

**SUPREME COURT OF NIGERIA**

6TH JULY, 2001. SC. 100/1996.

**CORAM:- U. MOHAMMED, A.I. IGUH, A.I. KATSINA-ALU,  
U.A. KALGO, A.O. EJIWUNMI, JJSC.**

THOMAS CHUKWUMA MAKWE ..... PLAINTIFF/APPELLANT  
AND

1. CHIEF OBANUA NWUKOR

(Carrying on business under  
the name and style of Prince ..... 1ST DEFENDANT/RESPONDENT  
Uba Industrial Advertising and  
Publishing Company or Uba  
Industrial Advertising & Publishing  
Company Limited)

2. FIRST BANK OF NIGERIA LTD. .. DEFENDANT/RESPONDENT

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**ACTIONS** - *Claims - Contract - The appellant's claim was hinged on contract arising out of a loan transaction - Since his main relief was a contractual relief (H 7)*

**ACTIONS** - *Negligence - The appellants action - Was not grounded in tort of negligence - With regard to his pleadings and evidence (H 6)*

**CONTRACTS** - *Bindingness - The deposit of the contractual document - With the respondents bank cannot make the respondent - Bound by its terms (H 9)*

**CONTRACTS** - *Breach of contract - Where the facts constituting the breach - Amounts to a tort - A stranger to the contract may sue for breach of duty of care owed to him (H 2)*

**CONTRACTS** - *Parties - As the respondent was not a party to the contract - It could not be bound by it - As the Court of Appeal rightly held (H 8)*

**CONTRACTS** - *Parties* - Only parties to a contract can sue or be sued on the contract (H 1)

**TORTS** - *Negligence* - An action in negligence - Can succeed only if actual damage is proved (H 3)

**TORTS** - *Negligence* - *Description of* - It is breach of a duty to take care imposed by law - Resulting in damage to the complainant (H 5)

**TORTS** - *Negligence* - *Ingredients of actionable negligence* (H 4)

### **FACTS**

The plaintiff /appellant sued the defendants at the High Court of former Bendel State of Nigeria holden at Asaba in 1988. In the action he claimed for an order of the court compelling the 1st defendant to pay the 2nd defendant the amount of loan he took from the 2nd defendant and an order for the 2nd defendant to return his statutory certificate of occupancy and replace it with the 1st defendant's customary certificate of occupancy amongst other claims.

The facts are that the 2nd defendant had granted a loan of N200,000.00 to the 1st defendant. The loan was guaranteed by the plaintiff who deposited his statutory certificate of occupancy as additional security for the loan. The 1st defendant had also previously deposited his customary certificate of occupancy as security for the loan. The loan was covered by a tripartite legal mortgage. After taking full benefit of the loan, the 1st defendant abandoned his account with the 2nd defendant and defaulted in repaying the loan. The plaintiff and the 1st defendant had also entered into an agreement as to how the 1st defendant would operate his account with the 2nd defendant. The agreement was deposited with the 2nd defendant though it was not a party to the agreement. After the 1st defendant defaulted in paying, the 2nd defendant made demands on the plaintiff and 1st defendant to pay but instead of complying

the plaintiff took out this action at the High Court.

The trial judge at the conclusion of evidence entered judgment for the plaintiff as claimed holding that the 2nd defendant was bound by the agreement between the plaintiff and 1st defendant deposited with it. The 2nd defendant naturally lodged an appeal to the Court of Appeal which allowed the appeal and set aside the judgment of the lower court. The plaintiff has therefore appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*"Whether the learned justices of the Court of Appeal were right to hold that the bank was not bound by contents of Exhibit A, an agreement between the appellant and the 1st defendant because the bank was not party to the said agreement."*

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

***Contract - Parties***

1. It is trite law that as a general rule, a contract affects only the parties thereto and cannot be enforced by or against a person who is not a party to it. In other words, only the parties to a contract can sue or be sued on the contract and, generally, a stranger to a contract can neither sue nor be sued on the contract even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. In the same vein, the fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue or to be sued upon the contract. See Malone v. Laskey (1907) 2 K.B. 141 C.A., Cameron v. Young (1908) A.C.176 H.L. (p. 2585 E)

***Contracts - Breach of contract***

2. I should however, point out that facts which constitute a breach of contract between two persons may, in some cases, give rise to a claim in tort. In such a case, a person who is not a party to the contract, and therefore unable to allege any contractual duty, may claim in tort in

respect of injury or damage suffered by him if the breach also constitutes a breach of a duty of care owed to him apart from the contract. See Meux v. Great Eastern Railway Co. (1895) 2 Q.B. 387, C.A. In the absence of such a duty, he cannot, of course, maintain a claim in tort.  
B (p. 2586 E)

### ***Torts - Negligence***

3. In the first place, it is a basic principle of law that there can be no action in negligence unless there is damage. Negligence is only actionable if actual damage is proved. The gist of the action is damage and there is even no right of action for nominal damages. See Munday Ltd. v. L.C.C. (1916) 2 K.B. 331, Hambrook v. Stokes Bros (1925) 1 K.B. 141 AT 156. As lord Reading, C..J. observed in Munday v. London County Council (1916) 2 K.B.331 at 334; a statement of law which received the approval of the judgment of her Majesty's Privy Council per Viscount Simon, L.C. in E. Suffolk Rivers Catchment Board v. Kent (1941) A.C.74 at 86,  
E *"Negligence alone does not give a cause of action; damage alone does not give a cause of action; the two must co-exist"* (p. 2588 B)

### ***Negligence - Ingredients***

F 4. In the second place, the essential ingredients of actionable negligence are:-

- (i) The existence of a duty to take care owed to the complainant by the defendant.
- (ii) Failure to attain that standard of care prescribed by the law;
- G (iii) damage suffered by the complainant, which must be connected with the breach of duty to take care.

Once these requirements are satisfied, the defendant in law will be held liable in negligence. (p. 2588 E)

H

### ***Negligence - Description***

5. Negligence as a tort may thus be described as the breach of a duty to take care imposed by common or statute law, resulting in damage to the

complainant. In Lochgelly Iron and Coal Co. v. M'Mullan (1934) A.C.1 at 25, Lord Wright succinctly put the matter thus:-

*"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owed."* (p. 2588 H) B

### ***Appeals - Actions***

6. And I ask myself whether having regard to all that I have stated above, C  
It can be said that the appellant's action against the respondents is in negligence. I think not.

This is because no where in the appellant's amended Statement of Claim was it pleaded that he suffered any damage whatever which was connected, no matter how remotely, with any breach of duty to take D  
care. No particulars of the alleged negligence were also pleaded in the appellant's amended Statement of Claim. It is plain to me, and I agree entirely with the court below, that having regard to the appellant's pleadings and the evidence in support thereof, the appellant's action before the E  
trial court was clearly not grounded in the tort of negligence. I should add that even if it was grounded on tort, and it is clear to me that it was not, the respondent can not be liable in negligence to the appellant for all the reasons I have given above. (p. 2589 B) F

### ***Claims - Contract***

7. A careful study of the appellant's action before the trial court does disclose in the clearest possible terms that the principal relief claimed is as reflected in paragraph 16 (1) of the appellant's amended Statement of G  
Claim. This is purely a contractual relief arising from the loan transaction between the appellant and the 1st respondent. This transaction is covered by the deed of mortgage, Exhibit E, and the deed of guarantee, Exhibit D. The rest of the claims contained in paragraphs 16(2) - 16(4) H  
of the amended Statement of Claim are merely ancillary or consequential reliefs, flowing from the main relief claimed. I think it is beyond doubt that the appellant's claims against the respondents hinge on contract aris-

ing from the loan transaction in issue. It is my considered view that the Court of Appeal cannot be faulted in its finding that the appellant's action before the trial court "*Savours in contract.*"

In Justifying this stand, that Court of Appeal had this to say:

B "*In a nutshell, the claim may be paraphrased as follows:- In view of the breach of terms in Exhibit A, I therefore claim as follows...*"  
I think the court below is right on this issue. (p. 2589 F)

***Contract - Parties - Bindingness***

C 8. It is thus clear, having regard to the facts that as a general rule, a contract affects only the parties thereto and cannot be enforced by or against strangers and that the circumstances and facts of this case do not fit into any of the recognised exceptions to the said general rule, that  
D the respondent bank, not being a party to Exhibit A, can not be bound by it. The Court of Appeal was therefore right to hold that the respondent bank could not be bound by Exhibit A to which it was not party. See Capt. Michael Chacharos and Another v. Ekimpex Ltd. and 2 others  
E (1988) 1 N.W.L.R (Part 68) 88. (p. 2590 E)

***Contracts - Deposit of the contractual document***

9. I think, the Court of Appeal is, again, on firm ground here. This is  
F because the mere fact that Exhibit A was deposited with the respondent bank cannot ipso facto make the bank bound to the appellant in respect of the terms therein contained. In my view, the Court of Appeal is right when in respect of this issue, it further observed:-

G "*The mere fact of the appellant receiving an agreement entered into by the plaintiff/respondent and the 1st defendant does not ipso facto discharge the plaintiff/respondent from the obligations he entered into with the appellant Bank in Exhibits D and E. If the appellant were a signatory to Exhibit A the matter would be different.*"

H I am also in agreement with the Court of Appeal when it stated that Exhibit D and E are binding on the appellant and the 1st respondent and that they are not vitiated by Exhibit A. (p. 2591 B)

**NOTABLE POINT OF INTEREST****EJIWUNMIJSC***1. Rules and functions of pleadings*

In this regard, it is not out of place to be reminded of some of the attributes of a good pleading. Primarily, the function of pleading is to ascertain with as much certainty as possible the various matters actually in dispute among the parties and those in which there is agreement between them. Pleading must not be evasive but must deal with the substantive points that are between the parties. See Morinatu Oduka and others v. Kasumu & Another (1968) N.M.L.R. 28,31; Adesoji Aderemi v. Johnson Adedire (1966) N.M.L.R. 398; Adimora v. Ajufo & others (1988)3 N.M.L.R. 1. Another objective of pleading is to define the issues and narrow the scope of controversy between the parties, and thus prevent a surprise being sprung upon either party. A pleading must be sufficient, comprehensive, and accurate. As neither party will be allowed to raise, at the trial of the suit, an issue which has not been pleaded Odogwu v. Odogwu (1990) 4 NWLR 224,234. (p. 2597 B)

**REPRESENTATION**

T.J.O. Okpoko Esq. S.A.N., with him are Messrs A.O. Deworitshe and A.O. Aburu for the appellant.

A.O. Omonuwa Esq. for the 2nd respondent.

**CASES REFERRED TO**

Munday Ltd. V. L.C.C. (1916)2 K.B. 331 at 334

Hambrook V. Strokes Bros (1925)1 K.B. 141 at 156

E. Suffolk Rivers Catchment Board V. Kent (1941) A.C. 74 at 86

Lochgelly Iron and Coal Co. V. M'Mullan (1934) A.C. 1 at 25

The Wagon Mound (No.1) (1961) A.C. 388 at 425

Ikpeazu v. African Continental Ltd. (1965) N.M.L.R. 374 at 379

Tweddle v. Atkinson 30 L.J.Q.B. 265

Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. (1915) A.C. 847

Adesoji Aderemi v. Johnson Adedire (1966) N.M.L.R. 398

Adimora v. Ajufo & Ors. (1988)3 N.M.L.R. 1

Odogwu v. Odogwu (1990)4 NWLR 224, 234

Ambrosini v. Tinko (1929)9 N.L.R. 8

Domingo Paul v. George (1959)4 F.S.C. 198

B

**LEAD JUDGMENT BY IGUH JSC**

The proceedings leading to this appeal was first initiated on the 18th day of March, 1988 in the High Court of Justice of the former Bendel State of Nigeria, holden at Asaba. In that court, the plaintiff's claims, as amended, against the defendants jointly and severally are as follows:-

"( 1) *An order of the Court on the 1st defendants to pay the 2nd defendant the amount of loan he took from the 2nd defendant plus interest and other charges on the said loan.*

(2) *An order of court on the defendants to return to the plaintiff the plaintiff's statutory Certificate of Occupancy No. BDSR 5273 of 14th June, 1985 and registered as No. 9 at page 9 in volume B.69 at the Lands Registry, Benin City.*

(3) *To exchange the plaintiff's Certificate of Occupancy No. BDSR 5273 of 14th June 1985 and registered as No. 9 at page 9 in volume B.69 at the lands Registry, Benin City with the 1st defendant's Customary Certificate of Occupancy No. BDCR 54 and registered as No. 54 at page 54 in volume 3 at Oshimili Local Government Council, Asaba which has now been converted into a Statutory Certificate of Occupancy No. BDSR 8493 and registered as No. 40 at page 40 in Volume B.115 at the Lands Registry in the office at Benin City and / or order the defendants to make the 1st defendant the surety to the loan and execute Deed of Mortgage on the Statutory Certificate of Occupancy No. BDSR 8493 and registered as No. 40 at page 40 in volume B.115 at the Lands Registry in the office at Benin city on the loan of N200,000.00 (Two hundred Thousand Naira Only).*

(4) *Perpetual injunction restraining the defendants from interfering with the plaintiff's possession and ownership of the property described in the plaintiff's Statutory Certificate of Occupancy' No. BDSR*

*5273 dated 14th June 1985 and Registered as No. 9 page 9 in volume B.69 at the Lands Registry, Benin City."*

Pleadings were ordered in the suit and were duly settled, filed and exchanged. At the subsequent trial, all the parties testified on their own behalf and the plaintiff called one witness in support of his claims. B

The brief facts of this case as found by the trial court and affirmed by the court below are that following an application by the 1st defendant to the 2nd defendant bank for a loan of N200,00.00, the same was granted on a guarantee provided by the plaintiff in respect of his property covered by his Statutory Certificate of Occupancy No. BDSR 5273 registered as No. 9 at page 9 in volume B. 69 at the Lands Registry in the office at Benin City. The plaintiff deposited this Certificate of Occupancy with the 2nd defendant bank as an additional security for the said loan. The 1st defendant had previously deposited his Customary Certificate of Occupancy No. BDCR 54 registered as No 54 at page 54 in volume 3 at Oshimili Local Government council, Asaba and now converted into a Statutory Certificate of occupancy No. BDSR 8493 registered as No. 40 at page 40 in volume B.155 at the Lands Registry in the office at Benin City as security for the same loan. C D E

A tripartite legal mortgage, Exhibit E, was subsequently executed to cover the loan. The plaintiff duly guaranteed the repayment of this loan by signing the 2nd defendant's guarantee form, Exhibit D. F

On the basis of the above securities offered, the 2nd defendant bank allowed the 1st defendant to draw on the said loan. After taking full benefit of the said loan facility, the 1st defendant abandoned his account with the 2nd defendant and defaulted in the repayment of the loan.

It ought to be mentioned that the plaintiff and the 1st defendant on their own entered into an agreement, Exhibit A, which made provisions as to how the 1st defendant would operate his relevant account with the 2nd defendant bank. The 2nd defendant bank was not a party to Exhibit A. It is the finding of both courts below that Exhibit A was deposited with the said 2nd defendant bank. G H

When the 1st defendant defaulted in the repayment of the loan, the 2nd defendant bank made several demands on both the plaintiff and

the 1st defendant to repay the loan and the interest thereon. Instead of making repayment of the said loan guaranteed by him, the plaintiff instituted an action against both defendants claiming jointly and severally as per paragraph 16 of his amended Statement of Claim.

B At the conclusion of hearing, the learned trial Judge after a review of the evidence on the 6th day of October, 1989 entered judgement for the plaintiff as claimed. On the question of whether the 2nd defendant bank was bound by the terms of Exhibit A between the plaintiff and the 1st defendant, the trial court stated:-

C *"Having found as a fact that Exhibit A was given to the 2nd defendant by the plaintiff and the 1st defendant the next question that calls for my determination is whether the 2nd defendant is bound by it having regard to the submissions of its counsel that it was not party to it.*  
D *I am of the view that since Exhibit A was given to the 2nd defendant, it is bound by it...."*

Dissatisfied with this decision of the trial court, the 2nd defendant bank lodged an appeal against the same to the Court of Appeal, Benin City Division. The Court of Appeal, after a most careful consideration of the issues raised in the appeal on the 11th day of April 1994, unanimously allowed the appeal and held that it was an error in law for the trial court to have arrived at the conclusion that the 2nd defendant bank was bound by the terms of the agreement, Exhibit A, to which it  
F was not party. Said the court:-

*"It is only the issue No. 4 of the appellant and the lone issue of the respondent that will determine the main contention in this appeal. This issue deals with whether there is any binding agreement on the ap-*  
G *pellant as to how the 1st defendant shall withdraw the loan granted to him by the appellant as provided for in Exhibit A. Exhibit A is an agreement between the appellant and 1st defendant. Only both of them are signatories to it. The appellant is not a party to it. It is not addressed to*  
H *the appellant although the appellant knew about it since there is evidence that a copy of Exhibit A. was lodged or deposited with the appellant. I shall deal in due course with the effect, if any, of Exhibit A being deposited with the appellant. Suffice it to say that it is basic that only*

*parties to a contract are bound by the contract; they alone can derive benefits under the contract or incur obligations under it unless the contract specifically states that it is made for the benefit of a particular 3rd party in which case the 3rd party may acquire benefits under it. There must exist privity of contract before a person can sue under a contract."* B

On the issue of the effect of the deposit of Exhibit A with the 2nd defendant, the court of Appeal per Ubaezonu, J.C.A. observed:-

*"What is the effect of the deposit? Does that make the appellant bound in contract by its terms? I emphasize the words bound in contract because the action before the lower court savours in contract. In a nutshell, the claim may be paraphrased as follows:-"* C

*'In view of the breach of the terms in Exhibits A, I therefore claim as follows.....'*

The mere fact of the appellant receiving an agreement entered into by the plaintiff/respondent and the 1st defendant does not ipso facto discharge the plaintiff/respondent from the obligations he entered into with the appellant Bank in Exhibits D and E. If the appellant were a signatory to Exhibit A, the matter would be different. The appellant would be bound by it. Again, if Exhibits D and E, which were in existence when Exhibit A was made, were discharged by Exhibits A and the appellant signed Exhibit A, then the plaintiff/respondent would be completely discharged from his obligations in Exhibits D and E. I am unable to see my way through how the appellant would be bound by a contract it was not a party to simply because the contract document was deposited with it." F

Aggrieved by this decision of the Court of Appeal, the plaintiff has appealed to this court. I shall hereinafter refer to the plaintiff as the appellant and the 2nd defendant bank as the respondent in this judgment. G

Pursuant to Rules of this court, the parties through their respective counsel filed and exchanged their written briefs of argument. In the appellant's brief, the single issue set out as arising for determination in this appeal is as follows:-

*"Were the learned Justices right in holding that the Bank was not bound to comply with the condition for disbursement of the loan as*

*stated in Exhibit A or, put in another way, having accepted Exhibit A from two of the parties to the mortgage in the loan transaction, can the bank deny its duty to disburse the loan as provided in Exhibit A on the ground that it is not party to Exh. A?"*

B The respondent, for its own part, submitted that the sole issue that has arisen for the resolution of this appeal is:-

*"Whether the learned justices of the Court of Appeal were right to hold that bank was not bound by contents of Exhibit A, an agreement between the appellant and the 1st defendant because the bank was not*  
C *party to the said agreement."*

It is plain to me that appellant's claims before the trial court are founded on contract. It cannot, therefore, be disputed that the issue as formulated on behalf of the respondent is clearly more direct, straight  
D and preferable for my consideration of this appeal than that set out on behalf of the appellant.

At the oral hearing of the appeal, learned leading counsel for the appellant, T.J.O.Okpoko Esq, S.A.N. adopted the appellant's brief of  
E argument and proffered additional arguments in amplification of the submissions therein made. In the main, learned Senior Advocate submitted that the Court of Appeal was in definite error to have based its decision on the doctrine of privity of contract on the question of whether or not  
F the respondent bank was bound by the contractual terms in Exhibit A. He reasoned that this is because the case before the court was one of breach of duty of care owed by the respondent bank to the appellant by reason of the said Exhibit A which was deposited with the respondent bank along with the appellant's documents of title in the loan transaction.  
G He argued that both the trial court and the court below found for the appellant in negligence. In his view, the Court of Appeal was wrong when it held that the appellant's claims were not founded in negligence as that issue was not raised before it. Reminded by the court that neither  
H negligence nor particulars thereof were pleaded by the appellant in his Statement of Claim, learned Senior Advocate submitted that the defective nature of the pleading need not drive the appellant out of the temple of justice. He however referred to paragraph 11 of the appellant's amended

Statement of Claim and argued that negligence, in effect, was therein pleaded by the appellant. He therefore urged the court to allow the appeal.

Learned counsel for the respondent bank, A.O. Omonuwa Esq. in his reply adopted his brief of argument and pointed out that there is no doubt that the appellant's claims are grounded in contract. He stressed that the contract, Exhibit A, came into existence after the loan transaction in issue was entered into. He submitted that the loan transaction comprised of the mortgage deed, Exhibit E, and the deed of guarantee between the appellant and the respondent bank, Exhibit D. The deed of guarantee came into existence on the 30th December, 1985. Learned counsel further pointed out that the only condition under Exhibits D and E for the release of the appellant's title deed to him is when the loan is fully repaid. He drew attention to the fact that Exhibit A was made on the 10th February, 1986 and that the purpose for which it was made was to ensure that the 1st defendant utilised the loan for the purpose for which it was granted to him. He argued that for negligence to arise, there must be corresponding damage but that no damage was either pleaded or proved by the appellant in the present case. He urged the court to dismiss this appeal.

**It is trite law that as a general rule, a contract affects only the parties thereto and cannot be enforced by or against a person who is not a party to it. In other words, only the parties to a contract can sue or be sued on the contract and, generally, a stranger to a contract can neither sue nor be sued on the contract even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. In the same vein, the fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue or to be sued upon the contract. See Malone v. Laskey (1907) 2 K.B. 141 C.A., Cameron v. Young (1908) A.C.176 H.L., Beswick v. Beswick (1967) 2 All E.R.1197, Frederick Oboye Negbenebor v. Eudora Omowunmi Negbenebor (1971)**

1 All N.L.R. 210. See too Ikpeazu v. African Continental Bank Ltd. (1965) 1 N.M.L.R 374 at 379 where this court per Ademola, C.J.N. put the matter as follows:-

"What advantages, if any, can the bank gain from the deed,  
B *Exhibit D? Can the bank sue on it as a guarantee? Not being a party to it we are of the view that the bank cannot acquire any rights under the deed. Generally, a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it"*

C See too Tweddle v. Atkinson 30 L.J.Q.B. 265 and the decision of the House of Lords in Dunlop Pneumatic Tyre Co. Ltd. V. Selfridge and Co. Ltd. (1915) A.C.847.

Without doubt, the above general principle of law admits of a  
D number of exceptions. These include the case of a contract made by an agent on behalf of an undisclosed principal, who again as a general rule, is entitled to sue and liable to be sued on such a contract etc. These exceptions are, however, hardly applicable or relevant to the facts and  
E circumstances of the present case. **I should however, point out that facts which constitute a breach of contract between two persons may, in some cases, give rise to a claim in tort. In such a case, a person who is not a party to the contract, and therefore unable to**  
F **allege any contractual duty, may claim in tort in respect of injury or damage suffered by him if the breach also constitutes a breach of a duty of care owed to him apart from the contract. See Meux v. Great Eastern Railway Co. (1895) 2 Q.B. 387, C.A. In the absence of such a duty, he cannot, of course, maintain a claim in tort. See**  
G **Dickson v. Reuters Telegram Co. (1877) 3 C.P.D.1, C.A.** I think it is convenient at this stage to determine whether the present action instituted by the appellant against the respondents is a claim in contract or, otherwise an action in tort.

H In this regard, it is the submission of the learned Senior Advocate for the appellant that the claim before the court is "*purely a question of negligence*" and not one of contract. He referred to paragraphs 9,10 and 11 of the appellant's amended Statement of Claim in support of his

contention.

For the respondent, it was submitted that the Court of Appeal is right in holding the appellant on to the claim he brought which is predicated on contract, there being no claim therein in negligence. It was his contention that the appellant's claim before the trial court simply savoured in contract without more. B

I have earlier on in this judgment set out a passage of the judgment of the court below in which it emphatically held that the action before the trial court "*savours in contract*" The court went on:-

*"With due respect to the learned trial Judge, I am unable to agree with his findings in this respect. It must be appreciated that there is no claim in NEGLIGENCE against the appellant. .... The claim before the lower court was predicated on a breach of contract to which the appellant was not a party. Again, I am unable to see my way through how the self same Exhibit A can vitiate the strong provisions of Exhibits D and E without expressly saying so and without Exhibit A being signed by the appellant."* C D

Paragraphs 9, 10 and 11 of the appellant's amended Statement of Claim averred as follows:- E

*"9. The plaintiff and the 1st defendant entered into an agreement dated 10th February, 1986 and submitted a copy of the said agreement to the 2nd defendant."*

*10. The Plaintiff will at the trial rely on the said agreement made between the plaintiff and the 1st defendant dated 10th February, 1986."* F

*11. The 2nd defendant then approved the 1st defendant's application and gave the 1st defendant the first N200,000.00 (two hundred thousand naira only). The Plaintiff and 1st defendant agreed that the Plaintiff shall countersign all cheques on the N200,000.00 (two thousand naira only) loan but the 2nd defendant allowed the 1st defendant to withdraw monies without the consent and signature of the Plaintiff."* G H

All that the above paragraphs of the appellants amended Statement of claim pleaded are that the appellant and the 1st respondent entered into the agreement, Exhibit A, that the said agreement would be

founded upon at the trial, that the loan of N200,000.00 was duly given to the 1st defendant and that the 2nd respondent allowed the 1st respondent to withdraw monies without the consent and signature of the appellant contrary to the terms of the agreement between the appellant and the 1st respondent. With profound respect, I cannot see how by any stretch of the imagination it can be suggested that the above averments without more constitute an actionable case of the tort of negligence by the appellant against the respondents.

**In the first place, it is a basic principle of law that there can be no action in negligence unless there is damage. Negligence is only actionable if actual damage is proved. The gist of the action is damage and there is even no right of action for nominal damages. See Munday Ltd. V. L.C.C. (1916) 2 K.B. 331, Hambrook v. Stokes Bros (1925) 1 K.B. 141 AT 156. As lord Reading, C..J. observed in Munday v. London County Council (1916) 2 K.B.331 at 334; a statement of law which received the approval of the judgment of her Majesty's Privy Council per Viscount Simon, L.C. in E. Suffolk Rivers Catchment Board v. Kent (1941) A.C.74 at 86,**

*"Negligence alone does not give a cause of action; damage alone does not give a cause of action; the two must co-exist"*

**In the second place, the essential ingredients of actionable negligence are:-**

- (i) The existence of a duty to take care owed to the complainant by the defendant.
- (ii) Failure to attain that standard of care prescribed by the law;
- (iii) damage suffered by the complainant, which must be connected with the breach of duty to take care.

Once these requirements are satisfied, the defendant in law will be held liable in negligence.

**Negligence as a tort may thus be described as the breach of a duty to take care imposed by common or statute law, resulting in damage to the complainant. In Lochgelly Iron and Coal Co. v. M'Mullan (1934) A.C.1 at 25, Lord wright succinctly put the mat-**

ter thus:-

*"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owed."*

See too The Wagon Mound (No.1) (1961) A.C. 388 at 425. **And I ask myself whether having regard to all that I have stated above, It can be said that the appellant's action against the respondents is in negligence. I think not.**

This is because no where in the appellant's amended Statement of Claim was it pleaded that he suffered any damage whatever which was connected, no matter how remotely, with any breach of duty to take care, No particulars of the alleged negligence were also pleaded in the appellant's amended Statement of Claim. It is plain to me, and I agree entirely with the court below, that having regard to the appellant's pleadings and the evidence in support thereof, the appellant's action before the trial court was clearly not grounded in the tort of negligence. I should add that even if it was grounded on tort, and it is clear to me that it was not, the respondent can not be liable in negligence to the appellant for all the reasons I have given above. I will next consider whether, as found by the Court of Appeal, the appellant's action was grounded on breach of contract.

A careful study of the appellant's action before the trial court does disclose in the clearest possible terms that the principal relief claimed is as reflected in paragraph 16 (1) of the appellant's amended Statement of Claim. This is purely a contractual relief arising from the loan transaction between the appellant and the 1st respondent. This transaction is covered by the deed of mortgage, Exhibit E, and the deed of guarantee, Exhibit D. The rest of the claims contained in paragraphs 16(2) - 16(4) of the amended Statement of Claim are merely ancillary or consequential reliefs, flowing from the main relief claimed. I think it is beyond doubt that the appellant's claims against the respondents hinge on contract

arising from the loan transaction in issue. It is my considered view that the Court of Appeal cannot be faulted in its finding that the appellant's action before the trial court *"Savours in contract."*

In Justifying this stand, that Court of Appeal had this to say:

*"In a nutshell, the claim may be paraphrased as follows:- In view of the breach of terms in Exhibit A, I therefore claim as follows..."*

**I think the court below is right on this issue.** The next question must be whether the respondent bank is contractually bound by the terms in the contract, Exhibit A.

It is indisputable from the pleadings that the respondent was not a party to Exhibit A which is a contract between the appellant and the 1st respondent. This is clearly pleaded in paragraphs 9 and 10 of the appellant's amended Statement of Claim set out earlier on in this judgment. The appellant also testified to that effect. Similarly, the respondent bank, both in its pleadings and evidence stated that it was not a party to Exhibit A and could not therefore be bound by it. **It is thus clear, having regard to the facts that as a general rule, a contract affects only the parties thereto and cannot be enforced by or against strangers and that the circumstances and facts of this case do not fit into any of the recognised exceptions to the said general rule, that the respondent bank, not being a party to Exhibit A, can not be bound by it. The Court of Appeal was therefore right to hold that the respondent bank could not be bound by Exhibit A to which it was not party. See Capt. Michael Chacharos and Another v. Ekimpex Ltd. and 2 others (1988) 1 N.W.L.R (Part 68) 88 and Ikpeazu v. African Continental Ltd. (1965) N.M.L.R. 374 at 379.**

The trial court, for its own part, was of the view that since Exhibit A was deposited with the respondent bank by the appellant and the 1st respondent, it must be bound by the terms therein. Said the trial court:-

*"I am of the view that since Exhibit A was given to the 2nd defendant, it is bound by it...."*

The Court of Appeal was unable to accept this finding of the trial court on the ground that:-

*"Exhibit A is an agreement (or arrangement) between the plaintiff/respondent and 1st defendant. Only two of them can sue each other for a breach of any of its terms."*

B

**I think, the Court of Appeal is, again, on firm ground here. This is because the mere fact that Exhibit A was deposited with the respondent bank cannot ipso facto make the bank bound to the appellant in respect of the terms therein contained. In my view, the Court of Appeal is right when in respect of this issue, it further observed:-**

C

*"The mere fact of the appellant receiving an agreement entered into by the plaintiff/respondent and the 1st defendant does not ipso facto discharge the plaintiff/respondent from the obligations he entered into with the appellant Bank in Exhibits D and E. If the appellant were a signatory to Exhibit A the matter would be different."*

D

**I am also in agreement with the Court of Appeal when it stated that Exhibit D and E are binding on the appellant and the 1st respondent and that they are not vitiated by Exhibit A.**

E

Accordingly, the sole issue for resolution in this appeal is answered in the affirmative.

In the final result, this appeal is without substance and it is hereby dismissed with N10,000.00 costs to the respondent bank against the appellant.

F

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### MOHAMMED JSC

G

I agree that this appeal has failed. I have had a preview of the judgment of my learned brother, Iguh, J.S.C., in draft and for the reasons advanced in the said judgment this appeal ought to be dismissed.

The court below is quite right to hold that the respondent is not bound by the agreement reached between the plaintiff and the 1st Defendant in Exhibit A. This is quite plain, because the respondent was not a party to the agreement. The limb of the doctrine of privity of contract

H

has never been doubted. As general rule only a person who is a party to a contract can sue or be sued on it. The main reasons for this are that it is the parties' contract, and that they are always free to vary or discharge it by agreement. The creation of a third party right would impede this freedom unless an agreement for such third party involvement has been made part of the agreement

I therefore agree that this appeal has failed and it is dismissed. The judgment of the Court of Appeal is hereby affirmed. I award N10,000.00 costs in favour of the respondent.

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### KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother IGUH JSC. in this appeal. I entirely agree with it. For the reasons which he gives I would also dismiss the appeal with costs as awarded.

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E

### KALGO JSC

I have read in draft the judgment just delivered by my learned brother Iguh JSC in this appeal. I am in full agreement with him that the appeal lacks merit and should be dismissed.

The only issue for determination of this court in the appeal is "*Whether the learned Justices of the Court of Appeal were right to hold that the bank was not bound by the contents of Exhibit A, an agreement between the appellant and the 1st defendant because the bank was not a party to the said agreement.*"

The facts giving rise to this case were fully set out by Iguh JSC in the leading judgment and I do not intend to repeat that here. It is trite law that the sanctity and bindingness of the terms and conditions of a contract shall only affect parties to the contract or their privies; not even a person for whose benefit the contract was made. See K.S.O. & Allied Products Ltd V Kofa Trading Co.Ltd. (1996) 3 NWLR (Pt.436) 244; Alfotrin Ltd. V.A.G. Federation (1996) 9 NWLR (Pt. 475) 634. In this

case, the 2nd respondent bank was not a party to the agreement Exhibit A and so it cannot be bound by any of the terms of the agreement. I am also satisfied that according to the nature and circumstances of this case and having regard to paragraphs 9,10 and 11 of the Amended Statement of Claim of the appellant at the trial, and the fact that no duty of care or breach of it causing any damage or injury to the appellant was proved, there cannot be any question of negligence arising in this case. B

Finally I agree with the reason and conclusions reached by my learned brother Iguh JSC in the lead judgment and I adopt them as mine. I find no merit in this appeal and I accordingly dismiss it. I abide by the order of costs in the leading judgment. C

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**EJIWUNMI JSC**

The judgment just delivered by my learned brother Iguh JSC was read before now in its draft form by me. There can be no doubt that the facts in this appeal have been carefully set down and the issues thereon discussed in the said judgment. I agree with all the reasons given for dismissing the appeal. However, by this judgment, I wish to make my own brief contribution. D

The appellant commenced this action against the defendants, after the 1st defendant/respondent had failed or neglected to pay the loan of the sum of N200,000.00 from the 2nd defendant/respondent. F

The main issue that has arisen for consideration in this appeal is whether a person who is not a party to a contract can be bound by it. In the instant appeal, it is common ground that the appellant and the 1st defendant/respondent entered into an agreement dated 10th February, 1986. By this agreement, it would appear that the appellant and the 1st defendant agreed that the appellant shall countersign all, cheques issued for all withdrawals made from the N200,000.00 granted to the 1st defendant/respondent. This agreement Exhibit A, was allegedly deposited with the 2nd defendant/respondent. G H

Before the agreement Exhibit A, was executed between the appellant and the 1st defendant/respondent, the appellant, the 1st defen-

dant/respondent and the 2nd defendant/respondent had executed a tripartite agreement to secure the loan of N200,000.00, for the benefit of the 1st defendant/respondent. The appellant also had to deposit an additional security for the loan, his Statutory Right of Occupancy in respect of his property, Exhibit E.

At the conclusion of the trial the trial Court made a finding to the effect that the 2nd defendant/respondent was bound by the document Exhibit A, which was executed between the appellant and the 1st defendant with regard to the disbursement of the loan. The finding of the learned trial judge read, *inter alia*, thus:-

*"Having found as a fact that Exhibit A was given to the 2nd defendant, the next question that calls for my determination is whether the 2nd defendant is bound by it having regard to the submissions of its counsel that it was not a party to it. I am of the view that since Exhibit A was given to the 2nd defendant, it is bound by it."*

The 2nd defendant/respondent then appealed to the Court of Appeal, and that appeal was successful. With regard to the finding of the learned trial judge, that the 2nd defendant/respondent became bound by Exhibit A, by its mere deposit with it, Ubaezuonu JCA, in a well considered judgment, made the following pertinent observation:-

*"What is the effect of the deposit? Does that make the appellant bound in contract by its terms? I emphasize the words bound in contract because the action before the lower Court savours in contract. In a nutshell, the claim may be paraphrased as follows:-*

*"In view of the breach of the terms in Exhibit A, I therefore claim as follows..."*

*The mere fact of the appellant receiving an agreement entered into by the plaintiff/respondent and the 1st defendant does not ipso facto discharge the plaintiff/respondent from the obligations he entered into with the appellant Bank in Exhibits D and E. If the appellant were a signatory to Exhibit A, the matter would be different. The appellant would be bound by it. Again, if Exhibits D and E, which were in existence when Exhibit A was made, were discharged by Exhibit A, and the appellant signed Exhibit A, then the plaintiff/respondent would be completely*

*discharged from his obligations in Exhibits D and E. I am unable to see my way through how the appellant would be bound by a contract it was not a party to simply because the contract document was deposited with it,"*

In this Court, to which the appellant has appealed from the judgment of the Court below, the following was formulated for the determination of the appeal. It reads:-

*"Were the learned Justices right in holding that the Bank was not bound to comply with the conditions of disbursement of the loan as stated in Exhibit A or, put in another way, having accepted Exhibit A from two of the parties to the mortgage in the loan transaction, can the bank deny its duty to disburse the loan as provided in Exhibit A on the ground that it is not a party to Exhibit A?"*

A careful reading of that issue raised by the appellant would in my respectful view reveal that the appellant was making a subtle attempt to affix negligence on the 2nd defendant/respondent. The thrust of that alleged negligence would appear to be hinged on the alleged failure of the 2nd defendant/respondent to restrain the 1st defendant from drawing down the loan. The argument proffered by the learned Senior Advocate for the appellant in support of this issue would be considered later.

In the meantime, I will consider the issue raised for the 2nd defendant/respondent in its brief. It reads:-

*"Whether the learned justices of the Court of Appeal were right to hold that the bank was not bound by the contents of Exhibit A, an agreement between the appellant and the 1st defendant because the bank was not a party to the said agreement."*

In my respectful view the issue quoted above and as raised in the brief of the 2nd defendant/respondent correctly touched upon what is at stake in this appeal. This being whether the 2nd defendant/respondent who was proved to be privy to Exhibit A could be bound by it. The Court below was no doubt right to have held that the 2nd defendant/respondent cannot be so bound. To hold otherwise would have been contrary to all the known principle on the doctrine of privity of contract. In this respect, may I refer to cases such as Malone v. Laskey (1907) 2

K.B. 141 C.A.; Cameron v Young (1908) A.C.176 H.L; Beswick v. Beswick (1967) 2 ALL E.R.1197; Negbenebor v. Negbenebor (1971) 1 ALL. N.L.R. 210; Ikpeazu v. African Continental Bank Ltd. (1965) 1 N.M..L.R. 374, Where at 379 Ademola C.J.N. delivering the judgment  
B to the Court, captured the essence of the doctrine of the privity of contract in the following words:

*"What advantages, if any, can the Bank gain from the deed, Exhibit D? can the bank sue on it as a guarantee? Not being a party to it we are of the view that the Bank cannot acquire any rights under the deed. Generally a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it- Tweddle v. Atkinson 30 L.J.Q.B. See also Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd. (1915) A.C.847".*  
C

D Reverting to the instant appeal, it is my view that in the absence of any evidence that the terms of the agreement Exhibit A, was communicated to the 2nd defendant/respondent, and that it accepted to be party to Exhibit A, 2nd defendant/respondent cannot be bound by it.

E Now, learned counsel for the appellant, T.J.O. Okpoko SAN, sought to argue that the 2nd defendant/respondent should have been found liable in negligence. When asked whether negligence was made an issue in the matter, he referred to paragraph II of the appellant's amended Statement of Claim. However, in order to give a better understanding the  
F pleadings in that regard, I will quote paragraphs 9,10 & 11 of the appellant's Statement of Claim. They read:-

*"9. The plaintiff and the 1st defendant entered into an agreement dated 10th February, 1986 and submitted a copy of the said agreement to the 2nd defendant.*  
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*10. The plaintiff will at the trial rely on the said agreement made between the plaintiff and the 1st defendant dated 10th February, 1986.*

H *11. The 2nd defendant then approved the 1st defendant's application and gave the 1st defendant the first N200,000.00 (Two hundred thousand Naira only). The plaintiff and the 1st defendant agreed that the plaintiff shall countersign all cheques on the N200,000.00 (Two*

*hundred thousand Naira only) loan but the 2nd defendant allowed the 1st defendant to withdraw monies without the consent and signature of the plaintiff."*

If the submission of learned counsel for the appellant is to be upheld that 2nd defendant/respondent was negligent with regard to the disbursement of the funds flowing from the loan granted to the 1st defendant, then the appellant's pleadings should have made that allegation in his pleadings. In this regard, it is not out of place to be reminded of some of the attributes of a good pleading. Primarily, the function of pleading is to ascertain with as much certainty as possible the various matters actually in dispute among the parties and those in which there is agreement between them. Pleading must not be evasive but must deal with the substantive points that are between the parties. See Morinatu Oduka and others v. Kasumu & Another (1968) N.M.L.R. 28,31; Adesoji Aderemi v. Johnson Adedire (1966) N.M.L.R. 398; Adimora v. Ajufo & others (1988) 3 N.M.L.R. 1. Another objective of pleading is to define the issues and narrow the scope of controversy between the parties, and thus prevent a surprise being sprung upon either party. A pleading must be sufficient, comprehensive, and accurate. As neither party will be allowed to raise, at the trial of the suit, an issue which has not been pleaded Odogwu v. Odogwu (1990) 4 NWLR 224,234; Ayoola James v. Mid Motors Nigeria Ltd. (1978) 11 & 12 S.C.32,63; Ambrosini v. Tinko (1929) 9 N.L.R.8; Domingo Paul v. George (1959) 4 F.S.C.198; Humani Ajoke v. Amusa Yesufu Oba & Another (1962) 1 ALL N.L.R. 73; Alhaji D.S. Adegbenro v. The Attorney General of the Federation (1962) 1 ALL N.L.R. 431.

In my humble view, therefore after a careful reading of the pleadings of the appellant, I cannot but come to the conclusion that the pleadings disclose principally a relief with regard to the contractual obligations entered into by the appellant. And that this obligation arose from the deed of mortgage, Exhibit E, and the deed of guarantee, Exhibit D. The pleadings had not in my own view revealed a relief based upon negligence. That is not to say that claim in negligence cannot arise from a claim in contract. See Abusomwan v. Mercantile Bank Ltd. (No. 2) 1987 3 NWLR

(pt. 60)196. However given that as a settled principle, the appellant to ground his claim of tortuous liability against the 2nd defendant/respondent it must also be pleaded and proved the duty owed to him by the 2nd defendant/respondent, and consequent damage. It is not the act or the failure to act, but the consequences on which tortuous liability is founded. Just as there is no such thing as negligence in the air, so there is no such thing as liability in the air. See Bourhill v Young (1943) A.C.92, 101; (1942) 2 ALL E.R. 396; King v Phillips (1953) 1 Q.B.429, 441; (1953) 1 ALL.E.R.617; Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd. 1961.A.C. 388; Home Office v Dorset Yacht Co. Ltd (1970) A.C. 1004.

As the appellant did not plead the requisite particulars to establish any liability in tort in his pleadings, nor can such particulars be inferred from his pleadings, that allegation in the circumstances, cannot be available for consideration in this appeal. In any event, the evidence led at the trial and accepted by the trial Court and the Court below, do not disclose a scintilla of evidence to support any negligence on the part of the 2nd defendant/respondent. I must therefore resolve the question raised against the appellant.

It follows from what I have said above that as this appeal lacks merit it must be dismissed. It is therefore dismissed for the above reasons and fuller reasons given in the leading judgment of my learned brother Iguh JSC. I also award costs in the sum of N10,000.00 in favour of the 2nd defendant/respondent.

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