hearing of appeal to E emphasize and clarify the written argument appearing in the briefs already filed in court." See Nwokoro v. Onuma (1990) 3 NWLR 22 at 42.*

In the case in hand, and from the Defendant's Brief, all that he is complain- ing about appears to be the use of the words "two briefs". The Defendant, as it were, did not complain that he was deprived of a fair consideration of his F own side of the appeal. On the contrary even without filing a Respondent's amended brief to meet the supplementary brief and the further additional grounds of appeal of the plaintiff, he was nevertheless allowed to make oral submissions on them. In my opinion, the issue now being raised cannot avail the Defendant unless it can be shown that there has been a substantial error G in procedure which clearly led to a miscarriage of justice. In Makanjuola v. Balogun (1989)3 NWLR (part 108) 192 at 205, Wali, J.S.C. stated:

"The principle of fair hearing as enshrined in Section 33(1) of the 1979 constitution has not in my view been violated by the procedure adopted as the 1st appellant was accorded hearing orally through his Counsel. Courts H of Appeal are established to correct erroneous decisions made by the courts below them in order to avoid miscarriage of justice. In the instant case failure of the Court of Appeal to advert to the written brief filed, though a contravention of the rules of procedure, can be treated as a mere procedural irregularity and not substantial enough to warrant interference with the

decision of the Court of Appeal. See also Alhaji Ahmadu v. Alhaji Salawu (1974) 11 S.C. 43; Awojugbagbe Light Industry Ltd. v. Chinukwe (1995) 4 NWLR (part 390) 379 and U.B.N. v. Ogboh (1995) 2 NWLR (part 380) 647. Further, in Onyekwelu v. The State (1988) 1 NWLR (part 72) 565 at 571 Agbaje, J.S.C. said as follows:

"It appears to me that counsel for the appellant seems to have overlooked the point that in the lower court, counsel for the respondent did not take any objection to the document filed as brief of argument by counsel for the appellant in that court. In fact, counsel treated it as being regular. In the circumstances I do not see how it can now be effectively argued that any irregularities in the briefs of argument filed in the lower court had not been waived albeit impliedly in that court."

In the instant case, the Defendant had filed a Respondent's Brief in reply to the first Brief filed by the plaintiff and he relied on the same during the hearing. By so doing he treated the said plaintiff's first brief as valid for purposes of the appeal. The position cannot in fact be otherwise, as a contrary view would mean that even the plaintiff's brief relied on by the Defendant was in fact no brief at all. The court below on its part treated all the briefs filed by the two parties as valid and based its judgment on a consideration thereof. The Defendant, belated as he is, cannot now be heard to complain about that.

The sum total of all I have been saying is that issues 1, 2 and 4 are answered in the affirmative. While the answer to issue 3 is rendered in the negative. All four issues having, in effect, been resolved against the Defendant, this appeal fails and it is accordingly dismissed by me with N1,000.00 costs to the plaintiff.

F

OGUNDARE JSC

After a perusal of the record of appeal and consideration of the arguments advanced by the parties in their briefs of argument I, too, find no substance in this appeal which I hereby dismiss with costs as assessed in the lead judgment of my learned brother Onu, JSC.

OGWUEGBU JSC

I have had a preview of the judgment of my learned brother ONU, J.S.C. and I agree with the reasoning and conclusion reached by him.

One of the issues canvassed in the appellant's brief is that the Court of Appeal was wrong in entering judgment for the respondent when he did not complete the building contract and without giving credit to the appellant for

his materials and shed used by the respondent in the construction work. In paragraphs 6 and 8 of the appellant's statement of defence, the appellant claimed a set-off in the sum of N4,120.00 being the value of sandcrete blocks and white gravel he deposited on the building site and a shed he erected on the same site to provide shelter for his workers. He provided these when he B wanted to construct the buildings by direct labour.

The learned trial Chief Judge refused to make any award for the materials for the following reasons appearing in his judgment:

"The defendant has estimated the total value of all these at N4,120.00. But it is difficult to set-off this amount from the contract price when the Court C has not been given details of total amount spent by the defendant in completing the works so that this amount and the cost of the said building materials and temporary shed might be deducted from the contract price. In my judgment, any award made in favour of the defendant without details of the expenditure incurred by him in completing the works will be arbitrary and D wrong."

The defendant did not cross-appeal against the above finding in the court below. That finding is adverse to him. In the absence of a cross-appeal which would have enabled the Court of Appeal to reverse the adverse finding set out above, the court below should not be expected to give the defendant E the credit which he is complaining about in this court. It is trite law that in civil cases, the court is without power to award a claimant that which he did not claim. See Ekpenyong & Ors. v. Nyong & Ors. (1975) 2 S.C. 71 at 80-81 and Chief Registrar High Court of Lagos State v. Vamos Navigation Ltd. (1976) 1 S.C. 33 at 41.

F The appellant not having taken the complaint to the Court of Appeal, should not, turn round to maintain that that court ought to have given him credit for the materials left on the site and for the shed he erected. A court of law can only hear and determine matters placed before it by the parties and not otherwise. For this court to entertain the complaint on this issue, it is entitled G to have the benefit of the opinion of the Court of Appeal on it before it can affirm or reverse the opinion. See Edokpolo v. Sam-Edo (1989) 4 N.W.L.R. (pt. 116)493.

Construction work on the two buildings started on 31:10:66 and by the building contract, the whole works were to be completed on 28:5:67, a H period of thirty weeks. This was not done because of the civil war. The contract price was #13,900.00 (thirteen thousand, nine hundred pounds) which is N27,800.00 (twenty seven thousand, eight hundred naira) now. The appellant was to pay the cost within 15 months from the commencement date i.e. 31:10:66. In February, 1973, after many entreaties by the respondent, the

appellant paid N6,000.00 leaving a balance of N21,800.00.

The appellant in paragraph 12 of his statement of defence and set-off averred that as at June, 1972, the respondent had not fully completed all the works contracted in the Building Contract and as a result, he lost at least N24,000.00 in terms of rent for five years which he would have collected if the two buildings were completed in time. B

The two courts below found that the appellant waived his remedies for the respondent's breach of contract by making the payment of N6,000.00 and by writing Exhibit "D". In Exhibit "D", he was conciliatory and wanted to reach an understanding with the respondent and having led the respondent to have the impression that he would not press for his remedies, it was not open to him to do so later without giving the respondent notice that time is now of the essence of the contract once more. C

The courts below also found that the appellant should have given the respondent notice to complete the remaining works within a stipulated time and that this should be a pre-condition for his taking possession of the buildings to complete the works. D

The appellant by his own act made the time of completion no longer of the essence of the contract. Having granted the respondent the indulgence, he thereby waived his rights as to the breach which had occurred. He cannot go back on his agreement without giving the respondent reasonable notice. If he had given reasonable notice of extension of period of completion, time would have once more become of the essence of the contract and this would have entitled him to sue for the money he spent in completing the works if the respondent failed to do so. E

The court below awarded the respondent the sum of N21,800.00 being the balance of the contract price and the appellant also complained that this should not have been done without making allowance for the loss he suffered by the respondent not completing the work on 28:5:67. The Court of Appeal held that the defendant having kept the contract alive for the benefit of both parties, he was wrong to have seized the buildings and to have proceeded to complete them without any notice to the plaintiff and that he ought to have brought a cross-claim for the unfinished part of the work and set it up in diminution of the balance of the contract price. F G

I have also come to the same conclusion as the Court of Appeal. From the correspondence between the parties, time was no longer of the essence and the respondent in the last paragraph of Exhibit "K" expressed its preparedness to carry out the remaining minor works on the building and ended by saying:

".....but should be very obliged if you would make move towards payment

of any amount on the contract." (*Underlining is for emphasis*)

Instead of paying any amount at all on the contract, the appellant jumped into the site and completed the buildings without any notice to the respondent. The learned trial Chief Judge was in the circumstances of the case being charitable in awarding damages to the appellant who was in default. He thereby erred. See Ekpenyong & Ors. v. Nyong & Ors. (supra) and Chief registrar v. Vamos (supra).

By taking possession of the uncompleted buildings without any notice to the respondent, the appellant had waived his right to insist that the respondent must complete the whole work before payment. It was the duty of the appellant to cross-claim for the amount expended in completing the buildings. The respondent did not abandon the contract. See Hoenig v. Isaacs (1952)2 All E.R. 176. This is not a case where a plaintiff abandoned a contract and the circumstances are not such as to give the defendant no option whether he would take the benefit of the work or not.

Before I conclude this judgment, I must observe that the appellant has done everything possible to get the two buildings only for N6,000.00. One would have expected him to quickly pay the judgment debt after the decision of the court below. It is unfortunate that the claim had to be fought up to this court notwithstanding the benefit he derived from the contract. I therefore dismiss the appeal and affirm the decision of the Court of Appeal. I endorse the order as to costs made in the lead judgment of my learned brother Onu, J.S.C.

F **MOHAMMED JSC**

I have had the privilege of reading the judgment just delivered by my learned brother, Onu, JSC., and I agree with him that this appeal has failed. I have nothing more to add. The appeal is dismissed.

G **IGUH JSC**

I have read in advance the leading judgment just delivered by my learned brother, Onu. J.S.C. and I am in complete agreement with his reasoning and conclusion.

H The appeal is devoid of substance and I, too dismiss it. I abide by the order for costs contained in the judgment.