

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH APRIL, 2002. SC. 115/1997  
**CORAM:- I. L. KUTIGI, E. O. OGWUEGBU, A. I. IGUH,**  
**A. I. KATSINA-ALU, E. O. AYOOLA, JJSC**

COMPTOIR COMMERCIAL  
& IND. S.P.R. LTD ..... APPELLANT  
AND  
1. OGUN STATE WATER  
CORPORATION  
2. THE ATTORNEY GENERAL  
OF OGUN STATE ..... RESPONDENTS

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APPEALS - Issue - Abandonment of - Effect - Court does not deal with issue not placed before it - As it is a departure from role of court - For appellate court to insist on dealing with abandoned issue (H1)

SUPREME COURT - Appeals - Abandoned issue - Although fresh point may be raised with leave - But it will be difficult for party to secure leave of the court - To raise an abandoned issue (H2)

EVIDENCE - Extrinsic evidence rule - Incorporated document - Transaction reduced to writing - Becomes the exclusive record - And no evidence may be given to prove it - Except the document itself (H3)

ARBITRATION - Award - Finality of - Kelantan's case - Where specific question of construction of a law is referred to arbitrator - His decision on that point cannot be set aside - On the ground that court would have ruled otherwise (H4)

**FACTS**

The parties had by a written agreement decided that appellant would supply and install for 1<sup>st</sup> respondent, 10 units of water treatment plants. Any dispute arising from the contract was agreed to be referred to an arbitrator. A dispute later arose which was then referred to an arbitrator. The arbitrator while considering the applicability of clause 40 in the transaction, held that the contract was intended by the parties for a lump sum and that the clause was not

intended to be applicable (i.e. that the contract price was not intended to be subject to variation). It further held that appellant had not established any basis for its claim for maintenance cost at 5% of the contract price per annum. Appellant was dissatisfied and hence appealed to the High Court of Oyo State to set aside the award on the ground that the arbitrator has mis-conducted himself and that the award was bad on the face of it.

In his judgment, Aderemi J. of the High Court held that an authorization in writing is the only condition precedent to involving clause 40 of exhibit 1. In the absence of such, he therefore dismissed the application to set aside the award. Appellant lodged a further appeal to the Court of Appeal, Ibadan. Appellant's counsel then abandoned the issue of whether or not there was an error on the face of the award. The point was thus not decided by the court. Nevertheless, on the issue of wrongful admission of evidence by the arbitrator, the court was of the opinion that argument of appellant's counsel on the issue could be said to relate to only exhibit F. On the authority of *Olukade v. Alade*, the court held that the document having been admitted without objection, the arbitrator should have acted upon it. Among other decisions, the court eventually held that the admission of exhibits F, O, P and Q without resistance is fatal to appellant's case. The appeal was therefore dismissed. Aggrieved, appellant filed appeal to Supreme Court.

### **ISSUES FOR DETERMINATION**

i. should the Court of Appeal not have considered on its own motion the correct interpretation of clause 40 of exhibit 1 notwithstanding that the appellant had abandoned the ground of appeal and the issue formulated thereon whereby the finding of the trial court on the interpretation of the said clause could have been challenged;

ii. was that court right when it held that it was too late for the appellant to complain about the admissibility of certain documents, the admissibility of which it did not object to at the trial;

iii. was that court correct when it held that the arbitrator did not rely on those documents?

# **HELD** (Unanimously dismissing the appeal per **AYOOLA JSC**)

*APPEALS - Issue - Abandonment of - Effect*

**1. Notwithstanding the exceptions, the general rule is that when an issue is not placed before the court, it had no business whatever to deal with it. Is there anything to take this case out of that general rule?**

**Counsel representing the appellant in the court below made a deliberate choice when he abandoned the issue that the award was bad on the face of it and left for the court to consider the following questions:**

**i. What were the issues before the sole arbitrator and the High Court?**

**ii. Can an award be set aside upon an application by one of the parties to an arbitration agreement? and,**

**iii. Did the misconduct of the arbitrator alleged by the appellant amount to such as to warrant the award being set aside?**

**Those were the real questions in controversy between the parties. For an appellate court to insist that an appellant should argue an issue which he has abandoned will not only be a clear departure from the role of the court but may also be embarrassing, for it could amount to insisting that counsel for the appellant should argue an issue which he himself probably considered to be lacking in substance.**

**From the foregoing, it is evident that there is no foundation in law for such general proposition put by learned counsel for the appellant that: "...where an issue is material and fundamental to the determination of the questions in controversy between the parties to an appeal, the Court of Appeal has the duty to exercise its statutory power to take the issue or question suo motu and invite address on it from the parties..."**

(pp. 2728 E/2729 E)

*SUPREME COURT - Appeals - Abandoned issue*

**2. Although the law permits a party to raise a fresh point not**

**raised in the court below in this court. That has to be with leave of the court. It will probably be an uphill task for a party who has abandoned a point in the court below to convince this court to grant leave to raise such point as a fresh point. It will be invidious to permit the same result to be achieved by complaining of failure of the Court of Appeal to exercise a power of raising issues suo motu when no such power exists, and requesting this court to do what the court below should have done.** (p. 2729 G)

*C Extrinsic evidence rule - Incorporated document*

**3. Learned counsel for the appellant does not deny that the law is as stated above. However, he argues that exhibits F, O, P and Q are documentary evidence that are legally and unconditionally inadmissible in law in the interpretation of clause 40 of exhibit 1 on the basis of the extrinsic evidence rule. The rule is that when a transaction has been reduced to or recorded in writing either by requirement of law or agreement of the parties, the writing becomes, in general, the exclusive record thereof, and no evidence may be given to prove the terms of the transaction except the document itself or secondary evidence of its contents.**

**It follows from the parol evidence rule that if the documents exhibits F, O, P, Q were not incorporated in exhibit 1 but were tendered for the purpose of proving the terms of the agreement of the parties or to contradict, alter, add to or vary the contents of the document exhibit 1, those documents cannot be admitted for the purpose. In my judgment, in such circumstance it would not matter that the documents were not objected to when they were tendered or that they were even tendered with consent. It is at the stage when the purpose for which they were tendered emerged that the court should consider whether it was permissible in law for the documents to be used for that purpose. Even if they have been admitted without objection the court may still exclude them from consideration at that stage if it becomes obvious that they were tendered to prove the terms of the contract, contrary to the parol evidence rule. I am of the opinion that a waiver of the**

**application of the parol evidence rule or an agreement not to insist on its application cannot be inferred merely from the failure of a party to object to the admissibility of a document which on the face of it is admissible until the purpose of its being tendered is revealed.**

**From what I have said, I come to the conclusion that the court of appeal was in error when it held that merely because the appellant did not object when exhibits F, O, P and Q were admitted it was rather late in the day for the appellant to complain that they were wrongfully admitted in evidence for the purpose for which they were used.**

**Secondly, although as a general proposition receiving inadmissible evidence which goes to the root of the issue submitted to arbitration may amount to misconduct justifying the setting aside of the award, such proposition does not apply in this matter as the documents exhibits F, O, P and Q in the opinion of the arbitrator were among the several instruments that the agreement exhibit 1 incorporated in itself. It has not been argued in the court below that he proceeded on a wrong footing. When a contract is reduced to the form of documents into which has been incorporated other documents, the documents incorporated cease to be extrinsic to the main document, but fall to be construed as part of it. (pp.2731 E/2733 D)**

*ARBITRATION - Award - Finality of*

**4. I agree with learned counsel for the respondent. First, I think this is a case in which it is apt to apply the principle in *Government of Kelantan v. Duff Development Co. Ltd.* (1923) AC 395, where Lord Cave said at p. 409: “But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion.”**

**There is also the opinion of Lord Wright in *FR. Absalom Ltd. v. G.W. (London) Garden Village Society* (1933) All ER 616, 625 that: “It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make**

***the award bad on its face so as to permit of its being set aside.”***

***It is common ground that what was referred to the arbitration in this case was mainly a question of construction of agreement, exhibit 1. He decided the matter referred to him. There is finality to that decision. It was not for the High Court or the court below to question that decision.*** (p. 2732 H)

## NOTABLE POINTS OF INTEREST

### **AYOOLA JSC**

#### ***C Powers of Court of Appeal under C. A. Act s. 16 & C. A. Rules O. 1 r. 20(5) – Purpose of***

1. The general powers of the Court of Appeal both under section 16 and Order 1 rule 20(5) to ensure the determination on the merits of the real question in controversy were designed to enable the court to clear whatever technical mistake or obstacles may be in the way of a fair determination of the appeal on its merit or of determining the real question in controversy in the appeal. The real questions in controversy in an appeal are the questions which arise from the grounds of appeal. Similar purpose must be ascribed to section 16. (p. 2727 E)

#### ***Role of court in accusatorial procedure***

2. The proper role of a court in our accusatorial model of procedure is to pronounce on and determine issue in controversy submitted to it. It is the parties who themselves play the primary role in the process, at the trial stage, by the issues raised on their pleadings, where the case is tried on the pleadings, and at the appellate stage, by the issues arising from the grounds of appeal raised by the appellant. It is not for the Judge to initiate controversy. His role in the accusatorial model is first and foremost that of an umpire and it is in that role that he offers assistance by directing proper focus to what the parties themselves may have articulated without sufficient clarity as the question in controversy. (p. 2727 G)

#### ***Court raising of issue suo motu – Instances of***

3. There are the exceptional cases where it is permissible for the court to take an initiative to raise an issue on its own motion. Some of such

instances are when the issue relates to its own jurisdiction; or, when both parties have ignored a statute which may have decisive bearing on the case; or, when on the face of the record serious question of the fairness of the proceedings is evident. The power of the court to make consequential orders as the justice of a case demands on its own motion though to be exercised with circumspection, also exists. B (p. 2728 B)

### **REPRESENTATION**

Olalekan Ojo, Esq., for the Appellant  
Oluseyi Oyebolu, Esq. (A-G., Ogun State with O. Ogunfowora, Esq., Principal State Counsel), for the Respondents C

### **CASES REFERRED TO**

Olukade v. Alade (1976) 2 SC 183 D  
Ebba v. Ogodo (1984) 1 SCNLR 372  
Ejowhomu v. Edok-Eter Mandillas Ltd (1986) 5 NWLR (pt. 39) 1  
Iyayi v. Eyigebe (1987) 3 NWLR (pt. 61) 523  
Hanson v. Wearmouth Co. Ltd. (1939) 3 All ER 47  
Rutherford v. Richardson (1922) All ER (Rep) 13 E  
Aboud v. Regional Tax Board (1966) NMLR 100  
Re Whiston (1924) 1 CH 122  
Williams v. Akintunde (1995) 3 NWLR (pt. 381) 101  
Ebba v. Ogodo (1984) 1 SCNLR 372 F  
Ipinlaiye II v. Olukotun (1996) 6 NWLR (pt. 453) 148  
Osha v. Ape (1998) 8 NWLR (pt. 562) 492 SC  
Kano State U.D.B. v. Franz Construction Co. Ltd (1990) 4 NWLR (pt. 142) 665  
Kelantan v. Duff Development Co. Ltd. (1923) AC 395, 409 G  
Management Enterprises v. Otusanya (1987) 2 NWLR (pt. 55) 179

### **STATUTES & RULES REFERRED TO**

Court of Appeal Act, s. 16  
Evidence Act, s. 132(2) H  
Court of Appeal Rules, O. 1 r. 20(4)(5), O. 3 r. 23

### **BOOK REFERRED TO**

Phipson on Evidence 15<sup>th</sup> Ed. para. 42-01

**LEAD JUDGMENT BY AYoola JSC**

The appellant, Comptoir Commercial & Ind. SPR Ltd being dissatisfied with the award made on 23rd December, 1986 by the arbitrator in the dispute between it and the respondent, the Ogun State Water Corporation, appealed to the High Court of Oyo State to have the award set aside. The grounds of the application were that the arbitrator had misconducted himself; that the award did not deal with the matter referred to the arbitrator; and that the award was bad on the face of it.

By an agreement dated January, 31st 1982, the parties agreed that the appellant would supply to the respondent and install 10 units of water treatment plants as "Turn Key" projects. Any question, dispute or difference arising from the contract was to be referred to the arbitration of a person to be agreed upon by the parties. A dispute having arisen in that the appellant claimed that under the agreement it was entitled to be paid in addition to the "basic contract price" variation in prices pursuant to clause 40(iii) of the contract and maintenance cost whereas the respondent insisted that it was a lump sum contract, a reference was made. The questions that arose were:

*"i. whether the appellant was entitled to what was described as "escalation cost", and*

*ii. whether it was entitled to 5% of final contract cost as maintenance cost.*

*The arbitrator proceeding on the footing that the terms of the contract of the parties have been embodied in several documents, held that reading clause 40 of the documents to discern the intention of the parties led to the conclusion that it could not have been intended by the parties that the contract price was subject to variation. He found that: "On the first issue of the applicability of clause 40, I hold that the contract for the supply of the water treatment plants was intended by the parties for a lump sum and that clause 40 was not intended to be applicable."*

In regard to the second question, he found that the appellant had not established any basis for its claim for maintenance cost at 5% of the contract price per annum. On the matter coming before the High Court on the appellant's application to set aside the award, Aderemi, J., (as he then was) held that: "...before there can be esca-

*lation of the contract price or before the contract can be construed as a variable one there must be evidence, in writing that the contractor was so authorised by the Engineer of the respondent to alter anything. In fact, authorization in writing is the only condition precedent to involving clause 40 of exhibit 1.*" He dismissed the application.

On the appeal to the Court of Appeal from that decision B  
counsel who then appeared for the appellant, but is not the appellant's  
counsel on this appeal, abandoned the ground and issue arising there  
from which would have been the crux of the appeal. The issue that  
was abandoned was whether or not there was an error on the face of C  
the award. The position being thus, Salami, JCA., who delivered the  
leading judgment of the Court of Appeal was of the view, in effect,  
that as a result of the election by counsel who then represented the  
appellant, there being no contention that the award was erroneous  
on the face of it, the finding of the High Court became conclusive. D  
However, out of abundance of caution, he considered the remaining  
issues in the appeal wherein it was contended that the arbitrator mis-  
conducted himself by wrongful admission of evidence. In the opin-  
ion of the learned Justice of the Court of Appeal, the only document  
to which the argument of counsel for the appellant could be said to E  
relate was exhibit F. In regard to that exhibit relying on *Olukade v.*  
*Alade* (1976) 2 SC 183, he held that the document having been  
admitted without objection, it was within the competence of the arbi-  
trator to have acted upon it. He applied the same consideration to F  
exhibits O, P and Q. The Court of Appeal (per Salami, JCA) held that  
the High Court was in "serious error" in considering exhibit 1 as well  
as exhibits F, O, P, Q since the entire transaction had been recorded in  
exhibit 1. Notwithstanding that critical view the court, nevertheless,  
concluded that:

*"The admission of exhibits F, O, P and Q without resistance is G*  
*fatal to the appellant's case. It was mainly responsible for producing*  
*or tendering exhibit F in evidence. Exhibits O, P, and Q were admit-*  
*ted without its objection timeously or immediately; and the arbitrator*  
*took them all into consideration in coming to his decision. It is rather H*  
*late in the day for the appellant to cry over or complain upon a*  
*situation its neglect greatly assisted in creating."*

Having considered some other issues raised before it, which  
are not of significance in this appeal, the court below dismissed the

appeal. This is an appeal from the decision of the Court of Appeal given on 7th July, 1992. Surprisingly, it took five years for it to reach this stage of determination. For this delay the parties were largely responsible. The appellant's brief was not filed until 13th October, 1999 and the respondent's brief dated 7th January, 2002, was only  
 B deemed to be filed on that day upon the respondent's application for extension of time within which to file it.

Three issues were submitted for determination by the appellant as follows:

C i. should the Court of Appeal not have considered on its own motion the correct interpretation of clause 40 of exhibit 1 notwithstanding that the appellant had abandoned the ground of appeal and the issue formulated thereon whereby the finding of the trial court on the interpretation of the said clause could have been challenged;  
 D

ii. was that court right when it held that it was too late for the appellant to complain about the admissibility of certain documents, the admissibility of which it did not object to at the trial;

E iii. was that court correct when it held that the arbitrator did not rely on those documents?

The question whether a party who has abandoned an issue can complain if the court failed to consider that issue seems to me to be a novel one. Mr. Ojo, learned counsel for the appellant, with thoroughness, industry and ingenuity went to great lengths to try to persuade us that he could. The candour with which he cited authorities which are against his contention is commendable. He cited cases such as Chief Ebba v. Chief Ogodo & Anor (1984) 1 SCNLR 372; (1984) 4 SC 84 112; Ejowhomu v. Edok-Eter Mandillas Ltd., (1986) 5 NWLR  
 F (Pt. 39) 1 and Iyayi v. Eyigebe (1987) 3 NWLR (Pt. 61) 523. All these cases show in a nutshell, that an appellate court should confine itself to determination of issues raised and argued before it. Without asking us to depart from these decisions, learned counsel for the appellant argued that notwithstanding what he acknowledged to be a  
 G "well established principle of law" the Court of Appeal is by statute empowered to go beyond the grounds of appeal and issues raised by the parties in the determination of the appeal. For this argument he relies on section 16 of the Court of Appeal Act, Order 1 rule 20(4) and (5) and Order 3 rule 23, of the Court of Appeal Rules.  
 H

Section 16 of the Court of Appeal Act gives the Court of Appeal a general power “*to make any order necessary for determining the real question in controversy in the appeal*”. Order 1 rule 20(5) empowers the Court of Appeal to exercise the powers of the Court that may be exercised Order 1 rule 20(1) - (4) notwithstanding (i) that no notice of appeal or respondent’s notice has been given in respect of any particular part of the decision or by any particular party to the proceeding or, (ii) that any ground for allowing the appeal or affirming or varying the decision of that court is not specified in such notice. The Court of Appeal by virtue of that rule has power to make any order to ensure the determination on the merits of the real question in controversy between the parties. In substance, the general powers conferred on the Court of Appeal pursuant to Order 1 rule 20(1),(3) and (4) are those which emanated from the fact that appeals in civil cases in that court are by way of rehearing. Thus, the court has “all the powers and duties as to amendment and otherwise of the High Court”: (r.20(1)); to receive further evidence on question of fact: (r.20(3)); to draw inferences of fact and to give any judgment and make any order which ought to have been given or made: (r.20(4)) Nothing in Order 1 rule 20(1),(3) and (4) which contain the “foregoing provisions” referred to in r.20(5) empowers the Court of Appeal to descend into the arena so to say, and take over the conduct of the appeal from the parties.

The general powers of the Court of Appeal both under section 16 and Order 1 rule 20(5) to ensure the determination on the merits of the real question in controversy were designed to enable the court to clear whatever technical mistake or obstacles may be in the way of a fair determination of the appeal on its merit or of determining the real question in controversy in the appeal. The real questions in controversy in an appeal are the questions which arise from the grounds of appeal. Similar purpose must be ascribed to section 16.

The proper role of a court in our accusatorial model of procedure is to pronounce on and determine issue in controversy submitted to it. It is the parties who themselves play the primary role in the process, at the trial stage, by the issues raised on their pleadings, where the case is tried on the pleadings, and at the appellate stage, by the issues arising from the grounds of appeal raised by the appel-

lant. It is not for the Judge to initiate controversy. His role in the accusatorial model is first and foremost that of an umpire and it is in that role that he offers assistance by directing proper focus to what the parties themselves may have articulated without sufficient clarity as the question in controversy.

B There are the exceptional cases where it is permissible for the court to take an initiative to raise an issue on its own motion. Some of such instances are when the issue relates to its own jurisdiction; or, when both parties have ignored a statute which may have decisive bearing on the case; or, when on the face of the record serious question of the fairness of the proceedings is evident. The power of the court to make consequential orders as the justice of a case demands on its own motion though to be exercised with circumspection, also exists. The cases cited by learned counsel for the appellant such as C  
D *Hanson v. Wearmouth Co. Ltd.* (1939) 3 All ER 47; *Rutherford v. Richardson* (1922) All ER (Rep) 13; *Aboud v. Regional Tax Board* (1966) NMLR 100; *Re Whiston* (1924) 1CH 122 and *Williams v. Akintunde* (1995) 3 NWLR (Pt. 381) 101 fall into one or the other of these categories.

E ***Notwithstanding the exceptions, the general rule is that when an issue is not placed before the court, it had no business whatever to deal with it.*** *Ebba v. Ogodo & Anor* (1984) 1 SCNLR 372; (1984) 15 NSCC 255, 266 (per Eso, JSC). ***Is there anything to take this case out of that general rule?***

F ***Counsel representing the appellant in the court below made a deliberate choice when he abandoned the issue that the award was bad on the face of it and left for the court to consider the following questions:***

G ***i. What were the issues before the sole arbitrator and the High Court?***

***ii. Can an award be set aside upon an application by one of the parties to an arbitration agreement? and,***

H ***iii. Did the misconduct of the arbitrator alleged by the appellant amount to such as warrant the award being set aside?***

***Those were the real questions in controversy between the parties. For an appellate court to insist that an appellant should argue an issue which he has abandoned will not only***

***be a clear departure from the role of the court but may also be embarrassing, for it could amount to insisting that counsel for the appellant should argue an issue which he himself probably considered to be lacking in substance.***

Notwithstanding that the court may have doubted the wisdom of the appellant's choice, it is not normally within its role to question and override such choice. Another counsel retained by the appellant on a further appeal may consider it mistaken and unwise that previous counsel abandoned an issue, but that will not evoke a responsibility in the court to insist on pronouncing on such abandoned issue. A substantial portion of the argument of learned counsel for the appellant in this appeal is devoted to demonstrating the importance and merit of the issue abandoned.

However, at the time when the matter was before the Court of Appeal, counsel who then appeared for the appellant was obviously not of the opinion that that issue was worth canvassing. It is not known to be our law that it is proper for a court to enter into debate with counsel retained by a party over what issues he considers of importance to the merit of his client's case. When an issue has been raised at and determined by a lower court, the appellate court is entitled to assume that a party who has not complained about how such issue has been resolved is satisfied with the resolution of the issue.

***From the foregoing, it is evident that there is no foundation in law for such general proposition put by learned counsel for the appellant that: "...where an issue is material and fundamental to the determination of the questions in controversy between the parties to an appeal, the Court of Appeal has the duty to exercise its statutory power to take the issue or question suo motu and invite address on it from the parties..."***

***Although the law permits a party to raise a fresh point not raised in the court below in this court. That has to be with leave of the court. It will probably be an uphill task for a party who has abandoned a point in the court below to convince this court to grant leave to raise such point as a fresh point. It will be invidious to permit the same result to be achieved by complaining of failure of the Court of Appeal to exercise a***

**power of raising issues suo motu when no such power exists, and requesting this court to do what the court below should have done.**

In the result the first issue must be resolved against the appellant. The second issue can be disposed of more quickly. It is common  
 B ground that no objection was raised to the admissibility of exhibits F, O, P and Q which were admitted in the arbitral proceedings. Exh. F, in fact, was tendered by the appellant. In the appellant's brief in the court below, appellant's counsel in summarizing his argument in advance of his full argument stated as one of the grounds of misconduct,  
 C that the arbitrator misconducted himself: *"by wrongfully receiving and considering evidence which goes to the root of the question in dispute submitted to him for resolution."*

Throughout the "elaboration of appellant's argument" by  
 D counsel who represented the appellant in the court below, which was long and strong on principles but was short and weak on application, there was a mere perfunctory mention of the inadmissibility of these documents. Although in the judgment it was said that *"counsel contended further... that it amounts to legal misconduct for an arbitrator*  
 E *to wrongfully admit and act on evidence which goes to the root of the question submitted,"* the ground of its wrongful admission was not specified. In the circumstances, I proceed on the assumption that what was in issue was whether the documents were admissible for the purpose to which they were put.  
 F

The Court of Appeal held that: *"The admission of exhibits F, O, P and Q without resistance is fatal to the appellant's case- exhibits O, P, and Q were admitted without objecting timeously or immediately; and the arbitrator took them all into consideration in coming to his decision. It is rather late in the day for the appellant to cry over or complain upon a situation its neglect greatly assisted in creating."* The  
 G court below relied on the case of Olukade v. Alade (1976) 2 SC 183 at 189. In that case, this court said, per Idigbe, JSC: *"A distinction must be drawn between those cases where the evidence complained*  
 H *of is in no circumstance admissible in law and where the evidence complained of is admissible under certain conditions. In the former class of cases the evidence cannot be acted upon even if parties admitted it by consent and the Court of Appeal will entertain a complaint on the admissibility of such evidence by the lower court (al-*

*though the evidence was admitted in the lower court without objection); in the latter class of cases, if the evidence was admitted in the lower court, without objection or by consent of parties or was used by the opposite party (e.g. for the purpose of cross examination) then it would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence.”* B

In *Ipinlaiye II v. Olukotun* (1996) 6 NWLR (Pt. 453) 148 at 168 this court (per Iguh, JSC) was of the same view that: “*in cases where the evidence complained of is not by law and in all circumstances inadmissible, a party may by his own conduct at the trial be precluded from raising objection to such evidence on appeal. In this category of civil cases, if the evidence was admitted in the trial court without objection to such evidence or by the consent of the parties or was used by the opposite party (e. g. for the purpose of cross-examination) then it would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence.”* C

The passage was cited with approval in the leading judgment in *Osha v. Ape* (1998) 8 NWLR (Pt. 562) 492 S.C. E

***Learned counsel for the appellant does not deny that the law is as stated above. However, he argues that exhibits F, O, P and Q are documentary evidence that are legally and unconditionally inadmissible in law in the interpretation of clause 40 of exhibit 1 on the basis of the extrinsic evidence rule. The rule is that when a transaction has been reduced to or recorded in writing either by requirement of law or agreement of the parties, the writing becomes, in general, the exclusive record thereof, and no evidence may be given to prove the terms of the transaction except the document itself or secondary evidence of its contents.*** F

*Phipson on Evidence* (15<sup>th</sup> Edition) para. 42-01, section 132(2) Evidence Act, *Union Bank of Nigeria Ltd v. Ozigi* (1994) 3 NWLR (pt. 333) 385. G

***It follows from the parol evidence rule that if the documents exhibits F, O, P, Q were not incorporated in exhibit 1 but were tendered for the purpose of proving the terms of the agreement of the parties or to contradict, alter, add to or vary the contents of the document exhibit 1, those documents can-*** H

**not be admitted for the purpose. In my judgment, in such circumstance it would not matter that the documents were not objected to when they were tendered or that they were even tendered with consent. It is at the stage when the purpose for which they were tendered emerged that the court should consider whether it was permissible in law for the documents to be used for that purpose. Even if they have been admitted without objection the court may still exclude them from consideration at that stage if it becomes obvious that they were tendered to prove the terms of the contract, contrary to the parole evidence rule. I am of the opinion that a waiver of the application of the parole evidence rule or an agreement not to insist on its application cannot be inferred merely from the failure of a party to object to the admissibility of a document which on the face of it is admissible until the purpose of its being tendered is revealed.**

**From what I have said, I come to the conclusion that the court of appeal was in error when it held that merely because the appellant did not object when exhibits F, O, P and Q were admitted it was rather late in the day for the appellant to complain that they were wrongfully admitted in evidence for the purpose for which they were used.**

However, learned counsel for the respondent argued that the question of wrongful admission of those documents has become inconsequential (i) because there was no challenge to the finding of the arbitrator that the contract was one for a lump sum (ii) because flowing from *Kano State U.D.B. v. Franz Construction Co. Ltd* (1990) 4 NWLR (Pt. 142) 665; (1990) 2 NSCC (Vol. 21) 399, wrongful admission of evidence as in the circumstances of this case will not amount to misconduct of the arbitrator for which the award would be set aside; (iii) because the Court of Appeal rightly held that the award was not based on exhibits F, O, P and Q but rather on the interpretation of the contract document, exhibit 1, itself.

**I agree with learned counsel for the respondent. First, I think this is a case in which it is apt to apply the principle in *Government of Kelantan v. Duff Development Co. Ltd. (1923) AC 395*, where Lord Cave said at p. 409: “But where a question of construction is the very thing referred for arbitration,**

***then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion."***

***There is also the opinion of Lord Wright in FR. Absalom Ltd. v. G.W. (London) Garden Village Society (1933) All ER 616, 625 that: "It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside."***

***It is common ground that what was referred to the arbitration in this case was mainly a question of construction of agreement, exhibit 1. He decided the matter referred to him. There is finality to that decision. It was not for the High Court or the court below to question that decision.***

***Secondly, although as a general proposition receiving inadmissible evidence which goes to the root of the issue submitted to arbitration may amount to misconduct justifying the setting aside of the award, such proposition does not apply in this matter as the documents exhibits F, O, P and Q in the opinion of the arbitrator were among the several instruments that the agreement exhibit 1 incorporated in itself. It has not been argued in the court below that he proceeded on a wrong footing. When a contract is reduced to the form of documents into which has been incorporated other documents, the documents incorporated cease to be extrinsic to the main document, but fall to be construed as part of it.***

In the result, even if, as I have held, the court below was in error in principle in the opinion that the appellant could not challenge the admission of the documents, exhibits F, O, P, Q, after they have been admitted without objection, the error in statement of principle has no practical effect in the case. The use made of the documents as documents incorporated into the main agreement to be read as part thereof made the documents admissible. These observations really have taken care of the third issue raised by the appellant. There cannot be any doubt that the arbitrator made use of exhibits O, P, Q (which were respectively 12, 13 and 14 before him) when he said:

***"From exhibits 12, 13 and 14, the parties intended that the***

*project was to be for a lump sum.*” However, as he had regarded those documents as incorporated into exhibit 1, the main agreement, reference to them was legitimate.

For the reasons I have given, this appeal must fail. However, before I make an order dismissing the appeal, I wish to observe that notwithstanding the handicap faced by present solicitors for the appellant, (Afe Babalola & Co.) which was certainly not of their own making but was a result of the manner in which the appellant’s case was presented in the court below, they have presented the appellant’s case before us with skill and industry. They have assisted me not only by citing cases which they accepted contain general principles against their contention, but have also usefully annexed to their belief a synopsis of some of the cases cited by them. Much assistance has been derived from the clarity of their presentation and from the concise and well focused briefs of the parties.

Be that as it may, this appeal fails. It is accordingly dismissed with N10,000.00 costs to the respondents.

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E **KUTIGI JSC**

I read in advance the judgment just rendered by my learned brother Ayoola, JSC. He has meticulously dealt with all the issues raised in the appeal. I agree with his reasoning and conclusions. I clearly find no merit in the appeal which is hereby dismissed with N10,000.00 costs to the respondents.

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**OGWUEGBU JSC**

G I have read in draft the judgment of my learned brother Ayoola, JSC, in this appeal. I entirely agree with his reasoning and conclusions. I agree that the appeal be dismissed Appellant shall pay N10,000.00 as costs of the respondents.

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H **IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, JSC and I am in entire agreement with him that this appeal lacks merit and should be dis-

missed. There is no doubt that the main issue for determination in the arbitrator proceedings is whether or not the agreement entered into by the parties is subject to variation or escalation costs. In this regard, the learned trial Judge observed:- “The onus was therefore on the applicant throughout to show that the contract had moved from one of lump sum to one of variable contract. That onus was never discharged. Exhibit ‘H’, a letter dated 8th October, 1985, written again by the applicant to the respondents and contained “ESCALATION” does not help the issue either it was never signed by the respondents and so it can not be their written authority.

Therefore, I cannot find anything in the totality of the evidence led before the arbitrator which is capable of taking the contract away from the arena of one lump-sum contract and stamp it with the authority of a “variable contract.” He then concluded:- *“In the final analysis, I cannot find any merit in the complaint in the application which is accordingly dismissed with costs which I shall now assess.”* On appeal before the court of appeal, that court after setting out the above passage of the judgment of the trial court quite rightly observed thus :- “The success of the appeal depends mainly on the resolution of the ground of appeal attacking the finding of the learned Judge contained in that passage. The ground of appeal directed at this finding is ground B. But the learned counsel for the appellant in the course of his oral submission withdrew the said ground which was accordingly struck out. It is pertinent, at this stage, to cull from the record of proceedings circumstances leading to the withdrawal. *“Issue D is distilled from ground B which is not argued in my brief. I therefore abandon it.”*

Having abandoned the ground B of the grounds of appeal as well as issue D related thereto, the two are deemed abandoned on the election of the learned counsel for the appellant who failed to argue the same. In the first place, an appeal court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any ground of appeal is incompetent and will be struck out. See *Management Enterprises v. Otusanya* (1987) 2 NWLR (Pt. 55) 179, *Adelaja v. Fanoiki & Another* (1990) 2 NWLR (Pt. 131) 137 at 148; *A. G., Anambra State v. Onuselogu Enterprises Ltd.* (1987) 4 NWLR (Pt. 66) 547 etc. So, too, where a ground of appeal was withdrawn or not canvassed in the brief, it shall be held to

have been abandoned. See *Lethmal Melwani v. Feed Nation Ltd.* (No.2) (1986) 5 NWLR (pt. 43) 644; *Chukwuogor. Obuora* (1987) 3 NWLR (Pt. 61) 454 at 479; *Nwugha v.Nwala* (1992) 2 NWLR (Pt. 225) 610 at 618.

In the same vain, where a party has not appealed against a finding of a trial court, he cannot be heard to question that finding on appeal. See *Ogunbiyi v. Ishola* (1996) 6 NWLR (Pt. 452) 12 at 23; *Ijale v. Leventis and Co. Ltd.* (1959) SCNLR 244; (1959) 4 FSC 108; *Bello v. Olatorin* (1996) 9 NWLR (Pt. 470) 49 at 66 etc. It seems to me that the aforementioned vital passage of the judgment of the trial court not having been appealed against following the withdrawal of the relevant grounds of appeal challenging it, the court of appeal was right to have determined and resolved the main issue in controversy between the parties in the appeal in favour of the respondents thus holding that the contract was for a lump sum and that it was not a “variable contract”. This finding of both courts below has yet not been set aside and therefore subsists. It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ayoola, JSC that I too dismiss this appeal with costs as assessed in the leading judgment.

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### **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Ayoola JSC in this appeal. I agree with him that there is no merit in this appeal. For the reasons he gives, I too dismiss the appeal with costs as awarded. Appeal dismissed.

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