

SUPREME COURT OF NIGERIA
2ND JULY, 2004. SC. 142/2000
CORAM:- M. L. UWAIJS CJN, S. U. ONU, U. A.
KALGO, N. TOBI, D. O. EDOZIE, JJSC

M. S. C. EZEMBA DEFENDANT/APPELLANT
AND

1. S. O. IBENEME

(Trading under the name and style)

SOIDE Engineering Works, Nigeria) PLAINTIFFS/RESPONDENTS

2. P. N. UDOJI

(Trading under the name and style)

P. N. Udoji Enterprises)

PLEADINGS - Documents - Facts that are material - Should be pleaded
- And not evidence - That a document pleaded is not available - Does not
preclude plaintiff - From relying on other credible evidence (H1)

EVIDENCE - Proof - Delivery of goods - Oral evidence - Exclusion of -
Is not merely based on availability of written document - But is based on
s. 132(1) EA (H2)

SALE OF GOODS - Evidence - Supply of goods - Document that re-
flected lesser quantity - Than that claimed to be delivered - Is not fatal in
this case (H3)

EVIDENCE - Proof - Burden of proof in civil cases - Is in two categories
- Appellant's defence failed - As he led no credible evidence - To contra-
dict that of the respondents (H4)

EVIDENCE - Witnesses - Credibility - Two material inconsistent evi-
dence under oath - Will discredit a witness as being truthful (H5)

EVIDENCE - Witnesses - Failure to call a particular witness - Weakened appellant's case in this matter (H6)

APPEALS - Briefs - Issues for determination - Should be derived from the grounds of appeal - And arguments should be based on the issues not the grounds (H7)

FACTS

Before the Anambra State High Court holding at Onitsha, the plaintiffs/respondents filed an action under the Undefended list against the defendant/appellant. Following a Notice of Intention to Defend, the suit was transferred to the General Cause List for trial upon pleadings. In their Amended Statement of Claim, plaintiffs claimed N440,000.00 being the balance owed by the defendant to the plaintiffs, and interest at rate of 4% from the date of judgment until the entire sum is liquidated. Plaintiffs' case is that they entered into a contract to supply 50,000 meters of 50mm aluminium conductor cables to the defendant at the rate of N13.50 per meter for a total price of N675,000. That they supplied even more than the agreed number of meters. But the defendant paid them in two installments only the sum of N235,000 and had refused to pay the balance of N440,000 despite repeated demands.

Defendant denied the claimed. He rather claimed that the quantity of cables supplied to him was 17,407 meters and that the sum of N235,000 he paid was the value of that quantity. The trial court found in favour of the plaintiffs in terms of their claim. Defendant's appeal to the Court of Appeal was dismissed. Being aggrieved he has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether upon a calm view of the pleadings and the evidence, the Court of Appeal below was right when it affirmed the judgment of the court of trial which held that the respondents had proved that they delivered 52,032.9 meters of aluminum conductor cable to the appellant.

(ii) Whether the judgment of the Court of Appeal below represent a dispassionate and full consideration of the issues raised by the appellant

before that court and fully argued in the appellants brief.”

HELD (Dismissing the appeal per **EDOZIE JSC, TOBI JSC** dissenting)
PLEADINGS - Documents - Facts that are material

1. I consider it appropriate to advert to one of the cardinal rules of pleadings which is that a party is only required to plead facts and not the evidence by which those facts are to be proved. From the above averments, it seems to me plain that the material facts which the respondents were required to plead and which they infact pleaded were the deliveries of 52,032.9 meters of aluminium cables to the appellant. In what manner they were to prove the deliveries goes to the realm of evidence. If they pleaded that they would rely on documents but the documents were unavailable or were rejected, I do not think they should be precluded from adducing other credible evidence in proof of the material averments. (p. 1954 F / 1956 D)

Proof - Delivery of goods - Oral evidence

2. The delivery of consignments of goods is a fact provable by the direct evidence of the person who delivered or witnessed the delivery. Section 73 of the Evidence Act 1990 provides that -

“73 Oral evidence must in all cases whatever be direct -

(a) If it refers to a fact which would be seen it must be the evidence of a witness who saw that fact.”

In my view, the mere fact that a transaction is reduced into writing does not exclude oral evidence of that transaction in proof thereof subject of course to the provisions of Section 132 (1) of the Evidence Act 1990 where oral evidence is excluded by documentary evidence with respect to judgments of court, official and judicial proceedings, written agreements and grants or other dispositions of property reduced into writing. These situations do not apply in the present case as a waybill or receipt for goods does not fall into the categories of matters specified under the section.
 (p. 1956 E)

SALE OF GOODS - Evidence - Supply of goods

3. The pith of the contention of the appellant is that since Exhibit ‘A’ merely

reflects the supply of a much lesser quantity of cables than the respondents claimed had been delivered, they were deemed to have failed in their action. That contention would have been tenable if Exhibit ‘A’ was tendered as evidence of the total quantity of cables supplied. This is so because documentary evidence being permanent in form is more reliable than oral evidence and is used as a hanger to test the credibility of oral evidence. In the present proceedings, however, the respondents pleaded in paragraph 16 of the Amended Statement of Claim earlier reproduced that the goods were supplied in six consignments. Sunday Ugwu (P.W.2) testified under cross-examination at p. 51 lines 8 to 9 that there were four deliveries. This is a minor discrepancy, which is natural bearing in mind that he was giving evidence in 1996 about a transaction that took place in 1991, that is, about 5 years previously. The inference to be drawn from the pleadings and the evidence of P.W.2 is that Exhibit ‘A’ did not represent the totality of the quantity of cables supplied but just the supply of one consignment which synchronized with that pleaded in paragraph 16(a) of the Amended Statement of Claim. It is for this reason that the disparity between Exhibit ‘A’ and the evidence of P.W.2 with respect to the quantity of cables supplied is not fatal to the respondents’ case. (p. 1957 G)

Burden of proof in civil cases - Is in two categories

4. In civil cases, the phrase “*burden of proof*” has two distinct and frequently confused meanings. Firstly, it may mean the burden of proof as a matter of law and the pleadings usually referred to as the legal burden or the burden of establishing a case; secondly, the burden of proof in the sense of adducing evidence often referred to as the evidential burden. While the burden of proof in the first sense is always stable or static, the burden of proof in the second sense may shift constantly as one scale of evidence or the other preponderates.

In the case under consideration, the respondents having adduced oral evidence accepted by the learned trial Judge to the effect that they, through P.W.2 supplied the appellant 52,032.9 meters of cable, the evidential burden shifted to the appellant to rebut that evidence and show that no cable or a lesser quantity of cable was supplied. In this regard the appellant testi-

fied but his evidence was nothing but a maze of contradictions.

In this case the respondents have discharged by credible evidence the evidential burden of proving that they supplied 52,032.9 meters of cables to the appellant on whom the evidential burden of proving the contrary had shifted. Having not led credible evidence in that regard the appellant's defence had collapsed thereby entitling the respondents to judgment. (pp. 1958 D / 1960 B)

Credibility - Two material inconsistent evidence under oath

5. No witness who has given on oath two material inconsistent evidence is entitled to the honour of credibility. Such a witness does not deserve to be treated as a truthful witness. In the face of the contradictory evidence given by the appellant, the courts below disbelieved him and accepted that the goods in question were delivered at Alor to Cyril Attah the site manager of the appellant. It is he who is competent to give evidence with respect to the quantity of cables he received on behalf of the appellant but he was not called to give evidence and the omission to call him to testify is fatal to the defence. (p. 1959 D)

Failure to call a particular witness

6. I therefore agree with Ubaezonu JCA., when at page 160, from line 33 of the record he said:-

“But the devastating weakness in the appellant's case which supports respondents case was the failure of the appellant to call this very important actor Cyril Attah to testify for the appellant who was his employer. No reason was given for the failure to call him. The provision of Section 149(d) of the Evidence Act operates against the appellant.”

I entirely agree with him but I do not think that Section 149(d) of the Evidence Act, Cap. 112 Laws of Nigeria 1990 could be invoked against the appellant. This is because it is quite settled that that provision is concerned with the withholding of evidence and not with the failure of a party to call a particular witness. See *Tewogbade v. Akande* (1968) NMLR 404. (p. 1959 F)

APPEALS - Briefs

7. Since the introduction of brief writing in the appellate courts about two decades ago, the practice has evolved whereby issues for determination in an appeal are derived from the grounds of appeal. Such an issue so formulated must be of such a nature that a decision on it one way or the other must affect the result of the appeal: Attorney-General of Kwara State & Ors. v. Olawole (1993) 1 NWLR. (Pt. 272) 645 at 660.

When the issues for determination have been formulated from the grounds of appeal, arguments in the brief are canvassed on the basis of the issues and no longer on the grounds of appeal. This principle was recently restated by this court in the case of Stephen Onowhosa & 5 Ors. v. Peter Ikede Odiuzou (1999) 1 S.C. 40 at 46. (p. 1962 D)

NOTABLE POINTS OF INTEREST

EDOZIE JSC

1. Oral evidence - Is not excluded by documentary evidence in all cases

In the case of Monier Construction Company Ltd v. Tobias I. Azubuike (1990) 3 NWLR (Pt. 136) 74, the appellants canvassed before this court that the documents exhibits 'A', 'B' and 'D' tendered at the trial court were inadmissible in evidence as they were not pleaded and that in their absence, the respondent failed to prove the special damages claimed by him. In rejecting that contention, Agbaje JSC., had this to say:-

"Even if Exhibits A, B & D are inadmissible which in my view they are not, the decision of the court below would have been the same on the admissible evidence. This is so in my view because there is the oral evidence of P.W.2 the Managing Director of FEMCO Stone Crushing Industries as to the sale and delivery of 2,400 cubic yards of chippings at N25.00 per cubic yard i.e. N62,400.00. The evidence is an eye witness account of the transaction. It is primary evidence of the transaction."

A similar view was expressed by this court in the case of Wahab Aigbotosho Sijuola Olanrewaju v. The Governor of Oyo State & 6 Ors (1992) 9 NWLR (Pt. 265) 335 at 366, where it was decided that oral evidence of what transpired in a meeting could be given in evidence even though there was a recorded minutes of the meeting. (p. 1957 A)

ONU JSC

2. Pleadings - Party not bound to lead evidence - In support of every averment

A party to a suit is not obliged to lead evidence in support of every averment in his pleadings. In *Gbadamosi Olorunfemi & 7 Ors. v. Chief Rafiu Eyinle Asho & Anor.* (2000) 1 S.C. 15, (2000) 2 NWLR (Pt. 643) 143 at page 158 this Court (per Ayoola, JSC held that:

“A party is not obliged to lead evidence in his pleadings. Although he is bound by his pleadings he is at liberty to abandon such averments as he considers unnecessary to his case or which he is unable to prove.....”

Secondly, under the rules of pleadings, a pleader who has pleaded more than he strictly need to have done can always disregard the surplus or unnecessary averments and rely on the more limited ones. Thirdly, the appellant’s submission is based on the misconceived and erroneous notion that the only means of proving delivery of goods is by tendering way-bills.

I therefore agree with the respondents that the law of Evidence requires a party to prove their case by calling the best evidence available. In the instant case, P.W.2 who personally delivered the goods was called as a witness and the trial court believed his testimony. See page 87 lines 14-27 of the Record of Appeal. (p. 1964 F)

KALGO JSC

3. Pleadings - Failure to prove complimentary averment is not fatal

This is a civil action, which in law can properly be proved by oral evidence on a balance of probabilities. It is also well established that parties are bound by their pleadings in all civil actions. This presupposes that a party must lead evidence in proof of the averments in his pleadings, and not outside the pleadings. In this case, paragraphs 14 and 17 specifically averred that the respondents have delivered all the consignments of the electrical materials contracted for at Alor and were received by the site manager of the appellant, one Cyril Ikechukwu Attah. The evidence of P.W.2 was in full compliance with this averment. It is my respectful view that the addition of

the words in the said paragraphs 14 and 17, that:

“The plaintiffs will at the trial of this suit found on the documents signed by the said site manager on behalf of the defendant”

is merely complementary to the evidence of such delivery and the absence of it would not affect the evidence itself. The evidence of P.W.2 is within and not outside the respondents’ pleadings and once accepted and believed, it can be relied upon. The learned trial Judge had accepted and believed the evidence of P.W.2 before giving judgment for the respondents. (p. 1969 F)

TOBI JSC (DISSENTING)

4. When oral agreement must be pleaded

Under cross-examination, witness said at page 51:

“Agreement was written before the supply was made but it was signed after the supply was made. There were some oral agreement for the supply of cables.”

The evidence of oral agreement given by P.W.2 is clearly a new dimension which was not pleaded in the Amended Statement of Claim.

An oral agreement which has the legal capacity to alter a previous written agreement is a fact which must be pleaded. It is more than evidence, which need not be pleaded. As parties are bound by their pleadings, I am of the firm view that the evidence of oral agreement goes to no issue, and I so hold. Although paragraph 14(a) of the Amended Statement of Claim averred that P.W.2 also signed the Way Bills on behalf of the 1st plaintiff, the witness did not lay this in evidence. (p. 1983 H)

5. Oral evidence cannot be led to contradict documentary evidence

It is clear that the evidence of P.W.1, P.W.2 and P.W.3 contradicted Exhibit A. Can oral evidence be led and admitted to contradict documentary evidence? Section 132(1) of the Evidence Act provides as follows:

“When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of

such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence..."

I am in some difficulty to agree with the submission of learned counsel for the respondents that Exhibit A does not come within the provision of Section 132(1) of the Evidence Act; although he conceded that the subsection applies to contracts reduced into writing. He also argued that the civil rights and liabilities of the parties in this case were not dependent on the waybills.

With respect, I do not agree with counsel. Exhibit A executed Exhibit E in part, the contract between the parties. It therefore has a contractual flavour and was so intended by the parties. This is vindicated by the pleadings, particularly paragraphs 14, 14(a), 16 and 17 of the Amended Statement of Claim. That apart, Exhibit A qualifies as "*series of documents*" within the meaning of Section 132(1). Since it is impossible to determine the civil rights and liabilities of the parties in this case without considering Exhibit A, I am of the firm view that the exhibit comes within the ambit of Section 134 (1) of the Evidence Act. (p. 1987 A)

6. Relationship between oral and documentary evidence

I should read Section 132(2):

"Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made if such a memorandum was not intended to have legal effect as a contract, or disposition of property."

Although the Evidence Act does not define "*documentary memorandum*", I am of the view that Exhibit A is not a documentary memorandum. Assuming that I am wrong, and Exhibit A qualifies as such a memorandum, the second arm of the subsection does not vindicate the position taken by the learned trial Judge. This is because Exhibit A was clearly intended to have legal effect in the contractual bargain of the parties. I should say that none of the exceptions in Section 132 apply to this case to admit oral evidence to contradict, alter, add or vary Exhibit A.

Section 132 of the Evidence Act apart, it is a principle of the common law that where parties have reduced their transaction in writing, oral or extrinsic evidence is not admissible to add to, vary, subtract from or contradict the written terms of the transaction. There is a long line of cases. See generally Abiodun v. Adehin (1962) All NLR 550; Eke v. Odolofin (1961) 1 All NLR 842.

Phipson on Evidence, one of the greatest authorities on the Law of Evidence in the common law system, if I may so naively restrict myself, dealt with the position in common law at paragraph 42:11-12, pages 1165 and 1166.

It is my view that Exhibit A qualifies as a transaction within the meaning of the word used by Phipson on Evidence above. It must be noted that in explaining the grounds of exclusion, Phipson drew a dichotomy between superior and inferior evidence vis-a-vis documentary and oral evidence respectively. In other words, to Phipson, documentary evidence is superior evidence while extrinsic evidence is inferior evidence. By Phipson's classification, the two courts preferred the inferior evidence to the superior evidence. That is, to say the least, sad and unfortunate. I am not with them.

Exhibit A qualifies as primary evidence within the provision of Section 94(1) of the Evidence Act and a court of law has no competence to play down the weight of documentary evidence. That is exactly what the two courts did. With respect, that is not available to them. (pp. 1988 B / 1993 C)

7. Facts in a document - Cannot be proved by oral evidence s. 76 EA

It is my view that provisions of Section 76 are clearly against the case of the respondents. The section provides as follows:

"All facts, except the contents of documents, may be proved by oral evidence."

By Section 76, parties cannot prove facts, which are contained in a document by oral evidence. And that is what the respondents have done. The document must be tendered as it speaks for itself. Reducing Section 76 to this appeal results in the conclusion that since the supply or delivery of the materials, in the evidence of P.W.1 and P.W.2, was as in Exhibit A, both

witnesses were estopped from leading oral evidence, particularly where there was no admissible evidence that there was oral agreement outside Exhibit A.

Section 77 provides that oral evidence must, in all cases, whatever, be direct. I agree entirely that the evidence of P.W. 1, P.W.2 and P.W.3 were direct but they were in conflict inter se. But the most important aspect is that the courts cannot accept direct oral evidence which is in conflict with documentary evidence on the same aspect or point. (p. 1990 G)

8. *Lower courts wrongfully placed burden of proof on the defendant*

With the greatest respect to the two courts, I do not agree with them. By the above, the two courts placed on the appellant, who was the defendant at the trial court, the burden of proof in this matter. This is clearly against the provisions of Sections 135 and 137(1) of the Evidence Act. By Section 135(1), whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist. By the state of the pleadings, the burden is clearly on the respondents to prove paragraphs 14, 14(a), 16 and 17 of the Amended Statement of Claim and not for the appellant to disprove them.

I can still go further and say that the initial or first burden is on the respondents, as plaintiffs, to prove the above paragraphs. This is because if no evidence is given in respect of the matter, particularly in respect of paragraphs 14, 14(a), 16 and 17 of the Amended Statement of Claim, judgment will be given against them. (p. 1993 H)

9. *Court is to be confined to evidence before it*

A court of law is always confined to the evidence before it. A court of law has no competence to arrive at conclusions on speculation or guess. In this case, it will be wrong to come to the conclusion that because the appellant admitted 17,407 meters, which is over and above the number in Exhibit A, he must have been supplied the total number of meters claimed by the respondents. That will be a most ambitious and tall speculation which is not available to any court of law. (p. 1995 E)

10. When contradictions in the defence are immaterial

The two courts did not remember, or should I say, bother, to deal with the contradictions in the evidence of the respondents. They rather descended on contradictions in the evidence of the appellant. With the greatest respect, they are not fair to the appellant. It is my humble view that contradictions in the evidence of a defendant, who, by the pleadings, has not the initial burden to prove his case, can only be material in the determination of the case if the plaintiff has, in the first place, proved his case. Where a plaintiff has not proved his case, contradictions in the evidence of the defendant will not avail or help the plaintiff in sustaining his claim. Accordingly, the evidence of the appellant in respect of who really received the goods is a non sequitur. (p. 1997 E)

D REPRESENTATION

Ubong Esop Akpan Esq., for the Appellant
M. I. Onochie Esq., for the Respondents.

E CASES REFERRED TO

- Okagbue v. Romaine (1982) 5 S.C. 133
Monier Construction Company Ltd v. Tobias I. Azubuike (1990) 3 NWLR (Pt. 136) 74
Wahab Aigbotosho Sijuola Olanrewaju v. The Governor of Oyo State & 6 Ors (1992) 9 NWLR (Pt. 265) 335 at 366
Arab Bank Ltd, v. Koss (1952) 2 QB 216 at 226
Kimdey v. Military Governor of Gongola State (1988) 2 NWLR (Pt. 77) 445 at 473
Felix O. Osawaru v. Simon Ezeiruka (1978) 6 & 7 S.C. 135 at 145
Odukwe v. Ogbunbiyi (1998) 8 NWLR (Pt. 561) 339 at 353
Tewogbade v. Akande (1968) NMLR 404
Ogbodu v. The State (1987) 3 S.C. 497 at 526
H Musa v. Yerima (1997) 53 LRCN 2549 at 2553

STATUTE REFERRED TO

Evidence Act Cap.112 LFN, 1990 ss. 149(d), 73, 132(1) & (2), 76, 77,

94(1), 96, 97, 91, 137

BOOK REFERRED TO

Phipson on Evidence (15th Edition) Sweet and Maxwell (2000) para. 42:11-12, pp.1165 and 1166

B

LEAD JUDGMENT BY EDOZIE JSC

The respondents as plaintiffs commenced an action in the High Court of Anambra State sitting at Onitsha against the appellant as defendant under the Undefended List procedure but following a Notice of Intention to defend filed by the appellant, the suit was transferred to the General Cause List for trial upon pleadings. The parties accordingly filed and exchanged pleadings. The plaintiffs/respondents subsequently with the leave of court, filed an Amended Statement of Claim wherein they claimed against the defendant/appellant in paragraph 31 thereof as follows: -

“ 1. N440, 000 (Four Hundred and Forty Thousand Naira) being the balance owed by the defendant to the plaintiffs.

2. Interest on the said amount at the rate of 4% (Four Percent) from the date of judgment until the entire sum is liquidated.”

At the trial, parties led evidence in support of their respective pleadings. The two plaintiffs testified, respectively, as P.W. 1 and P.W.3, while Sunday Ugwu an employee of the 1st plaintiff at the material time testified as P.W.2. The defendant/appellant testified on his behalf and called no witness.

The facts of the case are simple and straightforward. Both parties entered into an agreement whereby the plaintiffs/respondents were to supply to the defendant/appellant 50,000 meters of 50 mm aluminum conductor cables at the rate of N13.50 per meter for a total price of N675,000 to enable the latter execute an electrification project at Alor, the contract of which was awarded to him by the Anambra State Government. The case for the plaintiffs/respondents is that they supplied the quantity of goods as stipulated and even supplied more than what was agreed upon by delivering a total of 52,032.09 meters instead of the agreed quantity of 50,000 meters. The goods were delivered on behalf of the plaintiffs/respondents by an employee of 1st plaintiff/respondent by name Sunday Ugwu (P.W.2) who

delivered the goods at Alor to Cyril Ikechukwu Attah said to be the site manager of the defendant/appellant. The plaintiffs/respondents mentioned that after the supplies, the defendant/appellant paid to them in two installments, a total sum of N235,000 leaving a balance of N440,000 which he has refused to settle despite repeated demands, hence they instituted the action against him.

The defendant/appellant's case, on the other hand, was that the quantity of cables supplied to him was 17,407 meters of cables and that the sum of N235,000 he paid to the plaintiffs/respondents was the value of that quantity of cables. He denied vehemently being indebted to the plaintiffs/respondents.

The learned trial Judge, Ofomata, J., in his judgment delivered on 15th June, 1998, found in favour of the plaintiffs/respondents to whom he adjudged entitled to their claim. On appeal by the defendant/appellant to the Court of Appeal, Enugu Division, that court in its unanimous decision delivered on 17th May, 2000, dismissed the appeal and affirmed the judgment of the trial High Court. This is a further appeal by the defendant to be referred to simply as appellant. The appeal is predicated on four grounds. Parties by their counsel filed and exchanged briefs of argument, which were adopted and relied upon for the consideration of the appeal with oral address to highlight some aspects of the briefs. In the appellant's brief, two issues were identified as arising for the determination of the appeal. These are: -

“(i) *Whether upon a calm view of the pleadings and the evidence, the Court of Appeal below was right when it affirmed the judgment of the court of trial which held that the respondents had proved that they delivered 52,032.9 meters of aluminum conductor cable to the appellant.*

(ii) *Whether the judgment of the Court of Appeal below represent a dispassionate and full consideration of the issues raised by the appellant before that court and fully argued in the appellants brief.”*

For the plaintiffs/respondents, hereinafter, referred to simply as respondents, their counsel filed a respondents' brief with the following issues

“1. *Were the learned Justices of the Court of Appeal right when they affirmed the judgment of the trial court that the respondents delivered*

52,032.9 meters of aluminum conductor cables to the appellant?

2. Did the Court of Appeal consider all the issues properly raised before it. If answered in the negative, has their failure to do so occasioned any miscarriage of justice?"

A careful perusal of the two sets of issues reveals that though differently worded, they are nevertheless identical in content. B

On the first issue for determination, learned counsel for the appellant, Mr. Udechukwu SAN, who settled the brief, submitted therein that the respondent did not prove that they supplied 52,032.9 meters of aluminium conductor cables to the appellant; that since the respondent pleaded in paragraphs 14-17 of their Amended Statement of Claim that they were going to rely on waybills signed by P.W.2 and one Cyril Ikechukwu Attah on behalf of the appellant in proof the delivery of the goods, the respondents were bound to produce the said waybills and that since the only waybill tendered by the respondents was Exhibit "A" dated 15/7/91 showing a delivery of only 3020 meters of cable, the respondents had failed to prove their case. It was further argued on the strength of Section 149 (d) of the Evidence Act 1990 that the failure of the respondents to produce evidence of delivery of the remaining quantity of cables is either that such evidence is nonexistent or that if produced, it would not support the case of the respondents. He relied on the following cases and provisions of the Evidence Act - *Elias v. Omobare* (1982) (Pt .1) Vol. 1 All NLR 70; *A.C.B. Plc v. Haston (Nig) Ltd.* (1997) 8 NWLR (Pt. 515) 110 at 131; Sections 93, 94 and 96 of the Evidence Act. Learned counsel further submitted that since the appellant admitted the delivery of 17,407 meters of cable the respondents were only entitled to the value of that quantity. Referring to the observation in the leading judgment of the court below delivered by Ubaezonu JCA., to the effect that the appellant should have called Cyril Ikechukwu Attah, his site manager to give evidence, learned counsel submitted that it is for a plaintiff to prove his case and not for the defendant to disprove it, citing in support the case of *E. D. Tsokwa & Sons Company Ltd, v. Union Bank of Nigeria Ltd* (1996) 10 NWLR (Pt. 478) 281. C D E F G H

In his response, learned counsel for the respondents, Mr. Onochie, submitted that the appellant's submissions are misconceived. He argued,

firstly, that a party to a suit is not obliged to lead evidence in support of every averment in his pleadings and referred to the case of Gbadamosi Olorunfemi & 7 Ors. v. Chief Rafiu Eyinde Asho & Anor. (2000) 1 S.C. 15, (2000) 2 NWLR. (Pt. 643) 143. Secondly, learned counsel pointed out that under the rules of pleadings, a pleader who has pleaded more than he strictly needed to have done can always disregard the unnecessary or surplus averments. Thirdly, it was submitted that the law of evidence requires a party to prove his case by the best evidence available. Learned counsel referred to the evidence of P.W.2 which the two lower courts believed to the effect that he delivered 52,032.0 meters of aluminium cables to the appellant through his site manager, Cyril Ikechukwu Attah and citing the case of Lawrence Nwakpa & Anor. v. Dennis Ewulu & 2 Ors. (1995) 7 NWLR (Pt. 407) 269 at 293, argued that the circumstances under which an appellate court can interfere with the findings of fact of a trial court has not arisen in this case. On the contention by the appellant that he was not obliged to call as a witness Cyril Ikechukwu Attah, learned counsel for the respondents submitted that in civil cases, while the burden of proof initially lies on the plaintiff, the proof or rebuttal of issues arising in the course of the proceedings may shift from the plaintiff to the defendant and vice versa as the case progresses. Counsel craved in support the case of Friday Elema & Anor. v. Princess Charity A. Akenzua (2000) 6 S.C. (Pt. III) 26, (2000) 6 SCNJ 266 at 238.

Since the main plank of the appellant's appeal revolves on pleadings, that is to say, that the respondents did not prove their case strictly in conformity with their pleadings in paragraphs 14 to 17 of their Amended Statement of Claim, **I consider it appropriate to advert to one of the cardinal rules of pleadings which is that a party is only required to plead facts and not the evidence by which those facts are to be proved.** Discussing this principle in the case of Okagbue v. Romaine (1982) 5 S.C. 133, Idigbe JSC, said -

"In the words of Lord Denman CJ., in Williams v. Wilcox 8 Ad & EL 315 at 331, which I respectfully adopt,

'It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordi-

nate facts which are the means of proving it or the evidence sustaining the allegation. Thus in a case very familiar and almost identical with the present, if a trespass be justified by a plea of highway, the pleader never states how the locus in quo became highway, and if the plaintiff's case is that the locus in quo, by an order of justices, award of in closure commis- B sioners, Local Act of Parliament or any other lawful means had ceased to be such at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at that time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased C to be such, see *Williams v. Wilcox* (1838) 112 ER 857 at 863."

Against the background of the principle thus stated, I will reproduce hereunder paragraphs 14 to 17 of the Amended Statement of Claim -

"14. The plaintiffs delivered the consignments of electrical materi- D als at Alor and the consignments were duly collected by the site manager of the defendant, one Cyril Ikechukwu Attah. The plaintiffs will at the trial of this suit found on the documents signed by the site manager on behalf of the defendant

14(a) The consignments were delivered by Mr. Sunday Ugwu, who E was at the material time under the employment of the 1st plaintiff. The said Mr. Sunday Ugwu also signed the Way Bills on behalf of this 1st plaintiff.

15. The consignments were each time off loaded in the premises of F Chief Betrand Ojudo at Alor.

16. The electrical materials supplied to the defendant at his contract site were made in consignments between the 15th to the 25th of July, 1991 and are made up as follows:-

(a) Soibe - 2 drums of 2020 and 1000 meters respectively totalling G 3020 meters of 50 mm.

(b) DEN Electrical Trade mark (Nig) Ltd Onitsha -5 drums of 3000 meters of 50 mm each = 15,000 meters.

(c) 300 meters of 70mm cables were personally requested by the H defendant to be added in order to enable him string the high tension line leading to Uruezeani village via Ichie C.C. Onyemesili's residence.

(d) Sam & Sam Electrical Ltd Benin - 5 drums of 5000 meters of 50

mm each and 3000 meters of 70 mm - total 28,000 meters.

(e) 1000 meters of 70 mm were later added making it 4000 meters of 70 mm in order to cover the high tension area.

(f) Cutix PLC Nnewi - 2 drums of 6012.9 meters of 50 mm.

B Grand Total = 52,032.9 meters,

(17) The defendant had requested through his site manager for some quantity of materials to keep the work going pending the arrival of the major consignments. The 1st plaintiff as a result rushed two drums of 2020 and 1000 meters mentioned in paragraph 16(a) to the contract site in the 1st plaintiff's personal car in the morning of 15th July, 1991, which were collected by the site manager Cyril I. Attah before the main consignments arrived later in the evening of the same date. The plaintiffs will at the trial of the suit found on the document signed by the said site manager on behalf D of the defendant."

From the above averments, it seems to me plain that the material facts which the respondents were required to plead and which they infact pleaded were the deliveries of 52,032.9 meters of aluminium E cables to the appellant. In what manner they were to prove the deliveries goes to the realm of evidence. If they pleaded that they would rely on documents but the documents were unavailable or were rejected, I do not think they should be precluded from adducing F other credible evidence in proof of the material averments. The delivery of consignments of goods is a fact provable by the direct evidence of the person who delivered or witnessed the delivery. Section 73 of the Evidence Act 1990 provides that -

G "73 Oral evidence must in all cases whatever be direct -

(a) If it refers to a fact which would be seen it must be the evidence of a witness who saw that fact."

In my view, the mere fact that a transaction is reduced into writing does not exclude oral evidence of that transaction in proof H thereof subject of course to the provisions of Section 132 (1) of the Evidence Act 1990 where oral evidence is excluded by documentary evidence with respect to judgments of court, official and judicial proceedings, written agreements and grants or other dispositions of prop-

erty reduced into writing. These situations do not apply in the present case as a waybill or receipt for goods does not fall into the categories of matters specified under the section.

In the case of *Monier Construction Company Ltd v. Tobias I. Azubuike* (1990) 3 NWLR (Pt. 136) 74, the appellants canvassed before this court B that the documents exhibits 'A', 'B' and 'D' tendered at the trial court were inadmissible in evidence as they were not pleaded and that in their absence, the respondent failed to prove the special damages claimed by him. In rejecting that contention, Agbaje JSC., had this to say:-

"Even if Exhibits A, B & D are inadmissible which in my view they C are not, the decision of the court below would have been the same on the admissible evidence. This is so in my view because there is the oral evidence of P.W.2 the Managing Director of FEMCO Stone Crushing Industries as to the sale and delivery of 2,400 cubic yards of chippings at N25.00 per D cubic yard i.e. N62,400.00. The evidence is an eye witness account of the transaction. It is primary evidence of the transaction."

A similar view was expressed by this court in the case of *Wahab Aigbotosho Sijuola Olanrewaju v. The Governor of Oyo State & 6 Ors* E (1992) 9 NWLR (Pt. 265) 335 at 366, where it was decided that oral evidence of what transpired in a meeting could be given in evidence even though there was a recorded minutes of the meeting.

In the instant case, the respondents (P.W.1 and P.W.3) gave evidence F which the trial court believed to the effect that Sunday Ugwu (at the material time the servant of P.W. 1) supplied 52,032.9 meters of aluminium conductor cables to the appellant through the latter's site manager Cyril Ikechukwu Attah. Earlier, P.W. 1 had tendered Exhibit 'A' the receipt of 3020 meters of the cables. **The pith of the contention of the appellant is that since G Exhibit 'A' merely reflects the supply of a much lesser quantity of cables than the respondents claimed had been delivered, they were deemed to have failed in their action. That contention would have been tenable if Exhibit 'A' was tendered as evidence of the total quan- H tity of cables supplied. This is so because documentary evidence being permanent in form is more reliable than oral evidence and is used as a hanger to test the credibility of oral evidence. See the cases of S.B.**

Fashanu v. M. A. Adekoya (1974) 6 S.C. 83, Kimdey v. Military Governor of Gongola State (1988) 2 NWLR (Pt. 77) 445 at 473. **In the present proceedings, however, the respondents pleaded in paragraph 16 of the Amended Statement of Claim earlier reproduced that the goods were supplied in six consignments. Sunday Ugwu (P.W.2) testified under cross-examination at p. 51 lines 8 to 9 that there were four deliveries. This is a minor discrepancy, which is natural bearing in mind that he was giving evidence in 1996 about a transaction that took place in 1991, that is, about 5 years previously. The inference to be drawn from the pleadings and the evidence of P.W.2 is that Exhibit ‘A’ did not represent the totality of the quantity of cables supplied but just the supply of one consignment which synchronized with that pleaded in paragraph 16(a) of the Amended Statement of Claim. It is for this reason that the disparity between Exhibit ‘A’ and the evidence of P.W.2 with respect to the quantity of cables supplied is not fatal to the respondents’ case.**

In civil cases, the phrase “burden of proof” has two distinct and frequently confused meanings. Firstly, it may mean the burden of proof as a matter of law and the pleadings usually referred to as the legal burden or the burden of establishing a case; secondly, the burden of proof in the sense of adducing evidence often referred to as the evidential burden. While the burden of proof in the first sense is always stable or static, the burden of proof in the second sense may shift constantly as one scale of evidence or the other preponderates. As Aniagolu, JSC., correctly observed in the case of Felix O. Osawaru v. Simon Ezeiruka (1978) 6 & 7 S.C. 135 at 145-

“In civil cases, while the burden of proof in the sense of establishing the case initially lies on the plaintiff (Joseph Constantine Steam Line Ltd, v. Imperial Smelting Corp. Ltd. (1942) AC 154, 174) the proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the defendant and vice versa as the case progresses.....”

See the case of Odukwe v. Ogbunbiyi (1998) 8 NWLR (Pt. 561) 339 at 353.

In the case under consideration, the respondents having ad-

duced oral evidence accepted by the learned trial Judge to the effect that they, through P.W.2 supplied the appellant 52,032.9 meters of cable, the evidential burden shifted to the appellant to rebut that evidence and show that no cable or a lesser quantity of cable was supplied. In this regard the appellant testified but his evidence was **nothing but a maze of contradictions**. Whereas in paragraph 13B of his Statement of Defence he pleaded that Cyril Attah was his sub-contractor whose duties did not include the taking of delivery of goods, and that he personally received goods supplied to him, in his evidence-in-chief, he confirmed that Cyril Attah, was his sub-contractor but under cross-examination at page 58 line 27 of the record, he admitted that Cyril Attah, was his site manager. Still under cross-examination, at page 57 lines 16 to 25, he testified in one breath that 17,407 meters of cables were delivered to him personally but in another breath he stated that he was not present when the cables were delivered.

No witness who has given on oath two material inconsistent evidence is entitled to the honour of credibility. Such a witness does not deserve to be treated as a truthful witness. In the face of the contradictory evidence given by the appellant, the courts below disbelieved him and accepted that the goods in question were delivered at Alor to Cyril Attah the site manager of the appellant. It is he who is competent to give evidence with respect to the quantity of cables he received on behalf of the appellant but he was not called to give evidence and the omission to call him to testify is fatal to the defence. **I therefore** agree with Ubaezonu JCA., when at page 160, from line 33 of the record he said:-

“But the devastating weakness in the appellant’s case which supports respondents case was the failure of the appellant to call this very important actor Cyril Attah to testify for the appellant who was his employer. No reason was given for the failure to call him. The provision of Section 149(d) of the Evidence Act operates against the appellant.”

I entirely agree with him but I do not think that Section 149(d) of the Evidence Act, Cap. 112 Laws of Nigeria 1990 could be invoked against the appellant. This is because it is quite settled that that pro-

vision is concerned with the withholding of evidence and not with the failure of a party to call a particular witness. See *Tewogbade v. Akande* (1968) NMLR 404; *Ogboodu v. The State* (1987) 3 S.C. 497 at 526; *Musa v. Yerima* (1997) 53 LRCN 2549 at 2553.

B In this case the respondents have discharged by credible evidence the evidential burden of proving that they supplied 52,032.9 meters of cables to the appellant on whom the evidential burden of proving the contrary had shifted. Having not led credible evidence in that regard the appellant’s defence had collapsed thereby entitling
C the respondents to judgment.

The learned trial Judge carefully evaluated the evidence led on both sides. With respect to the evidence of Sunday Ugwu (P.W.2), he said at page 87 lines 4 to 27 -

D “On the issue of quantity of goods supplied by the plaintiffs to the defendant, there is evidence before me that a total of 52,302 meters of aluminium conductor cables were supplied to the defendant through his project site manager at Alor. The manager was Cyril Attah. This fact was
E not disputed. One Sunday Ugwu (P.W.2) made the deliveries to Attah at Alor. The evidence of P.W.2 was unshaken, uncontradicted under cross-examination. Between 1990 and December 1993, P.W.2 worked as the manager of the 1st plaintiff’s business. He left the plaintiff’s business in December, 1993. He had personal knowledge of the transaction between the
F plaintiffs and the defendants. He delivered the goods to the defendant through Cyril Attah. He is quite an independent witness who has no special interest to protect. His testimony is credible. I accept his evidence with regard to the quantity of goods supplied and the time it was supplied and the balance of
G goods left unpaid.”

With respect to the appellant’s case, the learned Judge continued inter alia from p. 87 to p. 90 as follows:-

H “The defendant claimed in his defence that only 17407 meters of aluminum conductor cables were supplied to him personally.....

In paragraph 16 of the Amended Statement of Claim the plaintiffs averred that they supplied a total of 52302 meters

of aluminum conductor cables of specific dimension mentioned in the sub-paragraphs of paragraph 16.....

There was no specific denial of each material fact averred by the plaintiffs in paragraph 16 of the Statement of claim

The defendant impressed me as unreliable witness who is not worthy of credit

Defendant did not call Mr. Cyril Attah to deny receiving the goods which the plaintiffs' P.W.2 stated were supplied to him.

The defendant lied before this court when he claimed that the duties of Cyril Attah did not include receiving of supplies of goods. I find as a fact that Mr. Cyril Attah received the whole goods as authorized agent of the defendant."

The court below affirmed the above findings. In the leading judgment of Ubaezonu, JCA., he concluded at page 162 of the record as follows:-

"The respondents, having given credible evidence through P. W.2 of the supply of the agreed quantity of the materials to the appellant, the learned trial Judge believed the respondents and rightly held in my view that the respondents have proved their case. The onus now shifts to the appellant who met the respondents' case with a tissue of lies, inconsistencies and contradictions. The learned trial Judge found him unworthy to be accorded any credibility. He was right, in my view, to so find. The findings of fact made 5 by a trial court which saw the witnesses and assessed their credibility, unless such findings are perverse or contrary to the dictates of justice, an appeal court should not interfere with such findings."

These are concurrent findings of the two lower courts. There are no exceptional circumstances to warrant the interference of those findings by this court. Accordingly, I will answer the first issue for determination in the affirmative, that is to say, that the learned Justices of the Court of Appeal were right when they affirmed the judgment of the trial court that the respondents delivered 52,032.9 meters of aluminum conductor cables to the appellant.

The second issue for determination poses the question whether

the Court of Appeal considered all the issues properly raised before it, and if not whether the failure to do so occasioned any miscarriage of justice. The record of appeal shows that the appellant at the court below filed thirteen grounds of appeal and from these, he formulated only one issue for determination. In his brief filed at the court below, he canvassed the lone issue and thereafter proceeded to argue the grounds of appeal filed. The court below observed that it was wrong for the appellant to argue his grounds of appeal one after the other after formulating one issue for determination but nonetheless proceeded to consider the grounds of appeal argued by the appellant. The appellant's complaint under this issue is that some of the grounds of appeal, which he filed at the court of trial, were not considered by the Court of Appeal.

With profound respect to learned senior counsel to the appellant, I find this contention disturbing. It is even more disturbing when it is realized that the counsel for the appellant who conducted the case in the court below and settled the appellant's brief is a Senior Advocate of Nigeria. **Since the introduction of brief writing in the appellate courts about two decades ago, the practice has evolved whereby issues for determination in an appeal are derived from the grounds of appeal:** See Ogidi v. Oliha (1986) 1 NWLR (Pt. 19) 786; Hart v. Hart (1987) 4 NWLR (Pt. 63) 105, Fasoro v. Beyioku (1988) 2 NWLR (Pt. 76) Akinbinu v. Oseni (1992) 1 NWLR (Pt. 215) 87. **Such an issue so formulated must be of such a nature that a decision on it one way or the other must affect the result of the appeal: Attorney-General of Kwara State & Ors. v. Olawole (1993) 1 NWLR. (Pt. 272) 645 at 660.**

When the issues for determination have been formulated from the grounds of appeal, arguments in the brief are canvassed on the basis of the issues and no longer on the grounds of appeal. This principle was recently restated by this court in the case of Stephen Onowhosa & 5 Ors. v. Peter Ikede Odiuzou (1999) 1 S.C. 40 at 46 where Ogwuegbu, JSC., delivering the leading judgment of this court opined thus:-

“No issue was formulated in respect of ground two of the grounds of appeal. The defendants argued the grounds of appeal in their brief. Argument on appeal should be based on issues formulated and not on grounds of

appeal. We have gone a long way since the introduction of brief writing and this court has said in a number of its decisions that arguments at the appeal court should be based on issues formulated and not on grounds of appeal. I will in the circumstance ignore the arguments in respect of ground two of the ground of appeal. It is not in compliance with Order 6 Rule 3 of the Court of Appeal (Amendment) Rules, 1984.” B

For the reasons articulated in the above except, I will similarly decline to entertain arguments that the Court of Appeal did not consider or consider fully, argument on the grounds of appeal before it. In any case, I am of the view that the resolution of issue one in this appeal has sufficiently disposed of this appeal. C

In the light of the conclusion arrived at with respect to the first issue for determination which was resolved in favour of the respondents, it is my judgment that this appeal lacks substance and is accordingly dismissed. I affirm the decision of the two lower courts. The respondents are entitled to costs, which I assess and fix at N10, 000.00 against the appellant. D

E

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Edozie, JSC. I agree that the appeal lacks merit and that it should be dismissed. I have nothing to add. F

Accordingly, I too hereby dismiss the appeal with N10, 000.00 costs to the respondents.

ONU JSC

G

Having been privileged to read before now the judgment of my learned brother, Edozie, JSC., just delivered, I am in entire agreement with him that the appeal is devoid of substance and must perforce fail.

I wish to add a few words of mine in expatiation thereto by making a brief comment on each of the two issues which the appellant had formulated and which overlap the two the respondents submitted as arising for our determination as follows: - H

“(1) *Whether upon a calm view of the pleadings and the evidence, the Court of Appeal below was right when it affirmed the judgment of the court of trial which held that the respondents had proved that they delivered 52,032.9 meters of aluminum conductor cable to the appellant.*

B *Whether the judgment of the Court of Appeal below represents a dispassionate and full consideration of the issues raised by the appellant before the court and fully argued in the appellant’s Brief.”*

ISSUE NO. 1

C The appellant in his brief forcefully argued that the respondents did not prove that they supplied 52,032.9 meters of aluminium conductor cables to him, adding that since the respondents pleaded in paragraphs 14 - 17 of their Amended Statement of Claim that they were going to rely on waybills signed by P.W.2 (Sunday Ugwu) and one Mr. Cyril Attah in proof of the D delivery of the goods, the respondents were bound to produce the said waybills. The appellant further argued that the respondents tendered only one waybill which showed that 3020 meters of aluminium conductor cables were supplied to him on 15/7/91. It was the appellant’s case that the E respondents proved the delivery of 3020 meters aluminium conductor cables to him and that at the most the respondents were entitled to judgment only to the extent of the admission made by him - the appellant. In other words that the respondents only proved the delivery of 17.407 meters of aluminium F conductor cables which the appellant admitted that he received. With due respect, this submission is misconceived in that in the first place, a party to a suit is not obliged to lead evidence in support of every averment in his pleadings. In *Gbadamosi Olorunfemi & 7 Ors. v. Chief Rafiu Eyinle Asho & Anor.* (2000) 1 S.C. 15, (2000) 2 NWLR (Pt. 643) 143 at page 158 this G Court (per Ayoola, JSC held that:

“*A party is not obliged to lead evidence in his pleadings. Although he is bound by his pleadings he is at liberty to abandon such averments as he considers unnecessary to his case or which he is unable to prove.....*”

H Secondly, under the rules of pleadings, a pleader who has pleaded more than he strictly need to have done can always disregard the surplus or unnecessary averments and rely on the more limited ones. See also Chief Akin Omoboriowo & Anor v. Chief Michael Adekunle Ajasin (1984) 8 SCNLR

108 at 134. See also Arab Bank Ltd, v. Koss (1952) 2 QB 216 at 226. Thirdly, the appellant's submission is based on the misconceived and erroneous notion that the only means of proving delivery of goods is by tendering waybills.

I therefore agree with the respondents that the law of Evidence requires a party to prove their case by calling the best evidence available. In the instant case, P.W.2 who personally delivered the goods was called as a witness and the trial court believed his testimony. See page 87 lines 14-27 of the Record of Appeal. See Lawrence Nwankpa & Anor. v. Dennis Ewulu & 2 Ors. (1995) 7 NWLR (Pt. 407) 369 at 293 per Ogundare, JSC .

In this case, the respondents having called P.W.2 who delivered the goods to the appellant as a witness they no longer need to tender the waybills. Be it noted that this is a civil case and the standard of proof required is proof on a balance of probability and not (as in a criminal case) proof beyond any shadow of doubt. See Onobruhere v. Esegine (1986) 1 NWLR (Pt. 19) 799; Ojomo v. Ejeh (1987) 4 NWLR (Part 64) 216 at 230 and Bakare v. A.C.B. (1986) 3 NWLR (Pt. 26) 47 at 57.

Besides, Section 76 of the Evidence Act, Cap. 112 L.F.N provides that all facts except the contents of a document may be proved by oral evidence. And Section 77 of the same Evidence Act stipulates that:

“Oral evidence must in all cases whatever be direct. If it refers to a fact which would be seen it must be the evidence of a witness who saw the facts.”

P.W.2 made the delivery of the goods to the appellant through his site agent. He is therefore competent to testify on that point.

As in civil proceedings, it is trite law that he who asserts proves and the onus of proof is on him who will fail if no evidence is given on an issue vide Section 135 Evidence Act (ibid) - see also Are v. Adisa (1967) NWLR 304. The onus became that of the appellant to call Cyril Ikechuku Attah to explain that he never received all the goods. This is what in law is referred to as shifting the evidential burden. Since the learned trial Judge believed P.W.2 the conclusion arrived at is unimpeachable.

The affirmation of the trial court's decision by the Court of Appeal made the decisions of the two courts below concurrent findings, not liable

to be interfered with lightly. See *Ibodo v. Enarofia* (1980) 5-7 S.C. 42 at 58 and *Nwangu v. Okonkwo* (1987) 3 NWLR (Pt. 60) 314 at 321.

From the foregoing, the court of Appeal, in my view, was therefore right when they held that the failure of the appellant to call Mr. Cyril Ikechukwu Attah, his site manager, to give evidence in rebuttal, was fatal to his case.

The appellant also argued in his brief that the trial court should invoked the provisions of Section 149(d) of the Evidence Act against the respondents for their failure to produce waybills pleaded by them. My short answer to this submission is that the respondents having called P.W. 2 testify on the matter and the trial court in infact believed his evidence with the fact that the trial court commented on the failure to call Cyril Ikechukwu Attah to show that he never received all the goods.

The appellant having failed to place all his cards face upward before the trial court, cannot now blame it for the outcome or fate befalling his case.

ISSUE NO. 2

The appellant at the court below filed thirteen grounds of appeal. From these thirteen grounds he formulated only one issue for determination. In his brief filed at the court below, he canvassed the lone issue he formulated and thereafter proceeded to argue the grounds of appeal filed. This approach is wrong since the court has repeatedly held that appeals should be argued on the issues formulated in the brief and not on the grounds. See *Chinweze v. Masi* (1989) 1 S.C. (Pt. II) 33, (1989) 1 NWLR (Pt. 97) 254; *Stephen Onowhosa & 5 Ors. v. Peter Ikede Odiuzou* (1999) 1 S.C. 40 at 46.

The court below held that it was wrong for the appellant to argue his grounds of appeal one after the other after formulating one issue for determination but nevertheless proceeded to consider the grounds of appeal sargued by him.

The appellant also submitted that the trial court was wrong when it held that issues were not joined on the pleadings with respect to the time of delivery of the goods. With utmost due respect, this argument is misconceived. As can be gathered from paragraph 16 of respondents' Amended

Statement of Claim, they (respondents) specifically pleaded that the goods supplied to the appellant were delivered at Alor between the 15th and 25th day of July, 1991, the appellant in response to that piece of pleading denied in general terms paragraphs 13-18 of the Amended Statement of Claim and further pleaded that the respondents supplied only 17.407 meters of cable to him. B

No attempt was made to join issues with the respondents date of delivery of the goods. As the appellant did not specifically denying the allegation, the learned trial Judge, in my view, was right when he held that issues were not joined as to the date of delivery. See Ifeanyichukwu Osondu & Co. Ltd, v. Dr. Joseph Akhigbe (1999) 11 NWLR (Pt. 625) 1 at pages 16 - 19. C

Thus, I agree that the conclusions arrived at by the two courts below on the credibility of appellant, in my opinion, are unassailable and this the moreso that Exhibit 'A' also belies his assertion that the goods were received personally by him. The appellant in his brief submitted that Exhibit "A" was tendered to prove the quantity of goods supplied to him and that the said document shows that only 3, 020 meters were supplied by the respondents. D E

I take the view that this is based on a misconception of the purpose for tendering Exhibit 'A'. Exhibit 'A' was not tendered to prove the entire quantity of goods supplied to the appellant but to prove the allegation pleaded in paragraph 17 of the Amended Statement of Claim. It was pleaded to prove that the first consignment of 3,020 meters of cable were delivered on 15/7/91 contrary to appellant's assertion that deliveries were made after 25/7/91 and also to prove that the goods were received by Mr. Cyril Attah and not by the appellant personally. True it is, that even the appellant admitted receiving more than 3,020 meters of cable vide Exhibit 'A'. Such that when confronted under cross-examination, the appellant who claimed that he personally took delivery of the goods had this to say: F G

"The plaintiffs signed no document to me showing that he supplied H 17,407 meters of cable to me."

It will therefore be preposterous for the appellant at that stage of the proceedings to argue that the respondents proved the delivery of only

3,020 meters of cables vide Exhibit 'A.

In Salawu Ajide v. Kadiri Kelani (1985) NSCC Vol. 16 page 1316, the Supreme Court, per Oputa, JSC., while stressing on the need for a party to be consistent in presenting his case observed as follows:

- B "A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance on his pleadings, then turn somersault during the trial, then assume a non - challant attitude in the Court of Appeal only to revert to his case as pleaded in the Supreme Court.
- C Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth. Justice will never decree anything in favour of so slippery a customer as the present defendant/appellant."

- D Finally, I am of the view that this appeal bordering essentially on findings of facts in respect of which there has been concurrent findings of the two courts below, the attitude of this court being that of always a reluctance to interfere therewith unless exceptional circumstances are shown to warrant same or the decision is demonstrated as being perverse, I will
- E decline to disturb the conclusions arrived at. See Edwin Obianefu Okeke & 4 Ors. v. Anthony Agbodike & 5 Ors. (1999) 12 S.C. (Pt. II) page 101/105; Dr Tunde Bamgboye v. University of Ilorin & Anor (1999) 6 S.C. (Pt. II) 72.

- F It is for the above reasons and the more comprehensive ones contained in the leading judgment of my learned brother, Edozie, JSC., that I too dismiss this appeal and make similar consequential orders as contained therein.

KALGO JSC

- G I have had the privilege of reading in advance the judgment just delivered by my learned, brother, Edozie, JSC. in this appeal. I am entirely in agreement with him that there is no merit in the appeal and it ought to be dismissed.
- H The main issue in dispute in the appeal is whether on the pleadings and evidence of the plaintiffs/respondents (hereinafter referred to simply as the respondents) they have sufficiently proved their case to entitle them to judgment. The facts of this case have been set out fully in the leading

judgment, and I do not intend to repeat them here.

The argument of the appellant was that since the respondents have pleaded in paragraphs 14-17 of their Amended Statement of Claim that the whole 50 meters of 50,000mm (sic, 50,000 meters of 50mm) aluminum conductor cables contracted for have been delivered through waybills B which the respondent agreed to produce at the trial, they are bound to produce those bills in accordance with their pleadings. It is common ground that the respondents produced at the trial only one waybill Exhibit 'A' for the supply or delivery of 3,020 meter only to the appellant which the latter C admitted. There is, however evidence of P.W.2 for the respondents that he personally delivered all the 50,00 meters and more of the conductor cables contracted for to one Cyril Attah the site manager of the appellant. The appellant did not call Cyril Attah, his site manager to rebut the evidence of P.W.2 at the trial. In his judgment the learned trial Judge who saw and heard D P.W. 2, had this to say about him:

"I accept his evidence with regard to the quantity of goods supplied and the time it was supplied and the balance of goods left unpaid."

It is significant to observe that P.W.2 was not in the services of E the respondent at the time he gave evidence in this case and that he was not shaken in cross-examination. Also Cyril Attah, the appellant's site manager to whom P.W.2 said he delivered the whole materials contracted for, did not give evidence to challenge or contradict the evidence of P.W.2. F In addition, the evidence produced or adduced by the appellant at the trial was a bundle of contradictions and inconsistencies and was rejected as unreliable by the trial court.

This is a civil action, which in law can properly be proved by oral G evidence on a balance of probabilities. It is also well established that parties are bound by their pleadings in all civil actions. Oduka v. Kasumu (1968) NMLR 28 Shell BP v. Abedi (1974) 1 All NLR 1, Emegokwe v. Okadigbo (1973) 4 S.C. 113. This presupposes that a party must lead evidence in proof of the averments in his pleadings, and not outside the plead- H ings. In this case, paragraphs 14 and 17 specifically averred that the respondents have delivered all the consignments of the electrical materials contracted for at Alor and were received by the site manager of the appel-

lant, one Cyril Ikechukwu Attah. The evidence of P.W.2 was in full compliance with this averment. It is my respectful view that the addition of the words in the said paragraphs 14 and 17, that:

B *“The plaintiffs will at the trial of this suit found on the documents signed by the said site manager on behalf of the defendant”*

C is merely complementary to the evidence of such delivery and the absence of it would not affect the evidence itself. The evidence of P.W.2 is within and not outside the respondents’ pleadings and once accepted and believed, it can be relied upon. The learned trial Judge had accepted and believed the evidence of P.W.2 before giving judgment for the respondents.

D It is also well settled that an appeal court will not interfere with the findings of fact of a lower court where the latter has properly appraised the evidence before it in accordance with law. Balogun v. Aboola (1974) 10 S.C. 111; Akinlove v. Eyiola (1968) NMLR 92 at 95; Fatoyinbo v. Williams (1956) 1 FSC 87 at 89. This is so, because according to Ogundare JSC in Nwankpa & Anor. v. Ewulu & Ors. (1995) 7 NWLR (Pt. 407) 269 at 293:-

E *“.....the trial Judge is in a better position than the appeal court to decide the issues of credibility of the witnesses. This is so because the trial Judge has the singular advantage of seeing and observing the witnesses. He watches their demeanour, candour or partisanship, their integrity and manners. These advantages are not normally enjoyed by the appellate court which has only the cold printed evidence to contend with”.*
F (Underlining mine)

I entirely agree with this principle of law. I adopt it in this case, and find that the Court of Appeal was right in refusing to interfere with the findings of the trial court and dismissed the appeal.

G For the above and more detailed reasons given by my learned brother Edozie, JSC., in the leading judgment, I also find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal. I award N10,000.00 costs to the respondents.

H _____

TOBI JSC (DISSENTING)

The respondents who were the plaintiff in the High Court are busi-

nessmen and contractors. They have their business offices at Nos. 5 and 14/16 Okwei Street, Onitsha South Local Government Area of Anambra State. The appellant who was the defendant in the High Court is also a businessman and contractor with office at No. 56A Ekwulummiri Street, City Layout, New Haven, Enugu. B

On 25th July, 1991, the parties entered into an Agreement for the supply of 50,000 meters of aluminum conductor cables at the rate of N13.65k per meter with a total value of N675,000.00. The Agreement is Exhibit E. In Exhibit E, the respondents agreed to supply the 50,000 meters of aluminium conductor cables and the appellant agreed to pay the sum of N675,000.00 C not later than six weeks after the date of delivery of the whole meters of the aluminum conductor cables.

It is the case of the respondents that they supplied the 50, 000 meters of aluminum to the appellant on 15th July, 1991 and the appellant failed or refused to pay the balance of N440,000.00. It is the case of the appellant D that the respondents only supplied 17,407 meters and that he paid the total price of N235,000.00 for the meters supplied and received by him.

The respondents filed an action in the High Court of Onitsha, Anambra State, claiming the balance of N440,000.00 and interest of 4% on the balance from the date of judgment until the entire sum is liquidated. The learned trial Judge gave judgment to the respondents. The appellant's appeal to the Court of Appeal was dismissed. E

Dissatisfied, the appellant has come to this court on appeal. As usual, F briefs were filed and duly exchanged. The appellant formulated two issues for determination:

“(i) Whether upon a calm view of the pleadings and the evidence, the Court of Appeal below was right when it affirmed the judgment of the Court of trial which held that the respondents had proved that they delivered 52,032.9 meters of aluminum conductor cable to the appellant.” G

“(ii) Whether the judgment of the Court of Appeal below represents a dispassionate and full consideration of the issues raised by the appellant before that court and fully argued in the appellant's Brief.” H

The respondents also formulated two issues for determination:

“ Were the learned Justices of the Court of Appeal right when they

affirmed the judgment of the trial court that the respondents delivered 52032.9 meters of aluminum conductor cables to the appellant?

Did the Court of Appeal consider all the issues properly raised before it? If answered in the negative has their failure to do so occasioned any miscarriage of justice?"

Learned counsel for the appellant, Mr. Ubong Akpan, submitted on Issue No. 1 that the onus lay squarely with the respondents to prove their title to the amount endorsed on their writ which is N440, 000.00. To prove their title to it, the respondents must prove strictly that they delivered at least 50,000 meters of cable to the appellant. Learned counsel submitted that the respondents woefully failed to prove this.

Referring to paragraph 14 of the Amended Statement of Claim in which the respondents pleaded they delivered the consignments of electrical materials which were duly collected by the site manager of the appellant, Cyril Ikechukwu Attah, counsel contended that in the evidence in court, it turned out that the only document the respondents produced allegedly signed by Cyril Ikechukwu Attah did not support their story of delivery of 52,032.9 meters of cable to the appellant. He maintained that Exhibit A merely shows delivery of 2 drums of cable making, a total of 3,020 meters of cable only.

It was the argument of learned counsel that the Court of Appeal ought to have inferred by virtue of Section 149(d) of the Evidence Act that the failure of the respondents to produce evidence of delivery of the remaining 49,012.9 meters of cable is either that such evidence is non-existent or that if it was produced, it would not support the case of the respondents. He cited *Elias v. Omobare* (1982) 1 All NLR (Pt. 1) 70; *ACB Plc v. Haston (Nig) Ltd.* (1997) 8 NWLR (Pt. 515) 110 at 113 and the case of *E. D. Tsokwa and Sons Co. Ltd, v. Union Bank of Nigeria Ltd.* (1996) 10 NWLR (Pt. 478) 281. In view of the fact that the appellant admitted receiving 17,407 meters of cable only from the respondents, the respondents were relieved of the onus probandi only to that extent and no more. They are bound to prove delivery of any more than is admitted by the appellant if they intend to foist liability on the appellant beyond the quantum of his admission, learned counsel argued.

It was the submission of learned counsel that to the extent that Exhibit A did not support paragraphs 14, 14(a) and 16 of the respondents Amended Statement of Claim, the paragraphs were not proved at the hearing. He contended that paragraph 16 of the Amended Statement of Claim is in conflict with paragraph 17 thereof.

Learned counsel pointed out that even though in paragraph 14(a) of the amended pleadings, the respondents pleaded that the consignments were delivered by Mr. Sunday Ugwu and that the said Sunday Ugwu also signed the Way Bills on behalf of the 1st plaintiff, this pleading was abandoned because there was no evidence of it as neither of the plaintiffs nor Sunday Ugwu who testified as P.W.2 gave evidence of any such Way Bills signed by Sunday Ugwu. Sunday Ugwu was never shown Exhibit A for him to identify his signature thereof and he did not give evidence in respect of Exhibits B, C and D as to whether he signed them or whether Cyril Ikechukwu Attah signed them. In fact, neither Sunday Ugwu nor Cyril Ikechukwu Attah signed any of Exhibits B, C and D, and their names did not even appear on any of them, learned counsel pointed out.

Referring to the evidence of the 1st plaintiff, P.W. 1, on Exhibits B, C and D, learned counsel submitted that Exhibits B, C and D are not Way Bills or evidence of any delivery made to the appellant by the respondents. None of them is a delivery note or Way Bill signed by Sunday Ugwu or Cyril Ikechukwu Attah on behalf of the appellant, contrary to the respondent's case, learned counsel contended. To learned counsel, they are documents evidencing a purported transaction between the respondents and third parties who are strangers to the suit. In so far as they are not documents signed by Cyril Ikechukwu Attah, the alleged site manager of the appellant, the appellant is not bound by them and they do not offer any proof of delivery of any cable to the appellant at Alor as pleaded by the respondents, learned counsel reasoned.

The pith of the appellant's complaint is that both the trial court and the Court of Appeal erred in law in entering judgment for the respondents when they failed to adduce valid evidence in support of their assertion that they supplied 52,032.9 meters of cable to the appellant, counsel argued. He contended that this is not a complaint against concurrent findings on facts

but complaint of wrong inference drawn from Exhibits A to E. A complaint that documentary evidence produced did not support the case as pleaded is a ground of law, counsel contended. He cited *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718; *Ogbechie v. Onochie* (1986) 3 S.C. 54.

B Referring to what the Court of Appeal said at page 159 of the Record, learned counsel submitted that having come to that conclusion, the Court of Appeal ought to have dismissed the plaintiff's case. He cited *Imana v. Robinson* (1979) 1 All NLR (1990 Reprint) 1 at 16. Submitting that parties are bound by their pleadings, counsel cited *Adimora v. Ajufo* (1988) 3 NWLR C (Pt. 80) 1 at 15 and *Aforka v. ACB* (1994) 3 NWLR (Pt. 331) 217 at 226.

Recalling the decision of the Court of Appeal on the failure by the appellant to call Cyril Ikechukwu Attah to testify for him, learned counsel submitted that the view expressed by the court stood Section 149(d) on its D head. He said that the onus lay on the plaintiffs to prove the averments in paragraphs 14(a) and 16 of the Amended Statement of Claim by producing the documents and Way Bills allegedly signed by Cyril Ikechukwu Attah and Sunday Ugwu. Relying once again on Section 149(d) of the Evidence Act, E learned counsel submitted that by producing Exhibit A, the respondents did not prove their case and by their failure to produce any other documents makes Section 149(d) a weapon against them. He cited once again *Elias v. Omobare* (supra); *ACB Plc v. Haston (Nig.) Ltd*, (supra) and the case of F *E. D. Tsokwa and Sons Co. Ltd, v. Union Bank of Nigeria Ltd*, (supra).

Learned counsel maintained that the appellant as defendant at the trial had no onus to call Cyril Ikechukwu Attah and his failure to call him could never at law be such a weakness as to relieve the plaintiffs of the onus of producing the documents and way bills, which they expressly G pleaded. The plaintiffs, learned counsel submitted, must succeed on the strength of their own case and the failure of the defendant to call Cyril Ikechukwu Attah to produce the job order pleaded in paragraph 13(b) of the Amended Statement of Defence cannot be such a weakness in the H defendant's case as to relieve the plaintiffs of the burden of producing the documents and way bills which they specifically pleaded in paragraphs 14 and 14(a) of their Amended Statement of Claim.

Dealing with the statement of the Court of Appeal at page 162 of the

Record that the respondents gave credible evidence through P.W.2 of the supply of the agreed quantity of the materials to the appellant, learned counsel submitted that the view is legally untenable. He cited *Anyaegbunam v. Osaka* (2000) 76 LRCN 535 at 552 and submitted that parties are bound by their pleadings which shall for all purposes dictate issues admitted upon B which evidence need not be led, and, issues disputed upon credible evidence must necessarily be led.

Learned counsel submitted that a person whose evidence is inconsistent with documentary evidence produced by him cannot be said to have C given credible evidence. Conversely, a witness cannot be said to have given credible evidence when the document he produced is inconsistent with his pleadings. He cited Sections 94(1), 96 and 97 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 and submitted that primary evidence means the document itself produced for the inspection of the court. D He cited *Lagos Timber and Co. Ltd, v. Tit Kombe* (1943) 17 NLR 14. Citing *Aguda, Law and Practice Relating to Evidence in Nigeria*. 1st edition (1980) page 227, paragraph 20-3, learned counsel submitted that in practice, if the existence of a document is accepted by both parties, a witness will be E estopped from speaking of its terms; and even when it is not clear on the pleadings whether the material transaction is in writing, a witness will be estopped from giving evidence of the terms and conditions of the transaction as soon as he says that the transaction was reduced into writing. F

On the issue of claim for value of goods supplied, learned counsel submitted that the claim for value of goods supplied sounds in special damages or is akin to it and must be strictly proved both as to price and to quantity supplied. While agreeing with what the Court of Appeal said about the weakness of the plaintiffs' case, he was unable to agree with the G court that the evidence of P.W.2 was credible.

Learned counsel finally submitted on the issue that upon a calm view of the pleadings and the evidence, both the trial court and the Court of Appeal were in grave error when they held that the respondents as plaintiffs H at the trial court had proved that they delivered 52,032.9 meters of aluminium conductor cable to the appellant when the respondents failed to produce the relevant documents and way bills in proof of this and Exhibit A,

which they produced did not prove the point.

On Issue No. 2, learned counsel submitted that the Court of Appeal neglected to make adequate and specific findings on the crucial issues argued before the court. He enumerated seven of the crucial issues at
 B page 11 of the brief. On the comments of the Court of Appeal on the brief of the appellant in the case, learned counsel submitted that brief writing is an art and the artist or advocate must adapt his craft to the peculiarity of the particular appeal and that there must be room for flair and innovation.

Learned counsel submitted that the Court of Appeal ought not to
 C have glossed over specific grounds of appeal presented before it on the starting proposition in the leading judgment that “*there is no case however complex that cannot be disposed of on 4,5 or 6 grounds of appeal*”. Justifying the grounds of appeal before the Court of Appeal, learned counsel
 D cited Nwabueze v. Okoye (1988) 10-11 S.C. 77, (1988) 4 NWLR (Pt. 91) 664 and Abacha v. Fawehinmi (2000) 4 S.C. (Pt. II) 1, (2000) 6 NWLR (Pt. 660) 228. Counsel enumerated the seven grounds which the Court of Appeal failed to consider and argued at pages 12 to 18 of his brief
 E why the court ought to have considered the grounds. He urged the court to allow the appeal.

Learned counsel for the respondents, Mr. M. I. Onochie, submitted on Issue No. 1 that the submission of appellant’s counsel that the respondents did not prove that they supplied 52,032.9 meters of aluminium
 F conductor cables is misconceived. Citing Olorunfemi v. Chief Asho (2000) 1 S.C. 15, (2000) 2 NWLR (Pt. 643) 134 at 158, learned counsel submitted that a party to a suit is not obliged to lead evidence in support of every averment in his pleadings. He submitted that under the rules of pleadings, a
 G pleader who has pleaded more than he strictly need to have done can always disregard the unnecessary or surplus averments and rely on the more limited ones. He cited Chief Omoboriowo v. Chief Ajasin (1984) SCNLR 108 at 134 and Arab Bank Ltd, v. Ross (1952) 2 QB 216 at 226.
 H To learned counsel, the submission of appellant is based on the erroneous notion that the only means of proving delivery of goods is by tendering waybills.

It was the submission of learned counsel that the law of evidence

requires a party to prove his case by calling the best evidence available and this, counsel said, is what is referred to as the Best Evidence Rule in the Law of Evidence. He relied on the evidence of P.W.2 and the case of Nwankpa v. Ewulu (1995) 7 NWLR (Pt. 407) 269 at 293. He submitted that the respondents having called P.W.2 who delivered the goods to the appellant as a witness they no longer need to tender way bills, as this is a civil case and the standard of proof required is proof on a balance of probability and not proof beyond any shadow of doubt. He cited Sections 76, 77 and 91 of the Evidence Act. Counsel submitted that the case of Lagos Timber Company Ltd, v. Tit Kombe (supra) and Aguda on Law and Practice Relating to Evidence in Nigeria did not apply to the appeal, as Aguda dealt with Section 132 of the Evidence Act. Although learned counsel said that Section 132 of the Evidence Act applied to (a) judgment of courts, (b) official and judicial proceedings, (c) contracts reduced into writing, and (d) grant or other disposition of property reduced into writing, he argued that the section does not apply to way bill which is only evidence in proof of delivery of goods. He also cited Section 134(1) of the Evidence Act and submitted that the civil rights and liabilities of the parties in this case were not dependent on the way bills. He cited Monier Construction Company Ltd, v. Azubuike (1990) 3 NWLR (Pt. 136) 74; Olarenwaju v. The Governor of Oyo State (1992) 9 NWLR (Pt. 265) 335 at 366 and Phipson on Evidence. 11th Edition, paragraph 129, page 62.

On the need for the appellant to call Cyril Attah, learned counsel submitted that the Court of Appeal was right in so holding on the ground that while the burden of proof initially lies on the plaintiff, the proof or rebuttal of issues which arise in the course of the proceedings was shifted from the plaintiff to the defendant and vice versa as the case progresses. He cited Elema v. Akenzua (2000) 6 S.C. (Pt. III) 26, (2000) 6 SCNJ 226 at 238.

It was the argument of learned counsel that as the respondents led credible evidence through P.W.2 that they supplied 52,032.9 meters of aluminium conductor cables to the appellant, the evidential burden shifts to the appellant to rebut the respondent evidence. To learned counsel, the only witness competent to give evidence in rebuttal for the appellant was Mr. Cyril Attah and not the appellant himself. He gave four reasons at pages 8

and 9 of the respondents' brief.

B On Section 149 (d) of the Evidence Act, learned counsel submitted that the provisions of the subsection cannot be invoked against the respondents. In this case, the evidence required to be produced by the respondents is evidence that they delivered 52,032.9 meters of aluminium conductor cables to the appellant and the respondents could prove this by the direct oral evidence of the person who delivered or received the goods or by the production of way bills. He relied once again on the evidence of P.W.2.

C On Issue No. 2, learned counsel pointed out that the appellant filed thirteen grounds of appeal and formulated only one issue for determination. And what is more, the appellant argued the grounds of appeal instead of the only issue for determination, learned counsel said. Citing *Onowhosa v. Odiuzou* (1999) 1 S.C. 40 at 46, learned counsel contended that this court has repeatedly held that appeals should be argued on the issues formulated in the brief and not on the grounds of appeal. Learned counsel took time at pages 10 to 14 of his brief to reply to the grounds of appeal which the appellant argued at pages 12 to 18 of his brief. He urged the court to dismiss the appeal.

F Let me first take the principles on burden of proof generally. Section 137 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, provides for the burden of proof in civil cases. The burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings (Section 137(1). If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be produced is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively until all the issues in the pleadings have been dealt with (Section 137(2)). Where there are conflicting presumptions, the case is the same as if there were conflicting evidence (Section 137(3)).

H By Section 137, the burden of proof is not static. It fluctuates or undulates between the parties. Subsection (1) places the first burden on the

party against whom the court will give judgment if no evidence is adduced on either side. In other words, the onus probandi is on the party who would fail if no evidence is given in the case. Thereafter the second burden if I may so number it, goes to the adverse party in line with Subsection (S). And so the burden changes places almost like a chameleon or weathercock in B climatology until all the issues in the pleadings have been dealt with. Although the Section 137(1) burden is in most cases on the plaintiff, it is not invariably so. It could fall on the defendant, in the light of the pleadings. But in most cases, the Section 137(1) burden falls on the plaintiff because he is, C again in most cases, the person against whom the judgment would be given if no evidence is produced on either side.

The standard of proof in civil cases is on the preponderance of evidence or the balance of probabilities. See *A mukomowo v. Audu* (1985) 1 NWLR (Pt. 3) 530; *Odulaja v. Haddad* (1973) 11 S.C. 357; *Okuarume v. D Obabokor* (1965) All NLR 360; *Faluyi v. Oderinde* (1987) 4 NWLR (Pt. 64) 155; *Onwuka v. Omogui* (1992) 3 NWLR (Pt. 230) 393.

In determining either preponderance of evidence or balance of probabilities in evidence, the court is involved in some weighing by resorting to E the imaginary scale of justice in its evaluation exercise. Accordingly, proof by preponderance of evidence simply means that the evidence adduced by the plaintiff should be put on one side of the imaginary scale as in *Mogaji v. Odofin* (1978) 3 S.C. 91, and the evidence adduced by the defendant put F on the other side of that scale and weighed together to see which side preponderates. See also *Nwankpu v. Ewulu* (1995) 7 NWLR (Pt. 407) 269.

In *Mogaji v. Odofin* this court, per Fatayi-Williams JSC (as he then was), said at page 93:

“Therefore, in deciding whether a certain set of facts given in evi- G dence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial Judge, after a summary of all the facts, must put the two sets on an imaginary scale, weigh one against the other; then decide upon H the preponderance of credible evidence which weights more, accept it, and then apply the appropriate law to it, if that law supports it bearing in mind the cause of action, he will then find for the plaintiff. If not, the plaintiff’s

claim will be dismissed.”

The balance of probabilities, like the preponderance of evidence, is not based on rhetorics but on credible evidence adduced by the parties in court. By this principles, the court weighs the evidence in the usual imaginary scale and sees which evidence sounds more probable than the other. In other words in order to give judgment to the plaintiff, the court must be satisfied that the evidence given by and or for the plaintiff is more likely to be true and correct than that of the defendant. By this the court comes to the conclusion that the story presented by the plaintiff is more likely to happen than that presented by the defendant.

In arriving at the preponderance of evidence or the balance of probabilities, the judge does not need to search for an exact mathematical figure in the “weighing machine” because there is in fact and in law no such machine and therefore no figures. On the contrary, the judge relies on his judicial and judicious mind to arrive at when the imaginary scale preponderates, and that is the standard; though oscillatory and at times nervous.

I have taken the trouble to state the law on the burden and standard of proof in some detail because the exercise is most necessary in the determination of the strengths of this appeal one way or the other. I will, in the appropriate place, take specifically the issue of proof by the witnesses, particularly in the light of the decisions of the two lower courts.

But let me take two aspects of the evidence of P.W. 1 and P.W.2. The first aspect is the person that delivered the meters of aluminum conductor cables. Paragraph 14(a) of the Amended Statement of Claim averred as follows:

“The consignments were delivered by Mr. Sunday Ugwu who was at the material time under the employment of the 1st plaintiff. The said Mr. Sunday Ugwu also signed the Way Bills on behalf of the 1st plaintiff”.

P.W. 1, the 1st plaintiff in his evidence in-chief said at page 45:

“I later supplied the aluminum conductor cables to the defendant.... H I delivered 52,000 meters of aluminum conductor cables to the defendant.... The goods were delivered to the defendant at Alor in Idemili LGA.”

P.W.2, who served P.W. 1 between 1990 and 1993, said in his evidence in-chief at page 50:

“The plaintiff supplied 52,032 meters to the defendant. I delivered the 52,032 meters to the defendant.”

By the above evidence, both P.W. 1 and P.W.2 claimed delivering the materials-in dispute. There is no evidence that both of them delivered the Materials together and it will be dangerous for this court to so conclude. B And this discrepancy in the evidence of P.W.I and P.W.2 is, in my humble view, material as it exposes them as witnesses of truth. Unfortunately, both courts did not deal with the issue.

Let me also take the evidence of P.W.3 on the issue. He was not consistent in respect of the number of meters of aluminum conductor cables delivered to the appellant. In examination-in-chief, witness said at page 53 of the Record: C

“We supplied in all to the defendant 52,000 mm cable to the defendant.” D

Under cross-examination, witness said at pages 54 and 55 of the Record:

“At Alor we found out that the quantity of goods was correctly supplied 50,000 mm of cable/wire were supplied...” E

Which version should this court take: 52,000 meters or 50,000 meters? From the totality of the evidence before the trial court, the court is exposed to about four versions of the number of meters of aluminium conductor cables supplied by the respondents. The first version by P.W.I puts the number at 52,000. The second version by P.W.2 puts the number at 52,032. F The third version by P.W.3 puts the number at 52,000 and 50,000. The fourth version is by the appellant who puts the number at 17,407. It is clear from the above that the respondents have three versions while the appellant has only one version. And yet, the two courts believed the evidence of the respondents. What a thing! In my view, in this matter where the litigation G centres on the quantity of materials delivered, the contradictions are material and I expected the two lower courts to examine the evidence of the witnesses in the light of the contradictions. H

As stated above, while P.W.I, the plaintiff, said in evidence that he delivered 52,000 meters, P.W.2 said that he delivered 52,032 meters. Paragraph 16 of the Amended Statement of Claim vindicates the evidence of

P.W.2; it did not vindicate the evidence of P.W. 1, the owner of the property. The learned trial Judge held that the respondents as plaintiffs proved that they delivered 52,032 meters; a decision, which the Court of Appeal upheld. By the decision both courts picked and chose the evidence of P.W.2 and B dumped the evidence of P.W. 1 on the issue of the quantity of cables delivered. Have they the jurisdiction to do that? I will not stop here to answer this question now. Although P.W. 1 said in his evidence-in-chief that he was only claiming for 50,000 meters of cable, the evidence given by the two witnesses remain contradiction and this ought to have affected the veracity of C their evidence.

It would appear that both courts believed the evidence of P.W.2 and were curiously and surprisingly silent on the evidence of P.W. 1, the plaintiff, and P.W.3 throughout the judgment. On the evidence of P.W.2, the D learned trial Judge said at page 87 of the Record:

The evidence of P.W.2 was unshaken, uncontradicted under cross-examination. Between 1990 and December 1993 P.W.2 worked as the manager of the 1st plaintiff's business. He left the plaintiff's business in December 1993. He had personal knowledge of the transaction between the E plaintiffs and the defendant. He delivered the goods to the defendant through Cyril Attah. He is quite an independent witness who has no special interest to protect. His testimony is credible. I accept his evidence with regard to the F quantity of goods supplied and the time it was supplied and the balance of the price of goods left unpaid. The fact that on 10/9/91 the defendant made a part payment of N35,000.00 for the goods supplied added a great weight to P.W.2's evidence that the whole goods were supplied between 15th G July and 25th July 1991. Exh. A supports the evidence.

The Court of Appeal said at page 162 of the Record:

"The respondents, having given credible evidence through P.W.2 of the supply of the agreed quantity of the materials to the appellant, the learned trial Judge believed the respondents and rightly held in my view H that the respondents have proved their case."

Why were the two courts in unison silent on the evidence of P.W.1, the plaintiff and P.W.3, I ask once again? If both P.W.1 and P.W.2 supplied the materials, why did the courts make use of only the evidence of one and

dump the other? Is it because the evidence of P.W. 1, the plaintiff, contradicted that of P.W.2 ? Again, I ask: have the courts the jurisdiction to pick and choose the evidence of P.W.2 and dump those of P.W.1 and P.W.3? I think not. .

In order to fully appreciate the evidence given by P.W.2, it is necessary to go into the pleadings. Paragraphs 14, 14(a) and 17 are relevant. Let me read them:

“14. The plaintiffs delivered the consignments of electrical materials at Alor. and the consignments were duly collected by the site manager of the defendant, one Cyril Ikechukwu Attah. The plaintiffs will at the trial of this suit found on the documents signed by the said site manager on behalf of the defendant. C

14(a) The consignments were delivered by Mr. Sunday Ugwu who was at the material time under the employment of the 1st plaintiff. The said Sunday Ugwu also signed the Way Bills on behalf of the 1st plaintiff. D

17. The defendant had requested through his site manager for some quantity of materials to keep the work going pending the arrival of the major consignments. The 1st plaintiff as a result rushed the two drums of 2020 and 1000 meters mentioned in paragraph 16(a) to the contract site in the 1st plaintiff’s personal car in the morning of 15th July 1991 which were collected by the site manager Cyril I. Attah before the main consignment arrived later in the evening of that same 15/7/91. The plaintiffs will at the trial of the suit found on the document signed by the said site manager on behalf of the defendant.” E F

P.W.2, said in his evidence in-chief at page 50:

“The plaintiff supplied 52032 meters to the defendant. I delivered the 52032 meters to the defendant..... The goods were received by Mr. Cyril Attah who was then the site manager of Mark ‘E’ Engineering Company. I do not remember delivering the goods to any other person. The deliveries were made at Alor between 15th July and 25th July 1991.” G

Under cross-examination, witness said at page 51: H

“Agreement was written before the supply was made but it was signed after the supply was made. There were some oral agreement for the supply of cables.”

The evidence of oral agreement given by P.W.2 is clearly a new dimension which was not pleaded in the Amended Statement of Claim.

An oral agreement which has the legal capacity to alter a previous written agreement is a fact which must be pleaded. It is more than evidence, which need not be pleaded. As parties are bound by their pleadings, I am of the firm view that the evidence of oral agreement goes to no issue, and I so hold. Although paragraph 14(a) of the Amended Statement of Claim averred that P.W.2 also signed the Way Bills on behalf of the 1st plaintiff, the witness did not lay this in evidence.

I should at this stage take the exhibits admitted at the trial. Nine exhibits were admitted at the trial of this case. Exhibit A rings so much bell if not all the bell. Let me take it first. It was tendered by P.W.I; not by P.W.2. The following is the evidence which led to the tendering and admission of Exhibit A:

"I delivered 52,000 meters of aluminium conductor cable to the defendant. The size of the cable is 50 mm and 70 mm square. The goods were delivered in the premises of one Chief Betrand Oyudo at Alor. One Cyril Ikechukwu Attah, a site manager of the defendant received the goods for and on behalf of the defendant. He acknowledged the receipt of the goods in writing. The site manager signed the original of the Way Bill. I have a copy of the original of the Way Bill. This is the copy."

The Record shows that the defence counsel objected to the tendering of the way bill on the ground that the witness was not the maker. The learned trial Judge, in his wisdom, admitted it as Exhibit A.

It is my understanding of the evidence of P.W. 1 that the content of Exhibit A, the waybill, was the total number of meters of aluminium conductor cables, which he supplied the appellant, and this he stated in his evidence as 52,000. This is clear from the following excerpt, which I reproduce at the expense of prolixity:

"I delivered 52,000 meters of aluminium conductor cable to the defendant... One Cyril Ikechukwu Attah, a site manager of the defendant received the goods for and on behalf of the defendant. He acknowledged the receipt of the goods in writing. The site manager signed the original of the Way Bill. I have a copy of the original of the Way Bill."

This is the copy.” (Underlining for emphasis only).

And if I may repeat myself, at the expense of tautology, the copy was admitted as Exhibit A. Can any evidence be clearer, I ask?

What is the content of Exhibit A? Did Exhibit A contain the 52,000 meters as stated by P.W. 1? Curiously, P.W.2, the witness that the two courts believed, as the person who supplied the materials, was not given the opportunity to identify Exhibit A. And so I confine myself to the evidence of P.W. 1, who tendered the exhibit.

Exhibit A told a different story and not the story of 52,000 meters. It told a story of 3,020 meters only, consisting of two drums of 2020 and 1000 meters respectively totaling 3020 meters. The exhibit neither supported the pleadings of the respondents nor their evidence in court. And this is an exhibit tendered by the respondents. And the two courts held that the respondents proved their case! I shall return to the exhibit later.

Let me take the other exhibits briefly, particularly in the light of the submissions of learned counsel for the respondents on or of their relevance to the live issues in this appeal. Exhibit B is a document of supply of materials from Den Electrical (Nig) Ltd., to the respondents. It is a Way Bill of Den Electrical (Nig.) Ltd. Similarly Exhibits C and D are documents of supply of materials from Sam and Sam Nig. Ltd., Benin and Cutis Cable Nig. Ltd., Nnewi, respectively, again to the respondents. Exhibit E is the “mother” of the action, so to say, as it gave birth to the action. It is the agreement between the parties in respect of the transaction. It was made on 25th day of July, 1991. Exhibit F is a photocopy of the payment certificate from Anambra State Government. Exhibit G is a copy of a letter addressed to Chief Ezemba by Emmanuel C. Nwankwo, Director General, Civil Service Commission. Exhibit H is receipt of part payment of N35,000.00 of the contract price or sum of N615,000.00. Exhibit J is notice of intention to defend the action by the appellant.

It is clear from the above that none of the exhibits was a way bill or had anything to do with the supply of the materials to the appellant. Although Exhibit B is a way bill, it was between Den Electrical (Nig.) Ltd., and the respondents. Exhibits B, C and D were supplies from companies to the respondents and not supplies from the respondents to the

appellant. There is therefore no nexus between the exhibits and the appellant in terms of the execution of Exhibit E. Both Exhibits F and G have nothing to do with the transaction. Exhibit H, which has something to do with the transaction, does not help in terms of the number of meters of aluminium conductor cables supplied, vide Exhibit E. Exhibit J is an affidavit and has nothing to do with the number of meters of aluminium conductor cables supplied. The result of the above is that there is no documentary evidence beyond or outside Exhibit A in respect of the supply of meters of aluminium conductor cables.

I have taken all the exhibits in the case. It is not the case of the respondents that some of the documents were not available to prove their case. As a matter of fact, they relied on Exhibits A to H. And none of the exhibits the respondents tendered were rejected. They were all admitted. This court is bound by the Record.

In paragraph 14 of the Amended Statement of Claim, the respondents averred inter alia:

“The plaintiffs will at the trial of this suit found on the documents signed by the said site manager on behalf of the defendant.”

Dealing with the above averment, the Court of Appeal said at page 150 of the Record:

“One weakness that I can detect in the respondents’ case is his reference to the word ‘documents’ in the plural in paragraph 14 of the amended Statement of Claim.... The respondents tendered however only one such document -Exhibit A. Exhibit A however contains only 3,020 meters of aluminium conductor whereas the appellant admits receiving 17,407 meters of wire.”

The above is a valid conclusion based on paragraph 14 of the Amended Statement of Claim. But the court thereafter went on speculation or conjecture which was not available to it.

Let me return to Exhibit A. Learned counsel for the respondents submitted that Exhibit A was not tendered to prove the entire quantity of goods supplied to the appellant but to prove the allegation pleaded in paragraph 17 of the Amended Statement of Claim. This may well be so as the submission relates to paragraph 17 of the Amended Statement of Claim

but the submission does not vindicate the evidence given by P.W.I at the trial; evidence which led to the admission of Exhibit A. I had earlier made the point by reproducing the relevant evidence. I need not repeat myself.

It is clear that the evidence of P.W.1, P.W.2 and P.W.3 contradicted Exhibit A. Can oral evidence be led and admitted to contradict document- B
ary evidence? Section 132(1) of the Evidence Act provides as follows:

*“When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or C
secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained; nor may the contents of any such document be contradicted, altered, added to or varied by D
oral evidence...”*

I am in some difficulty to agree with the submission of learned counsel for the respondents that Exhibit A does not come within the provision of Section 132(1) of the Evidence Act; although he conceded that the subsection applies to contracts reduced into writing. He also argued that the civil E
rights and liabilities of the parties in this case were not dependent on the waybills.

With respect, I do not agree with counsel. Exhibit A executed Exhibit F
E in part, the contract between the parties. It therefore has a contractual flavour and was so intended by the parties. This is vindicated by the pleadings, particularly paragraphs 14, 14(a), 16 and 17 of the Amended Statement of Claim. That apart, Exhibit A qualifies as “series of documents” within G
the meaning of Section 132(1). Since it is impossible to determine the civil rights and liabilities of the parties in this case without considering Exhibit A, I am of the firm view that the exhibit comes within the ambit of Section 134(1) of the Evidence Act.

The learned trial Judge examined the provision of Section 132 and H
said at pages 91 and 92 of the Record:

“Ordinarily oral evidence to contradict the terms of contract or agreement but for the exceptions stipulated in the proviso A to E of Section 132

(1) are not admissible. Apart from the above consideration regarding the oral evidence of the plaintiffs, I am of the view that parties are allowed to give oral evidence of what in fact transpired between the parties. See Section 132(2) Evidence Act...”

B The learned trial Judge reproduced the subsection and came to the conclusion that “*the background of this case suggests that exhibit C is intended to evidence that there was an agreement between the parties prior to the signing of the said Exhibit E.*”

C I should read Section 132(2):

“*Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made if such a memorandum was not intended to have legal effect as a contract, or disposition of property.*”

D Although the Evidence Act does not define “*documentary memorandum*”, I am of the view that Exhibit A is not a documentary memorandum. Assuming that I am wrong, and Exhibit A qualifies as such a memorandum, the second arm of the subsection does not vindicate the position taken by the learned trial Judge. This is because Exhibit A was clearly intended to have legal effect in the contractual bargain of the parties. I should say that none of the exceptions in Section 132 apply to this case to admit oral evidence to contradict, alter, add or vary Exhibit A.

F Section 132 of the Evidence Act apart, it is a principle of the common law that where parties have reduced their transaction in writing, oral or extrinsic evidence is not admissible to add to, vary, subtract from or contradict the written terms of the transaction. There is a long line of cases. See generally Abiodun v. Adehin (1962) All NLR 550; Eke v. Odolofin (1961) 1 All NLR 842; Colonial Development Board v. Kamson (1955) 21 NLR 75; G Molade v. Molade (1958) SCNLR 206; Macaulay v. NAL Merchant Bank (1990) 4 NWLR (Pt. 144) 283; Olaoye v. Balogun (1990) 5 MWLR (Pt. 148) 24; Union Bank of Nigeria Ltd, v. Ozigi (1994) 3 NWLR (Pt. 333) 385; Union Bank of Nigeria Ltd, v. Sax (Nig.) Ltd. (1994) 8 NWLR (Pt. 361) H 150.

Phipson on Evidence, one of the greatest authorities on the Law of Evidence in the common law system, if I may so naively restrict myself, dealt with the position in common law at paragraph 42:11-12, pages 1165

and 1166 and I will quote the author in extenso

“When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties extrinsic evidence is in general, inadmissible to contradict, vary, add to or subtract from the terms of the document... The grounds of exclusion commonly given are: (1) B that to admit inferior evidence when the law requires superior would be to nullify the law; and (2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of C their intention and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory. The rule, however, is sometimes thought to be based on the best evidence principle; sometimes on the doctrine of estoppel, as the party is precluded by his acknowledgment in D writing from disputing what is so acknowledged; and sometimes on the substantive law purely.” See Phipson on Evidence (15th edition), Sweet and Maxwell (2000).

It is my view that Exhibit A qualifies as a transaction within the meaning of the word used by Phipson on Evidence above. It must be noted that E in explaining the grounds of exclusion, Phipson drew a dichotomy between superior and inferior evidence vis-a-vis documentary and oral evidence respectively. In other words, to Phipson, documentary evidence is superior evidence while extrinsic evidence is inferior evidence. By Phipson’s classification, the two courts preferred the inferior evidence to the superior evidence. F That is, to say the least, sad and unfortunate. I am not with them.

Learned counsel for the respondents cited the case of Monier Construction Company Ltd, v. Azubuike (supra), to buttress his argument that G oral evidence is admissible even where documentary evidence is inadmissible. I must say right away that the issue raised in this court in that case was the inadmissibility of Exhibits A, B and D tendered and admitted at the trial court.

This appeal is not on the inadmissibility of exhibit A but on the refusal H to rely on the entire content of the exhibit by the two courts, which showed their preferences for oral evidence.

I should also take here the case of Olarenwafu v. The Governor of

Oyo State (1992) 9 NWLR (Pt. 265) 335. The issue in that case was quite different. In that case, there was no oral evidence in contradiction of the minutes of the meeting held on 19th March 1981 in which the plaintiff, the 4th defendant and two others were nominated to contest the vacant position of the Baale of Out. Karibi-Whyte, JSC., who delivered the leading judgment, was clear on that, when he said at page 366 of the report:

“There was no suggestion that the minutes of the meeting was falsified. Since there was no proof that the minutes did not represent what transpired, and oral evidence have been ad idem as to what happened at the meeting of the 9th March, 1981, a criticism of the minutes is only based on considerations aliuinde, and not on factors capable of rendering the meeting invalid.”

And so, this court was not involved in the issue of oral evidence contradicting documentary evidence. This court rather dealt with a situation where oral evidence complemented documentary evidence. But that is not the situation here. The situation in this appeal is the oral evidence contradicting inhibits A.

Learned counsel for the respondents relied on Section 91(1) of the Evidence Act and contended that proof by documentary evidence merely complements proof by direct oral evidence and that for documentary evidence to be admissible, direct oral evidence ‘on that point must be admissible. I entirely agree with the interpretation of the subsection by learned counsel, but I do not agree that the subsection is applicable in this case. This is clear from the provisions of paragraphs (a), (b) and (c) of the subsection.

Learned counsel also relied on the provisions of Sections 76 and 77 of the Evidence Act and submitted that P.W.2 witnessed the delivery of the goods to the appellant through his site agent. It is my view that provisions of Section 76 are clearly against the case of the respondents. The section provides as follows:

“All facts, except the contents of documents, may be proved by oral evidence.”

By Section 76, parties cannot prove facts, which are contained in a document by oral evidence. And that is what the respondents have done. The document must be tendered as it speaks for itself. Reducing Section 76

to this appeal results in the conclusion that since the supply or delivery of the materials, in the evidence of P.W.1 and P.W.2, was as in Exhibit A, both witnesses were estopped from leading oral evidence, particularly where there was no admissible evidence that there was oral agreement outside Exhibit A. B

Section 77 provides that oral evidence must, in all cases, whatever, be direct. I agree entirely that the evidence of P.W. 1, P.W.2 and P.W.3 were direct but they were in conflict inter se. But the most important aspect is that the courts cannot accept direct oral evidence which is in conflict with documentary evidence on the same aspect or point. C

There is no argument that the ipse dixit of a witness is admissible evidence as it is regarded in the Evidence Act and in our common law as valid evidence. Learned counsel dealt with the best evidence rule in respect of that aspect of the case, as related to the evidence of P.W.2. It has all the evidential and probative value, if it comes within the provision of Section 77 of the Evidence Act. But that is not the situation here. This court cannot look at the evidence of P.W.1, P.W.2 and P.W.3 in the context of Section 77 of the Evidence Act but in the context of contradicting Exhibit A. And this, to me, is most fundamental. D

In my humble view, the best evidence rule, as it relates to oral evidence, will not apply where the oral evidence contradicts documentary evidence. This is because since the documentary evidence was first in time, the oral evidence, in the absence of admissible evidence that there was an agreement between the parties outside the document that oral evidence will be led to vary the documentary evidence, will be inadmissible. The court will be entitled to hold in such a situation or circumstance that the oral evidence is an afterthought. After all, documentary evidence, is less prone to lying than oral evidence. It documentary evidence tells a lie, it is by human conduct and the act which makes it to lie is traced to and punished by our criminal law. E

There is still one other aspect on the issue of ipse dixit of the witnesses. Against the evidence of P.W.1, P.W.2 and P.W.3, appellant in his evidence-in-chief said at page 56 of the Record: F

“First plaintiff and myself discussed the possibility of his supplying G

me with 50,000 meters of 50 mm of aluminium conductor. I eventually entered into an agreement with 1st plaintiff. This agreement was in writing... Exhibit E shown to me is a copy of the agreement. The plaintiffs supplied me with 17,407 meters of 50 mm aluminium conductor. They did not supply me with 50,000 metes. I paid the plaintiffs the price for 17,407 meters. What they supplied amounted to N234,994.50 at N 13.50 per meter. I gave the plaintiffs a cheque of N200,000.00. I had earlier given the plaintiffs N35,000 cash. I know Cyril Attah. He was a sub-contractor to me. His duties did not include receiving of goods deliveries to me. He did not hand over to me any goods he received on my behalf. I am not owing the plaintiffs an outstanding sum of N440, 000.”

Like the evidence of P.W.1, P.W.2, and P.W.3, the above is also direct oral evidence within the meaning of Section 77 of the Evidence Act. A court of law has a duty to evaluate the evidence of both parties before coming to a conclusion, one way or the other. It will be grave injustice for a court of law to accept the evidence of a plaintiff which contradicts documentary evidence and also when the evidence of the witnesses contradicts themselves.

The learned trial Judge in accepting the evidence of P.W.2, said at page 87 of the Record:

“I accept his evidence with regard to the quantity of goods supplied and the time it was supplied and the balance of the price of goods left unpaid. The fact that on 10/9/91 the defendant made a part payment of N35, 000.00 for the goods supplied added a great weight to P.W.2’s evidence that the whole goods were supplied between 15th July and 25th July 1991. Exhibit A supports the evidence.”

And the above and others were the findings of the learned trial Judge that the Court of Appeal accepted. With the greatest respect, the conclusion is perverse as it is not borne out from the evidence before the court. How can the part payment of N35, 000.00 for the goods by the appellant “add a great weight to P.W.2’s evidence that the whole goods were supplied.”? There is no evidential or probative nexus between part payment for the goods and the total number of goods supplied. I cannot fathom the basis for that conclusion. I should have been more at home with the conclusion if the

part payment indicated what was paid for and the balance in terms of quantity of the materials to be paid for. It is only in such a situation that arithmetic of addition and subtraction should have given rise to the learned trial Judge's conclusion.

There is yet another fault in the conclusion of the learned trial Judge, B as the conclusion relates to Exhibit A. That exhibit did not contain part payment of N35,000.00. That apart, Exhibit A only justified the supply of 3,020 meters. P.W.2 gave evidence that he delivered a total of 52032 meters. Where then lies the conclusion of the learned trial Judge that the evidence C of P.W.2 is supported by Exhibit A?

Exhibit A qualifies as primary evidence within the provision of Section 94(1) of the Evidence Act and a court of law has no competence to play down the weight of documentary evidence. That is exactly what the D two courts did. With respect, that is not available to them.

Let me now take the issue in respect of the appellant's failure to call Cyril Ikechukwu Attah. The courts below came to the same conclusion on the matter. The learned trial Judge said at pages 89 and 90 of the Record: E

"Defendant did not call Mr. Cyril Attah to deny receiving the goods which the plaintiffs P.W.2 stated were supplied to him..... Attah ought to have been called as a witness by the defendant. Failure by the defendant to call Mr. Attah and to tender the job order is no doubt an indication F that their evidence will be fatal and unfavourable to the defendant's case. See Section 149(d) of the Evidence Act, 1990."

The Court of Appeal, in dealing with the same issue, said at page 160 of the Record:

"But the devastating weakness in the appellant's case which supports the respondents' case was the failure of the appellant to call this very important actor Cyril Ikechukwu Attah to testify for the appellant, who was his employer. No reason was given for the failure to call him. The provision of Section 149(d) of the Evidence Act operates against the H appellant."

With the greatest respect to the two courts, I do not agree with them. By the above, the two courts placed on the appellant, who was the

defendant at the trial court, the burden of proof in this matter. This is clearly against the provisions of Sections 135 and 137(1) of the Evidence Act. By Section 135(1), whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must
B prove that those facts exist. By the state of the pleadings, the burden is clearly on the respondents to prove paragraphs 14, 14(a), 16 and 17 of the Amended Statement of Claim and not for the appellant to disprove them.

I can still go further and say that the initial or first burden is on the respondents, as plaintiffs, to prove the above paragraphs. This is because
C if no evidence is given in respect of the matter, particularly in respect of paragraphs 14, 14(a), 16 and 17 of the Amended Statement of Claim, judgment will be given against them.

Let me turn to Section 137(2), a subsection which would appear to
D have informed the decision of the two courts. In my understanding of the subsection, while the first burden of proof lies on the plaintiff, the subsection (2) burden or evidential burden lies on the defendant. It should be pointed out that the subsection (2) burden does not automatically or mechanically lie on the defendant. Before the burden shifts on the defendant,
E the plaintiff ought to have “*adduced evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established*”. Since there is no more jury trial in Nigeria, the word “*jury*” will be replaced by the word
F “*court*”.

Learned counsel for the respondents cited what my learned brother, Katsina-Alu, JSC, said in *Elema v. Akenzua* (2000) 6 S.C. (Pt. III) 26, (2000) 6 SCNJ 226. Let me quote the relevant portion cited by learned counsel. It reads:

“In civil cases while the burden of proof initially lies on the plaintiff
G the proof or rebuttal of issues which arise in the course of the proceedings may shift from the plaintiff to defendant and vice versa, as the case progresses. If a party calls evidence which reasonably satisfies the court that the fact
H sought to be proved is established, the burden will shift to his adversary against whom judgment will be given if no more evidence were adduced.”

I entirely agree with the above because it is the correct position of the law as contained in the Evidence Act. The last sentence clearly vindi-

cates Section 137(2) of the Evidence Act. In my view, the burden does not shift to the defendant if the plaintiff fails to establish his case as presented in the pleadings. The burden only shifts if the plaintiff establishes his case. And in the light of all that I have said, the respondents as plaintiffs did not prove their case to shift or push the evidential burden on the appellant, the defendant. B

The courts below decided that the appellant had a duty to call Cyril Attah to produce the job order averred to in the Statement of Defence. With respect, I do not agree with that decision. In view of the fact that the respondents did not prove their case, the appellant was under no duty to tender the job order. It should have been different if the respondents proved that they supplied the 50,000 meters of aluminium conductor cables. C

The Court of Appeal held that Exhibit A gave up the appellant. I ask: in what way? How can Exhibit A which accounts for 3,020 meters give up the appellant in a matter where the respondents claimed delivering more than 50,000 meters? Or can it be because the name of Cyril Attah is in Exhibit A as against the evidence of the appellant on the issue? D

A court of law is always confined to the evidence before it. A court of law has no competence to arrive at conclusions on speculation or guess. In this case, it will be wrong to come to the conclusion that because the appellant admitted 17,407 meters, which is over and above the number in Exhibit A, he must have been supplied the total number of meters claimed by the respondents. That will be a most ambitious and tall speculation which is not available to any court of law. E

The Court of Appeal relied on paragraph 8 of Exhibit J, which reads: *‘That following their failure to supply as agreed both parties regarded the terms of the Agreement as vitiated and therefore all actions were thence based on personal understanding.’* F

Relying on the above, the Court of Appeal said at page 160 of the Record: H

“It would therefore seem that on the appellant’s own showing the parties acted largely on trust and personal relationship or understanding rather than on strict legality.”

I will be more comfortable to take paragraph 8 of Exhibit J in the context of the admitted 17,407 meters and not in the context of the 50,000 meters because there is no iota of evidence before the trial court in support of the 50,000 meters. And what is more, the appellant could not be taken as making a case for the respondents.

There is yet another aspect and it relates to the number of consignments supplied. It is claimed in paragraph 16 of the Amended Statement of Claim that the respondents supplied six consignments which are enumerated in the paragraphs as (a) to (f). Unfortunately for the respondents, they only proved one consignment and it is the one averred to in paragraph 16(a) thereof. As indicated above, all the other so-called consignments had nothing to do with the appellant, as they had to do with the respondents and other companies.

Related to the above is that, although paragraph 16 of the Amended Statement of Claim averred that there were six consignments, P.W.2 gave evidence on four deliveries which mean four consignments. I must say that his evidence of four deliveries did not vindicate the supply of 50,000 meters, vide Exhibit A. No other witness accounted for the remaining two. And this is a witness heavily relied upon by the two courts. It is elementary law that where oral evidence does not vindicate the pleadings, it will go to more issue, as parties are bound by their pleadings. See *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802; *Ebueku v. Amola* (1988) 2 NWLR (Pt. 75) 128. Above all, only one consignment was proved by the respondents and it is the content of exhibit A.

The appellant admitted receiving 17,407 meters. The law is elementary that a party is bound by his admission and to the extent of the admission. See *Ogunnaike v. Ojayemi* (1987) 1 NWLR (Pt. 53) 760; *Seismograph Services (Nigeria) Ltd, v. Eyuafe* (1976) 9 & 10 S.C. 135. A fact admitted needs not be proved. See *Akpan v. Umoh* (1999) 7S.C (Pt. II) 13, (1999) 11 NWLR (Pt. 627) 349 *Atanze v. Attah* (1999) 3 NWLR (ft. 596) 647; *UNIC v. UCIC Ltd.* (1999) 3 NWLR (Pt. 593) 17. In view of the fact that the appellant admitted receiving 17,407 meters, and in the absence of any evidence in support of the claim of the respondents of supplying 50,000 meters, I come to the conclusion that the respondents only supplied the

appellant a total of 17,407 meters of aluminium conductor cables. For the avoidance of doubt, and in the light of the evidence before the trial Judge, the 17,407 meters include the 3,020 meters in Exhibit A

In its efforts to know the truth in respect of what quantity of aluminium cables were supplied or delivered, the Court of Appeal said at page B 159 of the Record:

“The appellant asserts that the respondents supplied only 17,407 meters while the respondents claim that they supplied more than the agreed quantity, i.e. that they supplied 50,032.9 meters. Where does the truth lie? The truth shall be ascertained from (a) the pleadings and (b) the evidence in court including documents tendered. By the truth, I mean the truth ascertainable within the limits of human intellect as laid down by the roles of court and the law. One of the parties to this appeal must be a terrible liar or a crook. I shall attempt at the exercise of finding the truth.” C D

It appears to me from the judgment of the Court of Appeal that the liar or the crook is the appellant. Why? It is clear that the liar is not the appellant but the respondents. And this is clear from the exhibits and the evidence before the court. E

The two courts did not remember, or should I say, bother, to deal with the contradictions in the evidence of the respondents. They rather descended on contradictions in the evidence of the appellant. With the greatest respect, they are not fair to the appellant. It is my humble view that contradictions in the evidence of a defendant, who, by the pleadings, has not the initial burden to prove his case, can only be material in the determination of the case if the plaintiff has, in the first place, proved his case. Where a plaintiff has not proved his case, contradictions in the evidence of the defendant will not avail or help the plaintiff in sustaining his claim. Accordingly, the evidence of the appellant in respect of who really received the goods is a non sequitur. F G

Let me pause here and enumerate by way of recapitulation two major contradictions in the evidence of the respondents, which the two courts H ignored. Firstly, both P.W.1 and P.W.2 claimed that they delivered the goods. Although the evidence of P.W.2 vindicates paragraph 14 of the Amended Statement of Claim, the evidence of P.W.I is in an ocean. Secondly, while

P.W.1 claimed that he delivered 52,000 meters, P.W.2 claimed that he delivered 52,032 meters. Again the evidence of P.W.2 vindicates paragraph 16 of the Amended Statement of Claim but the evidence of the two witnesses contradict each other. Of course, the evidence of P.W.1 is in an ocean, as it is not supported by the pleadings. Although the claim was for 50,000 meters, the conflicting evidence of the witnesses materially questions their veracity.

In paragraph 14(a), the appellants averred that the consignments were delivered by Mr. Sunday Ugwu who was at the material time under the employment of the 1st plaintiff and that he, Mr. Sunday Ugwu, also signed the Way Bills on behalf of the 1st plaintiff. Sunday Ugwu was P.W.2 whose evidence was believed by both courts. As mentioned earlier, he did not say in oral evidence that he signed the way bills on behalf of the 1st plaintiff. What will one therefore make out from paragraph 14(a)? At pleadings have no mouth to speak, they speak through witnesses. In other words, the facts contained in them can only be made available to the court through the testimony of witnesses, therefore, where a witness does not give evidence in respect of a fact in the pleadings, the fact remains abandoned and of no evidential value. See *Ebueku v. Amola* (1988) 2 NWLR (Pt. 74) 128; *Bala v. Bankole* (1986) 3 NWLR (Pt. 27) 141; *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802. Accordingly, I so treat part of paragraph 14(a).

Our adjectival law on concurrent findings of two courts below is clear. Where concurrent findings are not perverse, this court cannot interfere. See generally *Abdullahi v. State* (1985) 1 NWLR (Pt. 3) 523; *Okonkwo v. Adigwu* (1985) 1 NWLR (Pt. 4) 694; *Nwachukwu v. State* (1986) 2 NWLR (Pt. 25) 765; *Onyekwe v. State* (1988) 1 NWLR (Pt. 72); *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1.

It is clear to me from the totality of the evidence before the trial court that the concurrent findings of both courts are perverse and I must therefore interfere, and I accordingly interfere.

That takes me to Issue No. 2 and it is on the grounds of appeal filed in the Court of Appeal vis-à-vis the issues. The appellant filed in the Court of Appeal thirteen grounds of appeal and formulated one issue therefrom. The appellant argued each of the grounds and the Court of Appeal held that he cannot do so. Dealing with the issue, the Court of Appeal said at page 157 of

the Record:

“Having formulated one issue on 13 grounds of appeal, learned Senior Advocate of Nigeria after arguing the issue before and after the formulation, proceeded to set out seriatim and argue the 13 grounds of appeal in his brief.... I must concede that Order 6 of the Rules of the Court of Appeal which deals with the filing of briefs of argument does not expressly and specifically shut out argument on the grounds of appeal but it is a practice which has acquired the force of a rule of the court that once the issues are formulated, arguments in the brief in the appeal shall be on the issues, and not on the grounds of appeal.... If an appellant formulates the issue arising in the appeal, which issues must be formulated from the grounds of appeal, what is the sense of going back to the grounds of appeal to argue the very grounds from which the issue or issues have been formulated?”

Learned counsel took so much time in arguing the issue from pages 10 to 18 of the appellant’s brief. He adopted the same method in the Court of Appeal here by arguing each of the grounds of appeal in that court. He felt very strongly that the Court of Appeal was wrong and that he is right.

With the greatest respect to learned counsel, he is wrong and the Court of Appeal is right. As a matter of law and practice, grounds of appeal stop at the Notice of Appeal level and cannot find themselves in the brief as done by learned counsel. Brief is not the forum to enumerate and argue grounds of appeal; rather it is a forum to argue issues which are invariably formulated out of the grounds of appeal. See *Idika v. Erisi* (1988) 2 NWLR (Pt. 78) 563; *Madumere v. Okafor* (1996) 4 NWLR (Pt. 445) 637. The procedure adopted by learned counsel is unknown to law and the Court of Appeal was correct in the position it took.

In sum, I am not comfortable with the majority decision on Issue No. 1 of the appellant's brief. I therefore dissent. Accordingly, I allow the appeal in part and that is on Issue No. 1. The appeal fails on Issue No. 2.

I make no order as to costs.

H