

SUPREME COURT OF NIGERIA
FRIDAY 28TH FEBRUARY, 2003. SC. 58/1998
CORAM:- M. L. UWAIS CJN, I. L. KUTIGI, M. E. OGUNDARE, S.
O. UWAIFO, N. TOBI, JJSC

ANDREW NWEKE OKONKWO APPELLANT
AND
1. COOPERATIVE & COMMERCE
BANK (NIG.) PLC RESPONDENTS
2. JAMES OBIAKOR
3. MRS. ENYIDIYA AGWU

CONTRACTS - Terms - Binding nature of - As relationship between the parties is contractual - Extrinsic evidence will generally not be accepted - To vary the terms agreed upon (H1)

CONTRACTS - Agreement - Binding nature of - Persons of full age and sound mind - Are bound by any agreement lawfully entered into by them (H2)

EVIDENCE - Pleadings - Facts not pleaded - Fate of - Evidence given on matters not pleaded - Goes to no issue and ought to be disregarded by court (H3)

EVIDENCE - Fraud - Allegation of - Failure to prove - Effect - Since fraud was not specifically pleaded - And no evidence led on it - The allegation is a non-issue (H4)

FACTS

Plaintiff/appellant had mortgaged the disputed property to 1st defendant/respondent as security for a loan. The loan was repayable within 12 months but appellant failed to repay the loan more than six years after the due date. In 1982 after the expiration of the due date, 1st respondent had sent notices of its intention to sell the property but suspended the plan when appellant paid in a part of the debt. However in 1988, 1st respondent went ahead with the plan to sell the property as appellant had failed to repay the loan

more than six years after its due date. Accordingly 2nd defendant/respondent acting on behalf of 1st respondent, advertised the sale in a national daily and proceeded to sell the property to 3rd defendant/respondent via public auction. Consequently, appellant instituted this action against respondents at the High Court of Abia State, Aba claiming sundry relief by which he contested the exercise of power of sale of the disputed property by 1st respondent under a Deed of Mortgage - Exhibit B. Appellant contends that the sale was invalid on the ground that 1st respondent failed to give him personal notice of its intention to sell and that those notices given to him in 1982 could not be valid basis for the sale in 1988. After hearing, trial court dismissed the claims of the appellant. Aggrieved, appellant appealed unsuccessfully to Court of Appeal Port Harcourt Division. Aggrieved further, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(1) Having rightly held that the award made by the trial court in favour of the 3rd Respondent was without jurisdiction, was the Court of Appeal right to proceed to declare the 3rd Respondent the title holder of the rights, title and interest of the unexpired term of lease based on Exhibit B?

(2) Was the Court of Appeal right to have raised the question of waiver, thereby stating that Section 19 of the Auctioneers Law of Former Eastern Nigeria Laws, 1961. Vol. I does not apply due to waiver in clause 8 of Exhibit B?

(3) Was the Court of Appeal right to hold that Exhibits H - H2, notices dated 15/5/81 and 30/5/85 were valid demand notices in respect of a proposed sale in 1988?

(4) Is the decision of the Court of Appeal that there was an auction sale on the 1st February, 1988, correct and sustainable in the light of the pleadings and evidence before that Court.

(5) Does the manner in which the Court of Appeal resolved the issue of fraud and lack of good faith on the part of the 1st Respondent show an appreciation of the Appellant's complaints before that Court.

(6) Was the Court of Appeal right not to have made any findings on issue whether Chief Orji Uzo Kalu was Chairman of the 1st Respondent's Bank at the material time and whether the sale to his mother, the 3rd Respondent, was not against public policy?

HELD (Dismissing the appeal by majority decision per KUTIGI JSC, Tobi JSC dissenting)

CONTRACTS - Terms - Binding nature of

1. It was common ground that the relationship between the plaintiff and the 1st Defendant is contractual and governed by exhibit B, the Deed of Legal Mortgage. That being so, extrinsic evidence will generally not be accepted to vary the terms agreed upon. (p. 730 H)

CONTRACTS - Agreement - Binding nature of

2. It is trite law that persons of full age and sound mind are bound by any agreement lawfully entered into by them. Clause 7 of Exhibit B above gave the 1st Defendant the right to sell the mortgaged property if the Plaintiff failed to repay the loan on the due date without any further consent of the plaintiff. By Clause 8 of Exhibit B, the Plaintiff also waived his rights to be given any notice under any statute or customary law. The Court of Appeal was thus plainly giving effect to the agreement entered into by the plaintiff himself and nothing else when it said the plaintiff had waived his right to any notice of sale under Section 19 of the Auctioneers Law of Eastern Nigerian. The 1st Defendant/Bank was thus not bound under the lease (Exhibit B) to have given the plaintiff any further notice of the proposed sale after the demand notices Exhibits H, H1 and H2. (p. 732 E)

Pleadings - Facts not pleaded - Fate of

3. The Plaintiff also contended in paragraph 21(c) of the Amended Statement of Claim that ***“the auction sale did not comply or conform with Auction Law of Eastern Nigeria, 1963, and shall therefore contend at the trial that the purported sale of the said property is invalid in law and therefore of no effect.”***

But the plaintiff in his pleadings has failed to state the facts relied upon which render the auction sale not to have complied or conformed with the law. In other words the plaintiff did not state the facts which took the sale outside any statutory provision or provisions, since a party cannot set out the conclusion of law in his pleadings. It is also trite law that evidences given on matters not pleaded goes to no issue and ought to be disregarded by the Court.

EVIDENCE - Fraud - Allegation of - Failure to proof - Effect

4. The Plaintiff did not in his pleadings specifically plead fraud or collusion and even where he alluded to them, he furnished no particulars. He again led no evidence whatsoever to prove any of the allegations. For example in his evidence he told the Court that the 3rd Defendant who purchased the property was the mother of the chairman of the 1st Defendant. Was that enough to prove collusion and or fraud between the 1st Defendant and the 3rd Defendant without more? Certainly not! The Plaintiff's story was disbelieved by the trial court as well as the Court of Appeal. It will serve no useful purpose here repeating him all over again. There was no obligation on the part of the Court of Appeal to have made a finding on one Chief Orji Uzo Kalu who was not a party to the case. As I said, since fraud was not specifically pleaded and no evidence led on it, it is a non-issue in the case. (p. 733 F)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. Appellant was not entitled to notice

In my view, the appellant cannot be heard to complain that notice was not given when the debt rose to N106,338.00. Nor can he be heard to say that the notices given not having been acted upon, the 1st respondent had waived its right to rely on them. In the first place, it is enough that the 1st respondent gave notice of demand at all. Secondly, there was no obligation under the deed of mortgage to give notice since the appellant by clause 8 had waived his right to be given such notice. (p. 735 E)

2. Clause 8 did not waive s.19 of Auctioneers Law

Although some aspect of this provision have become anachronistic owing to socio-political changes, it cannot be denied that the purpose of the provision is for the mortgagee to give adequate notice to the public of the proposed sale. It is not a notice intended to be given to the mortgagor. This is to ensure that a true public auction, where everyone interested in the property may have the opportunity to bid for it, is conducted for a fair deal, devoid of unconscionable bargain

through connivance or collusion. This is not a notice which can be waived by the mortgagor. Actually, it does not lie with him to do so as it is not meant for him. The court below was therefore in error to have held that the waiver contained in clause 8 of Exhibit B extended to Section 19. There is absolutely no connection between the two. The former is a waiver of a private right of the mortgagor. The latter is to ensure that the auction, to borrow the words of Lord Mansfield in *Bexwell v. Christie* (1776) 1. Comp. 395 at 396; 98 ER 1150, is not “a fraud upon the sale, and upon the public.” (p. 736 C) B

3. Sales by Auction Ordinance s.19 – Non-compliance

The evidence clearly is that Section 19 was not complied with. In paras. 13 and 14 of the amended statement of claim, it was pleaded: C

“13. On Saturday 30th January, 1988, the plaintiff saw a publication at page 190 of the Statesman Newspaper of that day headed “Auction Notice” advertising the plaintiffs said house for sale. The advertisement was inserted by the 2nd defendants on behalf of the 1st defendant. D

14. The said advertisement hereby pleaded put the date of sale of the plaintiff’s house for Monday 1st February, 1988, at 8 a.m.” E

In their amended statement of defence, the 1st and 2nd defendants, in para. 14, admitted the above-quoted paras 13 and 14. That shows that section 19 of the Auctioneers’ Law which requires not less than seven days of such public notice before the sale was not complied with. (p. 736 G) F

4. Sale is valid notwithstanding the defect

I have held that Section 19 of the Auctioneers’ Law was not complied with. The effect of this would have been perhaps that an important condition for, what I might call, a popular auction sale not having been met, the sale would be held invalid. But a provision of another statute, Section 21(1) of the Conveyancing Act, 1881, applicable in Abia State, has interplayed with Section 19 of the Auctioneers’ Law. It provides: G

“Where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not H

be impeached on the ground that no case has arisen to authorise the sale, or that due notice as not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorised or improper or irregularly exercise of the power shall have his remedy in damages against the person exercising the power.”

B (p. 739 B)

TOBI JSC

(Dissenting)

5. Waiver must be specifically pleaded

C What is the position of the law pleadings in respect of the defence of waiver? Waiver as an equitable defence must be specifically pleaded by the defendant.

It is elementary law that parties are bound by their pleadings and facts not pleaded will go to no issue. In other words, evidence on facts not pleaded will not avail the party relying on the evidence.

D A related point is that since waiver was not pleaded, it was not available to the Court of Appeal to raise it suo motu and resolve it suo motu. (p. 758 B)

6. Court should not resolve issues suo motu

E While a court has the jurisdiction to raise an issue suo motu. It has no jurisdiction to resolve it suo motu. In our adversary system of adjudication, a court of law should be most reluctant to raise issues suo motu. When it does that, the parties must be given an opportunity

F to react to the issue before a decision is taken. The Court of Appeal did not follow this procedure. The court was in serious error for not giving the right to counsel to react to the issue of waiver which it raised suo motu. (p. 758 E)

7. Right of redemption is open till the sale

G In sum, Exhibit A was made in bad faith. I entirely agree with learned counsel for the appellant that Exhibit A was “a devise to fetter the right of redemption.” Exhibit A, in my opinion, was a fiat accompli in so far as the redemption of the mortgaged property is concerned. A mortgagor has a legal right to redeem a mortgaged property which is not yet liable to an auctioneer’s most unfriendly hammer, and H the mortgagee has a corresponding duty to open his doors for the mortgagor to redeem the property. A mortgagee who out-smarts or

cunningly out-plays a mortgagor in the process of redemption of a mortgaged property will not be allowed by equity to sell the mortgaged property at his pleasure. This is because he has cruelly not considered the pains of the mortgagor in parting with his property in circumstances that are not legal. A mortgagee has no legal right to block the passage of redemption of a mortgaged property before auction. In other words, a mortgagee cannot place a clog on the mortgagor's wheel of redemption. Redemption of the property is a legal right to the mortgagor which he is entitled to exercise in law until the property is auctioned. Putting it in another language, the mortgagor's right of redemption is open till the sale of the property unless the deed of mortgage provides otherwise or to the contrary. It is clear to me that the 1st respondent did not act in good faith in its entire management of the purported sale of the mortgaged property as evidenced by Exhibit A. (p. 769 E)

8. Auction pre supposes reduction in price

In an auction sale, the mortgagee, who has a major interest in the property, is entitled to promote and take care of his interest in the sale. In an auction sale, the interest of the mortgagee is paramount and as long as the sale is conducted bona fide, a mortgagor has no legal basis to complain in respect of, or about a low price. Auction sale by its very commercial nature presupposes some reduction of the market price value as dictated by the price index. The auctioneer, in order to dispose of the goods, should attract the public by a lower price. As long as the price is not ridiculously low or grossly undervalued as to suggest a possible fraud or collusion amongst the mortgagee, the auctioneer and the buyer, the mortgagor has no legal ground to complain. (p. 773 A)

9. Good faith of purchaser is relevant when property has passed

While I entirely agree with the position of the law that irregularities arising from the sale by way of lack of giving statutory notice to the plaintiff and sale of the property at a low price per se may not vitiate sale of a mortgaged property, I think, and I feel very strongly that in order to enable the purchaser have the property for keeps, property must pass in the sale from the mortgagee to the purchaser. In other

words, where in law property does not pass to the purchaser, what he has bought is a nullity ab initio. In such a situation or circumstance, a purchaser cannot be heard to rest his defence on good faith, on his part. The defence of good faith, in my humble opinion, will arise only when property can in law pass to the purchaser.

B (p. 774 D)

REPRESENTATION

A. O. Obianwu, Esq, with Uche Nwokedi, Esq and C. A. Chuka-Nnodi, Esq, for Appellant

C Ben Anachebe Esq, with A. A. Okpala, Esq, for 1st and 2nd respondents

Chief Chris Uche, with K. O. Ojike, Esq, A. Dimuye, Esq, and A. A. Akpamgbo, Esq, for 3rd Respondents

D CASES REFERRED TO

Osagbe v. Ojo (1994) 6 NWLR (Pt. 349) 131

U.B.N v. Ozigi (1994) 1 NWLR (Pt. 333) 400

Arize v. NNPC (1991) 1 NWLR (Pt. 166) 258

Garba v. State (1999) 11 NWLR (Pt. 627) 422

E Oparaji v. Ohanu (1999) 9 NWLR (Pt. 618) 290

Makinde v. Akinwale (2000) 2 NWLR (Pt. 645) 435

Adekunle v. Adeboye (1992) 2 NWLR (Pt. 223) 305

UBN v. Penny-Mart Ltd. (1992) 5 NWLR (Pt. 240) 228

F Okufunmise v. Falana (1990) 3 NWLR (Pt. 136) 1

Oduye v. Nigeria Airways Ltd. (1987) 2 NWLR (Pt. 55) 126

Motunwase v. Sorungbe (1988) 5 NWLR (Pt. 92) 90

Ume v. Okoronkwo (1996) 10 NWLR (Pt. 477) 133

Umaru v. Abdul-Muttallabi (1998) 11 NWLR (Pt. 573) 247

Ezeafulukwe v. John Holt Ltd. (1998) 2 NWLR (Pt. 432) 511

G Ogbonna v. Attorney-General of Imo State (1992) 11 NWLR (Pt. 270) 647

STATUTES REFERRED TO

Auctions Law of Former Eastern Nigeria, 11961, s.19

Act, 1881, s. 21

H Sales by Auction Ordinance, s. 19

LEAD JUDGMENT BY KUTIGI JSC

In the High Court of justice holden at Aba, the Plaintiff claims against the Defendants jointly and severally as follows:

“(a) A declaration that the Defendants are not entitled to sell the Plaintiff’s property situate at and called No. 133 Aba-Owerri Road, Aba. B

(b) An order to set aside any purported sale of the said property made by the Defendants on the 1st day of the February, 1988, or thereabout as being illegal and a nullity and damages for the wrongful act. C

(c) An order of the Honourable Court for a review of the account of the plaintiff in the 1st defendant bank to determine the amount (if any) outstanding against the Plaintiffs.

(d) An injunction to restrain the Defendants by themselves, their servants or agents from selling or purporting to sell the plaintiff’s D aforesaid property.”

Pleading were ordered, filed and exchanged. These were further amended by leave of Court. The 1st and 2nd Defendants filed a joint Statement of Defence while the 3rd defendant filed a separate Statement of Defence. E

At the hearing, the Plaintiff gave evidence and called three witnesses. Two witnesses testified on behalf of the 1st Defendant while the 2nd Defendant testified for himself. He called no witnesses. The 3rd defendant also testified but called no witnesses. F

The facts may be summarised thus -

The plaintiff (mortgagor) had in 1981 mortgaged his building known as No. 133 Aba-Owerri Road, Aba, summarised to the 1st Defendant (Mortgagee) by virtue of a Deed of mortgage (Exhibit B in the proceedings) as security for a loan of N60,000.00. The loan G was repayable within twelve (12) months. The Plaintiff defaulted in complying with the terms of Exhibit B and did not repay the loan for more than six years after the debt became due. Upon continued default by the Plaintiff the 1st Defendant/Bank sent relevant notices and statements of account to the Plaintiff as evidenced by Exhibits H G, H, H, 1 and H.2 in the proceedings. When the 1st defendant first wanted to sell the house in 1982, it was stopped by the payment of N21,000.00 by the Plaintiff. Then on 30th January, 1988, the Plaintiff saw a publication in the Nigerian Statement Newspaper whereby the H

2nd Defendant (auctioneer) had advertised the mortgaged property for sale on behalf of the 1st Defendant/Bank. The auction sale was scheduled to take place on Monday 1st February, 1988 at 8.00a.m. The Plaintiff said he was able to raise the sum of N96,000.00 from friends which he took to the 1st defendant in payment of the mortgage debt so as to stop the auction sale but without success. This was denied. His contention also that there was no auction sale because there was no notice to that effect was equally denied. The 1st Defendant said in exercise of its power of sale under Exhibit B, it gave notice of the intended sale by conspicuously pasting notice on the building and other public places in addition to the publication in the newspaper (Exhibit A). That several people attended the auction sale including the Plaintiff, his brother and agent who bided for the property. The 3rd Defendant who also attended the public auction bided. She was the highest bidder, and the property was duly sold to her and a deed of assignment executed in her favour as per Exhibit K.

At the conclusion of hearing, counsel on both sides addressed the Court and in a considered judgment, the learned trial Judge dismissed plaintiff's claims.

Aggrieved by the judgment of the trial court, the plaintiff appealed to the Court of Appeal holden at Port-Harcourt. In a unanimous judgment, the appeal was dismissed. The plaintiff had now further appealed to this court from the decision of the Court of Appeal.

The parties filed and exchanged briefs of arguments which were adopted and relied upon at the hearing of the appeal during which additional oral submissions were made by learned counsel.

In the Plaintiff/Appellant's brief, the following issues have been set down for determination in the appeal -

(1) Having rightly held that the award made by the trial court in favour of the 3rd Respondent was without jurisdiction, was the Court of Appeal right to proceed to declare the 3rd Respondent the title holder of the rights, title and interest of the unexpired term of lease based on Exhibit B?

(2) Was the Court of Appeal right to have raised the question of waiver, thereby stating that Section 19 of the Auctioneers Law of Former Eastern Nigeria Laws, 1961. Vol. I does not apply due to waiver in clause 8 of Exhibit B?

(3) Was the Court of Appeal right to hold that Exhibits H - H2, notices dated 15/5/81 and 30/5/85 were valid demand notices in respect of a proposed sale in 1988?

(4) Is the decision of the Court of Appeal that there was an auction sale on the 1st February, 1988, correct and sustainable in the light of the pleadings and evidence before that Court. B

(5) Does the manner in which the Court of Appeal resolved the issue of fraud and lack of good faith on the part of the 1st Respondent show an appreciation of the Appellant's complaints before that Court. C

(6) Was the Court of Appeal right not to have made any findings on issue whether Chief Orji Uzo Kalu was Chairman of the 1st Respondent's Bank at the material time and whether the sale to his mother, the 3rd Respondent, was not against public policy? D

These issues will be taken one by one.

Issue (1)

The contention here is that the Court of Appeal having rightly held that the so called counter-claim of the 3rd Defendant was bad in law and that the award made by the trial Court in that regard was made without jurisdiction, the Court of Appeal was wrong when it somersaulted and proceeded to declare the 3rd Defendant the title holder of the rights, title and interest of the unexpired term of the lease based on Exhibit B (the Deed of Legal Mortgage) between the Plaintiff and the 1st Defendant. E

I say, straight-away that this contention is baseless. All that the Court of Appeal said on page 281 of the record is this - F

"After a cool calm view of the facts there is much force in the contention of the Appellant that invalid counter-claim was placed before the Court; therefore any award by the learned trial Judge based on it was without jurisdiction. I am in complete agreement with the contention of the appellant so the award made on page 116 of the record of appeal having been made without jurisdiction is struck-out. G

Be that as it may, the claim in paragraph 24 of 3rd Respondent's Amended Statement of Defence was unnecessary and superfluous having had a Deed of Assignment legally and validly executed in her favour she was a title holder of the rights, title and interest of the unexpired term of the lease based on Exhibit B." H

By no stretch of imagination can it be said that the Court of

Appeal has somersaulted in the above passage of its judgment. The Court of Appeal clearly struck-out the 3rd Defendant/Respondent's counter-claim and then proceeded to state the legal consequence flowing from the Deed of Assignment (based on Exhibit B) already executed in favour of the 3rd Respondent. That is not making an
B award to the 3rd Defendant. The issue therefore fails.

Issues (2), (3) & (4)

These issues will be taken together. They deal with the main question of whether there was proper notice, public and personal,
C before the auction sale was conducted in the instant case.

The Plaintiff contends that the Court of Appeal erred by holding that by virtue of Clause 8 of Exhibit B (the Deed of Legal Mortgage), the Plaintiff had waived his rights to be given notice of sale by the 1st Defendant/Bank, when waiver as a special defence was not pleaded and when waiver was raised suo motu by the Court of
D Appeal and without giving the Plaintiff a hearing. He said the Court of Appeal also failed to consider the provisions of Section 19 of the Auctioneers Law of Imo State of Nigeria, a failure that has occasioned a failure of justice. It was also contended that the Court of Appeal
E erred when it held that Exhibits H - H2 constituted sufficient notice of sale by the 1st defendants to the Plaintiff when in fact the property was sold 3 years after the Notices had expired, the Plaintiff was thus denied the opportunity to redeem his property because no fresh notice was served on him. It was further contended that the findings
F of the Court of Appeal that there was an auction sale was perverse because of material discrepancy in the evidence of witnesses which was never resolved.

It was common ground that the relationship between the plaintiff and the 1st Defendant is contractual and governed by exhibit B, the Deed of Legal Mortgage. That being so, extrinsic evidence will
G generally not be accepted to vary the terms agreed upon (see for example U.B.N v. Ozigi (1994) 1 NWLR (Pt. 333) 400).

I think the undermentioned clauses or provisions of Exhibit B are relevant in the determination of this appeal as a whole -

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. ...THE Borrower hereby covenants with the Bank to repay
H to the Bank the said sum of N60,000.00 (sixty thousand Naira)... on demand or within twelve (12) months from the date the first

installment of the overdraft was withdrawn by the Borrower... PROVIDED that failure to pay any instalment makes the whole balance outstanding due and payable

5. The Borrower hereby further covenants with the Bank as follows -

v. A demand for payment or any other demand or any notice under this security may be made or given by any officer of the Bank by letter served personally upon the Borrower or sent by post addressed to the Borrower at the address as given in this security or at the last known place of abode or business of the Borrower C

7. The Bank may at any time after the day appointed for the payment of this loan and without any further consent of the Borrower sell the mortgaged property or any part or parts thereof either together or in parcels and either by public auction or private contract.....

8. The Borrower hereby expressly waives his rights to be given notice by the Bank under Section 20 of the Conveyancing Act, 1881, or under any law or custom in operation in any part of the Federal Republic of Nigeria before the sale of the mortgaged property." (Underlining supplied by me) E

The learned trial Judge had found in his judgment on pages 109 -110 that the following facts were not in dispute (and there was no appeal against the findings) -

"(a) That the Plaintiff obtained a loan in 1981, from the 1st Defendant which was reserved for repayment on property, formerly known as 85 Aba-Owerri Road, but now No. 133 Aba-Owerri Road, Aba.

(b) That the loan was made refundable within 12 months (that is 1982). G

(c) That in 1982 the 1st Defendant wanted to sell the mortgaged property due to the plaintiff 's default in repaying the loan

That 1st Defendant later changed its mind when plaintiff paid some money.

(e) That between 1982 and 1988 (that is six years). Plaintiff H was still owing the mortgage debt to the 1st Defendant.

(f) That as at 1st February, 1988, the mortgage debt had not been repaid in full.

(g) That on 1st February, 1988, the property was sold to the

3rd Defendant.”

Later on in the judgment he also found as a fact (and I agree with him) that-

“(h) The demand notices Exhibits H, H.1 and H.2 dated 15th May, 1981, 28th March, 1984 and 30th May, 1985 had satisfied the requirement of notice of intention to sell the mortgaged property; and

(i) The sale took place at an auction sale in which many people gathered and participated in bidding along with the 3rd Defendants.”

It is trite law that persons of full age and sound mind are bound by any agreement lawfully entered into by them. Clause 7 of Exhibit B above gave the 1st Defendant the right to sell the mortgaged property if the Plaintiff failed to repay the loan on the due date without any further consent of the plaintiff. By Clause 8 of Exhibit B, the Plaintiff also waived his rights to be given any notice under any statute or customary law. The Court of Appeal was thus plainly giving effect to the agreement entered into by the plaintiff himself and nothing else when it said the plaintiff had waived his right to any notice of sale under Section 19 of the Auctioneers Law of Eastern Nigerian. The 1st Defendant/Bank was thus not bound under the lease (Exhibit B) to have given the plaintiff any further notice of the proposed sale after the demand notices Exhibits H, H1 and H2.

The Plaintiff also contended in paragraph 21(c) of the Amended Statement of Claim that “**the auction sale did not comply or conform with Auction Law of Eastern Nigeria, 1963, and shall therefore contend at the trial that the purported sale of the said property is invalid in law and therefore of no effect.**”

But the plaintiff in his pleadings has failed to state the facts relied upon which render the auction sale not to have complied or conformed with the law. In other words the plaintiff did not state the facts which took the sale outside any statutory provision or provisions, since a party cannot set out the conclusion of law in his pleadings (see *Liadi Giwa v. Bisiriyu Erunmilokun* (1961) All NLR 294, *Re Vendervell’s Trusts* (No.2) (1974) 3 All ER. 205). *Ayoola & Ors. v. Folawiyo & Ors.* (1942) 8 WACA 39). It is also trite law that evidences given on matters not pleaded goes to no issue and ought to be disregarded by the Court (see *Makinde v. Akinwale* (2000) 2

NWLR (Pt. 645) 435. It is sufficient to conclude here that both the trial High Court and the Court of Appeal found that the 1st Defendant in exercise of its power of sale under Exhibit B gave notice of the intended sale by conspicuously pasting notices on the building and other public places in addition to the publication in the newspaper (Exhibit A). B

These issues are therefore resolved against the plaintiff.

Issues (5) & (6)

These issues are founded on allegation of fraud or lack of good faith on the part of the 1st Defendant and alleged collusion and or complicity between the chairman of the 1st Defendant and the 3rd Defendant. C

The simple answer here is that the Plaintiff did not in his pleadings specifically plead fraud or collusion and even where he alluded to them, he furnished no particulars. He again led no evidence whatsoever to prove any of the allegations. For example in his evidence he told the Court that the 3rd Defendant who purchased the property was the mother of the chairman of the 1st Defendant. Was that enough to prove collusion and or fraud between the 1st Defendant and the 3rd Defendant without more? Certainly not! The Plaintiff's story was disbelieved by the trial court as well as the Court of Appeal. It will serve no useful purpose here repeating him all over again. There was no obligation on the part of the Court of Appeal to have made a finding on one Chief Orji Uzo Kalu who was not a party to the case. As I said, since fraud was not specifically pleaded and no evidence led on it, it is a non-issue in the case. There was thus nothing to be resolved by the Court of Appeal. D E F

These issues also fail.

Before I conclude I want to stress the fact that this is a case in which the evidence revealed that the Plaintiff and his brother were present at the venue of the sale and indeed participated in the bidding. The Plaintiff who allegedly had N96,000.00 with him, bided and offered only N70,000.00 for his property. Clearly therefore he was not interested in redeeming his property. When the property was sold for N110,000.00 he said it was under valued, or that there was fraud and or collusion etc. The plaintiff clearly in my view has no case. G H

All the issues having been resolved against the Plaintiff, the

appeal must fail. It is accordingly dismissed with N10,000.00 costs to each set of the Defendants/Respondents.

B UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Kutigi, JSC. I entirely agree with his reasoning and conclusions.

C I accordingly hereby dismiss the appeal with N10,000.00 costs to each set of the Respondents against the Appellant.

OGUNDARE JSC

D I had the advantage of reading before now the judgments of my learned brothers, Kutigi, and Uwaifo, JJSC. I agree with Kutigi, JSC., that this appeal lacks merit. I adopt in its entirety the reasoning of my learned brother, Uwaifo, JSC., on the application of Section 19 of the Auctioneers Law, Cap. 12 Laws of Eastern Nigeria, 1961, and the effect of Section 21(1) of the Conveyancing Act, 1881, (England) an Act of general application applicable to Abia State at all times relevant to these proceedings. I have nothing more to add.

E I too dismiss the appeal and abide by the order for costs
F made by my learned brother, Kutigi, JSC.

UWAIFO JSC

The facts of this case are very simple. There is no dispute that the appellant took a loan of N60,000.00 from the 1st respondent bank. He could not repay the loan together with the interest in full. As
G at 29th January, 1988, he was owing the sum of N106,338.00. The loan transaction was secured with his property at No. 133 Aba-Owerri Road, Aba, upon a deed of legal mortgage, Exhibit B. The loan was to have been repaid in 1982 in terms, of clause 1 of the deed of mortgage but was still owing six years on. Clause 7 of the deed
H gave the 1st respondent the power to sell the property to repay the loan "at any time after the day appointed for the repayment of this loan and without any further consent of the Borrower". Clause 8

contains the waiver made by the appellant as to “his right to be given notice... under any law or custom... before the sale of the mortgaged property.”

However, in spite of clause 8 of Exhibit B, the 1st respondent demanded repayment of the loan and gave notice of its intention to sell as per exhibits H, H1 and H2, the last of which was dated 30th May, 1985, when the indebtedness was some N68,863.99. In my view, the appellant cannot be heard to complain that notice was not given when the debt rose to N106,338.00. Nor can he be heard to say that the notices given not having been acted upon, the 1st respondent had waived its right to rely on them. In the first place, it is enough that the 1st respondent gave notice of demand at all. Secondly, there was no obligation under the deed of mortgage to give notice since the appellant by clause 8 had waived his right to be given such notice.

I do not intend, from what I have said above, to undermine the protection which equity gives to a mortgagor at the hands of an unconscionable mortgagee despite the mortgage terms when the latter is shown to have acted unreasonably: see *Thomas Pinnock v. G.B. Ollivant* 2 WACA 165 at 168. In the present case no such unreasonableness on the part of the 1st respondent has been shown. On the contrary, it gave the appellant ample opportunity to repay his debt and redeem his mortgaged property. He failed to do so.

The only serious issues to be considered in this appeal are: (1) whether Section 19 of the Auctioneers Law, Cap. 12, Laws of Eastern Nigeria, 1961, applicable in Abia State was waived by the appellant by operation of clause 8 of Exhibit B; (2) whether such a statutory provision can be waived; (3) what is the effect of non-compliance with the provision. The provision of Section 19 reads thus:

“No sale by auction of any land shall take place until after at least seven days’ public notice thereof made at the principal town of the district in which the land is situated and also at the place of the intended sale. The notice shall be made not only by printed or written documents, but also by beat of drum or such other method intelligible to uneducated persons as may be prescribed as the divisional officer of the district where such sale is to take place may direct, and shall state the name and place of residence of the seller.”

Although some aspect of this provision have become anach-

ronistic owing to socio-political changes, it cannot be denied that the purpose of the provision is for the mortgagee to give adequate notice to the public of the proposed sale. It is not a notice intended to be given to the mortgagor. This is to ensure that a true public auction, where everyone interested in the property may have the opportunity to bid for it, is conducted for a fair deal, devoid of unconscionable bargain through connivance or collusion. This is not a notice which can be waived by the mortgagor. Actually, it does not lie with him to do so as it is not meant for him. The court below was therefore in error to have held that the waiver contained in clause 8 of Exhibit B extended to Section 19. There is absolutely no connection between the two. The former is a waiver of a private right of the mortgagor. The latter is to ensure that the auction, to borrow the words of Lord Mansfield in *Bexwell v. Christie* (1776) 1. Comp. 395 at 396; 98 ER 1150, is not “a fraud upon the sale, and upon the public.”

The evidence clearly is that Section 19 was not complied with. In paras. 13 and 14 of the amended statement of claim, it was pleaded:

“13. On Saturday 30th January, 1988, the plaintiff saw a publication at page 190 of the Statesman Newspaper of that day headed ‘Auction Notice’ advertising the plaintiffs said house for sale. The advertisement was inserted by the 2nd defendants on behalf of the 1st defendant.

14. The said advertisement hereby pleaded put the date of sale of the plaintiff’s house for Monday 1st February, 1988, at 8 a.m.”

In their amended statement of defence, the 1st and 2nd defendants, in para. 14, admitted the above-quoted paras 13 and 14. That shows that section 19 of the Auctioneers’ Law which requires not less than seven days of such public notice before the sale was not complied with.

There is however evidence that an auction sale took place at the premises although the appellant denied this in these terse words: “On 1/2/88 at about 10 a.m. I did not notice any auction sale carried out at the premises of the mortgaged property. In other words, no auction sale of the property was done.” He called two witnesses to support this. But the 2nd respondent, the auctioneer, said there was an auction sale. Two defence witnesses confirmed this. In particular, DW2, Okonkwo O. I. Aguago, said:

"I know the plaintiff who was my landlord. On 26/1/88 there was a poster at Aba. On 1/2/88 I saw people converge at the premises of the property in dispute making offers to buy the property and my landlord the plaintiff was there in their midst. I was there when the auctioneer knocked his hammer for one woman after she had made some offers. I witnessed the sale to the 3rd defendant of the property in dispute." B

He was not challenged as to being a tenant of the appellant. The evidence as to poster is not one to be countenanced as the fact was not pleaded. C

The 3rd respondent who bought the property testified inter alia:

"I arrived at the venue before nine o'clock a.m. The first person I saw at the venue who wanted to buy offered N80,000.00. Somebody offered N90,000.00 while others offered N95,000.000. D At first I offered N100,000.00 before I offered N110,000.00. When I offered N110,000.00 there was no higher offer by anybody in the crowd. Then the auctioneer knocked his hammer for me - an indication that I have bought it."

This is the witness the appellant said acted as a front for the chairman of the Board of Directors of 1st respondent bank, one Chief Orji Uzor Kalu, being his mother. E

I do not think it has been denied that the 3rd respondent is the mother of the said Chief Kalu. It is not also disputed that Chief Kalu was the chairman of the board of Directors of the bank. But I think a few matters ought to be put right. First, what gave rise to the auction sale was not the making of the Chairman, Board of Directors. It was the failure of the appellant to settle his indebtedness with the bank. Second, auction sale attracts all and sundry. It affords an opportunity for anyone able to meet the challenges of an auction sale to participate in it unless he is precluded by any regulation, agreement, undertaking or by virtue of his special position in relationship with the transaction from so participating. F G

There is no evidence that the 3rd respondent acted as a front for the said Chief Kalu. It is not enough to allege that she is the mother of Chief Kalu, the Chairman of the Board of Directors of the 1st respondent. It must be proved that she acted as his front and that he used his position to the detriment of the appellant. She H

would seem to have gone to participate in the auction sale like any other person with the intention of a real bidder. She said she went there in her own right and the two courts below accepted that fact. After all, an auction is a manner of selling or letting property by bids at a place open to the general public, usually to the highest bidder by public competition. The prices which the public are asked to pay are the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition: See *Frewen v. Hays* (1912) 106 LT 516 at 518 P.C. per Lord McNaghten.

However, there are certain acts which will affect the proper conduct of an auction sale. These are improper or fraudulent acts which are likely to prevent the property put up from realizing its fair value. Collusion or want of good faith is an obvious one: See *Haddington Island Quarry Co. Ltd. v. Huson* (1911) AC 722 at 727; *Ekaete v. Nigeria Housing Development Society Ltd.* (1973) 6 S.C. 183 at 198. It is also recognised as another, any act which is likely to ‘chill’ the sale, for example, the solicitor in a cause in which property is sold bidding for it; See *Nelthorpe v. Pennyman* 14 Ves. 517; 33 ER 619 per Lord Eldon, LC, who said: “It would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor in the cause is that the sale is immediately chilled”. See also *Mason v. Armitage* (1806) 13 Ves 25; 13 ER 204 at 208. As Lord Mansfield said in *Bexwell v. Christie* (1996) 1 Cowp. 395 at 396; 98 ER. 1150:

“The basis of all dealings ought to be good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder.”

I have held that Section 19 of the Auctioneers’ Law was not complied with. The effect of this would have been perhaps that an important condition for, what I might call, a popular auction sale not having been met, the sale would be held invalid. But a provision of another statute, Section 21(1) of the Conveyancing Act, 1881, applicable in Abia State, has interplayed with Section 19 of the Auctioneers’ Law. It provides:

“Where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not

be impeached on the ground that no case has arisen to authorise the sale, or that due notice as not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorised or improper or irregularly exercise of the power shall have his remedy in damages against the person exercising the power.”

This is obviously to protect a bona fide purchaser who merely purchased under irregular circumstances as no purchaser who is twinted with fraud or collusion can be expected to benefit from this provision. Equity will intervene since as said by Sir Lloyd Kenyon, MR, in *Twining v. Morrice* (1788) 29 ER 182 at 184, “It is not every contract which is entered into that a court of equity will carry into execution.”

In *Sanusi v. Daniel* (1956) SCNLR 288, the Federal Supreme Court per Jibowu Ag. FCJ., after considering Section 21(2) of the Conveyancing act in almost similar situation as this case observed D at page 291 thus:

“The appellant’s complaint is against an irregular exercise of the power of sale on the ground that there was a contravention of Section 19(1) of the Sales by Auction Ordinance. It seems to me that the title of the 2nd respondent cannot be impeached since the property was conveyed to him, and that the appellant’s remedy is in damages against the 1st respondent as provided by Section 21(2) of the Conveyancing Act, 1881.”

Section 19(1) of the Sales by Auction Ordinance is in pari materia with Section 19(1) of the Auctioneers’ Law. The property in question has been duly conveyed to the 3rd respondent following the auction sale. Nothing has been shown to have been done by her to attract the intervention of equity to deny her the right to the property.

For these reasons I too will dismiss this appeal as my learned brother, Kutigi, JSC., has done in his judgment which I had the opportunity to read in advance and do agree with. I abide by the costs as assessed by him.

H

TOBI JSC (Dissenting)

The appellant is the plaintiff. He is the mortgagor. The 1st respondent is a commercial bank. It is the mortgagee. The 2nd re-

spondent is the Auctioneer of the 1st respondent. The 3rd respondent is the purchaser of the mortgaged property.

By virtue of the lease dated 5th April, 1987, and registered as No. 35 at page 35 in volume 124 of the Lands Registry, Owerri, the appellant became owner of the property which is the subject of the litigation. As a customer of the 1st respondent, appellant applied for and was granted a loan of N60,000.00 in 1981. In consideration of the loan, appellant mortgaged the leasehold property to the 1st respondent.

Appellant and the 1st respondent entered into a Deed of Legal Mortgage. Exhibit B is that Deed. By Clause 1 of Exhibit B appellant and 1st respondent agreed that the loan will be paid within a period of twelve months or on demand. There was a breach of Exhibit B. The 1st respondent by Exhibits H and H2 demanded the sum owed. Exhibit H2 stated specifically that if the sum of N68,883.99 was not paid, the property will be disposed of.

Appellant could not pay the sum demanded in Exhibit H2. On Saturday, 30th January, 1988, appellant saw an advertisement in the Statesman Newspaper offering the property for sale by public auction. The Statesman Newspaper is Exhibit A. On Monday, 1st February, 1988, the property was sold to the 3rd respondent. Appellant said that he made frantic and last minute efforts to pay the loan but to no avail.

He filed an action asking for two reliefs:

“(a) A declaration that the Defendants are not entitled to sell the plaintiff’s property situate at and called No. 133 Aba-Owerri Road, Aba.

(b) An order to set aside any purported sale of the said property made by the Defendants on the 1st day of the February, 1988, or thereabout as being illegal and a nullity and damages for the wrongful act.

The matter went to trial. The Judge dismissed the appellant’s claims. He went to the Court of Appeal. That court also dismissed his appeal. He has come here.

Briefs were filed and exchanged. Appellant formulated the following issues for determination:

(1) Having rightly held that the award made by the trial court in favour of the 3rd Respondent was without jurisdiction, was the

Court of Appeal right to proceed to declare the 3rd Respondent the title holder of the rights, title and interest of the unexpired term of lease based on Exhibit B?

(2) Was the Court of Appeal right to have raised the question of waiver, thereby stating that Section 19 of the Auctioneers Law of Former Eastern Nigeria Laws, 1961, Vol. 1 does not apply due to waiver in clause 8 of Exhibit B? B

(3) Was the Court of Appeal right to hold that Exhibits H - H2, notices dated 15/5/81 and 30/5/85 were valid demand notices in respect of a proposed sale in 1988? C

(4) Is the decision of the Court of Appeal that there was an auction sale on the 1st February, 1998, correct and sustainable in the light of the pleadings and evidence before that Court?

(5) Does the manner in which the Court of Appeal resolved the issue of fraud and lack of good faith on the part of the 1st Respondent show an appreciation of the Appellant's complaints before that Court? D

(6) Was the Court of Appeal right not to have made any findings on issue whether Chief Orji Uzor Kalu was Chairman of the 1st Respondent's Bank at the material time and whether the sale to his mother the 3rd Respondent was not against public policy? E

1st and 2nd respondents formulated the following issues for determination:

"i. Whether the 1st Respondent satisfied relevant conditions precedent and was entitled to exercise its power of sale within the context of the mutual deed of legal mortgage. F

ii. Whether there was a valid auction sale of the mortgaged property resulting in the transfer of title by the 1st respondent to the 3rd. G

iii. Whether the appellant's several allegations or insinuation of fraud, collusion, bad faith and breach of public policy in the circumstances of the auction sale were sustainable and proved within the purview of the pleadings and available evidence."

3rd Respondent formulated the following issues for determination: H

1. Whether the title acquired by the 3rd Respondent to the property in question was dependent upon her counterclaim or upon the Deed of Assignment being Exhibit K executed in her favour.

2. Whether the Court of Appeal was right in holding that the Appellant is deemed to have waived his rights to any notice by virtue of clause 8 of Exhibit B signed by the Appellant.

3. Whether there is any justification to disturb or interfere with the concurrent findings of fact of both the High Court and the Court of Appeal on the issues of (a) validity of the demand notices (b) validity of the auction sale, and (c) non-proof of the allegation of fraud and collusion.”

Learned counsel for the appellant, Mr. Obianwu, submitted on Issue No. 1 that the Court of Appeal having held that there was no valid counterclaim, the court was wrong in law to have made an award in favour of the 3rd Respondent, since it was not the case made on the pleadings by either party, nor was there any such evidence and the 3rd Respondent did not ask for the said prayer. Contending that the court is not a charitable organisation to award largesse, counsel cited *Ekpenyong v. Nyong* (1975) 2 S.C. 71 at 80; *Chief Registrar High Court of Lagos State v. Vamos Navigation Limited* (1977) 1 S.C. 33 at 41 and *Union Beverages Ltd. v. Owolabi* (1988) 1 S.C. 233 at 246-247. Learned counsel submitted that the Court was wrong in decreeing title to the 3rd Respondent based on Exhibit B, who was not a party to the Deed. He cited *Ezeafulukwe v. John Holt Ltd.* (1998) 2 NWLR (Pt.432) 511 at 522. On the binding nature of pleadings, counsel cited *Osagbe v. Ojo* (1994) 6 NWLR (Pt. 349) 131.

On issue No. 2, learned counsel submitted that the Court of Appeal erred in law by holding that by virtue of clause 8 of Exhibit B, the appellant waived his rights to give notice by the Bank under Section 20 of the Conveyancing Act, 1881, or any law or custom in operation in Nigeria. It was the submission of counsel that waiver, being a special defence, must be specially pleaded. Citing *Abowaba v. Adesina* 12 WACA 18 and Order 25 Rule 22 of the High Court Civil Procedure Rules, 1988 of Imo State, applicable in Abia State, learned counsel contended that if the respondents wished to rely on Exhibit B as constituting waiver, they ought to have pleaded the effect of the document. He also contended that the court was wrong in raising the issue of waiver suo motu, without hearing the appellant, a procedure that has prejudicially affected the judgment. He cited *Umaru v. Abdul-Muttallabi* (1998) 11 NWLR (Pt.573) 247 at 260.

Learned counsel submitted that the sale of the property did

not comply with Section 19 of the Auctioneers Law, which required the giving of 7 days public notice made at Aba the principal town of the district where the mortgaged property is situate. Counsel cited *Pinnock v. Ollivant and Co.* 2 WACA 164, and *Union Bank of Nigeria Ltd. v. Ugwu* FCA/E/176 delivered on 26/11/86. Learned counsel pointed out that by virtue of clause 8 of Exhibit B, what the appellant B waived was his right to be given notice by the 1st respondent before the sale of the mortgaged property but not to a 7 days notice to the public, public notice of an intended genuine auction sale.

On issue No. 3, learned counsel submitted that the Court C of Appeal was in error when it held that Exhibit H sufficiently gave notice of demand to the appellant to pay the mortgage loan. Counsel argued that having not acted on the last notice issued on 30/5/85, the 1st respondent cannot subsequently wake up from slumber three years later and proceed to exercise its power of sale without giving D a fresh notice of demand and showing the appellant's indebtedness as at January, 1988. The 1st respondent, counsel submitted, by not acting on Exhibits H and H2 had waived its right to do so. He cited once again *Pinnock v. Ollivant and Co.* (supra). He argued that the case of *Chief Ojikutu v. The Agbonmagbe Bank Ltd.*, (1964) 2 All E NLR 277 referred to by the Court of Appeal in holding that Exhibits H, H1 and H2 are valid demand notices, is inappropriate as the case was one in which notice of foreclosure had been given. Counsel urged the court to set aside the conclusion of the Court of Appeal F on Exhibits H and H2 on the ground that it is perverse.

On Issue No. 4, learned counsel submitted that the finding of the Court of Appeal that there was an auction sale is perverse and since it is based on the evaluation of evidence, this court can re-evaluate the evidence of the witnesses. He cited *Motunwase v. Sorungbe* G (1988) 5 NWLR (Pt.92) 90 at 105; *Ume v. Okoronkwo* (1996) 10 NWLR (Pt. 477) 133 at 144; *Onwugbufo v. Okoye* (1996) 1 NWLR (Pt.424) 252 and *Awayale v. Ogunbiyi* (No. 2) (1986) 2 NWLR (Pt. 24) 626. Counsel also examined the evidence of DW1 and PW3 as H they related to whether there was an auction sale.

On Issue No. 5, learned counsel contended that the 1st respondent did not act in good faith and as such it was inequitable to allow the purported sale of the appellant's property to stand. It is the law that a mortgagee can only exercise his powers of sale if only he

acted bona fide; and the same would be liable to be impeached if there is any evidence of bad faith, counsel contended. He enumerated six incidents of what he regarded as bad faith on pages 18 to 20 of his brief.

On Issue No. 6, learned counsel submitted that the Court of Appeal was in gross error when it failed to make any finding on the issue whether Chief Orji Uzor Kalu was the Chairman of the 1st respondent's bank at the material time and whether the sale of the property to his mother, the 3rd respondent, is not liable to be impeached being against public policy. He argued that since the averment that Chief Orji Uzor Kalu, the Chairman of the 1st respondent's bank at the material time was the son of the 3rd respondent was not denied, this court should admit it in evidence. He cited *Honika Sawmill (Nig) Ltd. v. Hoff* (1994) 2 NWLR (Pt.326) 252 at 265; *Ohiaeri v. Akabeze* (1992) 2 NWLR (Pt.22) 1; *Odulaja v. Haddard* (1973) 11 S.C. 35 and *Nigerian Maritime Services Ltd v. Afolabi* (1976) 2 S.C. 79 at 81. Counsel urged the court to reverse the finding of the two courts that Chief Orji Uzor Kalu was Chairman of the 1st respondent at the time the action was already pending in court on the ground that it is perverse. He cited *Ogbubunjo v. The State* (1996) 6 NWLR (Pt.452) 78 at 88. Counsel urged the Court to allow the appeal.

Objecting to the appellant's application for substitution, learned counsel for the 1st and 2nd respondents, Mr. Anachebe, submitted that there is substantial legal distinction between a dissolved company as opposed to a company undergoing liquidation as the respondent bank. In the case of a dissolved company, it loses its legal personality upon dissolution and can no longer sue or be sued as in the case of dead human being. He cited *Opebiyi v. Oshoboja* (1976) 9-10 S.C. 195; *Nzom v. Jinadu* (1987) 1 NWLR (Pt.51) 533.

In the case of a company undergoing liquidation, or in respect to which a provisional liquidation has been appointed, the sick company does not lose its legal personality prior to its dissolution. All that is required prior to institution of legal proceedings or continuation of pending legal proceedings is merely leave of court enabling fresh proceedings to be filed or for the pending proceedings to be continued against the company in respect of which a provisional liquidator has been appointed, counsel argued. He cited Section 417 of the Companies and Allied Matters Act 1990, and the following cases: *Opebiyi*

v. Oshoboja (Supra) Nzom v. Jinadu (supra); and Cooperative and Commerce Bank (Nig) Ltd. v. Onwuchekwa (2000) 3 NWLR (Pt. 647) 65.

Learned counsel for the 1st and 2nd respondents submitted on Issue No. 1 that Exhibit B, being a written contractual document speaks for itself and the parties/court will not be permitted to impute/propound extrinsic or extraneous interpretation to it. He cited Union Bank of Nigeria Plc v. Professor Ozigi (1994) 3 NWLR (Pt. 144) 385 at 400; Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283; Salami v. NAL Merchant Bank of Nigeria Ltd (1990) 2 NWLR (Pt.130) 106; Bank of the North Ltd v. Aliyu (1999) 7 NWLR (Pt.612) 622 and Obikoya v. Wema Bank Ltd. (1991) 7 NWLR (Pt.201) 119. Relying on Oguchi v. FMBN Ltd. (1990) 6 NWLR (Pt. 156) 330 at 343 and Nigerian Housing Development Society v. Mumuni (1977) 11 NSCC 65, learned counsel submitted that even though by virtue of clause 7 of Exhibit B, there is no need for further recourse to the appellant upon his default in repayment. It is nevertheless settled law that once a mortgage debt had fallen due even if any stipulated notice to sell the mortgaged debt had not been given, the sale will nevertheless not be impeached. He submitted that by clause 8 of Exhibit 8 the appellant waived his right to be given any statutory notice including under the Conveyancing Act, 1881, or any other law. He cited Adeniji v. Onagoruwa (2000) 1 NWLR (Pt.639) 1 in respect of the evaluation, interpretation and adoption of relevant portions of Exhibit B.

In reply to the submission of learned counsel for the appellant on pleading waiver as a special defence, counsel submitted that there is no such provision in Order 25 Rule 22 of the High Court (Civil Procedure) Rules, 1988. He submitted in the alternative that having not objected to the admission of Exhibit B, the appellant could no longer take objection on appeal to the evaluation of the exhibit. He cited Abowaba v. Adeshina 12 WACA 18. Counsel however conceded that the requirement for special plea arises where waiver is to be imputed orally by conduct or vide an ambiguous document sought to be relied upon by the defence in such situation as might take the opposite party by surprise as opposed to situations as the instant where the documents containing the waiver clause is unequivocal, pleaded and admitted as documentary evidence by both parties to

it. He cited *Mbeledogu v. Aneto* (1996) 2 NWLR (Pt.429) 157; *Odua Investment Ltd. v. Talabi* (1991) 1 NWLR (Pt. 170) 761 and *Arize v. NNPC* (1991) 1 NWLR (Pt. 166) 258.

Referring to paragraph 21(c) of the Amended Statement of Claim and page 96 of the address of counsel at the trial court, where
B he referred to Section 19 of the Auctioneers Law in relation to the appellant's statutory right, learned counsel submitted that there was no argument in the trial court in respect of right of the public to 7 days notice, an issue which was never canvassed in the lower courts.
C He submitted that the appellant cannot enforce or take benefit of a contractual or statutory right/provision made in favour of a third party, in this case, the public. He cited *UBN v. Penny-Mart Ltd.* (1992) 5 NWLR (Pt.240) 228 and *Ikpeazu v. ACB Ltd* (1965) NMLR 374. On the issue of not pleading waiver, learned counsel submitted that the appellant cannot suffer any prejudice or miscarriage of justice as he
D admitted being aware of the terms of Exhibit B, including clause 8.

Learned counsel submitted that failure of the mortgagee to give statutory or contractual notice cannot vitiate sale of the mortgaged property to an innocent purchase. He cited *Nigerian Housing Development Society v. Mumuni* (1977) 11 NSCC 65. Such failure
E to gave contractual notice where necessary can only entitle the mortgagor to damages for breach of contract. He cited *Pinnock v. Ollivant & Co. Ltd.* 2 WACA 164. Counsel distinguished the facts of *Pinnock v. Ollivant & Co.* 2 WACA 164 from the facts of this case.

In response to the submission of counsel for the appellant on Exhibits H and H2, learned counsel contended that the allegations that several payments were lodged by the appellant into the account to settle the loan were not pleaded. Besides, the appellant did not disclose the source of that piece of information including vide Exhibit
F G (the statement of claim), which the appellant disputes in its entirety, counsel argued. Since the appellant did not dispute that the time for repayment had become due necessitating exercise of right of sale by the 1st respondents, the court is entitled to rely on interpretation and evaluate contents of agreement or documents placed before it and not embark on voyage of discovery of extraneous meanings/
H imputations, however ingeniously reasoned, unless the wordings of the agreement are ambiguous as to compel the court to ascertain the intention of the parties, learned counsel argued. He cited *Oparaji*

v. Ohanu (1999) 9 NWLR (Pt. 618) 290; Oduye v. Nigeria Airways Ltd. (1987) 2 NWLR (Pt.55) 126 and Obikoya v. Wema Bank Ltd. (1991) 7 NWLR (Pt. 210) 119.

On Issue Nos. 2 and 3, learned counsel submitted that failure on the part of the appellant to specifically plead the allegations of fraud, collusion, bad faith and breach of public policy against the respondents in the circumstances of the auction sale and proved at the trial are prejudicial to the case of the appellant who has now raised the issues on appeal. Citing Section 138 of the Evidence Act and the cases of Nsirim v. Omuma Construction Co. Ltd. (1994) 1 NWLR (Pt. 318) 1 and Okufunmise v. Falana (1990) 3 NWLR (Pt.136) 1 at 16, learned counsel submitted that allegations of crime inclusive of fraud, and collusion made in civil cases must be proved beyond reasonable doubt. Since the allegations of fraud or collusion were not pleaded and particulars furnished or evidence in support adduced, the court should discountenance any allusion to allegation of fraud or collusion by the appellant in his brief. Urging the court to expunge any evidence adduced in support of the allegations at the trial, counsel cited Makinde v. Akinwale (2000) 2 NWLR (Pt.545) 435; Opeola v. Opadiran (1994) 5 NWLR (Pt.344) 368; Adejumo v. Ayantegbe (1999) All NLR 468; Adegbenro v. Attorney-General (1962) All NLR 428. Counsel also submitted that the appellant ought to have specifically pleaded bad faith and that it is insufficient if he pleaded that an act was done “without just cause”. He cited Alhaji Wada v. Chief Alkali of Birnin Kebbi (1962) All NLR (Pt.2) 783.

Learned counsel took time to deal with the allegations of fraud, collusion, bad faith and breach of public policy made by appellant at pages 18 to 20. He responded to all the allegations from pages 20 to 25 of his brief. He cited the following cases: Ikeanya v. ACB Limited (1991) 7 NWLR (Pt.205) 626; Bendel Insurance Company Limited v. Edokpolor and Company Limited (1986) 4 NWLR (Pt.118) 725; Ole v. Ekede (1991) 4 NWLR (Pt.167) 569; Eka-Eteh v. Nigerian Housing Development society Limited (1973) 6 S.C. 183; Alhaji Balogun v. Alhaji Labaran (1988) 6 SCNJ 71; Garba v. State (1999) 11 NWLR (Pt.627) 422; Makinde v. Akinwale (2000) 2 NWLR (Pt.645) 435; Woluchem v. Gudi (1981) 5 S.C. 291; and Adekunle v. Adeboye (1992) 2 NWLR (Pt.223) 305. He urged the court to dismiss the appeal.

Learned counsel for the 3rd respondent, Chief Uche, submitted on Issue No. 1 that the issue raised by the appellant in his Issue No. 1 is nothing but a storm in a tea cup. Counsel contended that the counter-claim was properly filed. He cited *Ogbonna v. Attorney-General of Imo State* (1992) 11 NWLR (Pt.270) 647 at 675. Counsel submitted that the title acquired by the 3rd respondent to the property was not dependent upon her counterclaim but by virtue of the Deed of Assignment validly transferring title to her. Counsel argued that once a power of sale becomes exercisable and it is exercised, the subsequent purchaser acquires valid title and once a valid assignment has been made by the mortgagee to a third party bona fide and for valuable consideration, the title cannot be impeached. He cited *Awojugbagbe Light Industries Ltd. v. Chinukwe* (1995) 4 NWLR (Pt.390) 379.

Learned counsel submitted on Issue No. 2 that the appellant's waiver of the right to be given notice by the 1st respondent under Section 20 of the Conveyancing Act, 1881, was not raised suo motu by the court. He contended that the 1st respondent raised the issue at pages 9 and 11 of its brief. Citing the cases, of *Olatunde v. Obafemi Awolowo University* (1998) 5 NWLR (Pt.549) 178 at 195; *Mbeledogu v. Aneto* (1996) 2 NWLR (Pt.429) 151 at 167; *Haruna v. Savannah Bank of Nigeria* (1995) 2 NWLR (Pt.377) 326 at 339 and clause 8 of Exhibit B, learned counsel submitted that appellant waived his right to the notices.

Counsel contended that since Exhibit B embodied the terms of the contract in a written document, extrinsic evidence would not be admissible to add to, vary, subtract from, or contradict the terms of such written instrument. Parties were presumed to have intended what they said in a document so that the words must be construed as they stand. He cited *Union Bank of Nigeria Ltd. v. Ozigi* (1994) 4 NWLR (Pt.333) 385 at page 389. If a mortgagee exercises his power of sale bona fide for the purpose of releasing his debt and without collusion with the purchaser, the court will not interfere even though the sale is disadvantageous unless the price is so low as in itself to be evidence of fraud, counsel argued. He cited *Bank of the North Ltd. v. Alhaji Muri* (1998) 2 NWLR (Pt.536) 159; Learned counsel submitted that even where an auction sale is made without the requisite publicity or notice, the mortgagor will only be indemnified by

the mortgagee in damages, rather than being a ground for setting aside the sale. He cited *Majekodunmi v. Co-operative Bank Limited* (1997) 10 NWLR (Pt.524) 198; *Sanusi v. Daniel* (1956) NSCC 85 and *Oguchi v. Federal Mortgage Bank Ltd.* (1990) 6 NWLR (Pt.156) 330.

On Issue No. 3, learned counsel submitted that issues Nos. 3, 4 and 5 and 6 of the appellant's brief for determination are all issues of concurrent findings by both the Court of Appeal and the trial High Court which this court will not ordinarily disturb or interfere. He cited *Elendu v. Ekwoaba* (1998) 12 NWLR (Pt. 578) 320 at 339; *UCA (Nig.) Ltd. v. Fasheyitan* (1998) 11 NWLR (Pt. 573) 179 at 187; *Okeke v. Agbodike* (1991) 14 NWLR (Pt. 638) 218 and *Vanderpuye v. Gbadebo* (1998) 3 NWLR (Pt. 541) 271. On the allegation that the 3rd respondent's son was the Chairman of the 1st respondent, learned counsel submitted that apart from the fact that the allegation was very vague, the appellant did not prove it. He cited Sections 134 and 136 of the Evidence Act and the cases of *Moses Ola and Sons Ltd. v. Bank of the North Ltd.* (1992) 3 NWLR (Pt...) 377 at 391; *Kpansanagi v. Shabako* (1993) 5 NWLR (Pt.291) 67 and *Ikeanyi v. ACB Ltd.* (1991) 7 NWLR (Pt.205) 626 and 640.

On the allegation of fraud, learned counsel submitted that where fraud is alleged, it must be specifically pleaded and particulars of the fraud given and where the commission of a crime like fraud is in issue, the party alleging must prove it beyond reasonable doubt. He cited *Ikoku v. Oli* (1962) 1 SCNLR 307 and *High Grade Maritime Services Limited v. First Bank of Nigeria Limited* (1991) 1 NWLR (Pt. 167) 290 at 294. Counsel pointed out that neither did the appellant in his pleadings specifically plead the particulars of the alleged fraud nor did he have any concrete proof of his allegations, thus the Court of Appeal had no hesitation in concurring with the findings of fact of the trial court on the issue.

Learned counsel contended that the property was not sold at undervalue, pointing out that the exercise of the power of sale by an auction is not meant or expected to be a bonanza for the defaulter. To counsel, if a mortgagee exercises the power of sale bona fide for the purpose of realizing the debt, the court will not interfere even though the sale is disadvantageous to the mortgagor.

It was the submission of learned counsel that the 1st and 2nd

respondents acted in good faith in the auction sale and the 3rd respondent also bought the property in good faith. To him, there was nothing to show bad faith irrespective of the unsubstantiated accusations of the appellant. The 1st respondent, counsel argued, was entitled to conduct the sale in such a manner conducive to their benefit and not for the benefit of the appellant. Citing *Moses Ola and Sons Ltd. v. Bank of the North Ltd.* (supra), learned counsel submitted that the only obligation incumbent on a mortgagee exercising his power of sale is that he should act in good faith. A mortgagee exercising his power of sale whether under an expressed or statutory power is entitled to conduct the sale in such a manner as he may think conducive to his benefit unless the deed contains any restrictions as to the mode of exercising the power, counsel argued.

On the issue of efficacy of demand notice tendered as Exhibits H1 and H2, learned counsel submitted that the notices did not abate and there was no waiver whatsoever. The 1st respondent, counsel contended, was not bound to make any concessions or to suspend the exercise of its power of sale since no consideration moved from the appellant and there was no binding agreement between the parties in that regard. Referring to clause 7 of Exhibit B, learned counsel argued that the clause provided that the Bank may sell the mortgaged property after the date appointed for repayment. He cited *Emecheta v. Ogueri* (1997) 8 NWLR (Pt. 516) 323 on the issue of waiver by the appellant.

Dealing with the issue of contradictions in the evidence of witnesses, learned counsel submitted that in normal course of events, it is expected that witnesses may not always speak of the same fact or event with equal and regimented accuracy. He contended that the contradictions in the evidence in question are not only unsubstantial but are also immaterial. He cited *Egangbedo v. The State* (1989) 4 NWLR (Pt. 113) 57 at 83 and *Nwokoro v. Onuma* (1999) 9 SCNJ 63 at 66 and 67. On the evaluation of evidence of witnesses, counsel pointed out that the decision of the Court of Appeal was not based on the credibility of witnesses and so the appellant cannot complain. He cited *His Highness, Oba Omoborunola II v. The Military Governor of Ondo State* (1998) 14 NWLR (Pt. 584) 89 at 91. Counsel, like his colleague for the 1st respondent, dealt with the sanctity of Exhibit B and cited the case of *Union Bank of Nigeria Ltd. v. Oziigi* (1994)

4 NWLR (Pt. 333) 385 at 389. He urged the court to dismiss the appeal.

Learned counsel for the appellant in his reply brief submitted that the leave that is required under Section 417 of CAMA is for proceedings of action pending or instituted at the Federal High Court. He cited *FMBN v. NDIC* (1999) 2 NWLR (Pt. 591) 333. He also submitted that the facts of the case of *CCB (Nig.) Ltd. v. Onwuchekwa* (2000) 3 NWLR (Pt. 647) 65 are distinguishable from the facts of this case. He cited *Abeke v. NDIC* (1995) 17 NWLR (Pt. 406) 228. Counsel finally submitted that the application for substitution before this court is properly made. To him, it will serve no useful purpose to continue with the proceedings against a company (i.e. the 1st Respondent) that is on the verge of being dissolved when the provisional liquidator statutorily empowered to stand in its place is available.

Let me take the preliminary objection as to substitution. I entirely agree with learned counsel for the appellant that Section 417 of the Companies and Allied Matters Act, 1990, leave requirement is only applicable to the Federal High Court. That was the decision of this court in *Federal Mortgage Bank of Nigeria v. Nigeria Deposit Insurance Corporation* (1999) 2 NWLR (Pt. 591) 333, where Ogun-dare, JSC., said at page 365:

“In any event, what is prohibited by Section 417 except with leave of court, is an action or proceeding pending or instituted in the Federal High Court for that is the meaning of the word “court” as used in the Section - see Section 650 of the CAMA. I think, therefore, that the court below was in error when it held that leave was required before the plaintiff could proceed with its motion against the respondent in the High Court of Lagos State.”

It is clear that the application was not made to the Federal High Court. Learned counsel for the 1st and 2nd respondents stated at page 1 of the respondents’ brief in opposition to the appellant’s application for substitution that the ‘application for substitution of the 1st Defendant on record by NDIC is premised on the appeal to the Supreme Court filed pursuant to leave of the Court of Appeal granted on 25/6/97.....’ The objection therefore fails.

Let me take first the issue of counter-claim. The Court of Appeal said at pages 280 and 281 on the counter-claim:

“In seeking the amendment 3rd Respondent sought leave to

amend her Statement of Defence without prayer to set up a counter-claim. In his judgment the learned trial Judge treated the said paragraph as a counter claim. Appellant has attacked the treatment of paragraph 24 aforesaid as a counter-claim as erroneous in law as in brief of argument and the grant of the relief based upon it as
 B legally incorrect and be set aside. A counter-claim to quote from Bairamien, JSC., in *Oyegbola v. Esso Wa* (1966) 1 All NLR 170 is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectively as in an independent action. The
 C counter-claim must be directly related to the principal claim but not outside of and independent of the subject-matter of the claim. There is no doubt that paragraph 24 of 3rd Respondent's amended statement of defence was not emphatic that the claim was by way of counter-claim as stated in Order 25 rule 16 *supra*..... Be that as it may, the claim in paragraph 24 of 3rd Respondent's amended
 D statement of defence was really unnecessary and superfluous having had a deed of assignment legally and validly executed in her favour she was a title holder of the rights, title and interest of the unexpired term of the lease based on Exhibit B."

E The Court of Appeal held that the counter-claim was incompetent. That is the clear implication of what the court said at page 281 and 282:

"In conclusion, all the issues raised by the appellant in his appellant's brief of argument were all resolved against the appellant
 F for the reasons given in this judgment as a consequence of which the appeal of the appellant is, dismissed as after due consideration of the law all the issues are found to be unmeritorious except the issue of incompetent counter-claim raised against the 3rd Respondent." (Underlining for emphasis only)

G The procedure for setting up a counter-claim is well established in law. It is the usual practice to commence a counterclaim immediately after the defence. It could be on the same page with the defence or on a fresh or separate page. There is no rule of the thumb. It depends upon the state of the individual pleadings. The important thing is that it should follow immediately after the defence and that is
 H the meaning of the conjunction "and" found in most Rules of court.

By our practice, a counter-claim is clearly marked "COUNTER-CLAIM" and the defendant, who in his apparently changed status

of plaintiff, avers in numbered paragraphs his claim which finally ends in the relief or reliefs sought. A counterclaim, though related to the principal action, is a separate and independent action and our adjectival law requires that it must be filed separately. The separate and independent nature of a counter-claim is borne out from the fact that it allows the defendant to maintain an action against the plaintiff as profitably as in a separate suit. It is a weapon of defence which enables the defendant to enforce a claim against the plaintiff as effectually as an independent action. As a matter of law, a counter-claim is a cross action with its separate pleadings, judgment and costs. It is almost in a world of its own. But a counter-claim cannot be inconsistent with the plaintiff's claim in the sense that it cannot erect a totally different case from that of the plaintiff. See *Oyegbola v. Esso West Africa Ltd.* (1966) 1 All NLR 17; *Nigerian Ports Authority v. CGFC* (1974) 11 S.C. 81; *Biode Pharmaceutical Industries Ltd. v. Adsell Ltd.* (1986) 5 NWLR (Pt. 46) 1070; *Fabunmi v. Agbe* (1985) 1 NWLR (Pt. 2) 299; *Phillips v. Rajaiye* (1961) LLR 15; *Elliot Saville and Company v. Mallam Lansari* (1957) NNLR 165; *Emaphil Limited v. Odili* (1987) 4 NWLR (Pt.67) 915 at 938.

What is the procedure or arrangement adopted in the 3rd respondent's amended statement of defence? The 3rd respondent's amended statement of defence which is on pages 43 to 51 contains 24 paragraphs. In paragraph 24, the last paragraph, the 3rd respondent averred:

"WHEREFORE the 3rd Defendant claims against the Plaintiff as follows:

(a) declaration of this Honourable court that the 3rd defendant is the lawful owner of No. 133, Aba/Owerri Road, Aba, by virtue of the Deed of Assignment registered as No.42 at page 42 in volume G 419 of the Land Registry, Owerri.

(b) An Order of the plaintiff to give up possession of the said premises.

(c) An Order for the payment by the plaintiff over the 3rd defendant of all the rents paid or payable in respect of the premises since 1st February 1988 to date."

What did the learned trial Judge say about the so-called counter-claim? He came to the following conclusion and ordered as follows at page 116 of the Record.

“On the 3rd defendant’s counter-claim, it is yet uncertain what amount the plaintiff has collected as rents on the property from 1/2/88 till date. This court cannot make an order based on uncertainty. I hold that 3rd defendant is the lawful owner of the property at No. 133, Aba/Owerri Road, Aba with effect from 1/2/88. I hereby
 B order the Plaintiff to give up vacant possession of the said No. 133 Aba-Owerri Road, Aba, to the 3rd defendant on or before the 3rd day of August, 1992. In the final result, the Plaintiff’s claims are hereby dismissed.”

C It is clear from the first two sentences that the learned trial Judge had problem with the claim for rent. But that is not an important point for the purposes of this appeal. The important point is what the Court of Appeal said about the so-called counter-claim? At the expense of prolixity and for the needed emphasis, I should say that the Court of Appeal regarded the counter-claim as incompetent, and

D I entirely agree with that court.

It is clear from the procedure adopted by the 3rd respondent that paragraph 24 alone does not qualify as a counterclaim. I have not come across a counter-claim of only one paragraph. Although the law does not provide for a minimum number of paragraphs in
 E a counter-claim, I am pretty certain in my mind that one paragraph cannot in law make a counter-claim. Is it possible for the single paragraph to narrate the story of the counter-claim as well as the relief sought? I think not. I therefore agree entirely with the Court of
 F Appeal when that court came to the conclusion that the counter-claim is incompetent.

A counter-claim is a conspicuous process which must be clearly donated by the statement of defence. It is not a secret or obscure document which the court and the plaintiff must use due diligence and strength to locate in the statement of defence. On the contrary,
 G it is one clear process which the court and the plaintiff can easily identify. Even a plaintiff who is a layman, in the sense that he is not a lawyer, can easily identify a counterclaim as it is clearly written on the face of the pleadings of the defendant. In my humble opinion, paragraph 24 does not constitute a counter-claim.

H The pitch of the submission of learned counsel for the appellant is that since the Court of Appeal held that the counter-claim is incompetent, it lacked the jurisdiction to give judgment in favour of

the 3rd respondent. Dealing “with paragraph 24 of the 3rd respondent’s amended statement of defence, the Court of Appeal said at page 281 of the Record:

“Be that as it may, the claim in paragraph 24 of the 3rd Respondent’s amended statement of defence was really unnecessary and superfluous having had a deed of assignment legally and validly executed in her favour she was a title holder of the rights, title and interest of the unexpired term of the lease based on Exhibit B.”

By the above, the Court of Appeal relied on Exhibit K and not on the counter-claim and that was the court’s apparent basis for the final order dismissing the appeal of the appellant. Although the court did not specifically mention Exhibit K, it is the deed of assignment from the 1st respondent to the 3rd respondent, which the court mentioned above.

There is one crucial aspect and it is the submission of learned D counsel for the appellant that the Court of Appeal granted the 3rd respondent relief she did not claim. Learned counsel submitted at page 7 of the appellant’s brief:

“The Appellant submits that having held that there was no valid counter-claim, the Court of Appeal erred in law to have made an award in favour of 3rd Respondent, since it was not the case made on the pleadings by either party nor was there any such evidence and the 3rd Respondent did not ask for the said prayer. This was, with respect, a gratuitous award made without jurisdiction. A Court, it has been decided, is not a charitable organisation to award largesse. It is without power to award to a claimant what he did not claim.”

In view of the fact that I have dealt with the first leg of the submission as it relates to the counter-claim, I will not repeat myself. I should rather take the issue of the Court of Appeal making an award which was not claimed in favour of the 3rd respondent. I do not intend to take the issue from the point of view of the counter-claim but I should take the issue from the finding and conclusion of the Court of Appeal on paragraph 24 of the amended statement of defence. That is the relief paragraph. It is the paragraph that the Court of Appeal held to be “unnecessary and superfluous.” The court therefore did not rely on the paragraph. The court, as I have said, relied on Exhibit K to give judgment in favour of the 3rd respondent.

In view of the fact that the court pronounced paragraph 24 of

the amended statement of defence as “unnecessary and superfluous,” there was no relief available to the 3rd respondent. This is because paragraph 24 which contained Exhibit K, by the pronouncement of the Court of Appeal, no more existed. Accordingly the Court of Appeal had no jurisdiction to make the following order as it affected the 3rd respondent:

“The appeal is dismissed, the claims of the appellant are dismissed like the decision of the lower court in its entirety. Having dismissed the appeal the respondents are entitled to costs. Acting judicially and judiciously, I fix the costs as follows... I also award the sum of N1,500.00 in favour of the 3rd Respondent against the appellant.”

What is the legal implication of the above order as it relates to the 3rd respondent? The legal implication is clear when the final order of the trial Judge is taken. Since I have reproduced the order above, I should not repeat it. The legal implication of the order of the Court of Appeal, when taken together with the order of the trial Judge, is that the 3rd respondent is the lawful owner of the property at No. 133, Aba/Owerri Road, Aba, with effect from 1/2/88, and that the appellant must give up vacant possession of the said property to the 3rd respondent on or before the 3rd day of August, 1992. I hold that the Court of Appeal had no jurisdiction and competence to give the above order after coming to the conclusion that paragraph 24 of the amended statement of defence is unnecessary and superfluous and that the counter-claim is incompetent.

I should like to correct an error on the part of the appellant before I leave the issue of the counter-claim and paragraph 24. Counsel claimed at page 8 of his brief that the Court of Appeal said that the counter-claim was “unnecessary and superfluous.” With respect, the court did not say such a thing. The Court of Appeal held that the counter-claim is “incompetent.” The court also held that paragraph 24 of the amended statement of defence was “unnecessary and superfluous;” not the counter-claim.

Let me take Exhibit B. It is the Deed of Legal Mortgage between the 1st respondent and the appellant. The first issue is whether the waiver clause in Exhibit B was duly pleaded? Clause 8 of Exhibit B provided as follows:

“The borrower hereby expressly waives his right to be given

notice by the Bank under Section 20 of the Conveyancing Act, 1881, or under any law or CUSTOM in operation in any part of the Federal Republic of Nigeria before the sale of the mortgaged property.”

Dealing with the above, the Court of Appeal said at pages 271 and 272 of the Record:

“In Exhibit B clause 8 supra the appellant herein expressly B
waived his right to be given notice by the Bank under Section 20
of the CONVEYANCING ACT 1881 or under any law or custom in
operation in any part of the Federal Republic of Nigeria before the
sale of the mortgaged property... Applying the decision in Abiro v. C
Elemo (1983) 1 SCNLR 1, such waiver is permissible, it is only a
constitutional right like fundamental right of fair hearing that a waiver
is not permissible. So with respect, Section 19 of Cap. 12 supra does
not apply due to waiver in clause 8 of Exhibit B.”

Although learned counsel for the 1st and 2nd respondents D
argued at page 8 of his brief that waiver need not be pleaded, he
argued with the same breath at page 15 that the appellant’s conten-
tion that the 1st respondent was held to have waived exercise of its
right of sale of the mortgaged property, a contention inherent in the
definition of waiver, was not pleaded and therefore this court should E
not countenance it. And so, when the issue goes against the 1st re-
spondent, his client, he contends that waiver need not be pleaded
and when he uses the same principle of law against the appellant, he
takes the opposite view. While the point is conceded that an advocate F
should be sensitive and loyal to his client’s case, such sensitivity and
loyalty should not exceed required boundaries, particularly the duty
the advocate owes the court to present the law correctly, even if it is
against his client.

What is the position of the law pleadings in respect of the G
defence of waiver? Waiver as an equitable defence must be specifi-
cally pleaded by the defendant. See *Abowabe v. Adesina* 12 WACA
18; *Dama v. Lion of Africa Insurance Co.* (1970) NNLR 84. It is
elementary law that parties are bound by their pleadings and facts
not pleaded will go to no issue. In other words, evidence on facts not H
pleaded will not avail the party relying on the evidence. See *Chinda*
v. Amadi (2002) 7 NWLR (Pt. 767) 505; *Okhwarobo v. Aigbe* (2002)
9 NWLR (Pt. 771) 29; *Adetoro v. Ogo Oluwa Kitan Trading Co. Ltd.*
(2002) 9 NWLR (Pt. 771) 157; *Omega Bank (Nig.) Plc. v. OBC* (2000)

16 NWLR (Pt. 794) 483.

A related point is that since waiver was not pleaded, it was not available to the Court of Appeal to raise it suo motu and resolve it suo motu. While a court has the jurisdiction to raise an issue suo motu. It has no jurisdiction to resolve it suo motu. In our adversary system of adjudication, a court of law should be most reluctant to raise issues suo motu. When it does that, the parties must be given an opportunity to react to the issue before a decision is taken. The Court of Appeal did not follow this procedure. The court was in serious error for not giving the right to counsel to react to the issue of waiver which it raised suo motu.

There is yet another point in respect of the defence of waiver and the point raised by learned counsel for the appellant. It is that, assuming the defence of waiver is available to the respondents (without so conceding), the appellant only waived his rights to notice to him. This is quite a brilliant submission. Clause 8 in Exhibit B is very clear on that. I can quote the wordings here at the expense of prolixity:

“The appellant herein expressly waived his right to be given notice by the Bank under Section 20 of the CONVEYANCING ACT 1881.”

By clause 8 of Exhibit B, the appellant can only waive his right to the statutory notice under the Auctioneers Law of Former Eastern Nigeria, 1963. He cannot waive the right to notice of members of the public or third parties who will be interested in the auction sale. After all, it is good law that a party cannot waive the legal right of members of the public because the right does not belong to him. One cannot waive a right that belongs to some other person or persons.

Learned counsel for the appellant relied heavily on Section 19 of the Auctioneers Law of Former Eastern Nigeria. The Section provides in part:

“No sale by auction of any land shall take place until after at least seven days public notice thereof made at the principal town of the district in which the land is situated and also at the place of the intended sale....”

The rationale behind Section 19 is to ensure that interested members of the public participate in the auction sale, and not a few persons. It is one Section which is designed to stop any collusion

amongst the mortgagee, auctioneer and or buyer, relevantly in this appeal, the 1st, 2nd and 3rd respondents, respectively.

By the provision, a minimum of seven days notice is required to be issued to the members of the public. What happened in this case? Did the 1st respondent satisfy the statutory notice of seven days in Section 19? If not, why not? B

Exhibit A is the notice of intention to sell the property. It is the Statesman Newspaper publication of Friday, 30th January, 1988. There is evidence that the auction sale was fixed for Monday, 1st February, 1988. This gave a notice of only two days, as opposed to the seven days minimum notice. C

The Court of Appeal held that Section 19 of the Auctioneers Law of Former Eastern Nigeria was not applicable because of the waiver clause No. 8 of Exhibit B. I have held that the waiver clause in Exhibit B cannot be invoked because waiver was not duly pleaded by the respondents, and even if duly pleaded, the waiver in Exhibit B did not extend to members of the public. Flowing from that, I am of the firm view that Exhibit A clearly breached the provision of Section 19 of the Auctioneers Law. D

In *Pinnock v. Olivant and Co.* (1934) 2 WACA 164, the claim was to set aside a sale made by the 1st defendants GB Olivant and Company Limited as Mortgagee-Vendors to the 2nd defendant, of certain land at Naswam under the power of sale in a Deed of Mortgage granted by the plaintiff to the 1st defendants, and for redemption. The ground upon which the claim was based was that the sale was effected without one calendar month's previous notice being given to the plaintiff of the intention to exercise the power of sale as stipulated in the Deed of Mortgage. Graham Paul, J., delivering the leading judgment of the West African Court of Appeal, stressed the importance of public notice. He said at page 166: E

"There was no notice given either to the public in general or to the mortgagor in particular of this proposed sale. I think that the most important point of the appellant's case was not put forward by his counsel." F

In his concurring judgment, Kingdom, CJ., said at page 168: H

"Equity has always aimed at protecting a mortgagor from unreasonable treatment at the hands of a mortgagee at a time when his necessities may have placed him at the mercy of the mortgagee;

and has looked with jealousy upon any attempt to counteract or oppose its interference in behalf of the mortgagee in the present case appears to me to be wholly reasonable.”

What comes out from Pinnock is the following: (1) The need for the public to be notified of the sale of mortgage property. (2) The need on the part of the court to protect the mortgagor from unreasonable treatment by the mortgagee; treatment which could be likened to a conduct of ‘Shylock’ in the literature play of Merchant of Venice. And the relevant evidence here on the unreasonable treatment is the so-called waiver clause 8 of Exhibit B. A person who is in desperate need of money to execute a project can agree to any terms, including clause 8 in order to obtain his facility. All he needs is money and he can do anything to get the loan, even the most cruel conditions. This court should in appropriate cases rise to the aid and support of mortgagors to declare such clauses as against human conscience and public policy. I do hope that day will come. This case does not provide that opportunity.

Learned counsel for the 1st and 2nd respondents made all efforts to distinguish the facts of this case from those of Pinnock. He was quick in saying that Pinnock is a case of persuasive authority. Much as I appreciate his efforts, I am firmly of the view that Pinnock came out excellently on the need to give the public notice and that, in my view, applies adequately to the issue in this appeal. I had earlier made the point that if the waiver clause in Exhibit B is functional; it is clearly restricted to the appellant’s right to notice and not the right of the public to notice. I entirely agree with learned counsel that Pinnock, being a decision of the West African Court of Appeal, is a persuasive authority. I allow myself to be persuaded by the authority and I am hereby persuaded and therefore adopt the decision as it relates to notice to members of the public. It is a sound judgment.

In the unreported case of Union Bank of Nigeria Limited v. Ugwu, FCA/E/176 delivered on 26/11/86, Kolawole, JCA., dealt with Section 19 of the Auctioneers Law Cap. 12, Laws of Eastern Nigeria. He said:

“The other aspect of the Plaintiff’s plea is that the sale on the 5th January, 1974, was made without publication as required by law. I am of the view that any public auction must be conducted in accordance with the Auctioneers Law Cap.12 of Laws of Eastern

Nigeria. Where the mandatory provisions of the law are not complied with, it is my judgment that any sale conducted on 5th January, 1974, did not comply with Sections 19, 20 and 21 of the Auctioneer Law.”

In *Chief Oseni v. American International Insurance Company Ltd.* (1985) 3 NWLR (Pt. 11) 229, the Court of Appeal held that the auction sale not having been conducted in accordance with the provisions of Sections 19 and 20 of the Sales By Auction Law of Lagos State in that the notice of auction sale published in the issue of *Concord Newspaper* of 28th of February, 1984, fell short of the requirement of, at least, seven days notice before the sale as provided by law, was not valid. B
C

In *Taiwo v. Adegboro* (1997) 11 NWLR (Pt. 528) 224, the Court of Appeal held that where there is non-compliance with Section 19 of the Auctioneers Law of Kwara State in the sale of mortgaged property by auction which requires that seven days notice be given after the notice of sale is pasted, the sale is invalid. D

In *Ihekwoaba v. African Continental Bank Ltd.* (1998) 10 NWLR (Pt. 571) 590, the Court of Appeal held as follows: (1) The requirement of Section 19 of the Auctioneers Law, Cap. 12, Laws of Eastern Nigeria, 1963, to the effect that no sale by auction of any land shall take place until after at least seven days’ public notice thereof made at the principal town of the district which the land is situated and also at the place of the intended sale is mandatory. (2) When a public notice of an auction sale of land is given, it must be allowed to last at least seven days before the sale takes place. Thus no sale can validly take place within less than seven days from the day the public notice is put out both at the principal town of the district in which the land is situated and the very place the land intended to be sold is. E
F
G

And finally, in *Fojule v. Federal Mortgage Bank of Nigeria* (2001) 2 NWLR (Pt. 697) 384, the Court of Appeal held that by virtue of Section 19 of the Auctioneers Law of Northern Nigeria no sale by auction of any land shall take place until after, at least, seven days public notice thereof made at principal town. This provision of the law, the court held, is very clear and unambiguous and there is no lacuna in the provision to be filled by reference to any other law. H

Although all the above decisions are merely of persuasive authority, like *Pinnock*, I adopt the decisions as they relate to the

construction or interpretation of Section 19. They have stated the correct position of the law.

Did the appellant plead the Auctioneers Law of Former Eastern Nigeria? He did. In paragraph 21 (c) of the Amended Statement of Claim, the appellant averred:

B “The Plaintiff states that the purported auction sale did not conform with the Sales of Auction Laws of Eastern Nigeria 1963 and shall therefore contend at the trial that the purported sale of the said property is invalid in law.”

C In my view, paragraph 21 (c) clearly pleads, not only the Law, but the effect of the Law on the sale of the property to the 3rd respondent. This is in conformity with the law of pleading, which requires that relevant documents by their very nature are invariably material facts which should be pleaded.

D In *Ipinlaiye II v. Chief Olukotun* (1996) 6 NWLR (Pt. 451) 148, Iguh, JSC., said at page 166:

E “Consequently, where the contents of a document are material, it shall be sufficient in any pleading to aver the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material such as in cases of libel.”

F I will find it extremely difficult to agree with the view that because Section 19 of the Law is not specifically pleaded, evidence cannot be heard in respect of the non-compliance with the section as it relates to the giving of seven days notice. With the greatest respect, that will be too abstract and technical for my liking. This court has come of age or arrived at an age where it must do substantial justice in the enforcement of the judicial process. And what is more, the respondents did not aver in their pleadings that paragraph 21(c) is not adequate pleading. As a matter of fact, counsel for the 1st and 2nd respondents used the sub-paragraph and applied it in his argument. In my view, this court is not competent to raise the issue suo motu without giving the appellant the opportunity to react to it. The case law is in great proliferation. Let me save my time in citing some.

H The aspects of doing substantial justice and the respondents not raising the issue apart, I do think that, that technical position is in line with the trend or flow of the case law. I say this because this court had even taken a step further by holding that documentary evidence

need not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded. In *Odunsi v. Bamgbala* (1995) 1 NWLR (Pt. 374) 641, Adio, JSC., said at page 667 and I quote him in extenso:

“The complaint of the appellant was that Exhibits D1 to D4 were not pleaded by either of the parties and should, therefore, not have been admitted or used for the purpose of deciding any issue in the case. There was substance in the submission, made for the respondents, that only material facts should be pleaded in pleadings and that as the plaintiffs pleaded the payment of annual rents by the father of the defendant and led evidence to that effect, Exhibits D1 to D4 were admissible. The legal position is that documents in support of facts pleaded need not be pleaded and they can be tendered in support of facts pleaded. See *Monier Construction Co. v. Azubuike* (1990) 3 NWLR (Pt. 136) 74.”

In *Ipinlaye II v. Chief Olukotun* (1996) 6 NWLR (Pt. 453) 148, this court rightly took the same position. Iguh, JSC., said at page 166:

“Documentary evidence, however, needs not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded.”

The appellant averred in paragraphs 13, 14 and 22 (a) as follows:

“13. On Saturday 30th January 1988, the plaintiff saw a publication at page 10 of the *Statesman Newspaper* of that day headed “Auction Notice” advertising the plaintiff’s said house for sale. The advertisement was inserted by the 2nd defendant on behalf of the 1st respondent.

14. The said advertisement hereby pleaded put the date of sale of the plaintiff’s house for Monday 1st February, 1988, at 8 a.m.

22(e) The Plaintiff states that the alleged power of sale of the 1st Defendant was improperly and unreasonably exercised.”

Paragraphs in pleadings are not read in isolation but read together to obtain the total story of the parties. Giving a community reading to the above paragraphs together with paragraph 21 (c) make me to come to the inescapable conclusion that the appellant pleaded the non-compliance with the Auctioneers Law, pleadings which form

the legal basis for the following evidence:

P.W.1, with the National Archive, Enugu, said in evidence-in-chief:

“It is part of our duty at the Archive to keep custody of the Nation’s newspapers. I had the opportunity of keeping copies of
B Statesman Newspaper of 30/1/88. This is the newspaper at p. 10 Publication of the Advert by the Auctioneer. This is the Publication.”

The Statesman publication of 30/1/88 was thus admitted as Exhibit A. Exhibit A is the advertisement duly pleaded in paragraph
C 14 of the Amended Statement of Claim. And what is the content of Exhibit A? The appellant, as PW.2 said in evidence-in-chief at page 61:

“On Saturday 30/1/88 I came across a publication in Statesman at p. 10 advertising the mortgaged property for sale by the 1st defendant. The sale was to be carried out by the 2nd defendant on
D behalf of the 1st defendant on Monday morning of 1/2/88.”

The above evidence is the basis for the pleading in paragraph 13 of the Amended Statement of Claim.

The averments in paragraphs 13 and 14 gave rise to paragraph 22 (a). I can still go further. It is the averment in paragraph
E 22 (e) that results in the averment that the purported auction sale did not conform with the Auctioneers Law of Eastern Nigeria. This is clearly underscored in Exhibit A which gave only two days notice to the public, the two days being Saturday and Sunday, were not
F working days.

Let me pause here to make a point that learned counsel for the 1st and 2nd respondents was wrong when he submitted that bad faith and collusion were not pleaded. Paragraph 22 (c) pleaded bad faith while paragraph 22 (d) pleaded collusion.

I should now take the issue of bad faith canvassed by appellant, the opposite of good faith, apparently canvassed by the respondents. Learned counsel for the appellant enumerated a number of actions taken by the respondent or events which he submitted constituted bad faith. He dealt with the specific actions and events from page 12 of his brief. I will take them in turn.

H On the issue of demand notices, learned counsel submitted that there was bad faith on the part of the 1st respondent in that it accepted payments up to 2nd August, 1988, and waited for three

years only to suddenly advertise for the sale of the property, without affording the appellant the opportunity to redeem his property. To learned counsel, this cannot be sanctioned by a court of equity and it smacks of fraud.

With respect to learned counsel, I do not agree with him. In the first place, the issue of demand notices is not well taken. The mere fact that the 1st respondent waited for three years before he took action from the last date when the appellant made payment in liquidation of the mortgage loan, has nothing to do with the principle of equity. I ask: where has the 1st respondent violated the principle of equity, and which principle or maxim specifically? If anything, I see the 1st respondent doing equity, if I can use that language unguardedly. By the three years, there was a lull, which in my view, was to the advantage of the appellant in terms of liquidation of the mortgage loan. I do not see any bad faith at all.

Learned counsel said at page 12 of the brief the following: It smacks of fraud” What smacks of fraud? Is it fraud on the part of the 1st Respondent for not issuing a fresh notice three years after Exhibit H2? I am surprised how counsel has forced the criminal offence of fraud to a civil matter which is not in any way related to fraud. I do not see any fraudulent action on the part of the 1st respondent. And what is more, fraud, as a crime must be specifically pleaded and proved. In *United African Company Limited v. Taylor* (1936) 2 WACA 70 at 71, the Judicial Committee of the Privy Council said:

“In the opinion of their Lordships there is no rule which is less subject to exception than the rule that charges of fraud and a’fortiori charges of criminal malversation or felony, against a defendant ought not to be made at the hearing of an action unless, in a case where there are pleadings, those charges have been definitely and clearly alleged so that the defendant comes into court prepared to meet them.”

See also *Tamakloe v. The Basel Trading Company Ltd.* (1940) 6 WACA 231; *Usenfowokan v. Idowu* (1969) NMLR 77; *Fabunmi v. Agbe* (1985) 1 NWLR (Pt. 2) 299; *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1.

The appellant did not specifically plead fraud in his Amended Statement of Claim. Of course, he did not give evidence on it. Even if he had given evidence, the evidence should have been to no issue.

This is because evidence not born out from the pleadings will not be admitted. The contention of learned counsel on fraud therefore fails.

Dealing with Exhibit A, learned counsel submitted that the publication and the timing of sale was to make it impracticable to redeem the property. Citing *Davis v. Symons* (1934) Ch. 442, learned
B counsel submitted that Exhibit A is no more than “a device to fetter the right of redemption.” It does not appear that counsel for the 1st and 2nd respondents on the one hand, and counsel for the 3rd respondent, on the other, responded to this very important submission.

C Let me analyse Exhibit A. The notice was given on Friday, 30/1/88 and the auction sale was fixed for Monday, 1/2/88. This gave only two days notice to the public and the two days were Saturday and Sunday. I take judicial notice of the fact that the 1st respondent does not open for business on Saturdays and Sundays and accordingly, proof is not necessary. After all, Saturdays and Sundays are
D work-free days in Nigeria. See Section 73 of the Evidence Act.

A number of questions arise from this careful arrangement and or fixture. Why was notice to the public given in a weekend of Friday? Why was the sale fixed for the following Monday? Why was the notice for sale not given for Monday, Tuesday, Wednesday or
E Thursday? If the notice was given on a Friday, why was the sale not fixed for the following Friday to satisfy Section 19 of the Auctioneers Law? I still have questions galore but I can stop here.

There is evidence that the appellant made desperate efforts
F on Monday, 1/2/88, the day of the sale, to make payments but to no avail. He said at page 61 of the Record:

“The sale was to be carried out by 2nd defendant on behalf of the 1st defendant on Monday morning of 1/2/88. I went to the 1st defendant/bank with the sum of N96,000.00 to pay to stop the sale, but the 1st defendant refused to accept the payment saying they
G had instruction to accept payment from me at that time which came from the head office. Subsequently, I proceeded to the Head Office at Enugu. Before going there, I left the premises of the 1st defendant/bank to 133 Aba/Owerri Road, the mortgaged property, where one of my tenants told me that the auctioneer and one woman came, inspected the property and left. I later found out that the people who
H came were the 2nd and the 3rd defendants,”

The 2nd respondent, the auctioneer, in his evidence-in-chief,

said at page 78 of the Record:

“I had to make a physical inspection of the property to assure myself that it was the one marked out for sale. On arrival, I saw the plaintiff who greeted me and told me he was making a frantic effort to pay off the debt to the 1st defendant. After one week I waited in vain without the plaintiff coming to pay anything. On 25/1/88 the plaintiff’s property was advertised for sale which was published on 30/1/88.” B

The evidence of the 2nd respondent confirms that of the appellant that he made frantic efforts to redeem the property. The difference in the evidence however is that while the evidence of the appellant was that he made frantic efforts on the day of the sale, that of the 2nd respondent was that he told him of the frantic effort on another day. C

The evidence of the appellant in respect of the efforts he made to pay the sum of N96,000.00 and the refusal of the 1st respondent to accept same is consistent with paragraphs 15, 16 and 17 of the Amended Statement of Claim. The paragraphs averred: D

“15. The plaintiff in a state of panic met most of his friends and relatives including Mr. John Oguejiofor who in sympathy raised the sum of over N96,000.00 for him. E

16. By 7.30 a.m. on Monday 1st February, 1988, the Plaintiff was at the 1st defendant’s Milverton Avenue Aba Branch to pay in the money in order to stop the advertised auction sale. He went with Mr. John Oguejiofor. F

17. But to the plaintiff’s shock, both the cashiers and accountant in the bank refused to accept the money from him informing the plaintiff that they had instruction not to accept any money from him. The Plaintiff managed to get in to see the manager who confirmed that they had instructions from above not to accept payment from him. He advised the plaintiff to go and meet the auctioneer - 2nd defendant.” G

In apparent answer to the above paragraphs, paragraphs 19 and 20 of the 1st and 2nd respondents’ statement of defence averred: H

“19. Paragraphs 15 and 16 of the Statement of Claim are irrelevant and an after-thought intended to whip up undue sympathy and prejudice to vitiate a sale which has already taken place. The plaintiff will be put to the strictest proof of the averments set out in

the said paragraphs 15 and 16.

20. Paragraphs 17, 18 and 19 of the Statement of Claim are cooked up and hearsay and the Plaintiff will be put to the strictest proof thereof.”

B Paragraph 19 is evasive. It did not specifically deny the truth of the averments in paragraphs 15 and 16. The law is trite that traverse or denials of specific facts pleaded in the statement of claim must be specific and not general or evasive. See *Olale v. Ekwelendu* (1989) 4 NWLR (Pt. 115) 396.

C The averment in paragraph 20 of the 1st and 2nd respondents’ statement of defence is that paragraph 17 of the Amended Statement of Claim is hearsay. With respect, this is not correct. There is no hearsay in paragraph 17. In his evidence, Lawrence Obikube, Advances Officer of the 1st respondent said unequivocally at page 82:

D “It is not correct that plaintiff brought N96,000.00 to the 1st defendant/bank before the sale to offset the debt.”

This evidence is not pleaded. It cannot be accommodated in the evasive paragraph 19. That apart, the evidence is inconsistent with the evidence of PW2 who corroborated the evidence of the E appellant that he gave him the sum of N96,000.00.

Witness said at page 73:

F “I then gave the plaintiff the sum of N96,000.00. Afterwards, plaintiff came back to me with the money saying that the 1st defendant refused to accept payment of the money from him.”

The learned trial Judge did not deal with this important area of the efforts by the appellant to save the property from sale. He did not find it necessary to do so most probably because of the conclusion he arrived at in respect of Exhibit A, when he said pages 112 and 113:

G “It follows from foregoing that what is necessary before sale is the Demand Notice. The advertisement notice appears irrelevant. Once a demand for repayment is made and if no payment is made after elapse of a reasonable time, the mortgagee can proceed with the sale of the mortgagor’s property... Accordingly the Notice Exh. A in this case is valid and cannot vitiate the sale.”

H With respect, that is not the position of the law. Pre-sale demand notice to a mortgagor is quite different and distinct from

notice to the public advertising for the sale of a mortgaged property. While the H group of exhibits covered the former, Exhibit A covered the latter. In my view, Exhibit A has to comply with Section 19 of the Auctioneers Law to be valid. I have said so a couple of times. I therefore sound repetitive but that is for emphasis.

In sum, Exhibit A was made in bad faith. I entirely agree ^B with learned counsel for the appellant that Exhibit A was “a devise to fetter the right of redemption.” Exhibit A, in my opinion, was a fiat accompli in so far as the redemption of the mortgaged property is concerned. A mortgagor has a legal right to redeem a mortgaged ^C property which is not yet liable to an auctioneer’s most unfriendly hammer, and the mortgagee has a corresponding duty to open his doors for the mortgagor to redeem the property. A mortgagee who out-smarts or cunningly out-plays a mortgagor in the process of redemption of a mortgaged property will not be allowed by equity to ^D sell the mortgaged property at his pleasure. This is because he has cruelly not considered the pains of the mortgagor in parting with his property in circumstances that are not legal. A mortgagee has no legal right to block the passage of redemption of a mortgaged property before auction. In other words, a mortgagee cannot place a clog on ^E the mortgagor’s wheel of redemption. Redemption of the property is a legal right to the mortgagor which he is entitled to exercise in law until the property is auctioned. Putting it in another language, the mortgagor’s right of redemption is open till the sale of the property ^F unless the deed of mortgage provides otherwise or to the contrary. It is clear to me that the 1st respondent did not act in good faith in its entire management of the purported sale of the mortgaged property as evidenced by Exhibit A.

And that takes me sequentially to the contention of the ap- ^G pellant that the 3rd respondent was the mother of the Chairman of the 1st respondent. Learned counsel for the appellant submitted that the respondents did not deny that the purchaser of the property was the mother of the Chairman of the 1st respondent. What is the state of the pleadings? Paragraph 18 of the Amended Statement of Claim ^H averred thus:

“From the bank, the plaintiff hurried home at about 8.10 a.m., where he was informed that a man and a woman drove to the premises, hovered around and left. One of the tenants of the house

told the plaintiff that the man who came to the premises, was the 2nd defendant and that the woman with him was the mother of one Chief Kalu who was the Chairman of the board of Co-operative and Commerce Bank of Nigeria Limited - 1st defendant.

B In answer to paragraph 18, the 3rd respondent averred in paragraph 8 of the Amended Statement of Defence:

C “The 3rd Defendant vehemently denies paragraph 18 of the Statement of Claim, and states that she never at any time came back to the premises with the 2nd Defendant before the sale. The said paragraph 18 is merely designed and fabricated to becloud issues and whip up undeserved sympathy. The Plaintiff conspicuously did not state the identity of the informant, and how his informant knew the 2nd and 3rd Defendants, and knew the children of the 3rd Defendant. The said paragraph is only an after-thought.”

D I agree with learned counsel for the appellant that the averment in paragraph 18 of the Amended Statement of Claim that the 3rd respondent is the mother of Chief Kalu who was the Chairman of the 1st respondent, was not specifically denied by the 3rd respondent. As it is, paragraph 18 is in two arms. The 3rd respondent denied the first arm but did not deny the second arm. Although the 3rd respondent E denied in paragraph 14 of the Amended Statement of Defence that she acted as a front to the actual man who wanted to acquire the property, she did not specifically deny the averment that she acted as a front for Chief Orji Uzor Kalu, her son who was the Chairman F of the 1st defendant’s board of directors at the material time.

In my view, the denials are not specific but highly evasive. I expected the 3rd respondent to deny that Chief Orji Uzor Kalu is not her son, if that was the correct position. She did not, rather she said at pages 87 and 88 of the Record:

G “It is not true that one Kalu Orji used me as a front to buy the property ... I know Chief Kalu Orji. It is not true that as at February, 1988, my son Chief Kalu Orji was the Chairman of the Board of Directors of the 1st defendant/Bank. It is true that he (Chief Kalu Orji) was once the Chairman of the Board of Directors of the 1st defendant/ Bank. That was in 1989. He assumed office as Chairman H of Board of Directors in April, 1989, and served in that capacity for three months only. It is not true that he (Chief Orji) was in 1988 Chairman of Board of Directors of 1st defendant/bank.”

I have carefully gone through the Amended Statement of Defence of the 3rd respondent and I cannot place my hands on any averment vindicating the above evidence. Both paragraphs 8 and 14 of the Amended Statement of Defence of the 3rd respondent did not aver to the fact that Chief Kalu is the son of the 3rd respondent. Similarly, there is no averment to the effect that Chief Kalu was the Chairman of the Board of Directors in April, 1989, and served in that capacity for only three months and that he was not Chairman of the 1st defendant in 1988. B

Since parties are bound by their pleadings and evidence which is at variance with the pleadings go to no issue; the averment of the appellant in paragraph 18 of the Amended Statement of Claim remains unchallenged. The law is that evidence not challenged is admissible. See *Egbunike v. ACB Ltd.* (1995) 1 NWLR (Pt. 375) 34; *Odunsi v. Bamgbola* (1995) 1 NWLR (Pt. 374) 641; *Broadline Entertainment Limited v. Monetary Maritime Corporation* (1995) 9 NWLR (Pt. 417) 1. D

There is another fairly curious aspect in respect of Chief Kalu and the Chairmanship of the 1st respondent. Lawrence Obikude, who gave evidence (see page 80 of the Record) as the 1st defendant did not know Chief Kalu. He was questioned under cross-examination whether he knew Chief Kalu. He replied at page 83: E

“I do not know him. Neither do I know the Chairman of Board of Directors of the 1st defendant/bank. I know only about the management. I have not heard of him nor had any personal contact with him.” F

Under cross-examination, witness admitted that he was employed in the Bank in 1979 and that at the time he gave evidence, he had served the bank for about seven years. He gave evidence in 1992, precisely on 11th May, 1992. Between 1979 and 1992 is thirteen years and not seven years. I am not pursuing that. It is fairly curious that somebody holding the position of advance officer does not know the name of the Chairman and any director of the Bank. I expect an office attendant to know the name of the Chairman. Assuming that Chief Kalu was not the Chairman at the material time, I expected witness to say so and tell the court the name of the Chairman at the material time. I am not pursuing that aspect. H

What then is the legal implication of the sanctity of paragraph

18? The legal implication is clear. Both the sale and the purchase were not bona fide but mala fide, unconscionable and against public policy. Equity will certainly frown upon a sale of property in an organisation in which a son is the head to a mother. I do not want to say more.

B Let me take Exhibit F. This is the instruction of the 1st respondent to the 2nd respondent to sell the mortgaged property. Learned counsel for the appellant submitted that the document had surreptitiously, cleverly and criminally the names cut off of the directors of 1st respondent, so as to shield Chief Orji Uzor Kalu.

C I do not think I will consider the submission in favour of the appellant. Although 1st and 2nd respondents averred to Exhibit F in paragraph 16 (b) of their Amended Statement of Defence, the appellant cannot in law use that paragraph to introduce the commission of offence. It is the law that before the appellant can legitimately raise the issue, he must plead it in his statement of claim with material
D particulars. Crime as an offence punishable by law must be specifically pleaded and proved. He ought to plead who committed the offence. He did not do that. He merely alleged in his brief that the names of the directors of the 1st respondent were cut off to shield Chief Orji Uzor Kalu. This is a most unfortunate allegation. I think
E the appellant went too far in making such allegation without pleading and proving same. Accordingly, I hereby reject the invitation of the learned counsel for the appellant to look at Exhibit F.

One contention of learned counsel for the appellant is that
F the property was sold for a ridiculously low price. In an auction sale, the mortgagee, who has a major interest in the property, is entitled to promote and take care of his interest in the sale. In an auction sale, the interest of the mortgagee is paramount and as long as the sale is conducted bona fide, a mortgagor has no legal basis to complain in respect of, or about a low price. Auction sale by its very commercial
G nature presupposes some reduction of the market price value as dictated by the price index. The auctioneer, in order to dispose of the goods, should attract the public by a lower price. As long as the price is not ridiculously low or grossly undervalued as to suggest a possible fraud or collusion amongst the mortgagee, the auctioneer and the buyer, the mortgagor has no legal ground to complain. See
H *Eka-Eteh v. Nigerian Housing Development Society Limited* (1973) 6 S.C. 183; *Union Bank of Nigeria Limited v. Professor Ozigi* (1991)

2 NWLR (Pt. 176) 677; Bank of the North Ltd. v. Alhaji Muri (1998) 2 NWLR (Pt. 536) 153. A price for goods in an auction sale cannot compete favourably with the current market value of the goods. The issue therefore fails.

Let me return to Exhibit B to make one important point. Both counsel for the respondents preferred very powerful and brilliant arguments based on the sanctity of contract, Exhibit B, being a contractual document. They cited a number of decision of this court and other courts to the effect that a court of law must read and interpret only the content of the contractual document and must not add to, or subtract from it. This is an elementary principle of law but is that the issue before this court? B
C

With respect, that is not the issue. The issue is whether Exhibit B, in the first place, can be invoked in this matter or whether it was properly invoked in the light of all the circumstances surrounding it as indicated above in this judgment. There is a clear distinction between the two issues for the purposes of dealing with the live issues in this appeal and we must keep the distinction straight. D

The law of sale by auction or auction sale protects the purchaser and that is the basis of the principle of law that a mortgagor's right essentially is in damages. The law has an important qualification and it is that the purchaser must have bought the mortgaged property in good faith, that is bona fide and not in bad faith, that is mala fide. The sympathies of the law on the purchaser will vanish the moment the court comes to the conclusion that the purchaser bought the property in bad faith. Bad faith on the part of the purchaser is a matter of fact to be deducted from the totality of the purchasing or buying conduct of the purchaser. Bad faith taints or better still, destroys a mortgage sale and therefore the property in the sale. E
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While I agree that the principle of law of caveat emptor will apply in respect of sale of mortgage property to a bona fide purchaser, the purchaser has a legal duty to prove that he bought the property bona fide and without any element bad faith. Where the court finds evidence of bad faith, then it is entitled to read mala fide into the transaction and that will be against the purchaser. H

There is yet another aspect. While I entirely agree with the position of the law that irregularities arising from the sale by way of lack of giving statutory notice to the plaintiff and sale of the property

at a low price per se may not vitiate sale of a mortgaged property, I think, and I feel very strongly that in order to enable the purchaser have the property for keeps, property must pass in the sale from the mortgagee to the purchaser. In other words, where in law property does not pass to the purchaser, what he has bought is a nullity ab initio. In such a situation or circumstance, a purchaser cannot be heard to rest his defence on good faith, on his part. The defence of good faith, in my humble opinion, will arise only when property can in law pass to the purchaser.

From the totality of the evidence in this matter, it is my view that the property in No. 133 Aba/Owerri Road, Aba did not pass to the 3rd respondent. By way of recapitulation, I am inclined to allowing this appeal for the following reasons:

(1) The Court of Appeal correctly came to the conclusion that the counter-claim was incompetent. Having come to that conclusion, and in view of the fact that what the court regarded as a counter-claim was the relief sought by the 3rd respondent, there was no relief available for the court to give judgment to the 3rd respondent, and so the Court of Appeal was not in a position to affirm the judgment of the learned trial Judge.

(2) The waiver which both courts relied upon against the appellant in Exhibit B was not pleaded, and even if it was pleaded, clause 8 therein was clearly restricted to the appellant and not the public. After all, the appellant cannot in law waive the right of members of the public to the seven days statutory notice required by Section 19 of the Auctioneers Law.

(3) And since Section 19 was not complied with, the sale was null and void ab initio.

(4) Exhibit A was made in bad faith as it was designed to outsmart the appellant. How else can one explain notice given on a Friday and sale taking place at 8.00 a.m. on a Monday!

(5) From the evidence, I do not think the 3rd respondent was an innocent purchaser. I am fortified by my conclusion above in respect of the relationship between the 3rd respondent and her son. In the light of the state of the pleadings, I have come to the inescapable conclusion that the son, Chief Kalu, was the Chairman of the 1st respondent at the material time when the 3rd respondent bought the property. Appellant contended that the 3rd respondent

fronted for her son. I do not want to go to that aspect. Let me restrict myself to the aspect that is covered by the evidence. There is utmost bad faith and clearly unconscionable and against public policy for the 1st respondent to sell the property to the 3rd respondent, the mother of their Chairman. This is clear evidence of collusion and to the knowledge and acquiescence of the 3rd respondent.

B

In sum, I allow the appeal. I set aside the judgment of the Court of Appeal in which the judgment of the High Court was affirmed. In other words, I also set aside the judgment of the trial court. I enter judgment in favour of the appellant. This appeal accordingly succeeds. I award N10,000.00 costs in this appeal in favour of the appellant. I also award N5,000.00 costs in favour of the appellant, as costs in the two lower courts.

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