

**SUPREME COURT OF NIGERIA**  
FRIDAY 11TH JULY, 2003. SC. 168/1999  
**CORAM:- U. MOHAMMED, A. I. KATSINA-ALU,**  
**U. A. KALGO, S. O. UWAIFO, A. O. EJIWUNMI, JJSC**

OWONIBOYS TECH. SERVICES LTD ..... APPELLANT  
AND  
UNION BANK OF NIG LTD ..... RESPONDENT

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APPEALS - Filing - Time limit - Court of Appeal Act s.25 - Appeal must be filed within time prescribed in the section - Whether ground is of law or mixed law and fact (H1)

APPEALS - Interlocutory appeals - Filing of - 1979 Constitution & Court of Appeal Act s.25 provisions - Must be complied with - And not be disregarded as mere technicality (H2)

MORTGAGES - Merger - An intention to create merger must be stated in documents executed by parties - Or such evidence that indicates such intention (H3)

ACTIONS - Proof - Burden of - Appellant has not led sufficient evidence - To shift the onus of proof of any particular point - To respondent (H4)

CONTRACTS - Mortgage deeds - Binding nature of - Since the parties have agreed to be bound by terms in Exhibits 4 D1 & 5 - Court cannot make a different contract for them (H5)

***FACTS***

Defendant/respondent granted an overdraft facility in the sum of N50,000 to plaintiff/appellant. The facility was increased to N100,000 and subsequently to N200,000. As collateral to the initial overdraft of N50,000, appellant had mortgaged the property in issue to respondent. That mortgage was appropriately consented to by the Governor of Kwara State. However during the subsequent increases of the initial sum, though mortgage deeds were executed by the parties in which the initial mortgage was recited and anchored

on, the subsequent mortgages did not receive Governor's consent as same were neither sought nor obtained. When respondent eventually advertised the property for sale due to the failure of appellant to pay debt owed, appellant obtained an *ex parte* order from the High Court of Kwara State restraining respondent from selling the property.

As a follow up, appellant instituted this action at the State High Court challenging the power of respondent to sell the property on the ground that the mortgages were illegal and unenforceable in that the last two of them which incorporated and allegedly superseded the first one did not receive the appropriate Governor's consent. Appellant also challenged the rate of interest being charged by respondent on the mortgages account. Following a further amendment of the statement of claim by appellant, respondent sought leave of trial court to further amend the Statement of Defence but leave was refused by the court. Respondent did not immediately appeal to the Court of Appeal, Ilorin against the ruling refusing leave. It rather awaited the final judgment (which was in favour of appellant) and then filed an appeal against same, making the interlocutory ruling one of the grounds of appeal. The court held in favour of respondent. Dissatisfied, appellant filed appeal at Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether the court below was right to hold that additional grounds of appeal Nos. 10, 11, 12, 13 & 14 filed before it were competent and arguable when the grounds were filed in contravention of the rules of the court below.*

*2. Whether the court below was right to have held that additional ground No. 13 filed before it was competent when the ground concerned an interlocutory ruling delivered more than 2 years before the ground was filed and no leave was sought nor obtained to argue same.*

*3. Whether the court below was right to have held that the principles of merger of mortgages was inapplicable to Exhibits 4, 5 and D1 and whether the further holding that the said exhibits were validly upstamped was not perverse.*

*4. Whether the court below was right to have held that the respondent could exercise the right of an unpaid mortgage when it did not file a counter-claim nor make out a case on the point.*

5. *Whether the court below was right to have held that the respondent was entitled to vary the rate of interest chargeably and whether without evidence the court could take judicial notice of the Central Bank monetary policy on which the parties did not join issue.*

6. *Whether the court below was right to have found that the appellant was indebted to the respondent when there was no counterclaim by the respondent and when the amount awarded to the respondent was never part of its claim at the trial.*

7. *Whether the court below was right to have set aside the well considered judgment of the trial court on all the issues agitated and in particular the issue of multiple entries in the appellant's account when there was no credible evidence from the respondent on the point and whether the cost awarded was not excessive."*

**HELD** (Unanimously dismissing the appeal per  
**EJIWUNMI JSC**)

*APPEALS - Filing - Time limit*

**1. Now, it is manifest that whether the appeal is based on grounds of law which enables the appellant to appeal as of right or the grounds are of mixed law and fact, the appeal must be filed within the time stipulated in the above provisions to ground the appeal. This means that if the appeal is against an interlocutory decision in a civil cause or matter, it must be filed within fourteen days from the date of the decision. This is also subject to the provisions of S. 25. Where it is against a final decision of the court, then the appeal must be filed within three months from the date of the decision. It is also manifest that by virtue of subsection 4 of Section 25 of the Court of Appeal Act, the court may extend the periods prescribed in subsections (2) & (3) of Section 25 of the Act.**  
(p. 2232 E)

*Interlocutory appeals - Filing of*

**2. It is common ground that the appeal was against an interlocutory decision of the High Court. It is also common ground that the appeal was not filed in compliance with the above**

**quoted provisions of the Constitution and subsections 2, 3 & 4 of Section 25 of the Court of Appeal Act, 1976. The argument of Senior Advocate of Nigeria, that this Court had in a number of cases observed that the expeditious trial of cases should not be delayed on account of interlocutory appeals is well taken. But that is not to say that if such appeals are to be heard with the main appeal in respect of the case, the provisions of the Constitution and the law with regard to interlocutory appeals should not be complied with. It is therefore my view that the observance of the law and the rules designated for appeals in respect of interlocutory appeals is not to be disregarded as a mere technicality. As it is not in dispute that the appeal against the interlocutory decision of the High Court to the Court below was not in accordance with the above quoted provisions of the Constitution and the law, the question raised in this issue is hereby resolved in favour of the appellant.** (p. 2232 G)

*MORTGAGES - Merger - Proof*

**3. I do not however agree with the contention of the appellant that a merger had occurred as a result of these transactions. In the instant case, what is under consideration is a simple process of borrowing money on a property made available by the appellant for that purpose.**

**For a merger to be created in such transactions, such an intention must be evinced in the documents from the documents executed by the parties, or such evidence as would indicate the intention of the parties that they envisaged a merger of the mortgages with one another. See Halsbury's Laws of England, 4th Edition, Vol. 16, par. 882, where the learned author said:-**

**".....Equity is not guided by rules of law as to merger, and both as regards the merger of a lesser estate in a greater, and a merger of a charge in the land, the question depends upon the intention, actual or presumed, of the person in whom the interests become united."** (p. 2240 A)

*ACTIONS - Proof - Burden of*

**4. It is argued for the appellant that the respondent ought to**

**have called evidence in respect of the clauses in the mortgage agreements. It is in my view difficult to understand the purport of the contention being made for the appellant by learned counsel. In the first place, it is expected that the onus is on the appellant who initiated this claim to prove its case. That has always been the guiding principle in our law.**

**I therefore do not see what evidence is required of the respondent when the respondent has not been shown to have led evidence of a kind which shifted the onus of proof of a particular point to the respondent.**

**It must be remembered that it was the appellant who initiated this case when its property was about to be sold for its failure to pay the debt owed to the respondent. The pleadings and evidence led at the trial were directed at showing that the debt was not established. Though the trial court upheld that position of the appellant, the court below has quite rightly rejected that finding of the trial court. (p. 2241 A)**

*CONTRACTS - Mortgage deeds - Binding nature of*

**5. For the resolution of the question raised by this issue, recourse must be had to Exhibits 4, D1 and 5, the mortgage deeds which no doubt formed the basis of the loan and overdraft facilities entered into by the parties. Now, if the parties have agreed between themselves upon the conditions for the formation of a contract, and as in this case those conditions were embodied in documents as in Exhibits 4, D1 and 5, then they are bound by the terms and conditions set down in the documents, and which was duly executed as was done in this case. Having so bound themselves, it is not the function of the court to make a contract for the parties.**

**In the instant case, each of the Exhibits 4, D1 and 5, the mortgage deeds has as their terms and conditions a clause 3 which reads thus:-**

***“All interest payable on the moneys hereby secured shall accrue due from day to day at the rate from time to time stipulated by the Bank and may be capitalised at such intervals as the Bank may from time to time prescribe but not more often than monthly and added to the moneys hereby secured and***

***shall thereupon bear interest accordingly at the rate aforesaid.***" (p. 2241 H)

## NOTABLE POINTS OF INTEREST

### **KATSINA-ALU JSC**

#### ***1. Leave was unnecessary for the interlocutory appeal***

Issue 2 is whether the ruling by the trial court refusing an amendment of the Statement of Defence should have been appealed within 14 days as of right or appealed thereafter only with leave of this court along with an appeal against the final judgment.

To raise the appeal on such a ruling as of right along with an appeal against the final judgment of the trial High Court would, in my view, depend entirely on the overall effect of such a ruling on the merit of the case.

The amendment sought for was meant to put the pleading in line with the evidence already led. It cannot be denied that the amendment sought forms an integral part of the structure of the case presented by the appellant. I think the Court of Appeal was right to hold that it was unnecessary to obtain leave to raise a ground of appeal on the facts of this case. (p. 2245 A/ D)

#### ***2. Governor's consent is unnecessary for the subsequent deeds***

Issue 3 raises the question of the principle of merger in regard to the mortgage transaction created by Exhibits 4, D1 and 5. Exhibit 4 was the deed of mortgage to secure the first loan of N50,000.00. The Governor's consent was obtained. The amount of loan was later raised to N100,000.00. A new deed of mortgage was executed - this is exhibit D1. Again the amount was raised to N200,000.00. Another deed of mortgage was executed, Exhibit 5. It must be borne in mind that Exhibits 4, D1 and 5 were concerned with one property which, by exhibit 4, the Governor's consent was obtained for the use of the property as a collateral for the loan transaction. What this means is that the Governor's consent is not required for the additional deeds of mortgage executed in exhibits D1 and 5. (p. 2245 G)

### **UWAIFO JSC**

#### ***3. Upstamping would have made the original deed sufficient***

***for all the transactions***

The said Exhibit 4 represents the actual mortgage of the property concerned for which the Governor's consent was obtained. That exhibit, as rightly argued by Mr. Ali, SAN, might have sufficed by upstamping it to reflect the increase in loan. Mr. Ali's contention of upstamping an original mortgage deed in case of increase in the loan first agreed, is right as I said, but purely on principle. To make it practical, the conveyancing procedure of drawing up such a deed must make provision for that contingency, so that by the mere endorsement of the deed with the amount of increase in the loan, it can be upstamped for the increase. This can be done as often as occasion demands without having to execute a new deed. (p. 2251 D) B  
C

***4. Governor's consent is not tied to amount of loan but to duration of mortgage*** D

The Governor's consent as indicated in Exhibit 4 has nothing to do with the amount of loan; the consent is for the alienation of the legal title in the property to the respondent (the mortgagee) in compliance with Ss. 22 and 26 of the Land Use Act, 1978, for the period of the mortgage transaction. So, no further consent was necessary just because further loans had been obtained upon the same collateral. (p. 2251 G) E

***REPRESENTATION***

Y. Ali, SAN, with S.A. Oke, Esq. and Taiwo Ayodele (Mrs.), for the Appellant F

Aliyu Salman, Esq., with Salman Salman, Esq., for the Respondent

***CASES REFERRED TO*** G

Ike v. Ugboaja (1993) 6 NWLR (Pt. 301) 539

Okubule v. Oyagbola (1990) 4 NWLR (Pt. 147) 73

Aderounmu v. Olowu (2002) 4 NWLR (Pt. 652) 253

Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (Pt. 498) 124

Osula v. Osula (1993) 2 NWLR (Pt. 274) 158 H

Adimora v. Ajufo (1988) 6 SCNJ 18

AP Ltd. v. Owodunni (1991) 8 NWLR (Pt. 210) 391

Savannah Bank Nig. Ltd. v. Ajilo (1989) 1 S.C. (Pt. II) 90

**STATUTES REFERRED TO**

Court of Appeal Act 1976, s. 25

Constitution of the Federal republic of Nigeria 1979, ss. 220, 221 & 222

Land Use Act 1978, s. 22

B Land Tenure Law Cap 59 Laws of Northern Nigeria 1963, s. 27

Land Registration Law Cap 58 Laws of Northern Nigeria 1963, s. 18

**BOOK REFERRED TO**

C Maggery & Wade, Law of Property, 4<sup>th</sup> Ed., pp. 892-893

**LEAD JUDGMENT BY EJIWUNMI JSC**

The thrust of this appeal filed against the judgment of the Court of Appeal, Kaduna Division, (Coram, Ogebe, M. Mohammed and D Muhammad, JJCA.), was for the purpose of overturning the judgment of that court which had reversed the judgment of the trial court. In that court, the appellant had commenced this action against the respondent for the following claims as per para. 32 of its further Amended Statement of Claim:-

E “(i) Declaration that the mortgages between the plaintiff and the defendant covering the plaintiff’s property, situate, lying and being at Taiwo Road, Ilorin, are illegal, unlawful, unenforceable and irregular.

F (ii) An order setting aside the mortgages.

(iii) Alternatively, declaration that the defendant is not entitled to sell any property of the plaintiff without complying with the Land Use Act and Auctioneers Law applicable to Kwara State.

G (iv) Declaration that the defendant is only entitled to charge on the plaintiff’s account interest at the rate prevailing when facility was granted to the plaintiff.

(v) Declaration that the debit balance in the account of the plaintiff is not a true and accurate reflection of the indebtedness of the plaintiff, if any, to the defendant.

H (vi) Injunction restraining the defendant by themselves their agents, servants and or privies or otherwise howsoever from selling the plaintiff’s property pursuant to the said mortgages.

(vii) Declaration that the deeds of mortgage registered as No. 122/122/1 and 45/45/6 respectively have been discharged by their



*incorporation in the deed registered as No. 94/94/8.*

*(viii) An order directing the defendant to pay to the plaintiff the sum of N500,000.00 or any amount the court may find the plaintiff entitled to recover from the defendant.”*

Following further Amended Statement of Claim filed by the appellant, the respondent also sought the leave of the court to file a further Amended Statement of Defence, but that application was refused by the learned trial Judge. That refusal by the learned trial Judge to grant the prayer of the respondent became one of the grounds of appeal in the appeal filed against the judgment of the trial court. The decision of the court below in that regard has also been the question in this appeal. It will be considered later in this judgment under the appropriate issue raised thereon.

I will now refer briefly to what transpired during the trial of this matter in the High Court. The appellant called two witnesses, namely, Isaiah Adeoti Adeniran, a chartered accountant who gave evidence as PW.1, and the PW.2 was Alhaji (Dr.) Aminu Ishola who described himself as the Managing Director of the appellant company. The respondent as defendant called one witness in the person of Mr. Remi Okulaja, a staff of the respondent company. During the course of the evidence of these witnesses, a number of documents were admitted as exhibits. The evidence given by these witnesses disclosed that the appellant has been the customer of the respondent for some time. In 1973, the respondent granted through the appellant an overdraft facility in the sum of N50,000.00. The facility was increased in 1976, to N100,000.00 and subsequently to N200,000.00. As collateral to the loan facility, the appellant mortgaged its property situate at Oja-Iya Taiwo, Road Ilorin. Before then, when the first loan facility was made available to the appellant, it duly obtained the consent of the Kwara State Governor to mortgage the property to the respondent. There was however a failure of repayment by the appellant of the facility granted. The respondent, sometime in 1988, made a demand for the repayment. As the appellant did not comply, the respondent then advertised for the sale of the mortgaged property. As a result of that action taken by the respondent, the appellant sought to restrain the respondent from selling the said property through a motion *ex-parte*. This was granted by the learned trial Judge on the 22nd of April, 1992. This was followed by the present action, which is now

the subject of this appeal. Upon those facts, the learned trial Judge after hearing addresses of counsel appearing for the parties delivered a considered judgment by which he granted all the claims of the appellant. As the respondent was dissatisfied with the judgment of the trial court, it appealed to the court below. Pursuant thereto, several grounds of appeal were filed. Following the hearing of the appeal, the court below allowed the appeal and the judgment of the trial court was set aside. This appeal is from that judgment of the court below. Briefs of Argument were thereafter filed and exchanged. In the brief filed on behalf of the appellant, the following seven issues were identified for the determination of the appeal. The respondent did not set down issues on its own, but adopted the issues set down in the appellant's brief. These are:-

*1. Whether the court below was right to hold that additional grounds of appeal Nos. 10,11,12,13 &14 filed before it were competent and arguable when the grounds were filed in contravention of the rules of the court below.*

*2. Whether the court below was right to have held that additional ground No. 13 filed before it was competent when the ground concerned an interlocutory ruling delivered more than 2 years before the ground was filed and no leave was sought nor obtained to argue same.*

*3. Whether the court below was right to have held that the principles of merger of mortgages was inapplicable to Exhibits 4, 5 and D1 and whether the further holding that the said exhibits were validly upstamped was not perverse.*

*4. Whether the court below was right to have held that the respondent could exercise the right of an unpaid mortgage when it did not file a counter-claim nor make out a case on the point.*

*5. Whether the court below was right to have held that the respondent was entitled to vary the rate of interest chargeable and whether without evidence the court could take judicial notice of the Central Bank monetary policy on which the parties did not join issue.*

*6. Whether the court below was right to have found that the appellant was indebted to the respondent when there was no counterclaim by the respondent and when the amount awarded to the respondent was never part of its claim at the trial.*

*7. Whether the court below was right to have set aside the well*

*considered judgment of the trial court on all the issues agitated and in particular the issue of multiple entries in the appellant's account when there was no credible evidence from the respondent on the point and whether the cost awarded was not excessive."*

Issue 1

I no longer need to consider this issue as learned counsel for the appellant withdrew the issue in the course of the hearing of the appeal. B

Issue 2

This issue raises the question as to whether the additional ground 13 was competent when the ground concerned an interlocutory ruling for which leave was not first sought and obtained to argue same. Briefly stated, the facts that led to this ground arose from the refusal of the trial court to allow the respondent, who was the defendant at the trial, to file a further amended Statement of Defence after it had granted a similar application to the plaintiff to file a further amended Statement of Claim. The trial court duly delivered a ruling disallowing the application of the respondent/defendant. It is common ground that the defendant/respondent did not appeal against that ruling immediately, but did so in the appeal filed against the judgment of the trial court. C D E

It is therefore contended for the appellant that the court below was wrong to have overruled that aspect of the objection raised to that ground of appeal that the failure to obtain the leave of the trial court or the court below to argue the appeal was a mere technicality. F The premise of the argument of learned counsel for the appellant that the court below was wrong, lies in the provisions of Section 221 (i) of the 1979 Constitution and Section 25(2) of the Court of Appeal Act. In his reply for the respondent, learned senior counsel contends that an appellant should not upon a mere technicality be denied the right to appeal against a decision which the party appealing considered to be against his interest. He therefore urged that the court below was right to have concluded that that appeal was properly before it. I think the question for consideration is not whether the right to appeal to the court below was denied to the appellant but whether the appeal was properly before the court in consonance with the provisions of Sections 220 and 221 (10) of the Constitution and Section 25(2) of the Court of Appeal Act, 1976. S. 220 (1) (b) G H

of the Constitution of 1979 provides for right of appeal as of right against interlocutory decision of the High Court. It provides thus:-

*“An appeal shall be from decision of a High Court to the Court of Appeal as of right in the following cases:-*

*(b) where the ground of appeal involves question of law alone*  
 B *decision in any civil or criminal proceedings.”*

But where the ground of appeal is of fact or mixed law and fact, there can be no appeal as of right. The appellant can only appeal with the leave of either the Court of Appeal or the High Court as  
 C the Constitution in Section 221(1) provides thus:-

*“Subject to the provisions of Section 220 of this Constitution, an appeal shall lie from decision of a High Court to the Court of Appeal with the leave of that High Court or the Court of Appeal.”*

The right to appeal from a High Court to the Court of Appeal  
 D is also governed by Section 222 (b) of the Constitution, which says that:

*“Shall be exercised in accordance with any Act of National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.”*

E ***Now, it is manifest that whether the appeal is based on grounds of law which enables the appellant to appeal as of right or the grounds are of mixed law and fact, the appeal must be filed within the time stipulated in the above provisions to ground the appeal. This means that if the appeal is***  
 F ***against an interlocutory decision in a civil cause or matter, it must be filed within fourteen days from the date of the decision. This is also subject to the provisions of S. 25. Where it is against a final decision of the court, then the appeal must be***  
 G ***filed within three months from the date of the decision. It is also manifest that by virtue of subsection 4 of Section 25 of the Court of Appeal Act, the court may extend the periods prescribed in subsections (2) & (3) of Section 25 of the Act.***

In respect of the issue as raised in this appeal, ***it is common***  
 H ***ground that the appeal was against an interlocutory decision of the High Court. It is also common ground that the appeal was not filed in compliance with the above quoted provisions of the Constitution and subsections 2, 3 & 4 of Section 25 of the Court of Appeal Act, 1976. The argument of Senior Ad-***

***vocate of Nigeria, that this Court had in a number of cases observed that the expeditious trial of cases should not be delayed on account of interlocutory appeals is well taken. But that is not to say that if such appeals are to be heard with the main appeal in respect of the case, the provisions of the Constitution and the law with regard to interlocutory appeals should not be complied with. It is therefore my view that the observance of the law and the rules designated for appeals in respect of interlocutory appeals is not to be disregarded as a mere technicality. As it is not in dispute that the appeal against the interlocutory decision of the High Court to the Court below was not in accordance with the above quoted provisions of the Constitution and the law, the question raised in this issue is hereby resolved in favour of the appellant.***

Issues 3, 4 and 5 would be considered together in this judgment. This is because the argument of counsel in respect of this matter are concerned with Exhibits 4, D1 and 5, the Deeds of legal mortgages executed by the appellant with the respondent and which led to this action. On this 3rd issue, learned counsel for the appellant admitted that Exhibit 4 is the deed of legal mortgage that was used to secure the first loan of N50,000.00 from the respondent in 1973, and the consent of the Governor was duly obtained in respect of that transaction. In 1976, the appellant's overdraft facility was increased to the sum of N100,000.00 and it was further increased to the sum of N200,000.00 upon the same property with which the loan facility was first granted in 1973. The subsequent facilities, though secured on the same property, Deeds of legal mortgages were executed between the parties, and marked as Exhibits D1 and 5 respectively. It is also common ground that no consent was received from the Governor in respect of the last two transactions that resulted in Exhibits D1 and 5. Before I consider what learned counsel conceives as the resultant effects of these transactions, it must be stated that the appellant commenced this action after the mortgaged property situate and lying at Oja-Iya Taiwo Road, Ilorin, was advertised for sale by the respondent. Before the property was so advertised, the respondent had written a letter dated 12/1/88 demanding the payment of the sum of N118,052.38 from the appellant. It was after the appellant had failed to respond to the letter of demand, that the property was

advertised for sale.

Now upon those admitted facts, it is contended for the appellant that there was a resultant merger of the legal mortgage Exhibit D1, with Exhibit 4 as it was executed in respect of the same property. And that Exhibit 5 also became merged with the earlier Exhibit 4 and B D1, which was also secured upon the same property with which Exhibit 4 was secured. Upon this, the learned counsel for the appellant, Y.O. Alli, SAN, submits in the appellant's brief thus:-

*"That under the equitable doctrine of merger, once an earlier deed of legal mortgage is incorporated into a latter one, the former ceases to exist on its own and it is in fact discharged. This rule is common sensical and logical. If this is not so, there arises the incongruous position that there will exist on the same property between the same parties more than one valid deed of legal mortgage. The D law disallows this.*

*On this point we pray this court to be persuaded by the Statement of Claim on this point in paragraph 979 of Halsbury's Laws of England, 4th Editions, to the effect that:*

*'by taking or acquiring a security of higher nature in legal valuation than one he already possess, a person merges and extinguishes his legal remedies upon the inferior security or cause of action.....'*

*This statement of the law should be preferred over the statement contained in paragraph 982 of the same work which suggest the contrary of the above."*

Now, before commenting on the above submissions made for the appellant, I deem it necessary to observe that I have searched in vain for where in Halsbury's Laws of England, 4th Edition, the above paragraphs were quoted. It would have been far more helpful if the G references had included the relevant volume of Halsbury. I will however examine the principle of merger, as I deem pertinent later in this judgment. Further support for the position envisaged for the appellant by reference to the Property and Conveyance Act of 1881, but again no reference was made to the particular section of the Act that H is in support of the proposition being made for the appellant by his learned Senior Advocate, Y.O. Alli, Esq. Reference was also made to Black's Law Dictionary for the definition of "merger" and also to Meggarty & Wade, Law of Property, 4th Edition, pages 892-893.

Basing himself on the above submissions with regard to his

perception about the “principles of merger”, learned counsel for the appellant therefore argued that since Exhibits “4” and “D1” have been merged into Exhibit “5”, they are no more effectual nor effective. The quantum of the right of the respondent, he further argues, is only traceable to Exhibit “5”. And as Exhibit D1, which was executed in 1976, was not made with the consent of the Governor, it is unenforceable. Similarly also, Exhibit 5 is not also enforceable against the appellant as it did not receive the consent of the Governor as they are in breach of the provisions of Section 22 of the Land Use Act, 1978, or Section 27 of the Land Tenure Law. Exhibit 4 is not also enforceable, having been merged with Exhibits D1 and 5.

In conclusion, it is argued for the appellant that the court below was wrong to have held that it was the appellant who had the duty to ensure that Exhibits “D1” and “5” received the consent of the Governor. The following cases were cited: *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124; *Lawal Osula v. Lawal Osula* (1993) 2 NWLR (Pt. 274) 158 at 175-176; *Savannah Bank Nig. Ltd. v. Ajilo* (1989) 1 S.C. (Pt. II) 90; (1989) 1 NWLR (Pt. 970) 305 at 326 - 327; *Paul Dickson & Anor. v. Solicitor General of Benue Plateau State* (1974) 5 S.C. 21; *Alhaji Labaran Nakyauta v. Alhaji Maikima* (1971) 6 S.C. 51.

In the respondent’s brief, the first contention made for the respondent is that there is no provision in the Land Tenure Law and the Land Use Act which requires that subsequent increases of overdraft facilities in favour of a customer of a bank in the position of the appellant must be with the consent of the Governor. It is his contention also that the consent given by the Governor in respect of Exhibit 4 remains valid and enforceable and that Exhibits D1 and 5 are also valid by virtue of the fact that the further overdraft facilities granted to the appellant was made upon the same property for which the Governor had granted consent in Exhibit 4. It is his further contention that the appellant who had the onus to prove that the lack of consent of the Governor in respect of Exhibits D1 and 5 vitiated the enforceability of the documents in respect of loan transactions failed to discharge that onus. In support of that submission, he cited, *Are v. Adisa* (1967) 1 All NLR 148; *Aladegbemi v. Fasanmade* (1988) 6 SCNJ 103. The learned Senior Counsel for the respondent also urged the court to hold that the cases cited by the appellant in support of

the proposition that Exhibits 4, D1 and 5 are not enforceable due to lack of Governor's consent do not support that contention. These cases are *Ibidapo v. Lufthansa* (supra); *Lawal Osula v. Lawal Osula* (supra); *Paul Dickson v. Solicitor-General of Benue -Plateau State* (supra); *Alhaji Labaran Nakyauta v. Alhaji Maikima* (supra).

B In his final submission in this issue, it is argued for the respondent that equity will not aid an appellant in this case who had derived benefit from a transaction and that it is unconscionable for him to now seek to avoid the liability that flowed from it. And he cited the following cases:- *Adimora v. Ajufo* (1988) 6 SCNJ 18; *AP Ltd. v. Owodunni* (1991) 8 NWLR (Pt. 210) 391; *Owosho v. Dada* (1984) 7 S.C. 149 at 174; *Awojugbagbe Light Industries Ltd. v. Chinukwe* (1993) NWLR (Pt. 270). I think that the question that should first be considered in respect of this issue is with regard to what is expected of  
C  
D a holder of a Statutory Right of Occupancy in terms of the provisions of Section 27 of the Land Tenure Law Cap. 59 and Section 18(1) of the Land Registration Law, Cap. 58, Laws of Northern Nigeria, 1963 applicable at the time of the transactions in Kwara State in respect of Exhibit 4. In the course of this judgment, the court below per  
E Muhammad, JCA., after referring to the above laws then said thus:-

*"The respondent, therefore, in my view validly alienated and mortgaged the entire property held by it under the said Certificate of Occupancy to the appellant. Exhibit "4" (the first legal mortgage between the parties), in paragraph 2 thereof states:*

F *'The mortgagor as BENEFICIAL OWNER and with the consent required by and subject to the provisions of the Land Tenure Law hereby demises unto the Bank ALL THAT the land and premises of which particulars are given in the schedule hereto TO HOLD*  
G *to the Bank for all the unexpired residue (except the last THREE (3) days thereof) of the term of years granted therein by the Certificate of Occupancy of which particulars are given in the schedule hereto subject to the proviso for redemption following namely that if all moneys hereinbefore covenanted to be paid shall be paid according-*  
H *ly then the term hereby created shall cease.'*

*The schedule referred to in the above paragraph is annexed to the exhibit. It reads in part as follows:*

*THE SCHEDULE above referred to:-*

*All that piece or parcel of landed property of OWONIBOYS*



*TECHNICAL SERVICES LTD., with the improvements and buildings erected thereon situate and laying at Oja-Iya Oyo-Bye-Pass, Ilorin, Kwara State, more particularly described in the title deed registered as follows:-*

*Both Exhibits D1 and 5, which were respectively executed on the 8th day of December, 1976, and 22nd day of June, 1987, were clearly related in their preambles to Exhibit 4. It is stated in Exhibit D1 as follows:*

*WHEREAS the mortgagor had by a deed of legal mortgage described in the second schedule hereto charged by way of legal mortgage the property described in the first schedule to secure an overdraft of N50,000.00 (Nigerian currency) from the bank ....*

*AND WHEREAS the mortgagor and the bank have agreed to increase the said overdraft of N50,000.00 to the sum of One Hundred Thousand Naira (N100,000.00, Nigerian Currency) on the same security of landed property but with increased improvements and on the same terms and conditions, mutatis mutandis, and in addition as hereby agreed.*

*This is what is exactly contained in Exhibit 5 except for the increase in the overdraft sum which was raised from N100,000.00 to N200,000.00. The legal mortgage and property described in the various schedules thereto, in my understanding, could refer to no other than the legal mortgage contained in Exhibit 4 and that piece or parcel of land property of OWONIBOYS TECHNICAL SERVICES LTD., referred to in the schedule to that Deed of Legal Mortgage. It is also my understanding that Exhibits D1 and 5 were executed for the purposes of subsequent increase in the original amount of overdraft of N50,000.00 secured by appellant's Certificate of Occupancy No. 540. This Certificate of Occupancy, as earlier on stated in respect of the said piece or parcel of land held by the appellant OWONIBOYS TECHNICAL SERVICES LTD, ILORIN, with all the improvements and buildings erected thereon, situate and lying at Oja-Iya Oyo Bye-Pass, Ilorin."*

And later in that judgment, his Lordship in holding that it was the appellant who had the duty of seeking the consent of the Governor in the subsequent transactions that led to Exhibits D1 and 5, said at p. 311 of the judgment, thus:-

*"The transactions referred to in all the exhibits related to same*

property which is covered by Certificate of Occupancy No. 540. That Certificate of Occupancy was, with the consent of the Governor, mortgaged to the appellant. I think it was not the business of the Governor to insist to know the value for which the respondent had wanted to mortgage the said property or that his consent was made  
 B a pre-condition in the event of an increase in the value of the property. That would have been too much of a demand and would have engaged the Governor into making of agreements between parties which offends the doctrine of freedom of contract. The Governor  
 C did all he was required to do by Section 27 of the Land Tenure Law. The two latter documents, Exhibits D1 and 5, were validly in my view, upstamped and registered by the Lands Registry, Ilorin. They were an extension of the first Deed of Legal Mortgage. "A mortgage", in any event, has been defined by Section 51 (1) of the Land Use  
 D Act, Cap. 202, LFN, 1990, to include, "a second and subsequent mortgage and equitable mortgage."

The view held by the court below with regard to the question as to who has the duty of obtaining the consent of the Governor in transactions of the kinds that occurred in the instant case was considered in this Court in International Textile Industries (Nigeria) Ltd. v. Dr. Ademola Oyekanmi Aderemi & Ors. (1996) 6 S.C., where the holders of the right of a statutory Right of Occupancy sought to avoid the consequences of the contract to sell the piece of land which is the subject matter of the statutory Right of Occupancy. Before I refer to  
 F the pertinent parts of the judgment, I need to quote S. 22 of the Land Use Act. His Lordship Uwaifo, JSC., who delivered the lead judgment then observed on the above provisions of S. 22 of the Act, thus:-

G "The position of S. 22 of the Act is clearly this: A holder of a Right of Occupancy may enter into an agreement or contract, with a view to alienating his said right of occupancy. To enter into such an agreement or contract, he does not need the consent of the Governor. He merely operates within the first stage of a 'transfer on sale of  
 H an estate in land' which stage ends with the formation of a binding contract for a sale constituting an estate contract at best. But when he comes to embark on the next stage of alienating or transferring his right of occupancy which is done by a conveyance or deed, culminating in vesting the said right in the 'purchaser', he must obtain the

*consent to the Governor to make the transaction valid. If he falls to, then the transaction is null and void under S. 26 of the Act. In my view, it is necessary to bear these two stages clearly in mind."*

And continued by quoting with approval what this court said in *Awojugbagbe Light Industries Ltd. v. Chinukwe* (supra) where Iguh, JSC., at pages 433 - 436 said:-

*"I think it ought to be stressed that the holder of a Statutory Right of Occupancy is certainly not prohibited by Section 22(1) of the Act from entering into some form of negotiations which may end with a written agreement for presentation to the Governor for his necessary consent or approval. This is because the Land Use Act does not prohibit a written agreement to transfer or alienate land. So long as such a written agreement is understood and entered into subject to the consent of the Governor, there will be no contravention of Section 22(1) of the Land Use Act by the mere fact that such a written agreement is executed before it is forwarded to the Governor for his consent. I agree entirely with Chief Williams, SAN, that Section 22(1) prohibits transactions or instruments whereby the holder of Statutory Right of Occupancy purports to alienate as a complete action, his right of occupancy by assignment, mortgage, transfer of possession, sublease or otherwise, the absence of the relevant consent of the Governor first had and obtained notwithstanding."*

From all I have referred to above, it is, I think, clear that it is the owner of a Statutory Certificate of Occupancy that is obliged to obtain the consent of the Governor of the State where the land in respect of which he wishes to sell, transfer or mortgage, etc, by virtue of S. 22 of the Land Use Act, and the relevant provisions of the Land Tenure Law of Northern Nigeria. The appellant in the instant appeal sought and obtained the consent of the Governor when it set out to obtain the first loan for the sum of N50,000.00 in 1973. By that transaction, it effectively transferred its interest in the land to the respondent as clearly spelt out in the mortgage deed. True enough, he obtained further overdrafts and Deeds of Mortgages were executed to effect the transaction upon the same property upon which the first loan of N50,000.00 was obtained. The first observation that must be made is that it is the respondent to whom the appellant had transferred its legal interest that had deliberately taken the risk of granting more overdrafts in respect of the property in question. That will be

the position even if no legal mortgages were executed as was done in the instant case, the basis of this being that the respondent would have taken its decision to lend more money to the appellant as it was satisfied that the value of the appellant's property would be sufficient, if sold, to recover the loans made to the appellant. **I do not**  
**B however agree with the contention of the appellant that a merger had occurred as a result of these transactions. In the instant case, what is under consideration is a simple process of borrowing money on a property made available by the ap-**  
**C pellant for that purpose.** It is clear, as was found by the court below, that the only beneficiary of the loans was the appellant and no one else, even if as argued by the appellant, it is not as automatic as the appellant had submitted. **For a merger to be created in such transactions, such an intention must be evinced in the**  
**D documents from the documents executed by the parties, or such evidence as would indicate the intention of the parties that they envisaged a merger of the mortgages with one another. See Halsbury's Laws of England, 4th Edition, Vol. 16, par. 882, where the learned author said:-**

**E "...Equity is not guided by rules of law as to merger, and both as regards the merger of a lesser estate in a greater, and a merger of a charge in the land, the question depends upon the intention, actual or presumed, of the person in whom the interests become united."**

**F** Having regard to the views expressed above in respect of the questions raised in this issue, I am clearly of the opinion that the court below was right to have concluded that the appellant had the duty to obtain consent in respect of the mortgaged deeds, and that in any  
**G** event there was no question of merger as canvassed for the appellant by its learned counsel. In my humble opinion, the argument concerning the merger of the mortgaged deeds is a mere ruse to avoid the liability incurred by the appellant on the mortgaged property. There is nothing proved to lead to the conclusion that Exhibits 4, D1  
**H** and 5 are void and unenforceable. Accordingly, this issue is resolved against the appellant.

I will now consider issues 4 & 5 together. In respect of issue 4, the appellant is contending that apart from the deeds of mortgage, Exhibits 4, D1 and 5 no further evidence was led by either party.

Particularly, ***it is argued for the appellant that the respondent ought to have called evidence in respect of the clauses in the mortgage agreements. It is in my view difficult to understand the purport of the contention being made for the appellant by learned counsel. In the first place, it is expected that the onus is on the appellant who initiated this claim to prove its case. That has always been the guiding principle in our law.*** See *Okubule v. Oyagbola* (1990) 4 NWLR (Pt. 147) 73; *Ike v. Ugboaja* (1993) 6 NWLR (Pt. 301) 539. ***I therefore do not see what evidence is required of the respondent when the respondent has not been shown to have led evidence of a kind which shifted the onus of proof of a particular point to the respondent.*** See *Nigerian Maritime Services Ltd. v. Afolabi* (1978) 2 S.C. 79 at 84; *Highgrade Maritime Services Ltd. v. First Bank of Nigeria Ltd.* (1991) 1 NWLR 167. ***It must be remembered that it was the appellant who initiated this case when its property was about to be sold for its failure to pay the debt owed to the respondent. The pleadings and evidence led at the trial were directed at showing that the debt was not established. Though the trial court upheld that position of the appellant, the court below has quite rightly rejected that finding of the trial court.*** The argument of learned counsel in this court has not with due respect, persuaded me to hold a contrary view as I do not need to comment any further on the validity of Exhibits 4, D1 and 5 in view of what I have already said about their validity and enforceability in resolving issue 3 against the appellant.

The next point that now falls to be considered is that raised in Issue 5. It is the submission of learned counsel for the appellant that the only universal custom of bankers is that a bank only has the right to charge simple interest and that this can only be varied by agreement of the parties. In support of that submission, he made reference to *Corsskill v. Bower, Bower, Turner* (1863) 32 LJ Ch. 540 at 544. And then went on to argue that the onus of proving that the respondent has the unqualified right to charge 'any prevailing' interest. And further submits that as the evidence led by the respondent in this regard is unreliable and was deservedly rejected by the trial court, there exists no basis upon which the respondent could have resisted the appellant's claim. ***For the resolution of the question***

**raised by this Issue, recourse must be had to exhibits 4, D1 and 5, the mortgage deeds which no doubt formed the basis of the loan and overdraft facilities entered into by the parties. Now, if the parties have agreed between themselves upon the conditions for the formation of a contract, and as in this case those conditions were embodied in documents as in Exhibits 4, D1 and 5, then they are bound by the terms and conditions set down in the documents, and which was duly executed as was done in this case. Having so bound themselves, it is not the function of the court to make a contract for the parties,**  
 See Oyenuga v. Provisional Council of the University of Ife (1956) NMLR 9. **In the instant case, each of the Exhibits 4, D1 and 5, the mortgage deeds has as their terms and conditions a clause 3 which reads thus:-**

***"All interest payable on the moneys hereby secured shall accrue due from day to day at the rate from time to time stipulated by the Bank and may be capitalised at such intervals as the Bank may from time to time prescribe but not more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid."***

It is interesting that in the case of U.B.N. v. Ozigi (1994) 3 NWLR (Pt. 333), 385, a clause similar in material terms was inserted in the mortgage deed that had to be considered in determining the merits of that appeal. In the course of the consideration of the meaning and effect of that clause, it was observed as I have done above that the court cannot make a contract for the parties or rewrite the one they have made for themselves. Adio, JSC., in that case then went on to make the following observation:-

**"In other words, the words in a document must first be given their simple and ordinary meaning and under no circumstances may new or additional words be imported into the text unless the document would be by the absence of that which is imported impossible to understand. The presumption is that the parties have intended what they have in fact said so that their words must be construed as they stand. See Solicitor - General, Western Nigeria v. Adebajojo (1971) 1 All NLR 178."**

And further on at page 405, His Lordship said thus:-

*“The provision of clause 3 of the mortgage agreements is clear and unambiguous. It is possible to understand and apply it as it stands. There was, therefore, not with, or the giving of prior notice of increase in rates of interest on the loan in question to the respondent. Therefore, failure of the appellant to hold prior consultation with or to give prior notice to the respondent about increase in rates of interest on the loan could not, as the Court of Appeal held, result in the nullification of the interest rates stipulated under the provision of clause 3 of the mortgage agreements.”*

In the instant case the complaint of the appellant is that the only interest payable by the respondent is that which he claimed was established by custom. It is ascertained that loans granted to customers of the bank should be at simple interest. That may well be but that is not the case. That cannot be the position in respect of this matter. This is because, as I have earlier stated, the parties entered into agreement as evidenced by Exhibits 4, D1 and 5. In those documents, clause 3 featured prominently and as has been explained in the case of Union Bank of Nigeria v. Ozigi (supra), the wordings of this clause 3 are clear and unambiguous. There is nothing which makes it imperative for the respondent to charge interest on the loan as simple interest as argued by the appellant. The respondent quite clearly from the wordings of the said clause 3 are entirely free to charge interest that is deemed necessary upon the loan granted to the appellant. It is clear to me that the court below properly dismissed the contention of the appellant that the respondent had no right to have charged interest as was done on the loan granted to the appellant. With the greatest respect to the learned counsel for the appellant, he has not advanced any reason for me to depart from the judgment of the court below. It follows that this issue must be resolved against the appellant.

I think it is also necessary to add that it is the further argument by counsel for the appellant that the respondent should not have been allowed to succeed in this appeal by reason of the fact that the respondent has no right to succeed as it has not made a counter-claim to be deserving of a judgment in its favour. It is not a matter of having not filed a counter-claim. As I have said earlier in this judgment, the appellant had to commence this action against the respondent wanting to act pursuant to the mortgage deed with the failure of

the appellant to pay what was adjudged as debt to the respondent. Having failed to establish that he was not indebted to the respondent as he claimed, the respondent is entitled to the judgment in its favour simply for the fact that the appellant was unable to establish what it set out to prove. I therefore see no merit in this contention which is the subject of the appellant's issue 6. From what I have said above in this judgment, I do not see any need to consider specially issue 7.

This appeal from all I have said above lacks merit and it is hereby dismissed by me. The judgment of the court below is hereby affirmed and I award costs in the sum of N10,000.00 in favour of the respondent.

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### **MOHAMMED JSC**

I have read the lead judgment of my learned brother, Ejiwunmi, JSC., and the concurring judgment of my learned brother, Uwaifo, JSC., and I agree with both of them that this appeal has failed and ought to be dismissed. The two main issues for the determination of this appeal, in my view, are as follows:

*"3. whether the court below was right to have held that the principles of merger of mortgages was inapplicable to Exhibits 4, 5 and D1 and whether the further holding that the said exhibits were validly upstamped was not perverse.*

*5. whether the court below was right to have held that the respondent was entitled to vary the rate of interest chargeable and whether without evidence the court could take judicial notice of the Central Bank monetary policy on which the parties did not join issues."*

The issues are the core issues identified for the determination of this appeal. In the two judgments of my learned brothers which I mentioned above, the two issues have been adequately considered. I do not find it necessary to add anything of my own to those decisions. For the reasons disclosed therein, I dismiss this appeal. I award N10,000.00 costs in favour of the respondent.

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### **KATSINA-ALU JSC**

I have had the benefit of reading in draft the judgments of my



learned brothers, Ejiwunmi, JSC., and Uwaifo, JSC., I agree with them and for the reasons which they give I would dismiss the appeal.

I shall however say a few words on issues 2 and 3. Issue 2 is whether the ruling by the trial court refusing an amendment of the Statement of Defence should have been appealed within 14 days as of right or appealed thereafter only with leave of this court along with an appeal against the final judgment. In this connection the Court of Appeal, per Muhammad, JCA., stated in the course of its judgment as follows:

*“In the instant appeal, ground No. 13, to my understanding, questions the refusal by the trial Judge to grant the appellant further amendment to its statement of defence. The refusal, in my view, pre-determined the appeal (the case) one way or the other as it shut out completely the appellant from presenting its case properly. That certainly affects the whole case and I think the appellant had every right to challenge that decision after the whole case was over at the trial. That is exactly what the appellant did.”*

I think the Court of Appeal stated the position correctly. To raise the appeal on such a ruling as of right along with an appeal against the final judgment of the trial High Court would, in my view, depend entirely on the overall effect of such a ruling on the merit of the case: see *International Industries (Nig.) Ltd. v. Chika Brothers Ltd.* (1990) 1 NWLR (Pt. 124) 70. The amendment sought for was meant to put the pleading in line with the evidence already led. It cannot be denied that the amendment sought forms an integral part of the structure of the case presented by the appellant. I think the Court of Appeal was right to hold that it was unnecessary to obtain leave to raise a ground of appeal on the facts of this case.

Issue 3 raises the question of the principle of merger in regard to the mortgage transaction created by Exhibits 4, D1 and 5. Exhibit 4 was the deed of mortgage to secure the first loan of N50,000.00. The Governor's consent was obtained. The amount of loan was later raised to N100,000.00. A new deed of mortgage was executed - this is exhibit D1. Again the amount was raised to N200,000.00. Another deed of mortgage was executed, Exhibit 5. It must be borne in mind that Exhibits 4, D1 and 5 were concerned with one property which, by exhibit 4, the Governor's consent was obtained for the use of the property as a collateral for the loan transaction. What this means is

that the Governor's consent is not required for the additional deeds of mortgage executed in exhibits D1 and 5.

For the above reasons and for the fuller reasons given by my learned brothers, Ejiwunmi, JSC., and Uwaifo, JSC., I too dismiss the appeal with N10,000.00 costs to the respondent.

B

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**KALGO JSC**

I have had the opportunity of reading in draft the judgment of my learned brother, Ejiwunmi, JSC., just delivered in this appeal. I agree with him entirely that there is no merit at all in this appeal and it ought to be dismissed. For the reasons which were given in the said judgment, which I adopt as mine, I also dismiss this appeal and affirm the decision of the Court of Appeal. I award the costs of N10,000.00 in favour of the respondent.

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**UWAIFO JSC**

I had the advantage of reading in advance the judgment of my learned brother, Ejiwunmi, JSC. I agree with him that this appeal be dismissed.

E

The short facts of the case are that the appellant applied for a secured loan of N50,000.00. It used its landed property at Oja-Iya Taiwo Road, Ilorin, as collateral. A deed of mortgage was executed for this purpose with the Governor's consent. That is Exhibit 4. Later the loan was increased to N100,000.00 and another deed of mortgage was executed to reflect this amount, which deed was accordingly upstamped. It is Exhibit D1. Later, the loan was increased to N200,000.00. The same procedure was followed. The deed is Exhibit 5. The Governor's consent was not sought in respect of Exhibits D1 and 5.

F

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The respondent alleged that the appellant failed to repay the loan together with the accrued interest in accordance with the terms of the agreement. It decided to exercise its power of sale of the property as provided under the deed of mortgage. The appellant on the other hand disputed it was owing. It alleged that it discovered several multiple debits of particular cheques which when sorted out would leave it with enormous credit balance. It also contended that the

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Governor's consent was not obtained for Exhibits D1 and 5 and that they were null and void as a result. It then argued that since Exhibit 4 has ceased to exist on the principle of merger, there was no valid mortgage upon which the power to sell its property could be exercised by the respondent. Finally, it contended that even if there was a subsisting deed of mortgage, the originally agreed interest rate could not be increased by the respondent and used to calculate its liability without both parties agreeing upon such an increase. B

It was on the basis of these contentions that the appellant brought action at the High Court, Ilorin, for the following reliefs in C para. 32 of the further amended Statement of Claim:

“(i) *DECLARATION that the mortgage between the plaintiff and the defendant covering the plaintiff's property situate, lying and being at Taiwo Road, Ilorin are illegal, unlawful, unenforceable and irregular.* D

(ii) *AN ORDER setting aside the mortgages.*

(iii) *ALTERNATIVELY, DECLARATION that the defendant is not entitled to sell any property of the plaintiff without complying with the Land Use Act and the Auctioneers Law applicable to Kwara State.* E

(iv) *DECLARATION that the defendant is only entitled to charge on the plaintiff's account interest at the rate prevailing when facility was granted to the plaintiff.*

(v) *DECLARATION that the debit balance in the account of the plaintiff is not a true and accurate reflection of the indebtedness of the plaintiff, if any, to the defendant.* F

(vi) *INJUNCTION restraining the defendant by themselves, their agents, servants and or privies or otherwise howsoever from selling the plaintiff's property pursuant to the said mortgages.* G

(vii) *DECLARATION that the deeds of mortgage registered as No. 122/122/1 and 45/45/6 respectively have been discharged by their incorporation in the Deed registered as No. 94/94/8.*

(viii) *AN ORDER directing defendant to pay to the plaintiff the sum of N500,000.00 or any amount the court may find the plaintiff entitled to recover from the defendant.” H*

On 14 April, 1994, the trial court, (per Gbadeyan, J.), gave judgment for the appellant in respect of all the reliefs claimed in the said para. 32 when the judgment was concluded thus:

“The bank has been shown by both P.W. 1 and P.W.2 to have wrongfully debited N550,000.00 against the plaintiff. There is no evidence to contradict that the debit entry of N550,000.00 was wrongful. On the preponderance of evidence the plaintiff’s case for its award is established. Consequently, the plaintiff’s case which is in the alternative succeeds in its entirety and the defence fails. All the reliefs claimed in paragraph 32 of the further amended statement of claim are hereby granted.”

The Court of Appeal, Kaduna Division, on 25 November, 1996, set aside the judgment and dismissed the claim. The appellant in his appeal to this court has raised a number of issues. Further details of the facts of the case and the entire issues for determination have been stated in the judgment of my learned brother, Ejiwunmi, JSC. I need not reproduce those issues nor delve into those further facts.

I shall briefly touch on and discuss some of the issues raised in this appeal as set out in the leading judgment. Issue 1 is about the competence of some grounds of appeal permitted to be argued by the court below. They were couched as a misdirection of law (or error in law) and error of facts at the same time. This issue was abandoned by the learned Senior Advocate for the appellant in view of the fact that it had been settled in some recent cases that such framing of grounds of appeal does not necessarily make them incompetent: see *Aderounmu v. Olowu* (2002) 4 NWLR (Pt. 652) 253, a decision of this court. See also *Thor Ltd. v. First City Merchant Bank Ltd.* (1977) 1 NWLR (Pt. 479) 35. Incidentally, it was the obiter dictum of Nnaemeka-Agu, JSC., in *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718 at 744 which was applied in many decisions of the court below upholding this kind of objection to such ground of appeal that appellant had relied on.

Issue 2 is whether the ruling by the trial court refusing an amendment of the Statement of Defence should have been appealed within 14 days as of right or appealed thereafter only with leave along with an appeal against the final judgment. I think whether it is permissible to raise the appeal on such a ruling as of right along with an appeal against the final judgment of a High Court sitting at first instance depends entirely on the overall effect of such a ruling on the merit of the case. The court below, per Muhammad, JCA., stated the position correctly, in my view, when the following observation was

made:

*“In the instant appeal, ground No. 13, to my understanding, questions the refusal by the trial Judge to grant the appellant further amendment to its statement of defence. The refusal, in my view, pre-determined the appeal (the case) one way or the other as it shut out completely the appellant from presenting its case properly. That certainly affects the whole case and I think the appellant had every right to challenge that decision after the whole case was over at the trial. That is exactly what the appellant did.”*

It seems to me that there could be several rulings in the course of a trial which, in effect, would be seen as forming an incident of the proceedings as whole. Some of such rulings, for example on admissibility of a document, may not need to be pursued on appeal as and when they are given but where necessary may become matters to be included in the appeal against the final judgment: see *International Industries (Nig.) Ltd. v. Chika Brothers Ltd. (1990) 1 NWLR (Pt. 124) 70 at 81 per Obaseki, JSC*. Whether this is a proper course depends entirely on the matters ruled upon as to whether they form an integral part of the structure of the case presented by the party in the sense that any complaint about any particular ruling is likely to reflect on the result of the case. For instance, a refusal to allow an amendment to a pleading may tend to affect the outcome of the case and present itself in consequence as an issue of a denial of a fair opportunity to present a proper case. In my opinion, the court below was right to hold that it was unnecessary to obtain leave to raise a ground of appeal on a ruling complaining of such denial since the amendment was meant to put the pleading in line with the evidence already led. I believe this could be seen as an appeal as of right against the final decision under Section 241 (1) (a) of the 1999 Constitution.

Issue 3 raises the question of the principle of merger in regard to the mortgage transaction created by Exhibits 4, D1 and 5. Exhibit 4 was the deed of mortgage to secure the first loan of N50,000.00. When the amount of loan or credit facilities was raised to N100,000.00, a new deed of mortgage was executed. This is Exhibit D1. Again, when the amount was raised to N200,000.00, another deed of mortgage was executed, Exhibit 5. But it must be recognised that all three were in respect of the same and only property used as collateral.

Learned Senior Advocate for the appellant has argued that

once an earlier deed of legal mortgage is incorporated into a latter one, the former ceases to exist on its own and is in fact extinguished. The whole purpose of this argument is further carried forward that because it was in respect of Exhibit 4 that the Governor's consent was obtained, Exhibits D1 and 5 which, as argued, extinguished Exhibit 4 are themselves not enforceable (or are indeed null and void), since the Governor's consent was not given in respect of them. The authority cited for the proposition is contained in para. 884 of Halsbury's Laws of England, 4th edn., vol. 32 (Reissue) though counsel referred to para. 979 of the original issue which is verbatim, but which he quoted partially. I shall reproduce the entire para, thus:

*"884. General rule. As a general rule, by taking or acquiring a security of a higher nature in legal valuation than one he already possesses, a person merges and extinguishes his legal remedies upon the inferior security or cause of action; thus the taking of a bond or covenant, or the obtaining of a judgment for a simple contract debt, merges and extinguishes the simple contract debt. For this purpose, however, the superior security must be co-extensive with the inferior security and between the same parties. A security given by one of two co-debtors to secure a simple contract debt does not merge the simple contract debt."*

The learned Senior Advocate for the respondent has on the other hand submitted that it was unnecessary to have a fresh consent of the Governor for Exhibits D1 and 5 otherwise they would not have been registered, citing *Odubeko v. Fowler* (1993) 9 SCNJ (Pt. 2) 185 at 195. The further submission is that, in any case, it was the duty of the appellant (the mortgagor) to obtain the necessary consent, citing *Awojugbagbe Light Ind. Ltd. v. Chinukwe* (1995) 4 NWLR (Pt. 390) 379 and *International Textile Ltd. v. Aderemi* (1999) 6 S.C. (Pt. I) 1.

A proper understanding of the passage from Halsbury's Laws of England (*supra*) is important. What is considered there is a security of a higher nature in legal valuation subsuming an inferior security. This has nothing to do with a security for a higher amount of money or loan. It is concerned only with the strength of one security over another in terms of legal superiority. The passage gives a simple and clear example. If there is a debt which is supported by a mere simple contract, when this is replaced by a bond or covenant, or a

judgment in respect of the simple contract debt, there is no need to rely on the simple contract. It would have been replaced by either the, judgment or by a bond or covenant which is obviously a higher security of better dependability. Neither of them extinguishes the debt (it indeed protects the debt) but the simple contract which it replaces. In *Twopenny v. Young* (1824) 107 ER 711 at 712 it was laid down by Bayley, J., that “where a simple contract security for a debt is given, it is extinguished by a specialty, if the remedy given by the latter is co-extensive with that which the creditor had upon the former.” This was followed by Byles, J., in *Boaler v. Mayor* (1865) 19 CB (NS) 76 at 83; (1865) 144 ER 714 at 717.

In my view, it was a misconception, with due respect, to rely on the passage in question from Halsbury’s as authority for saying that Exhibits D1 and 5 extinguished Exhibit 4 and with it the Governor’s consent. The said Exhibit 4 represents the actual mortgage of the property concerned for which the Governor’s consent was obtained. That exhibit, as rightly argued by Mr. Ali, SAN, might have sufficed by upstamping it to reflect the increase in loan. Mr. Ali’s contention of upstamping an original mortgage deed in case of increase in the loan first agreed, is right as I said, but purely on principle. To make it practical, the conveyancing procedure of drawing up such a deed must make provision for that contingency, so that by the mere endorsement of the deed with the amount of increase in the loan, it can be upstamped for the increase. This can be done as often as occasion demands without having to execute a new deed.

But there is nothing wrong with the way Exhibits D1 and 5 came to be executed in the circumstances of Exhibit 4. Actually, with the draftsmanship of Exhibit 4, I do not see how it could have been upstamped for the increased loans. That made Exhibit, D1 and 5 inevitable, but they certainly did not call for the Governor’s consent to be able to increase the loan which both parties agreed on. The Governor’s consent as indicated in Exhibit 4 has nothing to do with the amount of loan; the consent is for the alienation of the legal title in the property to the respondent (the mortgagee) in compliance with Ss. 22 and 26 of the Land Use Act, 1978, for the period of the mortgage transaction. So, no further consent was necessary just because further loans had been obtained upon the same collateral. If Exhibit 4 had been an equitable mortgage and Exhibit D1 and 5

being deeds of mortgage, it would be in accordance with principle for the latter to extinguish the former because they are both securities of a higher nature in legal valuation than an equitable mortgage. Para. 886 of Halsbury's Laws of England (supra) supports this analysis. It reads:-

B     *"A mere charge or equitable mortgage is extinguished by the taking of a formal mortgage, even though the mortgage does not confer a legal estate, and the sum from then on secured is the sum mentioned in the mortgage notwithstanding that other sums were covered by the deposit."*

C     The authority in support is Vaughan v. Vanderstegen (1854) 61 ER 730 where, at page 732, Sir R. T. Kindersley, VC., in discussing the principle of merger, said inter alia:

D     *"In November, 1844, Mr. Annesley, finding that Lady Dunboyne owed him considerable costs, became desirous of having a security for them. At the same time Lady Dunboyne applied to him to advance her £30, and the policy was then deposited by Lady Dunboyne with Annesley, by way of securing the costs and the £30."*

E     *A few weeks after, another occasion arose for an advance of money by Annesley, viz., for paying a premium on the policy, and then he required some better security than a mere deposit, and the mortgage was agreed upon..... When a mortgage is given to go as near as possible to the conveyance of a legal estate, you must look to that deed alone to see what security was intended, that is, to what*  
 F     *contract the property was intended to be subject..... The policy is, I think, in the hands of Mr. Annesley, not by virtue of the deposit, but of the mortgage, and when that is satisfied he has no further right to hold it (the deposit). The possession by the deposit is merged in the*  
 G     *possession under the mortgage."*

What is referred to here as "the deposit" is the equitable mortgage by way or deposit of the deed of conveyance to secure a loan. It should be understood that merger may take the form of a merger of estates or of a merger of a charge in the land. It is the merger of an  
 H     equitable mortgage with the legal mortgage in land that para. 886 quoted above and Vaughan's case (supra) reflect.

In the present case, there was no question of the principle of merger operating because all the said Exhibits 4, D1 and 5 are deeds of mortgage which are securities of the same nature in legal valuation.



tion. They were not intended to merge in the sense that takes place between a lower and higher legal security except that it is necessary to say that Exhibits D1 and 5 complement Exhibit 4 in regard to the amount of money secured. Other than that, it must be recognised that they are concerned with one property which, by Exhibit 4, the Governor's consent has permitted the said property to be used as a collateral for the loan transaction. It is said that a mortgage is not merged by the taking of a new mortgage on the same property to cover the original debt and further advances: see para. 887 of Halsbury's Laws of England (*supra*). In the circumstances, it was, in my view, proper to upstamp the relevant exhibits to reflect the further advances or loans made to the appellant in consequence of the authorised mortgage transaction. The court below took the correct view in this regard.

As regards issues 4, 5 and 6, the appellant has conceded, quite rightly, in its brief of argument that if Exhibits 4, D1 and 5 are valid, the respondent can exercise the power of sale conferred on it by those exhibits. I have reached the conclusion that the exhibits are valid. The consent of the Governor for the mortgage transaction covers all the deeds of mortgage. Those deeds are in respect of one transaction, namely mortgage to secure money lending although the lending came to involve first advance and further advances. It does not matter whether the Governor's consent came before or after negotiation for the lending was concluded: see *Awojugbagbe Light Ind. Ltd. v. Chinukwe* (*supra*); *International Textile Ltd. v. Aderemi* (*supra*).

An aspect of the argument of the appellant is that since the respondent did not counterclaim, "it is a moot point whether it can exercise a right of sale or not as an unpaid mortgagee." The argument then went further as to the conditions to be fulfilled before power of sale can be exercised as contained in clause 6 of Exhibit 4 which conditions include proof of the indebtedness of the mortgagor, notice given by the mortgagee for payment and failure of the mortgagor to pay within one month of the letter of demand. I think the argument has to be considered on the basis of what was placed before the two courts below for a decision and what they actually decided. The claim on the point by the appellant was for a declaration that the respondent is not entitled to sell any property of the appel-

lant without complying with the Land Use Act and the Auctioneers Law applicable in Kwara State. The trial court made the declaration sought for on the ground that it was not proved that the appellant was owing the respondent. The Court of Appeal found that conclusion to be wrong. Consequently, it expressed the view that the respondent is entitled to exercise its power of sale. That of course implies that this may be done upon compliance with all necessary conditions. I do not think the said view can only be expressed upon a counterclaim by the respondent. It follows from the consequences of the dismissal of the said claim of the appellant. It was not an order made which was intended to be carried out by virtue of these proceedings.

There is the issue of the amount and nature of interest the respondent was entitled to having regard to clause 3 of the deed of mortgage (per Exhibits 4, D1 and 5) which reads:

*"All interest payable on the moneys hereby secured shall accrue due from day to day at the rate from time to time stipulated by the Bank and may be capitalised at such intervals as the Bank may from time to time prescribe but not more often than monthly and added to the moneys hereby secured and shall thereupon bear interest accordingly at the rate aforesaid."*

This implies compound interest made to operate upon monthly or not more often than monthly interest. The appellant's argument is that 10% interest per annum was stated or agreed as per Exhibit 4 and that the Central Bank of Nigeria's directive pleaded by the respondent was not tendered by the respondent. The said clause 3 was interpreted by this court in *Union Bank of Nigeria Ltd. v. Ozigi* (1994) 3 NWLR (Pt.333) 385. This court considered the terms thereof unambiguous as then observed thus inter alia per Adio, JSC, at pp. 403 - 404:

*"If the prevailing interest rates (prime rates) fixed by the Central Bank vary from time to time, then the interest rates stipulated by the appellant, that was under obligation as a bank to comply with the Central Bank guidelines in the matter, could not be fixed: it had to vary from time to time in response to the Central Bank guidelines..... The provision of clause 3 of the mortgage agreement can be relied upon to stipulate rates of interests in response to the C.B.N.'s guidelines on the matter."*

The argument of the appellant that the interest rate of 10% stipulated in the mortgage deed cannot be varied in line with clause 3 has failed to take account of the wording of the clause and the statement of principle in this regard in *Union Bank of Nigeria Ltd. v. Ozigi* (supra).

The appellant's counsel argued further that the Central Bank's directive pleaded by the respondent was not tendered to support its entitlement to a higher rate of interest. I think, with due respect, the argument does not arise having regard to the nature of the claim before the court in this suit. The appellant's claim is that the 10% interest is fixed and cannot be varied. That is what the court was called upon to decide. The Central Bank's directive is not needed to interpret clause 3 of the mortgage deed. It will only be needed to ascertain what the variation is from time to time when there is a claim to a particular quantum of interest based on an alleged higher interest rate as directed by the Central Bank. Such a claim was not an issue in this action.

The contention of the appellant about multiple debits of some of its cheques is not convincing. The evidence it relied on is that the respondent fraudulently debited the appellant with cheques issued by it in several ledgers rather than just once a paid cheque should be reflected in the ledger. The Chartered Accountants commissioned by the appellant to check the bank statement carried out two specific assignments, namely (a) the differential in interest charged by the respondent about the 10% stated in the mortgage deed and (b) the debiting of the account more than once in respect of some cheques. One of the Chartered Accountants who testified as PW.1, Isaiah Adeoti Adeniran, worked the interest due on 10% throughout. He said that he relied on the figure of the 10% given to him by the appellant and admitted thus: if there is another agreed interest rate between the parties not supplied to me my finding will then be wrong." This shows that the witness was not given the increased interest rate to work on.

In respect of the alleged double debiting of cheques, the witness was not helpful to the appellant. He referred to different entries from the compilation made by him in which he quoted shortened cheque numbers, usually the three last figures on a cheque leaf. Those cheques appeared in more than one entry. But the witness himself said that the real figure in a cheque leaf is more than three digits and

that what he stated in his compilation was the shortened form not the digits quoted in full. He then admitted thus: “It is not possible to have more than one entry in respect of one cheque.” The sole witness for the defence, D.W. 1, Remi Okulaja, who works for the respondent bank, explained in detail the entries in the statement of account.

B        The court below gave adequate consideration to the evidence led and came, in my view, to the correct decision that the statement of account reflected genuine entries and the indebtedness of the appellant to the respondent. It is very strange that the trial court awarded  
C        the sum of N550,000.00 to the appellant as the total amount arising from multiple debiting when even P.W.1 admitted that if his calculation had been correct the appellant would be owing N34,389.44 as overdraft. On the whole, the evidence as to alleged multiple wrong entries or withdrawals does not at all prove the allegation.

D        In all the circumstances, I too find no merit in this appeal and accordingly dismiss it with N10,000.00 costs.

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