

SUPREME COURT OF NIGERIA
15TH DECEMBER, 2000. SC. 72/1998
CORAM:- A. B. WALI, I. L. KUTIGI, U. MOHAMMED,
U. A. KALGO, A. O. EJIWUNMI, JJSC

JERIC NIGERIA LIMITED APPELLANT
AND
UNION BANK OF NIGERIA PLC RESPONDENT

ACTIONS - Counter claim - Admission and available evidence - Entitles respondent to succeed in its counter claim.

ACTIONS - Counter claim - Being an independent action - Success of the main claim - Does not automatically mean that the counter claim must fail.

ACTIONS - Relief not claimed - Or a grant in excess of what is claimed - Should not be awarded by the court.

APPEALS - Irregularity - Such as misstating of the actual year of Judgment - Will not vitiate the appeal - As no miscarriage of justice was occasioned.

APPEALS - Relief - Award of an amount - That is higher than what was claimed - Without any proof of how the higher sum arose - Is wrong.

BANKING - Letters of credit - Lien - By the terms stated in the parties' contract - Respondent has a right of lien over all the goods - Imported under the LC it opened for the appellant.

BANKING - Overdraft facility - Sought for to finance opening of letters of credit - Was refused and therefore never materialized.

CONTRACTS - Banking - Conditions stated for opening letters of credit - Are binding on the appellant.

CONTRACTS - Variation - Banking - Contract governing the terms of letters of credit - Was not varied by the parties.

FACTS

Before the High Court Jos, the plaintiff/appellant claimed against the defendant/respondent various amounts for loss of profit, cost of imported machineries and 5 million naira being general damages for breach of contract. The respondent counter claimed against the appellant the sum of N350,000.84 plus interest until the debt is liquidated. Through the respondent's Jos branch manager, the appellant sought to obtain a loan of N300,000.00 to enable it process letters of credit for the importation of agricultural machineries. That was sometime in 1986. Although it would seem that the loan was granted, intervention of respondent's head office led to cancellation of the loan. Letters of credit were however opened in favour of the appellant subject to the terms and conditions stated in Exhibit 1 signed by the parties.

When the machineries eventually arrived after some delays, they were kept by the respondent pending payment of accrued amount by the appellant. It failed to pay and with time the machines became corroded and the concentrates expired. The trial court after considering the case granted most of the reliefs sought by the appellant. It held that the claim of the appellant having succeeded, the counter claim cannot stand. It then dismissed the counter claim. On appeal, the Court of Appeal allowed the respondent's appeal, dismissed the appellant's claim and awarded the sum of N2,581,498.68 to the respondent under its counter claim. Being aggrieved, the appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(1) Whether the Court below had the jurisdiction to entertain the appeal or whether the appeal before the Court of Appeal was valid and competent.

(2) Whether the Court of Appeal was right in holding that from the pleadings, no issue was joined on variation of the original agreement.

(3) Whether the contract between the parties was governed

exclusively by the letter of credit, Exhibit 1, or whether the contractual relationship includes such other documents like Exhibit 19, 18 or 25. Etc., see p. 3212

HELD (Unanimously dismissing the main appeal but allowing the appeal on counter claim in part per lead Judgment of **KALGO JSC**)

Appeals - Irregularity

1. I also entirely agree with the submissions of the learned counsel for the respondent that the mis-stating of the actual year of the judgment in the circumstances of this case is a mere irregularity which did not vitiate the appeal or cause any miscarriage of justice. The error was in my respectful view not fatal as to render the appeal incompetent and the reference by the Court of Appeal in its judgment to the judgment of Naron J. Delivered on 24/2/96 does not amount to any miscarriage of Justice. It is also true as submitted by The learned counsel for the respondent that this court has long moved away from sticking to technicalities as opposed to the determination of parties' rights on merits and substantial justice. See the State v Gwonto (1983) 1 SCNLR 142 at 160. (p. 3217 F)

Contracts - Banking

2. The signature of the appellant's Chairman and Chief Executive on Exhibit 1 signified that the appellant had accepted all the conditions in it and agreed to be bound by those conditions. This therefore makes Exhibit 1 a full and binding agreement between the appellant and the respondent. I entirely agree with the Court of Appeal when it held on P.240 of the record that:-

"Exhibit 1 represented the offer from the plaintiff to the defendant. The defendant accepted the offer by offering performance i.e the issuance and importation of the L/C". (p. 3219 A)

Contracts - Variation - Banking

3. The evidence was that even though the respondent had a discretion to accept security, or additional security, it could only do so under the

conditions set out at the back of Exhibit 1. It did not do so in this case and neither was it shown or proved that it authorised its Jos Branch Manager to do so. There is therefore no question of variation of the contract between the parties as governed by the terms of the L.C (Exhibit B 1). (p. 3222 C)

Banking - Overdraft facility

4. The combined effect of Exhibits 5 and 12 quoted above pointed clearly to the fact that the overdraft applied for or arranged by the appellant to cover the value of and expenses of opening the L. C by the respondent, has been refused. This means that it has not materialised.

In view of all what I said on issues 2,3 and 4 above, I answer all of them in the affirmative. (p. 3223 F)

Letters of credit

5. Since Exhibit 1 is a valid contract agreement the appellant was bound by all its terms and conditions. The above was only one of them and it clearly stated that the respondent could take possession of the goods, sell them without notice to the appellant to recover all the expenses incurred and if the proceeds are not sufficient, to demand the payment of any deficiency. It is very clear to me therefore that Exhibit 1 confers upon the respondent a right of lien over all the goods imported under the L.C it opened for the appellant. I therefore find that the respondent has unfettered right of lien over the goods imported under the L.C. and could properly seize and sell them, not withstanding Exhibit 18 or 25. I answer issue 5 in the affirmative. (p. 3224 D)

Actions - Counter claim

6. It is trite law, that for all intents and purposes, a counter-claim is a separate independent and distinct action and the counter-claimant, like all other plaintiffs in an action, must prove his claim against the person counter-claimed against before obtaining judgment on the counter-claim. See Ogbonna v A.G Imo State (1992) I N W L R (Pt. 220) 647.

In the first place, I agree entirely with the Court of Appeal that

the learned trial judge was wrong in holding that since the main claim of the appellant at the trial succeeded, the counter-claim of the respondent must fail. It all depends on the evidence produced in proof of the counter-claim and not otherwise since the counter-claim was a separate action. (p. 3225 E)

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Relief not claimed

7. It is a general principle of law that a court will not grant a party what was not claimed nor will a court grant a party more than what is claimed. This is based on the fact that a court is not a charitable organisation. See Ekpeyong v Nyong (1975) 2 SC 71. In this appeal, it is abundantly clear from the respondent's pleadings quoted above, paragraphs 9,15 and 37 that the total amount claim by the respondent was N350,708.84 plus interest at the prevailing rate. No where in its pleadings did it counter-claim for N2,581,498.68. (p. 3227 B)

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Appeals - Relief - Award of an amount

8. I have carefully examined Exhibit 32, and find that no where in it does the amount of N350,708.68 appear. And since the varying interest rates over the relevant period has not been shown or evidence on it given as stated in the above extract, it was not correct to presume that it was just "easy" to accept that the amount of N2,581,498.68 was the result of the interest over the years. There was no proof of how the sum of N2,581,498.68 came about and since it was also not the amount counter-claimed, the Court of Appeal cannot play father Christmas by giving it to the respondent as amount owed to it by the appellant. I find that it was wrong for the Court of Appeal to have done so in the circumstances. (p. 3227 G)

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Counter claim - Admission and available evidence

9. From this piece of evidence, there is clear admission that the appellant was liable for N125, 765.00 as the value of the letter of credit opened pursuant to Exhibit I. But on p.28 of the record, the same witness while talking about the delay in sending the letter of credit to the United States

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of America, he said that the value of the letter of credit escalated from N125, 765.00 to N206,510.00. This was not challenged or contradicted and is evidence which can properly be accepted against the appellant in the circumstances of this case. I am therefore convinced that the total
B amount of N206,510.00 will appear to have been proved as the actual liability of the appellant on the letter of credit pursuant to Exhibit I. The respondent will be entitled to interest of 7 1/2 % per annum on the amount from 24th November 1997 when the judgment of the Court of appeal was delivered to the time the whole debt is liquidated. (p. 3228 E)
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REPRESENTATION

G. O. Okafor SAN with S. Oyawole for the appellant.
Segun Idowu for the respondent.

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CASES REFERRED TO

Kato v Central Bank of Nigeria (1991) 9 NWLR (pt .214) 126 at 148
Odofin v Agu (1992) 2 NWLR (pt. 229) 350 at 365
E Madukolu v Nkemdilum (1962) 2 Au NLR 581
Bronik Motors v Wema Bank Ltd (1993) 1 SCNLR 296 at 310
State v Musa Danjuma (1997) 5 NWLR (pt. 506) 512 at 546
Surakatu v Housing Development Company Ltd (1981) 4 SC 51
F State v Gwonto (1983) 1 SCNLR 142 at 160

LEAD JUDGMENT BY KALGO JSC

The appellant was the plaintiff at the trial High Court of Plateau State in Jos. He claimed against the respondent and one other party
G jointly and severally as per paragraph 17 of his amended statement of claim, the following reliefs:-

- (a) N1,140,309.01 for loss of profit after tax from 6/2/88 to 20/7/89;
- H (b) The sum of N2,005.93 being loss of profit every day from 21/7/89 until judgment and payment;
- (c) Cost of imported machineries, its accessories concentrates/additives and freight charges 120,546 US Dollars, Both the concentrates

and machineries have since expired and condoled and cannot be refurbished;

(d) General damages for breach of contract / and or agreement - N5, 000,000.00.

The respondent also counter-claimed against the appellant for B the sum of N350,000.84 plus interest at the prevailing banking interest rate from the 26th of October, 1987 until the debt is completely liquidated.

Parties filed and exchanged pleadings. The trial commenced on the 24th of October, 1994, and finished on the 29th of January 1996 C when after hearing learned counsel's addresses for the parties, the trial Court adjourned for judgment. On the 24th of February 1996, the learned trial judge, Naron J. In a lengthy considered judgment enter judgment in favour of the appellant in the following terms:-

(a) N1,140,309.01 for loss of profit after tax from 6/2/88 to 20/ D 7/89;

(b) The sum of N2,905.93 being loss of profit everyday from 21/7/89 to today and thereafter at the same rate until full payment, and

(c) Cost of imported machineries, its accessories, concentrates/ E Additives and freight charges - 120,546.00 U.S. Dollars.

The claim against the other defendant sued together with the respondent was dismissed. On the counter claim, the learned trial judge held that -

".....the claim of the plaintiff having succeeded, the counter- F claim cannot stand and is accordingly dismissed".

The respondent was not happy with this decision and it appealed to the Court of Appeal Jos, which after hearing the appeal, allowed it and set aside the decision of Naron J. In the leading judgment, Oguntade G JCA on 12/11/97 (Edozie and Opene JJCA concurring) held :-

"In substitution for the said judgment (of Naron J) I make an order dismissing the plaintiff's case. On the counter-claim, judgment is entered in favour of the defendant for the sum of N2,581,498.68 being H amount outstanding against the plaintiff in its account with the defendant's Jos Branch. The said amount is to attract interest at the rate of 7 1/20/0 per annum with effect from 1/1/96 until the judgment debt is fully

liquidated."

The appellant was dissatisfied with the decision and it also appealed on seven ground to this Court.

B In this Court the parties filed and exchanged their respective briefs. At the hearing, counsel for both parties relied upon their respective briefs and addressed the Court in oral arguments.

In his brief, the learned counsel for the appellant formulated the following issues for the determination of this court in the appeal:-

C (1) Whether the Court below had the jurisdiction to entertain the appeal or whether the appeal before the Court of Appeal was valid and competent.

(2) Whether the Court of Appeal was right in holding that from the pleadings, no issue was joined on variation of the original agreement.

D (3) Whether the contract between the parties was governed exclusively by the letter of credit, Exhibit 1, or whether the contractual relationship includes such other documents like Exhibit 19, 18 or 25.

E (4) Whether the Court of Appeal was right in holding that one of the two contingencies in Exhibit 19 i e grant of a loan or over draft to cover the import never materialised.

F (5) Whether or not the defendant had unfettered right of lien to seize the imported goods notwithstanding the fact that a security by way of Mortgage has been provided.

(6) Whether the Court of Appeal was right in awarding the defendant a sum of N2, 581,418.68 on the counter-claim.

G (7) Whether the judgment of the Court of Appeal is proper in law, having regard to the facts and evidence.

In the brief of the learned counsel for the respondent, the four (4) issues, which were raised, read thus-

H (1) Whether an error of is-standing the date of the judgment being appealed against in the notice of appeal is fundamental or mere irregularity.

(2) Was the Court of Appeal right in holding that variation of an earlier agreement was not in issue on the face of the pleadings.

(3) Whether the Court of Appeal was right to have held that

EXHIBIT 1, created a valid contract between the parties with a right of lien vested in the defendant and that no loan was granted pursuant to Exhibit 19.

(4) Whether the judgment of the Court of Appeal is supported by the pleadings and the evidence on the record.

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He also adopted in toto the appellant's issue No 6 on the counter-claim.

I have examined the issues raised by the parties in this appeal and it appears to me very clear that they are in many respects very similar. They both talked about the validity of the contract agreement, the right of lien, the mortgage deed, the counter - claim and the evidence at the trial. To that extent they are not different. For this reason, I shall adopt the issues raised by the appellant, (though more in number) for my discussion and consideration in this appeal.

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Before I start the consideration of the issues, it appears to me worthwhile to set out albeit in brief, the facts and circumstances which gave rise to the case.

The respondent was the appellant's bankers at its branch in Bank Street Jos. The appellant, a limited liability company incorporated and registered in Nigeria carries on Agro - industrial projects in the plateau State of Nigeria. On the 6th of June 1986, the appellant applied through a documentary letter of credit , Exhibit 1, to the respondent to open a letter of credit in favour of CRC Agricultural Export Incorporated, Michigan, United States of America. The letter of credit (hereinafter referred to as 'L. C') was to the value of 120, 546 US Dollars for the importation to Nigeria, of two containers of feedmills, spare parts and concentrates/additives. At the time of the application to open the L. C, the appellant had no money in its account with respondent to cover the Naira equivalent of the L. C, which was then the sum of N125,765.00. However the manager of the respondent's branch in Jos where the appellant maintained its account for many years, approved a loan of N300, 000.00 to the appellant to cover the value of the L.C. and to use the balance as working capital. He then authorised the opening of the L.C in anticipation of final approval by the headquarters office in Lagos. All these he did,

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without consulting the said headquarters in Lagos. It was then discovered that the send manager being a manager of a branch had no power to approve the loan of N300,000.00 to the appellant or my body. This prompted the headquarters' office to write the letter (Exhibit 12) to the manager informing him that the overdraft he extended to the appellant was beyond the "Branch discretionary limit" and that no approval or sanction of the controlling office has been obtained to approve the overdraft. Exhibit 12 also asked what security was held or proposed for the overdraft and what percentage of cash margin was obtained before granting the overdraft.

Meanwhile, the L. C was processed by the headquarters of the respondent and sent to the beneficiaries CRC Agricultural Exports Incorporated Michigan United States (hereinafter simply referred to as D C.R.C) only in August 1986. On receipt of the L. C, the CRC by their letter dated 15/9/86, (Exhibit 7) returned the L. C complaining that there was no sufficient time for them to pack and export the goods. The respondent then amended the L. C as requested and returned it to the E CRC in the United States.

On the 4th of December 1986, the goods arrived in Lagos. The respondents, with full knowledge and cooperation of the appellant instructed Panalpina, a clearing agent, to clear the goods and store them in their warehouses. The appellant voluntarily submitted all the necessary F documents for the clearance of the goods to the respondent (Exhibit 2), and on the 6th of May 1987, the goods were fully cleared by Panalpina.

As a result of a delay in the movement of the L. C. to C. R.C. in the United States, the value of the L. C has escalated from N125,765.00 G to N206,510.00. There was no money in the appellant's account with the respondent to pay for the L.C and the so called overdraft processed by the Jos Branch Manager on its behalf was not approved by the headquarters in Lagos and was not supported by any security. H Consequently, by a letter date 3rd September, 1987, the Jos Branch Manager informed the appellant that since its overdraft application was refused by Lagos Head Office, and there was no money in its account to settle the debt, it was allowed up to 25th of September 1987, to settle the

entire debts including all charges due to Panalpina, failing which the goods shall be sold at a public auction in Lagos on the 28th of September. 1987. The appellant had earlier created a legal Mortgage in favour of the respondents for the value of N200,000.00 which was executed on the 31st of August 1987. (Exhibit 13).

The appellant realizing that they could not claim the goods from Panalpina without any money, it made frantic efforts to get the Nigerian Agricultural and Commerce Bank to sponsor the project and collect the goods on their behalf. This however proved abortive. The appellant had failed to pay for the L. C opened for it to import the goods, and all the necessary expenses incurred by the respondent in respect thereof. The respondent believing that it had lien over the goods, refused to release them to the appellant. And when all efforts to settle the matter failed, and the goods could not be sold for value (machines corroded and concentrates/additives expired) the appellant sued in court claiming as per its paragraph 17 of the amended statement of claim. The respondent also counter-claimed as per paragraph 37 of its statement of Defence, hence this action. I have already adopted the set of issues formulated by the appellant for the determination of this appeal. There are 7 issues and I think can be categorised thus:-

- (i) Issue 1 on jurisdiction to be taken separately;
- (ii) Issues 2,3 and 4 all touched on the validity of original contract agreement between the parties (Exhibit 1) and could be taken together.
- (iii) Issues 5,6 and 7 will each be taken separately

I now start the consideration of issue number one. This issue pertains to the question of jurisdiction of competence of the Court of appeal to entertain the appeal.

There is no doubt that in our adversary system of adjudication, the question of jurisdiction is very fundamental. In fact it is so fundamental that the adjudicating court should determine the issue first before starting any proceedings: And if the court proceeded and it was found that the court had no jurisdiction in the matter, all the proceedings however well conducted amount to nothing and are a nullity. See Kato v Central Bank of Nigeria (1991) 9 NWLR (Pt. 214) 126 at 148. Odofin v Agu (1992) 2

NWLR (Pt. 229) 350 at 365; Madukolu v Nkemdilum (1962) 2 Au NLR 581. It is also trite law, that the issue of jurisdiction can be raised at any time by a party even on appeal in the Supreme Court as was done in this case. See Bronik Motors v Wema Bank Ltd (1993) 1 SCNLR 296 at 310.

B In this issue the argument of learned counsel for the appellant both orally and in his brief is that the notice of appeal filed by the respondent from the decision of the trial court to the Court of Appeal was fundamentally defective because it referred to the date of judgment which was non-existent. Therefore, learned counsel submitted, the notice of
C appeal as a very important appeal document and the foundation of the appeal, being defective rendered the Court of Appeal incompetent to entertain the appeal since there was no appeal ab initio to entertain. Counsel further submitted that the failure to file a valid and proper notice of appeal
D in any purported appeal, is not a procedural irregularity which can be waived, or cured by the consideration of substantial justice, as according to his submission, it goes to the root of the appeal itself.

The learned counsel for the respondent in his brief while
E conceding that the issue of jurisdiction is the bedrock of any judicial process and fundamental to the competence of a court to adjudicate, submitted that what happened in this case when the respondent misstated the date of the judgment appealed against in the notice of appeal, was a
F mere irregularity which should not be allowed to affect the substance of the appeal and did not result in any miscarriage of justice. Learned counsel further argued that to uphold the submissions of the learned counsel for the appellant in this issue is to attach importance to technicalities as opposed to the determination of the parties' rights to the merits. He relied on the
G case of State v Musa Danjuma (1997) 5 NWLR (pt. 506) 512 at 546, Surakatu v Housing Development Company Ltd (1981) 4 SC 51.

The notice of appeal which was filed by the respondent in the Court of Appeal which formed the main grouse of the appellant in this
H issue reads:-

"TAKE NOTICE that the Appellant being dissatisfied with the decision of the Honourable Justice T. D. Naron of the High Court of Plateau State sitting in Jos contained in the judgment delivered on the

24th of February, 1996, more particularly stated in paragraph 2 thereof, do hereby appeal to the Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4".

(Underlining mine).

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The judgment of Naron J. Purportedly referred to in the notice of appeal above was actually delivered on the 24th of February 1997 and not 24th of February 1996. See page 72 of the record of appeal. But it is very clear from the notice of appeal, on page 74 of the record that-

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(a) the decision appealed against was that of Hon. Justice T.D. Naron;

(b) it was given in the High Court of Plateau State sitting in Jos;

(c) the parties were Union Bank of Nigeria v Jeric Nigeria Ltd.

(d) judgment delivered on 24th February 1996.

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The learned counsel for the appellant did not contend that any of (a) to (c) above were not relevant to the appeal. His only objection was in (d) where he pointed out that "1996" should read "1997". He is quite right according to the record but this must be the result of a human error. The appellant's counsel responded fully to the appeal in his brief in the Court of Appeal (without objection although this does not bar him from raising it here). He is therefore fully aware of what case the notice of appeal in question was for and he was not misled at all. **I also entirely agree with the submissions of the learned counsel for the respondent that the mis-stating of the actual year of the judgment in the circumstances of this case is a mere irregularity which did not vitiate the appeal or cause any miscarriage of justice. The error was in my respectful view not fatal as to render the appeal incompetent and the reference by the Court of Appeal in its judgment to the judgment of Naron J. Delivered on 24/2/96 does not amount to any miscarriage of Justice. It is also true as submitted by The learned counsel for the respondent that this court has long moved away from sticking to technicalities as opposed to the determination of parties' rights on merits and substantial justice. See the State v Gwonto (1983) 1**

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SCNLR 142 at 160,

Amoko v The State (1995) 6 NWLR (pt. 399) 1 at page 26; Akpan v The State (1992) 6 NWLR (pt. 248) 439.

I am therefore satisfied and hereby find that the putting in of the
B year "1996" instead of "1997" in referring to the date the judgement of
the trial court appealed against to the Court of Appeal in the notice of
appeal filed by the respondent, is a mere irregularity in the circumstance
and did not vitiate the appeal or render the Court of 'Appeal incompetent
to entertain the appeal. I answer issue I in the affirmative.

C I now take issues 2,3 and 4 together. References to " original"
agreement in issue 2 must in my understanding mean the "earlier"
agreement as stated in ground 2 of the appellant's notice of appeal to this
court, and explained in paragraph 5.02 of its brief. In paragraph 5.02 (a)
D the appellant wrote:-

*"The plaintiff paragraph 4 of the further amended statement of
claim pleaded that on 6/6/86 they applied for a letter of credit (L.C) for
\$ 120,546 U.S. Dollars The application form for LETTER OF
E CREDIT dated 6/6/86 is Exhibit 1".*

And in his evidence at the trial as P.W.2, the Executive Chairman
had this to say on P.27 of the record:-

*"On 6th June 1986, we approached the 1st defendant to raise a
F letter of credit to C.R.C Agricultural Export Incorporated Michigan U.S.A.
The letter of credit was for the sum of N120,546 U.S. Dollars for the
importation of two containers Loads of Feed Mill machines, Spare parts
and concentrates. Exhibit I is the form we completed."*

And on page 38, in cross - examination he said :-

G "I signed Exhibit 1".

I have carefully examined Exhibit 1 . It is in two pages. The
first page contains inter alia, the names of the parties and the beneficiary
of the L.C, the value of the L,C in dollars, documents to accompany it on
H shipment of the goods to be imported and the period for the shipment.
And page 2 contained all the terms and conditions of opening the L.C
including its value in Naira. Exhibit 1. It was dated 6th June 1986 and
was signed at the bottom of page 2 by the Chairman and Chief Executive

of the appellant. **The signature of the appellant's Chairman and Chief Executive on Exhibit 1 signified that the appellant had accepted all the conditions in it and agreed to be bound by those conditions. This therefore makes Exhibit 1 a full and binding agreement between the appellant and the respondent. I entirely agree with the Court of Appeal when it held on P.240 of the record that:-**

"Exhibit 1 represented the offer from the plaintiff to the defendant. The defendant accepted the offer by offering performance i.e the issuance and importation of the L/C".

I now consider whether this contract was varied by the pleadings of parties or Exhibit 19,18 or 25.

According to the terms of Exhibit 1, and in accordance with the established practice of the respondent in opening L.C which is well-known to the appellant, there must be 100 percent credit margin in a customer's account before any L.C is opened on its behalf. But what happened in this case was explained by the respondent in paragraph 4 (d) and (c) of its Amended statement of defence and counter-claim as follows:-

"4 (d) at the time the plaintiff requested the 1st defendant to Open the letter of credit in 1986, the plaintiff failed to furnish the 100% cash margin requested by the 1st defendant, instead, the plaintiff connived with the 1st defendant's then Jos Branch Manager, T. Okewole to mislead and misrepresent to the 1st defendant's head office that 100% cash margin had been paid.

(e) The plaintiff Executive Chairman, Dr. Austin (formerly Onwuama) mislead the said T. Okewole into believing that he had a cheque in his favour from which the mandatory cash margin was to be satisfied and it was upon the strength of the misrepresentation of facts in (d) and (c) hereof which the 1st defendant's Head Office believed and acted upon that the said letter of credit was opened and the proceeds remitted to its beneficiaries in U.S.A."

D. W. I. in support of this, testified that at the time of opening the L. C. the appellant had no funds in its account to cover the value of the L.C, and it did not deposit, at that time, anything by way of security

to cover the value of the L. C. He proceeded to say:-

"As at that time, the plaintiff had convinced the then Branch Manager that adequate fund would be made available almost Immediately. This he did by showing a cheque which will grace the account".

P. W.2 on the other hand, confirmed in his testimony that at the time of their application for the L.C, the appellant did not have sufficient funds to cover the value of the L.C. In his evidence on the cheque, he had this to say :-

"The Cheque of N450, 000 was not for the confirmed letter of credit. It was to be given by the CRC of Michigan through one of their customers in Lagos as result of the equipment from trade fair sold but the Lagos based company did not deliver same. The cheque was to be kept for CRC as they had no account in Nigeria. It was to be paid into our account and to be withdrawn by them in Jos. The cheque was issued in my name. The cheque was paid into our account. It was not at the same time I applied for confirmed letter of credit. The cheque was dishonoured. I don't have the cheque". (Underlining mine)

P.W.2 also testified that at the time he applied for the L.C. on behalf of the appellant, the Jos Branch manager demanded security to cover the value of the L.C. He said he showed the Manager the Right of Occupancy No PL 7992 not yet signed by the Governor of Plateau State and there and then the Manager approved an overdraft facility of N300,000.00 to the appellant to cover the letter of credit, and the balance to be used as working capital. This was unfortunately turned down by the Head Office of the respondent as being beyond the discretionary powers of the Jos Branch Manager as per the letter dated 3/7/86 (Exhibit 12).

The appellant very heavily relied on paragraphs 4 (a) and (b) of its Amended statement of claim in showing that it had pleaded the variation of Exhibit 1. Paragraph 4 (a) and (b) read:-

"4 (a) when the defendant discovered that the amount to the plaintiffs credit in its account with the 1st defendant, was not sufficient to cover the letters of credit of 120,546. United States Dollars, it requested the plaintiff to cover balance on the account by mortgaging one of its

properties to the defendant. By a letter dated 6/2/87 from the 1st defendant's Jos Branch Manager to the plaintiff, the defendant agreed to provide the needed facility on the condition that they would clear the goods and release to plaintiff when the plaintiff pay them or when the plaintiff submit a security.

(c) thereupon the plaintiff deposited his Right of Occupancy No PL 7992 with the 1st defendant as security for the loan. The 1st defendant prepared legal Mortgage which was executed by the parties."

The letter dated 6/2/87 referred to above, was a handwritten note written by the then Jos Branch Manager of the respondent on a plain (not office headed letter) paper addressed to the Chief Executive of the appellant which was exhibit 19 at the trial. It reads:-

"Dear Dr. Erie,

I saw Michael this afternoon with a lodgment of N20,000.00 which I have requested to be paid to the cashier. This amount is certainly not enough as I had already informed our Area office that a total of N30,000 00. Would be paid into your account. Head office have (sic) agreed that we clear the goods on your behalf and to be released to you when you pay us or alternatively when facility required is finalised.

The only delay now is security which I understand from madam that you are handling seriously. To enable me conclude the clearing of the consignment, please forward photocopy of the receipt issued to you in respect of the advance duty to avoid me making double payments to the customs or even paying too high. Meanwhile I will want you to the (sic) enclosed (sic) guarantee form signed and the statement of affairs forms. As regards the customs receipt I need this urgently to enable me send the documents to Lagos on Monday morning.

Regard

sgd.

....."

The appellant in paragraph 11 of its Amended statement of claim pleaded Exhibit 19 as being a separate contact agreement reached between the parties. But this was fully denied by the respondent in paragraph 10 of its Amended Statement of Defence when said:-

"The 1st defendant denies paragraph 11 of the claim and aver that it did not enter into any contract agreement with the plaintiff on the 6/2/87 or at any time date at all".

The writer of Exhibit 19 Mr. Okewole was not called to testify
B by the appellant or the respondent at the trial as the respondent had already
dismissed him. But there was no dispute between the parties that Exhibit
19 originated from him when he was the Jos Branch Manager of the
respondent. It appears to me however, by the nature in which Exhibit 19
C was written it was not to be treated as strictly official but a note of
information to a customer from the Branch Manager. In any case from
the time of opening of the I.C on 6/6/86, there was no correspondence
from the Head office of the respondent requesting the appellant to provide
security to cover the value of the L.C. **The evidence was that even**
D **though the respondent had a discretion to accept security, or**
additional security, it could only do so under the conditions set out
at the back of Exhibit 1. It did not do so in this case and neither was
it shown or proved that it authorised its Jos Branch Manager to do
E **so. There is therefore no question of variation of the contract between**
the parties as governed by the terms of the L.C (Exhibit 1).

Exhibit 18 (original Exhibit 25) was deed of legal mortgage
executed by the appellant in favour of the respondent as security to cover
F all expenses incurred by the respondent in respect of the L.C opened on
the appellant's behalf. It was a tripartite agreement but was only executed
by one party - the Chief Executive of the appellant. However having
found that the terms of the L. C. have not been shown to be varied in any
way by the appellant, Exhibit 18 would appear to be uncalled for and
G irrelevant and I so hold.

The two important points made in Exhibit 19 are the payment of
all expenses incurred by the respondent in respect of the L.C before the
goods could be claimed by the appellant and the provision of security to
H be finalised. It is understood that the goods ordered under the L. C had
arrived Nigeria since 4th December 1986 and were cleared by panalpina
on 6/5/87. It was not in dispute that the appellant failed to pay for the L.
C itself how much more of the other subsequent expenses incurred on its

behalf by the respondent pursuant to Exhibit 1. It was also clear from the evidence that there was no formal application for overdraft made to the respondent to cover the value of the L. C and other expenses and even the one tacitly arranged with the Jos Branch Manager was disapproved. The letter from the Head office in Lagos to the Jos Branch Manager of the respondent (Exhibit 12) reads in part:-

" Your L/C3/86 FOR US \$ 120, 546.00

JERIC NIGERIA LIMITED

We are unable to process your above mentioned request for N134, 884.18 as the relevant application for confirmed letter of credit form lacks adequate information. The total facility extended (including overdraft) is above Branch discretionary limit. Has controlling office sanction/consent been obtained? Conduct of the account is very unimpressive".

This was followed by the letter of Jos Branch Manager to the appellant (Exhibit 5) which in paragraph 1 also reads:-

" YOUR L/C 3/86 FOR US \$ 120, 546.00

We refer to the above mentioned letter of credit opened by us for the importation of machinery concentrates/additives. As it would appear that our Head Office, Lagos have refused to approve the overdraft created in the process of opening this letter of credit, we have been authorised to sell off the goods immediately".

The combined effect of Exhibits 5 and 12 quoted above pointed clearly to the fact that the overdraft applied for or arranged by the appellant to cover the value of and expenses of opening the L. C by the respondent, has been refused. This means that it has not materialised.

In view of all what I said on issues 2,3 and 4 above, I answer all of them in the affirmative.

I now move to issue 5. I have already found that the purported security by way of legal mortgage (Exh. 18 or 25) was not of any essence or relevance to the variation terms of the agreement in the L. C (Exhibit 1). If at all, it could be accepted as an additional security for other expenses incurred or to be incurred in respect of the L.C.

One of the conditions for opening the L. C as stated in Exhibit 1 reads:-

" We hereby authorise you to hold the documents called for by the terms of this credit and the merchandise to which they relate and the relative insurance as security for all liabilities incurred by you or you or your correspondents or agents in connection with this credit including expenses and charges of whatever nature incurred in relation to the said merchandise or the obtaining of possession or the disposal thereof (which expenses and charges we hereby authorise you to incur and undertake to repay to you) and you may sell the said merchandise either before or after arrival at your discretion and without notice to us. I have agree to give you any additional security that you may from time to time require to cover our liabilities to you hereunder and in the event of your selling the merchandise to pay on demand the amount of any deficiency".

(Underlining mine)

Since Exhibit 1 is a valid contract agreement the appellant was bound by all its terms and conditions. The above was only one of them and it clearly stated that the respondent could take possession of the goods, sell them without notice to the appellant to recover all the expenses incurred and if the proceeds are not sufficient, to demand the payment of any deficiency. It is very clear to me therefore that Exhibit 1 confers upon the respondent a right of lien over all the goods imported under the L.C it opened for the appellant. I therefore find that the respondent has unfettered right of lien over the goods imported under the L.C. and could properly seize and sell them, not withstanding Exhibit 18 or 25. I answer issue 5 in the affirmative.

I now deal with the counter - claim in issue 6. Paragraph 15 of the Amended Statement of Defence and Counter - Claim reads:-

"The 1st defendant claims a total of N350, 708.84 (Three hundred and Fifty thousand, Seven Hundred and Eighty Naira, Eighty four kobo) from the plaintiff being money due from and payable by the plaintiff, to the 1st defendant for money lent by the 1st defendant to the plaintiff as overdraft, and for moneys paid by the 1st defendant as bankers for the

plaintiff on the plaintiff's request, and for interest, commissions, and other charges occurring and due upon the moneys due and payable from the plaintiff to the 1st defendant and or for money had and received."

And earlier paragraph 9 provides:-

"The 1st defendant bare all costs relating to the imported goods including value of the letter of credit, fluctuation in exchange rate, freight, interest, commission, clearing , insurance, storing , et cetera."

Finally paragraph 37 also reads:-

" AND WHEREOF THE 1ST DEFENDANT CLAIMS FROM THE PLAINTIFF the sum of N350,708.84 (Three hundred and Fifty thousand, seven hundred and eighty Naira, Eighty four Kobo) plus interest at the prevailing banking interest rate from the 26th of October, 1987 until the debt is completely liquidated".

The appellant in his defence to the counter-claim in paragraph 19 said:-

" The plaintiff denies paragraph 9 of the counter-claim that it is indebted to the 1st defendant in the sum of N350, 784.84. The 1st defendant is put to the strict proof of the plaintiff indebtedness to it in the sum of N350,784.84."

It is trite law, that for all intents and purposes, a counter-claim is a separate independent and distinct action and the counter-claimant, like all other plaintiffs in an action, must prove his claim against the person counter-claimed against before obtaining judgment on the counter-claim. See Ogbonna v A.G Imo State (1992) 1 N W L R (Pt. 220) 647; Obmiami Brick & Stone Nig. Ltd v A.C.B Ltd, (1992) 3 NWLR (Pt. 229) 260; Dabup v kolo (1993) 9 NWLR (Pt.317) 254.

In the first place, I agree entirely with the Court of Appeal that the learned trial judge was wrong in holding that since the main claim of the appellant at the trial succeeded, the counter-claim of the respondent must fail. It all depends on the evidence produced in proof of the counter-claim and not otherwise since the counter-claim was a separate action.

In this case the evidence of D.W I in proof of the counter-claim is important. He testified at the trial that as at the time he was giving

evidence, the account of the appellant with respondent had a debit balance of up to N3 million and a suspense account showing a debit of N593, 325.00. He tendered the statement of account of the appellant with the respondent which he prepared and signed himself and it was admitted in evidence as Exhibit 32. He explained that Exhibit 32 contained all the debts owed by the appellant to the respondent in respect of exhibit I, plus interests and legal charges. He gave no details of the actual amount and the rate of interest charged. He did not testify on the figures appearing in Exhibit 32. D.W.I however identified Exhibit 32 and said that the appellant was owing the respondent N2,581,498.68 as at 15/12/95. He also said that the prevailing rate of interest at that date was 21%

For the defence to the counter-claim the evidence of P.W. 2 is essential. He is the Chief Executive of the appellant who carried out every commitment on behalf of the appellant. In his evidence on p. 33 of the record, he said:-

"We are not liable for the sum of N350, 708.84 counter-claim. We are only liable to the sum of N125, 765, which is the value of the letter of credit."

Earlier in his evidence on the letter of credit, he said:-

" It was delayed in Lagos and sent out to America late August 1986 the Naira was depreciating with the result that the value of the letter of credit escalated from N125,756 to N206,510.00".

The is all evidence I find available on the record in respect of the counter-claim. The learned counsel for the appellant in his brief submitted that the respondent has failed to prove the counter-claim and is not entitled to the judgment in their favour in respect thereof. Counsel pointed out in the brief that D W I did not give any evidence of the indebtedness of the appellant apart from tendering the statement of account Exhibit 32, and to make matters worse, while Exhibit 32 showed that the appellant was owing the respondent the sum of N2, 581,498.68, the respondent was only claiming as per its pleadings, the total sum of N350, 708. 84. Counsel further pointed out in his brief that even the sum of N350, 708.84 claimed as per pleadings, is not reflected in exhibit 32. Learned counsel therefore submitted that failure to prove the actual amount owed as counter-claim

is fatal to the claim of the respondent since the court not being a charitable organisation will not give judgment on a debt not proved. He cited the case of Ajakaiye v Idahai (1994 8NWLR (Pt.364) 504 at 526.

For the respondent it was submitted in the brief that the counter-claim was clearly proved by the respondent and the Court of Appeal B properly evaluated the evidence before awarding the sum of N2,581,498.68 to respondent as counter-claimed.

It is a general principle of law that a court will not grant a party what was not claimed nor will a court grant a party more than what is claimed. This is based on the fact that a court is not a charitable organisation. See Ekpeyong v Nyong (1975) 2 SC 71. In this appeal, it is abundantly clear from the respondent's pleadings quoted above, paragraphs 9,15 and 37 that the total amount claim by the respondent was N350,708.84 plus interest at the prevailing rate. No where in its pleadings did it counter-claim for N2,581,498.68. this last amount was also disclosed in Exhibit 32 and was not explained by the respondent's witnesses. C D

The Court of Appeal in giving judgment to the respondent in the counter-claim said:- E

"As at 26th October, 1987, the plaintiff according to the counter-claim was owing the defendant N350, 708.68. It is therefore easy to understand from Exhibit 32 how the indebtedness has over a period of nine years risen to N2,581,498.68 as at 15th December, 1995 if one takes account of the varying interest rates. The defendant has not stated specifically the rate of interest charged on the overdraft in plaintiff's account. Presumably, this is because the rates vary from time to time in accordance with the guideline from the Central Bank". F G

(Underlining mine)

With due respect to the learned Justices of the Court of appeal, I disagree with them on this finding. **I have carefully examined Exhibit 32, and find that no where in it does the amount of N350,708.68 appear. And since the varying interest rates over the relevant period has not been shown or evidence on it given as stated in the above extract, it was not correct to presume that it was just "easy" to accept that** H

the amount of N2,581,498.68 was the result of the interest over the years. There was no proof of how the sum of N2,581,498.68 came about and since it was also not the amount counter-claimed, the Court of Appeal cannot play father Christmas by giving it to the respondent as amount owed to it by the appellant. I find that it was wrong for the Court of Appeal to have done so in the circumstances.

On the amount of N350, 708.84 claimed as counter-claim and pleaded by the respondent in its Amended Statement of Defence, it appears to me that it was not specifically proved. As I said earlier that figure did not appear anywhere in Exhibit 32 which is the statement of account of the appellant showing its indebtedness to the respondents over the years. The appellant has challenged the contents of exhibit 32 both by his pleadings quoted earlier, and by his testimony in court. See paragraphs 19 and 29 of the Amended Statement of claim and counter-claim and in the evidence of P. W.2 on P. 33 of the record where he said:-

" We are not liable for the sum of N350,708.84 counter-claim. We are only liable to the sum of N125, 765 which is the value of the letter of credit".

From this piece of evidence, there is clear admission that the appellant was liable for N125, 765.00 as the value of the letter of credit opened pursuant to Exhibit I . But on p.28 of the record, the same witness while talking about the delay in sending the letter of credit to the United States of America, he said that the value of the letter of credit escalated from N125, 765.00 to N206,510.00. This was not challenged or contradicted and is evidence which can properly be accepted against the appellant in the circumstances of this case. I am therefore convinced that the total amount of N206,510.00 will appear to have been proved as the actual liability of the appellant on the letter of credit pursuant to Exhibit I . The respondent will be entitled to interest of 7 1/2 % per annum on the amount from 24th November 1997 when the judgment of the Court of appeal was delivered to the time the whole debt is liquidated. See Order 40 Rule 7 of Plateau State High Court (Civil Procedure Rules); Berliet (Nig) Ltd v Kachalla (1995) 9 NWLR (Pt.420) 478 at 490; Himma Merchants Ltd v

Aliyu (1994) 5 NWLR 9 (Pt.347) 667. I answer issue 6 in the negative.

On issue 7, it is clear that the learned appellant's counsel did not argue it at all in the brief. Paragraphs (b) and (c), which written on pp.29-30 of the brief, bear no relevance to the issue 7 at all. I will discountenance this issue as being abandoned and determine the appeal B on issues 1-6 already considered.

For the reason stated above I find that there is no merit in the main appeal and it is hereby dismissed. On the counter-claim of the respondent, I allow the appeal on it, and set aside the award of N2, 581, 498.68 made in favour of the respondent by the Court of Appeal. Instead C hereby substitute the sum of N206, 510.00 as counter-claim in favour of the respondent with interest at the rate of 7 1/2% per annum from 24th November 1997 to the time when the whole debt is liquidated.

I make no order as to costs for or against either party. D

WALI JSC

I have had the privilege of reading before now a copy of the lead judgment of my learned brother Kalgo JSC and I agree with his reasoning E for dismissing the main appeal and partially allowing it in respect of the Counter-claim by setting aside the amount of N2,581,498.68k awarded by the Court of Appeal and substituting it with N206, 510.00 with interest rate of 7 1/2% per annum, effective from 24th November, 1997 until the F judgment debt is liquidated.

I adopt the reasoning in the lead judgment as mine.

I make no order as to costs.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Kalgo, JSC. I agree with his conclusion that the appeal fails. The parties no doubt entered into a contract as specified in Exhibit I (Letter of credit). It should be noted that the letters or documents H particularly Exhibits 19, 18 or 25 which the Appellant contended amounted to a variation of the original agreement, all came into existence after the goods or machinery had arrived in Nigeria. The parties must be held

bound by their agreement (Exhibit I) and there should be no room for departure what are stated therein.

The appeal therefore fails and it is dismissed. I would however reduce the award of N2,581,418.66 made by the Court of Appeal to the Respondent to N206,510.00 being what was actually proved or admitted as the counter-claim. A Court has no authority to award more than what is claimed although it may award less (see for example EKPEYONG VS NYONG (1975) 2 S.C. 71, OBIOMA VS OLOMU (1978) 3 S.C.I.)

I subscribe to the orders as contained in the lead judgment.

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Kalgo, JSC, in draft, and I agree with his conclusions therein. The main appeal is dismissed. The appeal from the decision in respect of the counter-claim is allowed. I agree also to set aside the award of N2,581,498.68 made by the court below. In its place, an award of N206,510.00 in favour of the respondent is substituted. The judgment debt shall yield interest at 7 1/2 percent as from 24th November, 1997, until the whole debt is liquidated. I abide by the order made in the lead judgment on costs.

EJIWUNMI JSC

I have had the privilege of reading in advance the draft of the judgment just delivered by my learned brother Kalgo, JSC.

For the reasons ably set down in the said judgment, I also hold that there is no merit in the main appeal. It is dismissed accordingly. However, the appeal in respect of the counter-claim is allowed and the award of N2,581,498.68 made in favour of the respondent is hereby set aside. In its stead, the respondent is hereby awarded N206,510.00 with interest at the rate of 7 1/2% per annum from 24th November, 1997 to when the whole debt is liquidate. I abide with the other orders made as to costs in the leading judgment.