

SUPREME COURT OF NIGERIA

20TH APRIL, 2001. SC. 159/1997

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI, O. ACHIKE,
U. A. KALGO, E. O. AYOOLA, JJSC.**

1. NARINDEX TRUST LIMITED

2. ALHAJI LAWAL ALHASSAN APPELLANTS
AND

NIGERIA INTER - CONTINENTAL

MERCHANT BANK LIMITED RESPONDENTS

AGENCY - *Proof - Claim based on alleged agency relationship - Was not proved - Award of N12.1 million as special and general damages - Cannot stand (H 3)*

BANKING - *Credit facilities - Interest rate - Changes from time to time - So that upward review of prime lending rate in this case is proper (H 5)*

EVIDENCE - *Admissibility - Secondary evidence - Of entries in bank ledger - Will be admitted upon substantial compliance with s. 97 (2) (e) Evidence Act (H 4)*

EVIDENCE - *Admission - Though what is admitted needs no proof - But where it is based on misapprehension - Court has the discretion to require its proof (H 1)*

EVIDENCE - *Admissions per se - Do not constitute conclusive evidence - Trial court should have called for further evidence - In the circumstances of this case (H 2)*

EVIDENCE - *Exhibit - Admitted without objection - Is a valid document the court can rely upon - To support the respondent's claim (H 6)*

FACTS

This action was originally filed in the trial court on the unde-

fended list. The appellants as defendants at the trial, filed a notice of intention to defend the action and applied to the court to transfer the case to the general cause list. The learned trial judge transferred the case to the general cause list after hearing arguments on the application. Thereafter, the appellants applied for an order of pleadings but the trial judge overruled him and ordered that the case be heard without pleadings.

In the writ of summons, the respondent as plaintiff claimed against the appellants, jointly and severally the sum of N18,550,763.93 plus interest at the rate of 63% per annum and further at the court's rate from the date of the judgment until the whole debt is liquidated. The appellants also filed a counter-claim against the respondent claiming the sum of N30,000,000.00 (Thirty million Naira) being the cost of cotton delivered to the respondent's accredited agent SGS services which cotton was stolen as a result of the negligence and or carelessness of the SGS. The respondent filed a reply to the counter-claim. Since there was no pleadings filed in the action, the trial proceeded by each party calling witnesses in proof of their respective cases including the counter-claim. At the end of the trial, the trial judge struck out the name of the 2nd appellant and found only the 1st appellant liable and accordingly ordered it to pay the sum of N18,550,763.94 as claimed. In respect of the counter-claim, the learned judge entered judgment for the appellant in the sum of N12,000,00.00 as special damages and N100,000.00 as general damages. Both parties being dissatisfied appealed to the Court of Appeal. The Court of Appeal allowed the main appeal of respondent, restored the name of the 2nd appellant as a party to the case and liable jointly with the 1st appellant as guarantor of the loan. It also dismissed the cross- appeal of the appellants and set aside the order of N12.1 million special and general damages entered or made in favour of the appellants by the trial court. The appellants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the learned Justices of the Court of Appeal, Kaduna Division were not in error in setting aside the sum of N12.1 million awarded the Appellants as counterclaim by the trial Court and dismissing their counterclaim of N30 million for their missing 1877 metric tones of cotton

when both the evidence adduced at the trial and the findings of the learned trial judge have clearly established the fact that they are entitled to the same.

2. *Whether the decision of the lower Court restoring Exh. 18 earlier on expunged by the trial Court was not erroneous, and whether in the absence of this exhibit, there was any material left on the basis of which the Court of Appeal could justify the judgment of N18,550,763.94 entered in favour of the Respondent by the trial High Court.*

3. *Whether the judgment of the Court of Appeal, Kaduna Division affirming the judgment of the trial Court in the manner it did, and setting aside the Appellant's counter-claim and dismissing same was not in the light of the facts and circumstances of this case and the findings of the trial High Court, unreasonable and against the weight of evidence.*

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

Evidence - Admission

1. Section 19 of the Evidence Act defines “admission” as “a statement, oral or documentary which suggests any inference as to any fact in issue or relevant fact and which is made by any person.” But such admission must be clear and unequivocal and not based on misapprehension as in this case See I.M.B PLC V Comrade Cycle Co. Ltd (1988) 11 NWLR (pt.574) 460. And although by the provisions of S.75 of the said Act what is admitted needs no proof (See Nwankwo V Nwankwo (1995) 5 NWLR (p.894) 153 at 171; Owosho V Dada (1984) 7 S.C. 149 at 163 – 4), the proviso to that section gives the trial court the discretion in relevant cases to require the fact admitted to be proved (p. 1333 G)

Admissions per se - Do not constitute conclusive evidence

2. Since in law, admissions per se do not constitute conclusive evidence of the matter admitted, the court in considering the worth of such admissions must take into account the circumstances under which they are made and the weight to be attached thereto. See Kamalu v Umunna (1997) 5 NWLR (pt. 627) 349. In the circumstances of this case, I am

satisfied that the learned trial judge should have called for further evidence on the facts as required in the proviso to S.75 of the said Act to explain the contents of Exhibits 13 before accepting the admission against the respondent in order to decide what weight to be attached thereon (p.

B 1334 A)

Claim based on alleged agency relationship

3. I have carefully examined the evidence on record and the exhibits relevant to this issue including those examined by the Court of Appeal and I am convinced that the above findings of the Court of Appeal on SGS agency are proper and valid and I agree with them including the conclusion that the SGS was not proved to be the accredited agent of the respondent. In the result, the respondent bears no liability for the loss of the raw cotton concerned and consequently the award to the appellants of the sum of N12.1m as special and general damages in respect thereof cannot stand. I answer issue 1 in the affirmative (p. 1334 H)

E Admissibility - Secondary evidence

4. From his evidence examined above, I am satisfied that he has substantially complied with the requirements of the provisions of Section 97 (2) (e) on the admissibility of the statement of account Exhibit 18. It is not necessary according to law that the words of the section must be strictly followed word by word before secondary evidence of the entries in the ledger of the bank is admitted in evidence once there is substantial compliance. I therefore agree with the Court of Appeal that the learned trial judge was wrong to have expunged the statement of account Exhibit 18 which was in fact admitted without objection by the appellants. I also answer issue 2 in the negative (p. 1337 A)

Credit facilities - Interest rate

5. It is common ground that banks normally charge interest on credit facilities granted to its customers. It is also common ground that the rate of interest in all commercial transactions changes from time to time. Therefore although the rate of interest chargeable on the credit facility

given to the appellants was specified in Exhibit 2, it was made clear there that the rate might change and that was why it said “*for now.*” Further more, the respondents in Exhibits 12A, 12B and 12C, have given notice to the appellants on the upward review of the prime lending rates on the loan. This entitles the respondents to charge the current interest on the loan as it did in this case, bringing the final amount outstanding to the amount claimed in the writ of summons i.e. N18,550,763.94 (p. 1338 D)

Exhibit - Admitted without objection

6. Exhibit 18 was admitted in evidence without any objection by the appellants. In fact DW 1, appellant’s witness who is an accountant also said he agreed with entries of debit and credit in their Statement of Account Exhibit 18. There is therefore no doubt, in my view, that Exhibit 18 is a valid document which can be relied upon by any court. I therefore find that there is sufficient evidence on record to support the claim of the respondent as confirmed by the Court of Appeal. I have no hesitation in answering issue 3 in the negative.

Therefore from all what I said above, I find no merit in this appeal and I dismiss it accordingly (p. 1338 H)

NOTABLE POINTS OF INTEREST

ACHIKE JSC

1. Counter-Claim - Appropriate quantum of proof

When it is borne in mind that, stricto sensu, a counter-claim is an independent claim made by the defendant which can be taken together with the main claim, then it becomes necessary to appreciate that the quantum of proof appropriate to be attained in order to give judgment on the counter-claim in favour of the defendants/appellants must be of the type required of the plaintiff in every civil claim, i.e. the proof based on preponderance of evidence (p. 1341 A)

2. Need to differentiate between special and general damages

From the above, it is unarguable that the counter-claim was subsumed as a monolithic claim, totalling N30,000,000.00 as the cost of the alleged

stolen cotton. Undoubtedly, the counter-claim being for a particularised sum of N30,000,000.00, it must be strictly proved at the trial. Yet, without more, the learned trial judge awarded the appellant the sum of N12.1m as special and general damages by way of counter-claim. There was no apportionment of what constituted “*special damages*” in this lump sum of N30,000,000.00 in contradistinction to what could be christened “*general damages*”. Such distinction was mandatory, firstly, because while “*special damages*” as earlier stated must be strictly proved, small or minimal evidence would ordinarily be required in proof of “*general damages*”. Secondly, even if the proof of “*special damages*” may fail because of inability to establish same strictly, yet the proof of general damages could be established on the slightest satisfactory evidence adduced by the counter-claimant (p. 1341 E)

REPRESENTATION

K. T. Turaki for the Appellants

E Nelson Ezuegbu Esq. for the Respondents

CASES REFERRED TO

Nwankwo v. Nwankwo (1995) 5 NWLR (p.894) 153 at 171

F Owosho v. Dada (1984) 7 S.C. 149 at 163 - 4)

Kamalu v. Umunna (1997) 5 NWLR (pt. 627) 349

Ojiegbe v. Okwaranyia (1962) 2 SCNLR 358

Ajide v. Kalari (1985) 3 NWLR (pt. 12) 248

Yassin v. Barclays Bank DCO (1968) 1AU N.L.R (Reprint) 171 at 177

G Oguma v. I. B. W. A (1998) 1 NWLR (pt. 73) 658

Anyaebosei v. R. T. Brisco Ltd (1987) 3 NWLR (pt. 59) 84

I.M.B. Plc v. Comrade Cycle Co. Ltd (1988) 11 NWLR (pt. 574) 460

H STATUTES & RULES REFERRED TO

Kano State High Court (Civil Prcedure) Rules, 1998 O. 23 r. 1 and r. 3 (2)

Evidence Act ss. 19, 75, 97 (2) (e)

LEAD JUDGMENT BY KALGO JSC

This is an appeal against the decision of the Court of Appeal, Kaduna, delivered on the 16th day of January 1996. The case was earlier tried in the Kano State High Court (hereinafter referred to as the trial court) by Abdullahi J. who delivered his judgment on the 18th day of May 1995.

The action was originally filed in the trial court on the undefended list pursuant to the provisions of Order 23, rule 1 of the Kano State High Court (Civil Procedure) Rules, 1998. The appellants as defendants at the trial, filed a notice of intention to defend the action and applied to the trial court to transfer the case to the general cause list. The learned trial judge heard arguments of counsel on the application and in a ruling delivered on 18th January 1994, transferred the case to the general cause list. Thereafter learned counsel for the appellants also applied for an order of pleadings by the parties but the learned trial judge overruled him and ordered that the case be heard without pleadings in accordance with Order 23, rule 3(2) of the said Rules.

In the writ of summons which was taken out on the 13th of December 1993, the respondent, as plaintiff, claimed against the appellants, jointly and severally, the sum of N18,550,763.94 (Eighteen million, five hundred and fifty thousand seven hundred and sixty three Naira ninety four Kobo) plus interest at the rate of 63% per annum and further at the court's rate from the date of judgment until the whole debt is liquidated. The appellants also filed a counter-claim against the respondent claiming the sum of N30,000,000.00 (Thirty Million Naira) being the cost of cotton delivered to the respondent's accredited agent SGS Inspection Services by warrant No. 009250 which cotton was stolen as a result of the negligence and/or carelessness of the said SGS. The respondents filed a reply to the counter-claim.

Since there was no pleadings filed in the action, the trial proceeded by each party calling witnesses in proof of their respective cases including the counter-claim. At the end of the trial the learned trial judge struck out the name of the 2nd appellant from the action and found the

1st appellant only liable and accordingly ordered it to pay the respondent the sum of N18,550,763.94 as claimed. In respect of the counter-claim, the learned judge entered judgment for the appellant in the sum of N12,000,000.00 as special damages on account of the respondent's admission that the cotton was worth 12 Million Naira. N100,000.00 was also awarded to the appellant as general damages. Both parties were not satisfied with the decision of the learned trial judge and they appealed to the Court of Appeal. The Court of Appeal allowed the main appeal of the respondent, restored the name of the 2nd appellant as a party to the case and liable jointly with the 1st appellant as guarantor of the loan. It also dismissed the cross-appeal of the appellants and set aside the order of N12.1 million special and general damages entered or made in favour of the appellants by the trial court. The appellants now appealed to this court on 11 grounds of appeal.

In this court the parties filed and exchanged written briefs. In the appellants brief the following issues for the determination of this court were identified:-

1. *Whether the learned Justices of the Court of Appeal, Kaduna Division were not in error in setting aside the sum of N12.1 million awarded the Appellants as counterclaim by the trial Court and dismissing their counterclaim of N30 million for their missing 1877 metric tones of cotton when both the evidence adduced at the trial and the findings of the learned trial judge have clearly established the fact that they are entitled to the same.*

2. *Whether the decision of the lower Court restoring Exh. 18 earlier on expunged by the trial Court was not erroneous, and whether in the absence of this exhibit, there was any material left on the basis of which the Court of Appeal could justify the judgment of N18,550,763.94 entered in favour of the Respondent by the trial High Court.*

3. *Whether the judgment of the Court of Appeal, Kaduna Division affirming the judgment of the trial Court in the manner it did, and setting aside the Appellant's counter-claim and dismissing same was not in the light of the facts and circumstances of this case and the findings of the trial High Court, unreasonable and against the weight of evidence.*

The respondents restated the issues thus:-

1. *Whether the learned Justices of the Court of Appeal erred in setting aside the award of N12.1 million to the 1st Appellant on its counter-claim.*
2. *Was Exhibit 18 (the 1st Appellant statement of account) wrongly admitted in evidence?*
3. *Did the Court of Appeal rightly affirm the judgment in favour of the Respondent Bank for the sum of N18,550,763.94?*

I think it is pertinent, albeit briefly, to set out facts giving rise to this case as presented before the trial court. C

The 1st appellant was an old customer of the respondent Bank and the 2nd appellant is the managing director of the 1st appellant. On the 13th of July 1992, the 1st appellant applied for a N10 million credit facility called Bankers Acceptance (B.A) warehousing facility from the respondent. The application was Exhibit I at the trial. The application was approved and the approval was conveyed to the 1st appellant through the 2nd appellant vide letter dated 27th July 1992 (Exhibit 2) on the conditions set out in that letter. By a letter dated 28th July 1992, (Exhibit 3) E the 1st appellant, by its Managing Director (2nd appellant) and Secretary, notified the respondent that the 1st appellant had accepted the credit facility on the conditions set out in Exhibit 2, and that the 2nd appellant was authorised to sign any document concerning the loan facility. F

As security for the loan facility, the appellants offered the personal guarantee of the 2nd appellant and 1877 metric tones of raw cotton in their warehouse valued at N12 million. The loan was to be repaid within 90 days only, and on the due date the respondent demanded repayment. The appellants were unable to pay anything but wrote to the respondents to extend time for repayment to another 180 days from the 16th of October 1992. The respondent obliged but meanwhile interest had accrued on the principal loan. On the 8th of June 1993 when the respondents wrote back demanding for repayment, the appellants replied H that they needed a little more time to liquidate the loan and interest and in the same letter blamed their partner one Alhaji Sani Buje of Buji Investment Ltd for diverting their funds. When the default in payment contin-

ued, the respondent sought to lay their hands on the 1877 metric tons of raw cotton granted to them as security. Here again the appellants told them that their said partner Alhaji Sani Buji had sold the cotton and misappropriated the money to his own use. Thereafter, the respondent gave notice to the appellants for their intention to institute legal action which they did by filing this action in the trial court on 13th December, 1993.

I now come back to the issues for determination framed by the learned counsel in their respective briefs. Each has formulated 3 issues and the points raised in the appellants issues are exactly the same as those in the respondents issues. I shall therefore consider the appellant's issues for the purpose of this appeal.

Issue 1

This issue deals with the counter-claim of the appellant. The trial court awarded the appellant N12.1 million as special and general damages by way of counter-claim but this was set aside by the Court of Appeal. Learned counsel for the appellant submitted in his brief that there was sufficient evidence to support the findings of the learned trial judge and that the appellants were entitled to the amount of N12.1 million awarded to them.

On page 82 of the record, the Counter-Claim reads:-

"Wherefore the 1st defendant Counter-Claim from the plaintiff the sum of thirty million naira only N30,000,000.00 being the cost of cotton delivered to the plaintiff's accredited agent, SGS Inspection (Sic) by their warrant No. 009258 but which cotton was stolen as a result of carelessness of the said plaintiff's SGS Inspection Services Limited."

The respondent denied the counter-claim in its reply to the counter-claim and further averred thus:-

"2(a) The said SGS inspection services Ltd. was appointed by the defendants as their agents for the purpose of the warehousing arrangement. The SGS collateral Management Agreement between the plaintiff, 1st defendant and the SGS Inspection services Ltd. is hereby pleaded and the plaintiff will rely on same at the trial.

(b) The plaintiff are aware that the warrant No.009258 was raised in respect of a quantity of cotton received from the defendant by SGS

Inspection service Ltd. but the plaintiff denies that the said cotton was valued at N30,000,000.00 and puts the defendant to the strictest proof of his averments.

(e) At all times material to this action the service rendered by said SGS were retained and paid for by the 1st defendant.

(f) The 1st defendant knew and has consistently maintained at all material times that the cotton in question was wrongly diverted by their bonafide partner Alhaji Sani Buji the Managing Director of Buji investment Ltd. who to the knowledge of the defendant and SGS had a set of the warehouse keys. The defendant pleads the 1st defendant's letter to the plaintiff dated 12-07-93 letter dated 15-06-93 from SGS to the plaintiff and letter of 26-07-93 from defendant's counsel to SGS solicitors as copied to the plaintiff."

It is very clear that the counter-claim is based on the 1877 metric tons raw cotton which the 1st defendant/appellant gave to the appellant as additional guarantee for the credit facility granted to it by the respondent. The appellants alleged that the value of the cotton at the material time was N30,000,000.00, but they failed to prove this at the trial. The learned trial judge found quite properly that this was not proved when on page 76 of the record he said:-

"In the counter-claim and the testimony of the Managing Director of the defendant the defence has asked for N30m being the cost of cotton. But it must be pointed out that apart from that assertion the defence has not produced any evidence to support that contention. It is trite law the special damages must be proved by way of evidence and where it is not proved the claim must fail."

But the learned trial judge found that in paragraph 2(c) of the reply to the counter-claim and in the evidence of PW1 (respondent's witness) the respondent admitted that the value of the raw cotton was N12m, and since admission need no proof, he awarded the N12m as counter-claim to the appellant.

Paragraph 2 (c) of the reply to counter-claim reads:-

"The plaintiff further avers that the whole 1877 metric Tones of raw cotton was worth N12,000,000.00 and hereby pleads the 1st

respondent's letter to the plaintiff dated 23-11-92 as well as the plaintiff's letter of 4-12-92 to SGS Inspection Services (Nig) Ltd."

PW1 in his testimony on p. 25-26 of the record also said:-

*"The counter-claim of the defendant should be rejected because
B the value of the cotton is not N30m. At the time of the transaction it was N12m based on the defendant's letter of 23-11-92."*

The averment in paragraph 2 (c) of the reply to the counter-claim and the evidence of PW1 are all relying on the appellants letter of 23-11-92. That letter was admitted in evidence as Exhibit 13 and it reads:-

C November 23, 1992

The Manager

Nigerian Inter-Continental Merchant Bank

37 Muratala Mohammed Way

D Kano

ATTENTION: AKINBO AKINTAYO/KABIRU

Dear Sir,

RE: CHANGE OF SECURITY ON OUR N10.0 MILLION

E We wish to inform you that we had since started purchasing raw cotton and stockpiling at a ginnery near Kankara town in Katsina State. We have now purchased almost N8.0 million worth of raw cotton. The raw cotton is awaiting ginning at the above mentioned ginnery.

F In addition to the above, we have utilized part of our existing cotton lint in making "YARN" or "THREAD". We believe we will make better margin in same if we add value to our existing lint. All efforts are on with a view to disposing the Yarn or the existing lint. However, the prices being offered are rather low. This notwithstanding, we believe the prices

G will go up very soon.

In view of the foregoing, we wish to request you to allow us to substitute our existing security on our facility with either of the followings:-

Value in

H N

<i>1.Stock of Raw Cotton at Kankara Ginnery</i>	<i>8,000,000.00</i>
<i>2.Stock of yarn/Thread</i>	<i>12,000,000.00</i>

The above arrangements will enable us to quickly dispose of the exist-

ing unsold cotton lint or use same to make yarn. We are doing all we can to sell our stock of yarn to companies in Kaduna or Lagos.

We honestly hope you will oblige us with the above request. At this juncture we wish to seize this opportunity to extend our sincere appreciation to your entire bank especially your Kano Branch, for the support/ understanding on our existing relationship.

Very best Regards.

For: NARINDEX TRUST LIMITED

SIGNED

LAWAL ALHASSAN

Managing Director”

From the content of this letter particularly paragraph 3, it is clear that the stock of row cotton at Kankara Ginnery which is relevant to the subject matter of this case, and which was earlier given as security for the credit facility, was shown to be valued at N8,000,000.00 only. The N12m there was the value of stock of yarn/thread which was not affected by the security granted by the appellant. By Exhibit 13, the appellants were seeking for a change of their security for the credit facility, they were not given any value to the raw cotton of 1877 metric Tones earlier given by them as security for the loan, as shown in Exhibit 14. Therefore since the counter-claim was directed upon the 1877 metric Tones of raw cotton contained in Exhibit 14, the admission (assuming it is regarded as an admission) of N12m with particular reference to Exhibit 13 only goes to the value of stock of yarn/Thread and not the value of any raw cotton held as security. It seems to me therefore that the respondent proceeded on the misapprehension that Exhibit 13 gave the value of the raw cotton given to it as security at N12m.

Section 19 of the Evidence Act defines “admission” as “a statement, oral or documentary which suggests any inference as to any fact in issue or relevant fact and which is made by any person.” But such admission must be clear and unequivocal and not based on misapprehension as in this case See I.M.B PLC V Comrade Cycle Co. Ltd (1988) 11 NWLR (pt.574) 460. And although by the provisions of S.75 of the said Act what is admitted needs no proof (See

Nwankwo V Nwankwo (1995) 5 NWLR (p.894) 153 at 171; Owosho V Dada (1984) 7 S.C. 149 at 163 – 4, the proviso to that section gives the trial court the discretion in relevant cases to require the fact admitted to be proved. Since in law, admissions per se do not constitute conclusive evidence of the matter admitted, the court in considering the worth of such admissions must take into account the circumstances under which they are made and the weight to be attached thereto. See Kamalu v Umunna (1997) 5 NWLR (pt. 627) 349; Ojiegbe v Okwaranyia (1962) 2 SCNLR 358; Ajide v Kelari (1985) 3 NWLR (pt. 12) 248. In the circumstances of this case, I am satisfied that the learned trial judge should have called for further evidence on the facts as required in the proviso to S.75 of the said Act to explain the contents of Exhibits 13 before accepting the admission against the respondent in order to decide what weight to be attached thereon.

The counter-claim of the appellants were also based on the assumption that SGS Inspection Services Ltd (hereinafter called SGS) was the accredited agent of the respondent and on the principle of vicarious liability, the respondent are liable for the acts of its agent. The Court of Appeal has painstakingly examined this relationship between the respondent and the SGS and came to the conclusion that in the circumstances of this case, SGS is more inclined to be the agents of the appellants than the respondent, because:-

- (i) The appellants had the legal estate or right over the 1877 metric Tons of the raw cotton while the respondents had only a lien thereon.
- (ii) The raw cotton which is the subject matter of the agency was never actually placed under the custody and control of SGS;
- (iii) Exhibit 15 and 20 showed clearly what happened to the raw cotton concerned and SGS was not involved,
- (iv) Exhibit 4, the Tripartite management Agreement, did not apply to the present transaction between the parties which gave rise to this case.

I have carefully examined the evidence on record and the

exhibits relevant to this issue including those examined by the Court of Appeal and I am convinced that the above findings of the Court of Appeal on SGS agency are proper and valid and I agree with them including the conclusion that the SGS was not proved to be the accredited agent of the respondent. In the result, the respondent bears no liability for the loss of the raw cotton concerned and consequently the award to the appellants of the sum of N12.1m as special and general damages in respect thereof cannot stand. I answer issue 1 in the affirmative.

Issue 2

This issue is complaining against the order of the Court of Appeal reinstating, as it were, Exhibit 18 (the appellants Statement of Account with the respondent) which was expunged by the learned trial judge in his judgment.

The learned trial judge expunged the Exhibit 18 from his record because, according to him:-

(i) Exhibit 18 should have been tendered for admission in court through PW1 and not through PW2 in this case; and

(ii) The evidence of PW2 prior to tendering Exhibit 18 in evidence, did not lay down the proper foundation for the admission of Exhibit 18 (Statement of Account) as required by S.96 now S.97 of the Evidence Act.

The Court of Appeal, in dealing with this point found that the evidence of PW2 prior to tendering Exhibit 18 for admission in evidence substantially complied with the requirements of S.97 (2)(e) and since Exhibit 18 was admitted without objection by the appellants the learned judge was wrong to have expunged Exhibit 18 from the record.

S.97(1) provides:-

“Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-

(a) (etc.)

(h) *When the document is an entry in a banker’s book.*

A statement of account is ordinarily a document of entries in a banker’s book. According to section 97 (2) (e) of the said Act, secondary

evidence of the entry in a banker's book can only be admissible in evidence if:-

B "... it be first proved that the Book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the Book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or Officer of the Bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit." (Underlining mine).

D PW2, Hamza A. Ibrahim was the witness who tendered Exhibit 18 at the trial, before it was admitted in evidence. His evidence appears on pp 30-33 of the record. He testified that he is an officer in the credit and marketing department of the plaintiff's bank. This means that he is an officer of the bank. On page 31 of the record, he said:-

E "The amount advanced to the defendants as loan is N10,000,000.00 the amount is in the account of the 1st defendant. Ledger is a book of account where entries are posted. I am the one in charge of the ledger...The bank has statement of account of the 1st defendant It covers the period up to October, 1993. The S/Acct. is an extraction of the ledger card. I have checked and cross-checked and it reflects adequately the ledger."

G It was after this evidence that the statement of account was admitted in evidence as Exhibit 18. According to the evidence PW2 is the officer of the bank in charge of the ledger where entries in the account were posted. He said the ledger is the book of account of the bank where entries are posted, which entries must necessarily be made in the ordinary course of business of the bank. He testified that the statement of account is an extraction i.e and exact copy, of the ledger card and he checked and cross-checked the statement of account with the ledger and found it to be "adequate" or correct. This means that he has examined the original entry in the ledger with those in the statement of account and found same to be correct. He gave his testimony orally in court and was examined and

cross-examined. He was not discredited in any way. **From his evidence examined above, I am satisfied that he has substantially complied with the requirements of the provisions of Section 97 (2) (e) on the admissibility of the statement of account Exhibit 18. It is not necessary according to law that the words of the section must be strictly followed word by word before secondary evidence of the entries in the ledger of the bank is admitted in evidence once there is substantial compliance.** See Yassin V Barclays Bank DCO (1968) 1 AU NLR (Reprint) 171 at 177; Oguma V. I.B.W.A. (1988) 1 NWLR (pt. 73) 658; Anyabosi V. R.T. Brisco Ltd (1987) 3 NWLR (pt.59) 84.

I therefore agree with the Court of Appeal that the learned trial judge was wrong to have expunged the statement of account Exhibit 18 which was in fact admitted without objection by the appellants. I also answer issue 2 in the negative.

Issue 3

This issue deals with whether the Court of Appeal was right in affirming the decision of the trial court in the light of the evidence at the trial. It is common ground and there is no dispute about it that the appellants were granted credit warehousing facility of N10,000,000.00 (ten million Naira only) in July 1992, as per Exhibit 2. The loan was accepted formally by the appellants per Exhibit 3 on the conditions stipulated in Exhibit 2. Exhibit 2 inter alia, stipulated that the period of payment of the loan shall be 90 days. The appellants used the facility to the full and were unable to refund anything after the expiry of the 90 days stipulated therefore. The respondent naturally sent two letters Exhibits 5 and 6 demanding payment of the outstanding indebtedness at that time which stood at N14.572m. This was in June 1993. The appellants followed this demand by Exhibits 8, 11, 20 and 27 which were letters addressed to the respondent in which they acknowledged the loan and the default in paying back as stipulated in Exhibit 2, explaining their inability to raise any funds in their trading business and the only available funds which have been entrusted to their partner has been misappropriated by him. The appellants also deeply apologised for what they called “*the discomfort*” caused to the respondent “*for non-payment of the loan.*” Also in all

these 3 letters, Exhibits 11, 20 and 27, they offered to sell the house of the 2nd appellant in Kano which they said was valued over N15m, and as soon as the house was sold, they would have sufficient funds to liquidate the entire loan and accrued interest. In the same exhibits, they asked for more time to allow their arrangements to materialise and take steps to liquidate the loan. In fact in Exhibit 27, the appellants offered to sell the 2nd appellant's house to the respondent and invited the respondent to inspect the house and if it is interested, it can take the house in full settlement of the appellant's indebtedness. It is however significant to observe that in none of these exhibits did the appellants say that they made any payment to the respondent's bank towards the settlement of the loan facility. It is therefore totally unacceptable when the 2nd appellant in his testimony said that they paid N10m. as interest on the principal loan.

It is common ground that banks normally charge interest on credit facilities granted to its customers. It is also common ground that the rate of interest in all commercial transactions changes from time to time. Therefore although the rate of interest chargeable on the credit facility given to the appellants was specified in Exhibit 2, it was made clear there that the rate might change and that was why it said "for now." Further more, the respondents in Exhibits 12A, 12B and 12C, have given notice to the appellants on the upward review of the prime lending rates on the loan. This entitles the respondents to charge the current interest on the loan as it did in this case, bringing the final amount outstanding to the amount claimed in the writ of summons i.e. N18,550,763.94.

I have already found that Exhibit 18 was properly and validly admitted at the trial in this case. Exhibit 18 was the Statement of Account of the 1st appellant with the respondent's bank. According to the respondent's witness PW2, it contained all entries relevant to the transaction in respect of the loan facility granted to the 1st appellant. The last entry in Exhibit 18, has shown a debit balance of N18,550,763.94 as at 31st October 1993, and although the 2nd appellant in his evidence has said that they paid N10m interest in October, 1993, there is no such credit entry in Exhibit 18. **Exhibit 18 was admitted in evidence with-**

out any objection by the appellants. In fact DW 1, appellant's witness who is an accountant also said he agreed with entries of debit and credit in their Statement of Account Exhibit 18. There is therefore no doubt, in my view, that Exhibit 18 is a valid document which can be relied upon by any court. I therefore find that there is sufficient evidence on record to support the claim of the respondent as confirmed by the Court of Appeal. I have no hesitation in answering issue 3 in the negative. B

Therefore from all what I said above, I find no merit in this appeal and I dismiss it accordingly. I affirm the judgment of the Court of Appeal delivered on 6th January 1997. I award N10,000.00 costs in favour of the respondent. C

D

KARIBI-WHYTE JSC

I have had the privilege of reading the leading judgment of my learned brother Umaru Atu Kalgo, JSC in this appeal. I agree entirely with his reasoning that this appeal is completely without merit and ought to be dismissed. I also for the reasons given in the leading judgment hereby dismiss the appeal. E

Appellant shall pay N10,000.00 as costs to the Respondents.

F

KUTIGIJSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother Kalgo, JSC. He has dealt with all the issues submitted for resolution in the appeal. I agree with his reasoning and conclusions. The appeal fails and it is dismissed. The judgment and orders of the Court of Appeal are hereby confirmed. I endorse the order for costs in the lead judgment. G

H

ACHIKE JSC

I have before now, had the privilege of reading the judgment of my learned brother, Kalgo, JSC. I am in full agreement with his reasoning and conclusions that this appeal lacks merit.

B The issues for determination as postulated by the appellants appear to be more apposite than those of the respondents. They run thus:

C *"1. Whether the learned Justices of the Court of Appeal, Kaduna Division were not in error in setting aside the sum of N12.1 million awarded the appellants as counterclaim by the trial Court and dismissing their counterclaim of N30 million for their missing 1877 metric tones of cotton when both the evidence adduced at the trial and the findings of the learned trial judge have clearly established the fact that they are entitled to the same.*

D *2. Whether the decision of the lower Court restoring Exh. 18 earlier on expunged by the trial Court was not erroneous, and whether in the absence of this exhibit, there was any material left on the basis of which the Court of Appeal could justify the judgment of N18,550,763.94*
 E *entered in favour of the Respondent by the trial High Court.*

F *3. Whether the judgment of the Court of Appeal, Kaduna Division affirming the judgment of the trial Court in the manner it did, and setting aside the Appellant's counter-claim and dismissing same was not in the light of the facts and circumstances of this case and the findings of the trial High Court, unreasonable and against the weight of evidence."*

G The first issue seeks to establish that the trial court was justified in awarding the appellant the sum of N12.1m as counter-claim. It is quite clear that on close reading of Exhibit 13, a letter dated 23/11/92, the sum of N12.1m stated in the said letter was referable to stock of yarn/thread that was not affected by the security granted by the appellants. In no sense could Exhibit 13 be construed to express the value of 1877 metric tones of cotton earlier given by them as security for the loan made
 H to them by the respondent which was evidenced in Exhibit 14. Consequently, even if the reference of N12.1m made in Exhibit 13, could, by the wildest imagination (which is difficult to concede in the circumstances of this case) be directed to the value of the cotton misappropriated, yet

this amount cannot be said to be referable to the counter-claim which encompassed a total of 1877 metric tones of raw cotton as stated in Exhibit 14. When it is borne in mind that, stricto sensu, a counter-claim is an independent claim made by the defendant which can be taken together with the main claim, then it becomes necessary to appreciate that the quantum of proof appropriate to be attained in order to give judgment on the counter-claim in favour of the defendants/appellants must be of the type required of the plaintiff in every civil claim, i.e. the proof based on preponderance of evidence.

But that was not the end of the problem of the appellants' counter-claim. It would be recalled that no pleadings were ordered, the defendants/appellants simply stated its counter-claim rather briefly and incomprehensibly, to wit,

Wherefore the 1st defendant Counter-Claim from the plaintiff the sum of thirty million naira only N30,000,000.00 being the cost of cotton delivered to the plaintiff's accredited agent, SGS Inspection (sic) their warrant No. 009258 but which cotton was stolen as a result of carelessness of the said plaintiff's SGS Inspection Services Limited.

From the above, it is unarguable that the counter-claim was subsumed as a monolithic claim, totalling N30,000,000.00 as the cost of the alleged stolen cotton. Undoubtedly, the counter-claim being for a particularised sum of N30,000,000.00, it must be strictly proved at the trial. Yet, without more, the learned trial judge awarded the appellant the sum of N12.1m as special and general damages by way of counter-claim. There was no apportionment of what constituted "*special damages*" in this lump sum of N30,000,000.00 in contradistinction to what could be christened "*general damages*". Such distinction was mandatory, firstly, because while "*special damages*" as earlier stated must be strictly proved, small or minimal evidence would ordinarily be required in proof of "*general damages*". Secondly, even if the proof of "*special damages*" may fail because of inability to establish same strictly, yet the proof of general damages could be established on the slightest satisfactory evidence adduced by the counter-claimant. Again, it is the responsibility of the counter-claimant, at the outset, to clearly state and subsume the damages under

the appropriate head of damages. The counter-claim in this case, like a festering wound, was afflicted by various, and indeed, insurmountable problems. The problems, at this stage of the trial, were incurable. They were sufficient to render the counter-claim unsustainable.

B Even if the counter-claim was properly claimed and articulated, there remained a serious hurdle of who was liable for the carelessness or negligence leading to the theft of the cotton sought to be subsumed under the counter-claim. The learned trial judge had no difficulty in making the assumption, which with respect, in my view, was lamentably erroneous
C that the SGS Inspection Services (hereinafter referred simply as SGS) were the accredited agents of the respondents, and therefore vicariously liable to the appellants for the loss of the stolen cotton. The Court of Appeal, after a thorough evaluation of the evidence as shown placed on
D the record reached the conclusion, with which I respectfully agree, that the SGS were the agents of the appellants. Upon that conclusion, the counter-claim became a domestic problem of the appellant for which the respondent was absolutely exonerated from the liability arising from the
E negligence of the SGS.

From all I have said, it becomes crystal clear that the counter-claim lacks merit and the first issue on which it is premised cannot be but resolved against the appellants.

F The second issue seeks to determine whether Exhibit 18 was wrongly expunged by the learned trial judge who having earlier admitted same in evidence later decided to expunge it. The lower court however took a contrary view because on appeal, it held on three grounds, namely,

(a) Exhibit 18 is not ordinarily an inadmissible document but one
G whose admissibility is predicated on the provisions of section 97(2)(e) of the Evidence Act;

(b) DW2's testimony substantially satisfied the provisions and conditions for admissibility under Section 97(2)(e) of the Evidence Act,
H and

(c) The document was admissible without objection that Exhibit 18 was rightly admitted in evidence.

I have closely examined Exhibit 18 which was 1st appellant's

statement of account with the respondent against the background of the provisions of section 97(2)(e) of the Evidence Act and the testimony of PW2 through whom the said document was introduced in evidence. It is worthy of note that the authorities, in respect of the admissibility of banking documents predicated on section 97(2)(e) of the Evidence Act are in agreement that such prepared banking documents i.e. secondary evidence of entries of ledger of the banker, rather than the ledger itself, sought to be admitted in evidence are invariably not defeated so long as there is a substantial compliance with the provisions of that Act and not necessarily insisting on a compliance that is verbatim; see Oguma v I.B.W.A. (1998) 1 NWLR (Pt.73) 658. C

Against this background wherein Exhibit 18 was admitted in evidence, it is pertinent to observe that there was no opposition whatsoever from the appellants when Exhibit 18 was sought to be tendered at the trial. The record also confirms that the proper foundation was laid for the admissibility of that document that is ordinarily admissible. I think the Court of Appeal was on strong wicket when it decided that the trial court was palpably in error to have expunged Exhibit 18. accordingly, I agree that there was no basis whatsoever for the trial court to have suo motu decided to expunge Exhibit 18. D E

The third and final issue questions whether the decision of the trial court which was in favour of the respondent in respect of the main claim and was confirmed by the lower court, is supportable. It will be recalled that the plaintiff/respondent had claimed a total of N18,550,763.94 as reflected in Exhibit 18, being the amount reflected therein as the debit balance arising from the appellants' loan facility granted to them by the respondent, as at 31st October, 1993. One does not lose sight of evidence of payment of N10,000,000.00 representing interest in October 1993 made by the 2nd appellant. It is common ground that this payment was not reflected in Exhibit 18, a document whose admissibility, as earlier noted, was not opposed nor was its content subsequently subjected to any cross-examination. I have also read the record of appeal very closely and I am satisfied that there is overwhelming evidence which preponderates in favour of the respondent's claim, as reflected in Exhibit F G H

18 as the outstanding debit balance of the appellants' indebtedness to the respondent. The lower court, I think, was unquestionably obliged to uphold and confirm the decision of the trial court in favour of the respondent with regard to the main claim for the appellants' indebtedness for B the sum of N18,550,763.94.

The end result is that this appeal deserves to fail as lacking in merit. I would accordingly dismiss the appeal and award N10,000.00 costs in favour of the respondent.

C —————

AYOOLA JSC

I agree with the conclusion arrived at by my learned brother, D Kalgo JSC that this appeal should be dismissed and with the reasons he gives for that decision. In the result, I too would dismiss the appeal with costs as ordered by him.

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