

**SUPREME COURT OF NIGERIA**

14TH MAY, 2004. SC. 89/2000

**CORAM:- S.M.A. BELGORE, I.L. KUTIGI, A.O. EJIWUNMI,  
D. MUSDAPHER, I.C. PATS-ACHOLONU, JJSC**

1. ALI PINDER KWAJAJFFA

2. HUSSANIM. ALIYU

3. ALI PINDER KWAJAJFFA GARAGE LTD. .... APPELLANTS  
AND

BANK OF THE NORTH LIMITED ..... RESPONDENT

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APPEALS - Leave - Ground of appeal - Ground or issue - That was not raised before Court of Appeal - Is not competent before the Supreme Court - Without leave (H1)

SUPREME COURT - Fresh point - Where sought to be raised - Leave must be obtained - The issues must be substantial - And further evidence will not be required (H2)

APPEALS - Jurisdiction of Supreme Court - To hear appeals - Is not extended to decision of the High Court - But restricted to that of the Court of Appeal (H3)

ACTIONS - Declaratory reliefs - Grant of - By trial court - Shall not be based on default of defence - Or on admission (H4)

BANKING - Loan account - Concurrent findings - Pleadings and evidence - Did not show how appellants paid the loan they were owing - As rightly found by the courts below (H5)

COURTS - Evidence - Valuation of evidence by trial court - Is through imaginary scale for weighing evidence - Based on quality - And observation of demeanour of the witnesses (H6)

### **FACTS**

The 3rd plaintiff/appellant obtained a loan from the defendant/respondent some time in 1982, vide an overdraft facility that was converted into a separate loan account. The appellants mortgaged to the respondent 2 properties belonging to the 1st and 2nd appellants. A Deed of Legal Mortgage was executed by the parties which was duly registered in the Maiduguri Land Registry. The amount due on the loan account grew to the sum of N1,858,622.15 as at 28th July, 1993. When respondent served notice of its intention to exercise its power of sale, appellants filed this action before the Borno State High Court. Respondent filed a counter-claim. Appellants claimed inter alia, declaration that the Deed of Legal Mortgage is void and of no effect and a perpetual injunction restraining the respondent from conducting any sale of their properties. They claimed that the 2nd appellant was a minor at all material times and could not enter into any agreement with the respondent.

The trial court found against the appellants and gave judgment in the respondent's favour. Appellants' appeal to the Court of Appeal was dismissed. They have further appealed to the Supreme Court. But their appeal suffered terribly as most of the issues they raised were new and they did not obtain leave of the Supreme Court.

### **ISSUES FOR DETERMINATION**

*1. Whether the Court of Appeal was right in law in affirming the decision of the trial High Court that Mortgage Agreement between the 2nd appellant and the respondent was valid in law.*

*2. Whether the learned justices of the Court of Appeal were right in law to have granted the 1st relief claimed by the respondent in the counter-claim.*

*3. Whether the learned Justices of the Court of Appeal were right in law to hold that the appellants were indebted to the respondents.*

*4. Whether the learned Justices of the Court of Appeal were right in law to hold that the learned trial Judge properly evaluated the evidence proffered in the case."*

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

***APPEALS - Leave - Ground of appeal***

1. In the appeal aforesaid, the validity of the Deed of Legal Mortgage was not an issue that was raised for determination. The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the Court of Appeal. For any ground of appeal or any issue to be raised and argued at the Supreme Court, it should first have been raised and argued in the Court of Appeal, or with leave of the Supreme Court. By logical extension, the general position is that an issue which is a fresh point entirely and not having been raised and argued in the Court of appeal is not competent to be raised at the Supreme Court without leave. The rationale for this rule is that it is desirable for the Supreme Court to have the benefit of the opinions on such points in issue, of the Court of Appeal. (p. 1268 H)

***SUPREME COURT - Fresh point***

2. Where a party seeks to raise a fresh point in the Supreme Court, he must:

(a) obtain leave of the Supreme Court.

(b) ensure that the new points sought to be so raised involve substantial issues of substantive or procedural law which need to be allowed to prevent an obvious miscarriage of justice.

(c) show that no further evidence is required to resolve the issue for determination.(p. 1269 D)

***APPEALS - Jurisdiction of Supreme Court***

3. In any event, the law is well settled that an appeal to the Supreme Court must relate to the decision of the Court of Appeal and not that of the High Court. The Supreme Court has no jurisdiction to hear appeals from the decision of the High Court. Oduntan v. Akibu (2000) 7 S.C. (Pt. II) 106; (2000) FWLR (Pt. 12) 1982. The case of the appellants as argued in the Court of Appeal must be consistent with the case on appeal to the Supreme Court. The Supreme Court will not allow a party to put up a different case from the case it had put up at the Court of Appeal without leave. The issue of the validity of the Deed of Legal Mortgage as

argued in the appellants' brief is a fresh issue for which it was necessary to obtain leave of this court to raise it. No leave was obtained and as such the issue is not competent. (p.1272 B)

**B ACTIONS - Declaratory reliefs**

4. It was also their contention whether the learned trial Judge was right to have granted the declaration sought merely on default of a defence to the counter-claim. The Court of Appeal agreed with the appellants, the law, correctly in my view, is that a declaratory relief cannot be granted merely on default of defence or even on admission. The Court of Appeal was right to have held that the trial Judge was in error to have granted the respondent's first relief on the counter-claim merely because of the default of the defence by the appellants, but the court correctly relied on the other documentary evidence on record to find that the respondent had proved the counter-claim. I accordingly find no merit in the second issue. (p.1274 B)

**E BANKING - Loan account - Concurrent findings**

5. So, it cannot be correct as asserted by the appellants' counsel that the lower court was wrong to have held that the appellants never denied the existence of the loan account by their pleadings and the evidence. I have myself read very carefully the pleadings of the appellants and the evidence led particularly the documentary exhibits. I agree with the findings of both the trial court and the Court of Appeal, that the appellants have not shown how they paid the loan account to which they admitted owing under Exhibit J. The learned trial Judge accepted the evidence of D.W.1 to the effect that the zero balance showed in Exhibit B indicated that the overdraft account was closed and the debit balance transferred to the loan account in the sum of N487,375.52k. Thus the appellants were no longer owing on the current account but on the loan account. The question of the indebtedness of the appellants to the respondent on the loan account, as mentioned above, is a concurrent finding of fact by the two lower courts. As mentioned also, I have myself looked at the pleadings and the evidence and the finding by the two courts cannot be faulted. I

accordingly also resolve the said issue against the appellants. (p. 1277 B)

***COURTS - Evidence - Valuation of evidence by trial court***

6. Now, on the valuation of evidence by a trial court, the law is settled. It is that before a court which evidence is adduced by the parties in a civil case comes to a decision as to which evidence it believes or accepts and which evidence it rejects, it should first of all put the totality of the acceptable testimony adduced by both parties on an imaginary scale; it would put the legal evidence adduced by the plaintiff on one side and that of the defendant on the other side and weigh them together. It will then see which is heavier, not by the number of the witnesses called by each party but by the quality or probative value of the testimony of those witnesses. It is the pre-eminent duty of a trial court which saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate court which neither heard the witnesses nor saw them to observe their demeanours in the witness box. See Ajakaiye v. Adedeji (1990) 7 NWLR (Pt. 161) 197. (p. 1278 E)

**NOTABLE POINTS OF INTEREST**

**MUSDAPHER JSC**

*1. A party can rely on new line of argument or new authorities*

It may also be argued that the true position of the law is that whereas a party to a suit cannot ordinarily without leave of the Supreme Court raise an argument not canvassed in the court below, that party can rely upon any new line of argument or new authorities, judicial or statutory, to support his argument in an issue which is properly before the Supreme Court. (p. 1269 G)

*2. When a party cannot take advantage of his own illegality*

Looking at the whole transaction, it was the first appellant that procured the mortgage and he cannot be found to resile from it on narrow claim of unenforceability. A party cannot resile from his obligation under a contract because he never followed what the law required; in essence he cannot take refuge from his contractual obligations on the pretext of his

own illegality insofar as the other party was not aware of the illegality at the time of the transaction. Had this appeal succeeded it would have created consequences that will allow fraud to pay. The appellants' case was ab initio based on the illusory nullity caused by their deceit. A court of law must always be that justice and equity, self-induced nullity will not help the appellants. (p. 1280 A)

### **PATS-ACHOLONU JSC**

3. *Court will not lend credibility to a questionable deal*  
 C It is in my opinion, invidious on his part to use the under age of his son to repudiate the Deed of Mortgage he had entered. As at the time the 2<sup>nd</sup> appellant was giving evidence in court, he was already grown up then, he never asked about the property for which he had the Certificate of Occu-  
 D pancy. The necessary inference is that the property although ostensibly for some sinister purpose was made out in 2<sup>nd</sup> appellants' name, the 1<sup>st</sup> appellants really had the effective control and possession of the property which he used to secure a loan. It will be unjust for any tribunal of justice  
 E to end a willing hand in using subterfuge to defeat the rights of another when the evidence shows that implicit in the deal and the act of the 1<sup>st</sup> appellant is an attempt to pull a fast one on the respondent. I refuse to  
 F lend any hand in giving substance and credibility to this sort of questionable deal. (p.1284 G)

### *4. Interest rates are dependent on yearly policy of the Central Bank*

As I held before, although it would appeal from the nature of the evidence of the appellants that they did dispute the amount, it must be stated  
 G they did not quite come openly to deny it. The matter is not made easy by their claiming that they agreed on the interest rate of 13% when there was no such clause in the Deed of Legal Mortgage and when it is a well-known fact which this court takes judicial notice of that interest rates are  
 H dependent of the policy on the Central Bank. No interest rate is static. It is not immutable. It varies depending on the nature of Government policy which follows the state of the economy. (p. 1288 G)

**REPRESENTATION**

A.O. Okeaya-Inneh, Esq., for the Appellants

B.P. Ishaku, (with him, G.S. Ogbosi), for the Respondent

**CASES REFERRED TO**

Okoujeror v. Sagay (1958) WNLR 70

Pratt v. Haffner (1959) 4 FSC 82

Odesanya v. Ewedemi (1962) 1 AII NLR 320

Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 S.C. 6

Uor v. Loko (1988) 2 NWLR (Pt. 77) 430

Adedeji v. N.B.N. Ltd., (1989) 1 NWLR (Pt. 96) 212

Oguma v. IBWA (1988) 1 NWLR (Pt. 73) 658

A.G. Oyo State v. Fairlakes Hotel Ltd. (1988) 12 S.C. (Pt. 1) 1. (1988) NWLR (Pt.92) 1

Oniah v. Onyia (1989) 2 S.C. (Pt.1) 69, (1989) 1 NWLR (Pt. 99) 514

Agbaje v. Adigun (1993) 1 NWLR (Pt. 269) 161

**STATUTE REFERRED TO**

Land Use Act ss.22, 26, 7

**LEAD JUDGMENT BY MUSDAPHER JSC**

This is an appeal against the judgment of the Court of Appeal sitting in Jos, Plateau State delivered on the 9<sup>th</sup> of December, 1998, wherein the appeal of the appellants herein was dismissed, thus affirming the decision of the trial High Court of Borno state. The claim of the appellants herein, as the plaintiffs before the trial court as per paragraph 24 of the Further Amended Statement of Claim/and reply to counter-claim was in these terms:-

*“1 Declaration that the purported Deed of Legal Mortgage date 13<sup>th</sup> October, 1982 between the parties to this case is void, ineffective and of no effect whatsoever.*

*2. That there is no Legal Mortgage existing between ALI PINDER KWAJAFFA, HUSSANIM M. ALIYU and ALI PINDER KWAJAFFA GARAGE LTD. And the BANK OF THE NORTH relating to the properties*

*covered by Certificates of Occupancy Nos. BO/1621 and NE 1367 purportedly mortgaged to the defendant by the plaintiffs.*

*3. Declaration that the second plaintiff is a minor and could not legally and validly enter into any agreement with the defendant at all*  
B *times material to this case.*

*4. Declaration that the plaintiffs did not guarantee any person be it natural or corporate in this purported Deed of Mortgage.*

*5. Declaration that the defendant cannot sell by public auction any of the properties covered by Certificates of Occupancy Nos. BO/*  
C *1621 and NE/1367 properties of the plaintiffs.*

*6. Declaration that the second plaintiff never consented to any matter relating to the transfer of his property covered by the Certificate of Occupancy No. BO/1621.*

D *7. Declaration that the plaintiffs are not indebted to the defendant to warrant the sale of the plaintiffs' properties by the defendant under a purported Deed of a legal mortgage.*

*8. A perpetual injunction restraining the defendant, its servants,*  
E *or privies from trespassing into the plaintiffs' properties; nor conducting any purported sale of the plaintiffs' said properties covered by Certificates of Occupancy Nos. BO/1621 and NE/1367 or any of the plaintiffs' properties.*

F *9. Declaration that the plaintiffs had paid whatever loan taken from the defendant sometimes ago.*

*10. An order commanding the defendant to release the Certificate of Occupancy of the plaintiffs' illegally being held by the defendant as a result of the purported Deed of Mortgage.*

G *11. The plaintiffs claim costs to this suit."*

The defendant, the respondent herein, denied the appellants' claims and in paragraph 2 of a counter-claim subjoined to its Further Amended Statement of Defence, the respondent counter-claimed against the appellants  
H for the following reliefs:-

*"(a) A declaration that there is subsisting Legal Mortgage between the plaintiffs and the defendant.*

*(b) A declaration that the defendant is entitled to N1,858,622.15*



*as at 28<sup>th</sup> July, 1993 with interest on the said outstanding amount from the 28<sup>th</sup> July, 1993 to 1<sup>st</sup> January, 1994 and 21% on the outstanding sum from the 1<sup>st</sup> January, 1994 until liquidation of the outstanding sum."*

The facts as found by the learned trial Judge and succinctly summarised by the Court of Appeal as per the judgment of Edozie, JCA., B (as he then was), were put as follows:-

*"From the pleadings filed, oral evidence of witnesses called by the parties and the numerous documentary evidence tendered, the facts of the case leading to this appeal may be summarized as follows:*

*As far back as the year 1980, the 3<sup>rd</sup> appellant had an account with the respondent bank. The account number 400127. Initially the 3<sup>rd</sup> appellant was granted an overdraft facility for the sum of N80,000.00. By the year 1982, the outstanding amount of the overdraft stood at N487,375.50. At the instance of the appellant the respondent Bank converted the overdraft amount into a loan account and the account number was variously referred to as 400127/62586,44014/62586/400127 pursuant to the conversion, the appellants mortgaged to the respondent Bank properties covered by Certificates BO/1621 and NE/1367 belonging respectively to the 2<sup>nd</sup> and 1<sup>st</sup> appellants. A Deed of Legal Mortgage dated 13/10/1982 registered as No. 347 at page 347 Vol. 7 (misc) of Land registry in the office at Maiduguri (Exhibit C) was executed by the parties with the 1<sup>st</sup> and 2<sup>nd</sup> appellants as mortgagers and sureties, 3<sup>rd</sup> appellant as the borrower and respondent as the Mortgagee. It is the appellant's case that in November, 1982 when the respondent drew their attention to the outstanding amount, the 1<sup>st</sup> appellant and the respondent agreed that the amount should attract interest at the rate of 13% but rather than adhere to this agreement, the respondent inflated the interest rate. The appellants further claimed that they had paid to the respondent bank the sum of N1,189,963.26k; that the 1<sup>st</sup> appellant again paid under duress the sum of N300,000.00 and finally that the Nigeria Bank of Commerce and Industry (NBCI) paid on their behalf the sum of N82,257.74 on 19/7/84. By reason of these payments, the appellants contend that they have fully liquidated their indebtedness to the respondent Bank. They relied on the 3<sup>rd</sup> appellants' account which was admitted in Evidence as Exhibit*

“B”. On its part, the respondent denied reaching agreement with the 1<sup>st</sup> appellant on the interest rate maintaining that the interest rates are charged in accordance with the Central Bank guidelines. The respondent admitted that the 1<sup>st</sup> appellant paid the sum of N300,000.00. But denied it was paid under compulsion. It is the respondent’s case that the appellants are still indebted to it to the tune of N1,858,622.15 as at 28<sup>th</sup> July, 1993. Regarding the sum of N82,297.74 paid by the NBCI, the respondent explained that the NBCI paid the amount for the release of another C of O No. NE/154 held by the respondent as security for another overdraft of N40,000.00 it granted to the 3<sup>rd</sup> appellant which had risen to N82,297.14. The NBCI took that step so as to use the C of O No. NE/154 as security for its own loan to the 3<sup>rd</sup> appellant. By a letter dated 19/3/1984 Exhibit J4, the respondent Bank reminded the 3<sup>rd</sup> appellant of its default in the repayment of loan and in response the 1<sup>st</sup> appellant by letter dated 29/3/1984 Exhibit J pleaded for time to repay the loan. As the appellants were unable to liquidate the loan, the respondent in accordance with terms of the legal mortgage served them notice of its intention to exercise its power of sale.”

It should also be mentioned that the 2<sup>nd</sup> appellant was said to be a minor and could not legally be a party to the Deed of the Legal Mortgage. That the Deed of Legal Mortgage, as far as his property was concerned, was null and void and of no effect, since as a minor, he could not transfer his property by means of a legal mortgage.

After the hearing of the evidence the learned trial Judge dismissed in their entirety the plaintiffs’ claims and entered judgment in favour of the defendant in its counter-claim. The plaintiffs appealed to the Court of Appeal and in the Court of Appeal, the plaintiff submitted five issues for the determination of the appeal. In summary, the issues were (1) whether the defendant could transfer money funds or liabilities from one account to another without the consent of the plaintiffs. (2) whether having regard to Exhibits J, J4 and J5, the defendant could be said to have been put on notice on the existence of the loan account. (3) whether having regard to the Exhibits J, J1 to J5, the defendants had discharged the burden of proof as required in a declaratory judgment. (4) whether the

defendant had proved its counter-claim, when the plaintiff failed to put a defence in respect of paragraph 1 of the counter-claim and (5) whether in proper evaluation of the Exhibits E, B and H12, the defendant could legally charge interest on the loan account.

The Court of Appeal discussed these issues and in its judgment dismissed the appeal and affirmed the decision of the trial court with respect to the counter-claim. This is now a further appeal to this court. The Notice of Appeal contains six grounds of appeal and they are as follows:-

#### GROUNDS OF APPEAL

1. The learned Justices of Court of Appeal erred in law when they held as follows:-

*“The respondent requested for security and the appellants had to provide the properties covered by Certificate of Occupancy Nos. BO/ 1621 and NE/136, which were mortgaged to the respondent. Having done so, it does not be in their mouth to turn round to impugn the validity of Exhibit ‘B’ on the ground that the consents for the transfer of the properties were irregular .....”* (Underlining ours for emphasis), and this error occasioned miscarriage of justice.

#### PARTICULARS OF ERROR

(a) From the evidence of 2<sup>nd</sup> appellant it was clear that he is neither a customer to the respondent and that by virtue of Exhibit ‘E’ he is the owner of the property covered by Certificate of Occupancy No. BO/ 1621.

(b) It is in evidence that the necessary consent for the transfer of the properties were not sought and had.

(c) It is also in evidence that at the time the Deed of Mortgage was executed, the 2<sup>nd</sup> applicant was a minor and could not have entered into a legally binding contract.

(d) It is not in evidence that the 2<sup>nd</sup> appellant by any stress of imagination benefited from the grant made to the 3<sup>rd</sup> appellant if any.

2. The learned Court of Appeal Justices misdirected themselves in law when it held as follows:-

*“..... From the available evidence on record the respondent*

*was entitled to the 1<sup>st</sup> relief granted on the counterclaim.....”*

PARTICULARS OF MISDIRECTION

(a) From the available evidence on record the respondent did not establish its entitlement to the 1<sup>st</sup> relief claimed.

B (b) The 1<sup>st</sup> relief being a declaratory relief the respondent did not lead credible evidence to warrant the grant of the relief.

(c) The D.W. 1 evidence on the printed record do not support the claim.

C (d) It is trite principle of law that for a declaratory relief to succeed there is the need to lead evidence in support.

3. The Court of Appeal erred in law in confirming the decision of the trial court, when the trial court failed to properly consider the documentary evidence tendered by the appellants which support the appellants’ case and which evidence were not contradicted and thereby arrived at a wrong decision.

PARTICULARS OF ERROR

E (a) The trial court as well as the Court of Appeal failed to draw proper inference on the documentary evidence tendered before the court.

(b) The evidence of P.W. 1 on Exhibit ‘E’ as to the point that Exhibit ‘E’ was unnecessary as at 13/10/82, which was not challenged was not considered by the trial court and appellate court.

F (c) It is trite principle of law that oral evidence can not vary the contents of a document in this case Exhibits ‘E’, ‘B’, ‘G’ and ‘H12’.

(d) It is clearly in evidence and remained uncontradicted that the 2<sup>nd</sup> appellant was never a customer to the respondent and did not borrow any money from the respondent.

G 4. The learned trial Justices of Court of Appeal erred in law when it held that:

*“It does not appear to me that they dispute the ..... they were indebted to the respondents..... It is plain from the above paragraph that what the appellants were quarrelling about is the high interest charged on the x loan account.”*

PARTICULARS OF ERROR

(a) A careful perusal of the averment in paragraphs 11-14 of the

further amended statement of claim reveals that the appellants denied indebtedness to the respondent in any form.

(b) If the court below had adverted to the paragraphs of the further amended statement of claim as well as the evidence led in support together with the documents tendered, the decision of the court below B would have been different.

5. The Court of Appeal erred in law when it held as follows:-

*“There is no evidence by way of bank tellers or any other document to support the payment. By a letter dated 29/3/98..... The statement of account Exhibit ‘J3’ shows that between the date of writing that letter Exhibit ‘J’ and 11/9/87 the appellants paid some amount the largest being the sum of N300,000.00 paid by cheque on 28/5/96 (Underlined for emphasis).”* C

PARTICULARS OF ERROR D

(a) By evidence of P.Ws. 1, 3 and 4 at the trial court, it was clear that the payment averred in the pleadings to have been made to the respondent i.e. N1,189,963.26 was not challenged.

(b) The respondent having admitted that as at the time account E No. 400127 was closed there was no further indebtedness by the appellants, it is incumbent on the respondent to establish how the appellants become indebted to it.

(c) It is not just enough to rely on formulated statement of account Exhibit “J3” without leading credible evidence on how the sum F contained in the statement is arrived at.

6. The learned Court of Appeal misdirected itself when it held as follows:-

*“As noted earlier, the Statement of Account Exhibit ‘J3’ by the last entry therein reflects an outstanding debt balance of N1,856,622.15 as at 8/7/93. The account has not been falsified by the appellants. I am therefore of the firm view that Exhibit ‘J3’ ..... is supportive of the 2<sup>nd</sup> relief sought by the respondent in its counter-claim.”* G H

PARTICULARS OF MISDIRECTION

(a) From the totality of the evidence before the trial court and the printed record, the appellant were not the author nor did they tender the

Exhibit 'J3' to warrant its falsification.

(b) The mere tendering of Exhibit 'J3' without leading credible evidence on how the sum indicated on same, how interest were charged do not warrant the grant of the claim on Exhibit 'J3'.

B (c) A careful reading of Exhibit 'J3' reveals that it carries two account No. 400127/62586, while by Exhibit 'B' which indicated account No. 400127 the appellant (3<sup>rd</sup>) have discharged its obligation to the respondent.

C (d) The respondent failed how a close account could be turned to loan account."

In compliance with the rules of this court the parties have filed written briefs of arguments and at the hearing of this appeal both learned counsel relied on the written briefs. In his brief of argument for the D appellants the learned counsel has identified and submitted to this court for the determination of the appeal the following four issues:-

1. Whether the Court of Appeal was right in law in affirming the decision of the trial High Court that the Mortgage Agreement between the E 2<sup>nd</sup> appellant and the respondent was valid in law.

2. Whether the learned Justices of the Court of Appeal were right in law to have granted the 1<sup>st</sup> relief claimed by the respondent in the counter-claim.

F 3. Whether the learned Justices of the Court of Appeal were right in law to hold that the appellants were indebted to the respondents.

4. Whether the learned Justices of the Court of Appeal were right in law to hold that the learned trial Judge properly evaluated the evidence proffered in the case."

G The learned counsel for the respondent accepted the issues in this brief for the respondents.

#### ISSUE No. 1

H Now, issue one is concerned with the decision of the court below in affirming the validity of the Deed of Legal Mortgage between the 2<sup>nd</sup> appellant and the respondent. I have in this judgment reproduced the summary of the issues submitted to the Court of Appeal by the appellants for the determination of the appeal. **In the appeal aforesaid, the valid-**

ity of the Deed of Legal Mortgage was not an issue that was raised for determination. The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the Court of Appeal. See Okoujeror v. Sagay (1958) WNLR 70; Pratt v. Haffner (1959) 4 FSC 82; Odesanya v. Ewedemi (1962) 1 AII NLR 320. For any ground of appeal or any issue to be raised and argued at the Supreme Court, it should first have been raised and argued in the Court of Appeal, or with leave of the Supreme Court. By logical extension, the general position is that an issue which is a fresh point entirely and not having been raised and argued in the Court of appeal is not competent to be raised at the Supreme Court without leave. The rationale for this rule is that it is desirable for the Supreme Court to have the benefit of the opinions on such points in issue, of the Court of Appeal.

Where a party seeks to raise a fresh point in the Supreme Court, he must:

- (a) obtain leave of the Supreme Court.
- (b) ensure that the new points sought to be so raised involve substantial issues of substantive or procedural law which need to be allowed to prevent an obvious miscarriage of justice.
- (c) show that no further evidence is required to resolve the issue for determination.

See Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 S.C. 6; Uor v. Loko (1988) 2 NWLR (Pt. 77) 430; Adedeji v. N.B.N. Ltd., (1989) 1 NWLR (Pt. 96) 212; Oguma v. IBWA (1988) 1 NWLR (Pt. 73) 658; A.G. Oyo State v. Fairlakes Hotel Ltd. (1988) 12 S.C. (Pt. 1) 1; (1988) 5 NWLR (Pt.92) 1; Oniah v. Onyia (1989) 2 S.C. (Pt.1) 69, (1989) 1 NWLR (Pt. 99) 514. Agbaje v. Adigun (1993) 1 NWLR (Pt. 269) 161.

It may also be argued that the true position of the law is that whereas a party to a suit cannot ordinarily without leave of the Supreme Court raise an argument not canvassed in the court below, that party can rely upon any new line of argument or new authorities, judicial or statutory, to support his argument in an issue which is properly before the

Supreme Court.

In the instant case, the issue of the validity of the Deed of Legal Mortgage between the 2<sup>nd</sup> appellant and the respondent was not an issue or argument that arose for the determination of the appeal in the Court of Appeal.

I have stated above that the issue of the validity of deed of the legal mortgage was not raised by the appellant in the Court of Appeal. The observation made by the Court of Appeal, to wit “..... it does not lie in their mouth to turn round to impugn the validity of Exhibit E xxxxx” was made by reference to whether the consent for the mortgage was regular or not and not on the capacity of the 2<sup>nd</sup> appellant to sign the Mortgage Deed or to put it another way, whether the respondent made a case for the declaration sought by them that “*there is a subsisting mortgage between the plaintiffs and the defendant.*” It shall, perhaps be necessary to reproduce the portion of the judgment in order to show that the issue of the validity of the Mortgage Deed on the capacity of the second appellant was not discussed at all. The portion reads:-

A great deal of the pieces of evidence led in this case is purely documentary and not evidence based on credibility of witnesses. It will be necessary to examine these pieces of evidence to see to what extent they support the reliefs granted to the respondent on its counter-claim. With respect to the first relief, that is a declaration that there is a subsisting legal mortgage between the parties, the appellants through P.W. I tendered the said Mortgage Deed dated 13/10/82 which was admitted in evidence as Exhibit “E”. This Deed was made pursuant to the request of the appellants for their overdraft to be converted into a loan amount. The respondent requested for security and the appellants had to provide the properties covered by Certificate of Occupancy Nos. BO/1621 and NE/1367 which were mortgaged to the respondent. Having done so, it does not lie in their mouth to turn round to impugn the validity of Exhibit E on the ground that the CONSENTS FOR THE TRANSFER OF THE PROPERTIES IN QUESTION WERE IRREGULAR (Emphasis mine).

It is my view that from the available evidence on record the respondent was entitled to the first relief granted on the counter-claim.”



The above statement was made when the Court of Appeal was considering issues No. 4 which I reproduced in full as follows:-

*“Whether the respondent had succeeded in proving its counter-claim, the appellants having failed to file a defence in respect of paragraph 1 of the counter-claim.”*

B

This clearly means that the issue of the validity of the Deed of Legal Mortgage was not the issue under consideration. Indeed the appellants did not even file any defence or reason why the declaration of the subsistence of the deed of Legal Mortgage should not be granted as claimed under paragraph 1 of the counter-claim. In the further Amended Statement of Claim and Reply to the counter-claim, paragraphs 6 and 7 thereof, the appellants pleaded thus:-

C

*“6. The second plaintiff avers that there was never a time his property covered by Certificate of Occupancy No. BO/1621 was mortgaged to the defendant as security for any obliged loan, since the 2<sup>nd</sup> plaintiff never took any money from the defendant.*

D

*7. The second plaintiff avers that at all material time to this case, he was a minor and will found on his BIRTH CERTIFICATE at the trial of this case in proof of his age.*

E

*(a) That there was no valid Mortgage Deed between the parties to this case on the ground that the 2<sup>nd</sup> plaintiff could not validly enter into such agreement coupled with MEMORANDUM AND ARTICLES OF ASSOCIATION of the 3<sup>rd</sup> plaintiff a copy of which was given to the defendant at all times material to this case.”*

F

The learned trial Judge in his judgment and when considering the claims of the appellants as pleaded specifically came to this conclusion:-

*“The burden of proof is on the plaintiffs to show that they are entitled to the declarations sought.*

G

*Having considered the totality of the evidence adduced, I am of the humble view that the plaintiffs have failed to establish their claims on the balance of probabilities. I will accordingly dismiss the plaintiff's claims.”*

H

There was no appeal to the Court of Appeal challenging the dismissal of the appellant's claim on the validity of the Deed of the Legal

Mortgage on the grounds that the 2<sup>nd</sup> appellant was a minor. The issue was decided by the trial Judge who ruled against the appellants and dismissed their claims. The observation made by the Court of Appeal could not under the circumstances be a competent issue for this court to consider.

Accordingly, all the arguments of counsel for the appellants go to no competent issue, though if the issue be competent, it might be a valid point. **In any event, the law is well settled that an appeal to the Supreme Court must relate to the decision of the Court of Appeal and not that of the High Court. The Supreme Court has no jurisdiction to hear appeals from the decision of the High Court. Oduntan v. Akibu (2000) 7 S.C. (Pt. II) 106; (2000) FWLR (Pt. 12) 1982. The case of the appellants as argued in the Court of Appeal must be consistent with the case on appeal to the Supreme Court. The Supreme Court will not allow a party to put up a different case from the case it had put up at the Court of Appeal without leave. The issue of the validity of the Deed of Legal Mortgage as argued in the appellants' brief is a fresh issue for which it was necessary to obtain leave of this court to raise it. No leave was obtained and as such the issue is not competent.**

I accordingly rule the first issue so formulated by the appellants incompetent and it is rejected by me. Consequently the first issue is struck out.

#### ISSUE NO. 2

This is concerned with whether the learned Justices of the Court of Appeal were right in law to have granted the first relief claimed by the respondent in its counter-claim. It is firstly submitted that the Justices of the court below held that the learned trial Judge was wrong to have held that the respondent was entitled to the relief number one merely on the ground that the appellants did not join issues with the respondent, the claim being declaratory. Since declaratory judgment is not granted either on default of defence or indeed on admission, there must be evidence that the party seeking the declaration is entitled to it. Learned counsel referred to Bello v. Eweka (1981) 1 S.C. 1; Ogbonna v. A.G. Imo State

(1992) 1 NWLR 647 at 698. It is argued further that the lower court was in error to have found the evidence entitling the respondent to the claim of declaration as claimed by it. It is submitted that the Deed of Legal Mortgage was invalid because the mortgage contract was fraught with so many irregularities and the issue of non-conformity with Sections 22 B and 26 of the Land Use Act. Learned counsel referred to Savannah Bank v. Ajilo (1989) 1 S.C. (Pt.II) 90, (1989) AII NLR 26.

Here again, it is manifestly clear and that the appellants in the court below merely argued, whether the learned trial Judge was right to have found for the respondent in its claim of declaration, only on the default of the defence to the counter-claim. There was no argument or suggestion that the Deed of Legal Mortgage was invalid. Issue No. 4 in the court below based on additional ground of appeal number one on page 82 of the record reads:- D

*‘Whether the respondent succeeded in proving its counter-claim. The appellants having failed to file a defence in respect of paragraph 1 of the counter-claim.’*

The relevant Ground of Appeal also reads:- E

*“1. The learned trial Judge erred in law when it entered judgment against the appellants in respect of the respondent’s counter-claim when same had not been proved and this error had occasioned a miscarriage of justice.”*

#### PARTICULARS OF ERROR

 F

(a) It is trite law that pleadings is not evidence and that facts contained therein must be proved by evidence.

(b) The respondent had not discharged the onus to prove on him as required by law in a declaratory judgment. G

(c) Paragraph 9 of the respondent’s counter-claim needed to be strictly proved by the evidence and this was not done.

(d) Going by paragraphs 2-16 of the respondent’s Further Amended Statement of Defence as adopted by the respondent in its counter-claim H did not establish that interest as at 28/7/1993 to 1<sup>st</sup> January, 1994 was 30%.

(e) Similarly no evidence was led to show that interest as regu-

lated by the Central Bank and Commercial Bank is 21% in the absence of an express agreement.

(f) The rate of interest was specified in Exhibit J3 which was heavily relied on by the learned trial Judge as the basis for establishing the liability or the debt owed.”

Thus the main contention of the appellants is the court below was limited to the fact whether the respondent proved that it was entitled to the declaration it had sought that there was a subsisting legal mortgage.

**It was also their contention whether the learned trial Judge was right to have granted the declaration sought merely on default of a defence to the counter-claim. The Court of Appeal agreed with the appellants, the law, correctly in my view, is that a declaratory relief cannot be granted merely on default of defence or even on admis-**

**sion.** The other issues raised was to do with interest. There were no arguments or complaints raised on the validity of the Deed of the Legal Mortgage. The issue of the legality or validity of the mortgage has no connection whatever with the complaint under the ground of appeal or the issue raised. Indeed the appellant did not discuss the validity of the Deed of Legal Mortgage in its arguments in the Court of Appeal. The learned Justice of the Court of Appeal as shown, while considering the first issue looked at the pieces of evidence adduced and came to the conclusion that the respondent had proved its entitlement to the decree of declaration as prayed by it. The complaint concerning the validity of the Deed of Legal Mortgage on the ground of the incapacity of the 2<sup>nd</sup> appellant or in breach of the provisions of the Land Use Act are in my view incompetent and all the arguments in that wise are discountenanced by me.

**The Court of Appeal was right to have held that the trial Judge was in error to have granted the respondent’s first relief on the counter-claim merely because of the default of the defence by the appellants, but the court correctly relied on the other documentary evidence on record to find that the respondent had proved the counter-claim. I accordingly find no merit in the second issue.**

Issue No. 3 is whether the learned Justices of the Court of Appeal were right in law to hold that the appellants were indebted to the respondents. It is submitted for the appellants, that the legal conclusion arrived by the courts below that the appellants were indebted to the respondent was erroneous and at variance with the pleadings and the evidence proffered at the trial. By their pleadings, the appellants claimed to have paid in full the debt claimed by the respondent. It is submitted that the Court of Appeal was wrong to have stated that there was no “*dispute that they were indebted to the respondent*” when by their pleadings and the evidence led by them, the appellants clearly denied being indebted to the respondent. It is also submitted that by Exhibit B and as testified by D.W.1, the debit balance shown in the account of the appellant No. 400127, was “00.” Thus showing there was no debit balance. The appellants also denied that they had reached any agreement with the respondent to transfer the debit balance or their current account to a loan account. The appellants denied the existence of any loan account and claimed to have paid any debit balance on the current account. It is further submitted that both courts below failed to consider the pleadings and the evidence led by the appellants when they arrived at the conclusion that the appellants were owing on the loan account. Learned counsel referred to and relied on the cases of Khalil v. Odumade (2000) 7 S.C. (Pt. 1) 69 at 76; NSCC 127 at 128.

It is submitted further that though the finding of the indebtedness of the appellants on the loan account is a concurrent finding of facts, this is an appropriate situation that on a further appeal, the appellate court should disturb the findings as the findings was perverse and had occasioned a miscarriage of justice. Learned counsel referred to the cases of Bibhabati v. Ramendra 51, CWN 98 or A (1947) pc. 19, Adisa v. Oyinwola (2000) 6 S.C. (Pt.II) 47.

The learned counsel for the respondent on the other hand argued that the indebtedness of the appellants to the respondent was a finding of fact by the trial court after it had evaluated and appraised all the evidence led by both sides. The findings was confirmed also by Court of Appeal after examining all the evidence adduced. The Court of Appeal came to

the conclusion, that the appellants led no evidence by way of “*tellers or any other document*” to show payment of the debt. The learned counsel further argued that the law is settled, that whenever a debtor acknowledges a debt such as the appellants in this case (Exhibit J), the burden of proof of payment is upon the debtor. Learned counsel referred to the cases of Macaulay v. Nal Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 293 at 308; Nigeria Maritime Services Ltd. v. Alhaji Bello Afolabi (1979) 2 S.C. 79 at 84, Onyeama v. Amah (1988) 1 NWLR (Pt. 73) 772. It is finally submitted that there is no substantial error to enable this court disturb the concurrent finding of facts.

Now, there is no doubt that the Court of Appeal per Edozie, JCA., (as he then was) stated “..... *It does not appear to me that they dispute the fact xxxxxxx they were indebted to the respondents xxxxxxx.*” But to understand the context in which the statement was made it shall be necessary to read further. The learned Justice stated:-

“*Reading through the entire paragraphs of the appellants’ Further Amended Statement of Claim, it does not appear to me that they dispute the fact that at some time they were indebted to the respondent. The gravamen of their case was that the respondent charged high interest rate on the loan account. In paragraphs 8 and 9 of their further Amended Statement of claim it was averred as follows:-*

8. *The plaintiffs aver that in spite of the agreement that interest chargeable on the alleged outstanding sum against the first plaintiff would be 13% per annum, defendant went ahead without any notice to plaintiffs to charge over and above agreed rate of interest per annum.*

9. *The plaintiffs aver that as a result of the exorbitant rate of interest charged by the defendant contrary to the agreed one and without notice to the plaintiffs the defendant by their singular act raised the alleged outstanding sum against first plaintiffs allegedly high which plaintiffs deny and reject.”*

“*It is plain from the above paragraphs that what the appellants are quarrelling about is the high interest rate charged on the Loan Account. And in paragraph 10 of their claim they pleaded:-*

10. *The plaintiffs with serious efforts paid a total sum of*

*N1,189,963.26 to the defendant while the defendant is illegally still claiming outstanding sum of N1,858,622.15”*

*“There is no evidence by way of bank tellers or any other document to support the payment. By a letter dated 29/3/94 addressed to the respondent by the first appellant (Exhibit “J”), the appellants acknowledged a debt of N573,999.52 on the loan account and pleaded for more time to repay it xxxx.”*

**So, it cannot be correct as asserted by the appellants’ counsel that the lower court was wrong to have held that the appellants never denied the existence of the loan account by their pleadings and the evidence. I have myself read very carefully the pleadings of the appellants and the evidence led particularly the documentary exhibits. I agree with the findings of both the trial court and the Court of Appeal, that the appellants have not shown how they paid the loan account to which they admitted owing under Exhibit J. The learned trial Judge accepted the evidence of D.W.1 to the effect that the zero balance showed in Exhibit B indicated that the overdraft account was closed and the debit balance transferred to the loan account in the sum of N487,375.52k. Thus the appellants were no longer owing on the current account but on the loan account. The question of the indebtedness of the appellants to the respondent on the loan account, as mentioned above, is a concurrent finding of fact by the two lower courts. As mentioned also, I have myself looked at the pleadings and the evidence and the finding by the two courts cannot be faulted. I accordingly also resolve the said issue against the appellants.**

**ISSUE NO. 4**

The complaint under issue No. 4 is whether the court below was right in law to have held that the trial court had properly evaluated the evidence proffered in the case. It is submitted that the learned trial Judge was wrong to have stated in his judgment at page 68 of the printed record that the appellant “*by paragraph 3 of the Further Amended Statement of Claim*” were not disputing the fact that on 2/11/83, the 3<sup>rd</sup> appellant was indebted to the respondent.

It is submitted that the statement was at variance with what the appellant pleaded and the said paragraph 3. It is further submitted that the learned trial Judge held in his judgment, that the appellants have failed to prove that the agreed interest was 13% per annum or show that the respondent resiled from any agreement and charged exorbitant interest as pleaded under paragraphs 8 and 9 of the claim. It is submitted that the learned trial Judge was wrong in that the appellants and their witness gave the evidence in proof of their claims as pleaded by them. It is also submitted that the evidence of D.W. 1 was hearsay and offended Section 77 of the Evidence Act. It is finally argued that in spite of the wrong evaluation of the evidence by the trial Judge, the Court of Appeal failed to properly consider the case on the record.

It is submitted by the respondent on the other hand, that the Supreme Court has no jurisdiction to entertain the appeal from the decision of the trial court. The jurisdiction of the Supreme Court is only limited to the decision of the Court of Appeal. Vide Adio v. State (1986) 2 NWLR (Pt. 24) 581. It is again argued, that the issue of the evidence of D.W. 1 being hearsay and the inadmissibility of Exhibits B and J3 are being introduced for the first time on appeal in this court and no leave was obtained to raise the issues as fresh issues and they should therefore be discountenanced. See Ajuwon v. Adeoti (1990) 2 NWLR (Pt. 132) 271 at 284.

**Now, on the valuation of evidence by a trial court, the law is settled.** See Mogaji v. Odojin (1978) 4S.C. 91 and Solomon v. Mogaji (1982) 11 S.C. 1. **It is that before a court which evidence is adduced by the parties in a civil case comes to a decision as to which evidence it believes or accepts and which evidence it rejects, it should first of all put the totality of the acceptable testimony adduced by both parties on an imaginary scale; it would put the legal evidence adduced by the plaintiff on one side and that of the defendant on the other side and weigh them together. It will then see which is heavier, not by the number of the witnesses called by each party but by the quality or probative value of the testimony of those witnesses.** See also Sha Jnr. v. Kwan (2000) 5 S.C. 178,(2000) 8 NWLR (Pt.670) 685. **It is the pre-eminent duty of a trial court which saw**



**and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate court which neither heard the witnesses nor saw them to observe their demeanours in the witness box. See Ajakaiye v. Adedeji (1990) 7 NWLR (Pt. 161) 197.** I have carefully read the judgment of the trial court and I am of the view, that the learned trial Judge had properly appraised, analysed and evaluated all the evidence led before him before he came to the conclusion, that the appellants were owing the respondent and that the appellants had failed to prove the rate of interest agreed nor that they had repaid the loan. Most of the evidence before the trial court was documentary and at least in Exhibit J the appellants admitted owing the respondents and correctly, as found by the learned trial Judge and confirmed by the Court of Appeal, the appellants did not show that they had repaid the loan. As mentioned above, these are findings of concurrent and consistent facts made by the lower courts. I am not convinced that the findings are perverse or not made as a result of proper evaluation and appraisal of the evidence led and accepted. I also find no merit in this issue and I resolve it against the appellants.

All the issues having been resolved against the appellants, this appeal fails and I accordingly dismiss it. The respondent is entitled to costs assessed at N10,000.00.

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### **BELGORE JSC**

I have read in draft the judgment of my learned brother, Musdapher, JSC., with which I am in complete agreement. The facts before trial court on which it relied and upheld by Court of Appeal, are that the first appellant clearly went to the respondent bank to borrow on mortgage. He dealt with the bank all along giving the impression that as alter ago of the third appellant he was the mouth and brain of that company. He brought in a certificate of occupancy belonging to his infant son. How the infant son came about the title to the piece of land is never explained. The son, not knowing what was all about, signed away the right of occupancy to procure the mortgage.

Certainly the first appellant left no other impression that he and only he was negotiating with the bank but under a grand design of deceit and possibly defraud.

Looking at the whole transaction, it was the first appellant that  
B procured the mortgage and he cannot be found to resile from it on narrow claim of unenforceability.

A party cannot resile from his obligation under a contract because he never followed what the law required; in essence he cannot take refuge from his contractual obligations on the pretext of his own illegality  
C insofar as the other party was not aware of the illegality at the time of the transaction.

Many of the grounds of appeal are novel to the case and the practice required that he got leave to argue them. No leave was obtained so  
D that all the said grounds are incompetent and I agree with the lead judgment's stand on this.

Had this appeal succeeded it would have created consequences that will allow fraud to pay. The appellants' case was ab initio based on  
E the illusory nullity caused by their deceit. A court of law must always ensure justice and equity. Self-induced nullity will not help the appellants. I also dismiss this appeal for the foregoing reasons and for the fuller reasons in the judgment of Musdapher, JSC., I also award N10,000.00  
F costs in this appeal against the appellants in favour of the respondent.

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### KUTIGI JSC

I read in advance the judgment delivered by my learned brother,  
G Musdapher, JSC. I agree with him that the appeal lacks merits. It is accordingly dismissed with N10,000.00 costs in favour of the defendant/respondent.

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H

### EJIWUNMI JSC

As I have had the privilege of reading before now the draft of the judgment just delivered by my learned brother, Musdapher, JSC., wherein

he dismissed this appeal, I also dismiss the appeal for the reasons given in the said judgment. I abide also with the other consequential orders made thereon including the order as to costs.

**PATS-ACHOLONU JSC**

I have read the judgment of my learned brother, Musdapher, JSC., in draft and I agree with him. Let me however make a few comments of mine.

In this case the appellants had instituted an action against the respondent and sought declarations that the purported Legal Mortgage dated 13<sup>th</sup> October, 1982 between them and the Bank is void and of no effect, that there is no subsisting Legal Mortgage between the parties, and that the 2<sup>nd</sup> appellant being a minor is incapable of entering into a valid contract, and further, that the respondent cannot sell by public auction any properties which are subject to the alleged Legal Mortgage. There was a prayer for an injunction to restrain the respondent by itself, its servants and privies from conducting any sale.

The respondent had in its counter-claim equally sought for a declarations that it is entitled to N1, 828, 622.15 with interest on the loan facility at the rate of 30% and further interest of 21% on the outstanding sum.

In the High Court after listening to the facts of the case and address of counsel, the learned trial Judge in a considered judgment granted the declarations sought by the respondents. On an appeal to the Court of Appeal, that court affirmed the judgment of the court of first instance and dismissed the appeal, whereupon the appellants appealed to this court.

The first appellant had, secured a loan from the respondents by using the certificate of occupancy purportedly granted to his son who was a minor, as a collateral. In the course of the history of their banking relationship, the Bank after writing to the appellants in respect of the sum of money claimed was outstanding and not paid in spite of repeated demands, evinced an intention to sell the security to realize its debts. The appellants denied that they were owing any sum of money and proceeded to institute an action. Some of the highlights of the appellants' case are:

1. That the 2<sup>nd</sup> appellant is a minor and therefore any contract with a minor is void.

2. That the appellants are not owing any money to the respondent.

3. That the mortgage supposedly made was tainted by illegality as the consent of the Governor was not first sought and obtained before the purported mortgage.

4. The appellants' further grouse is that the interest agreed between the parties was 13% therefore any interest rate above that is against the contents of the mortgage agreement.

Pursuant to the appeal, the appellants identified four issues to be resolved by the court and they are as follows:-

1. Whether the Court of Appeal, was right in law in affirming the decision of the trial High Court, that the mortgage agreement between the 2<sup>nd</sup> appellant and the respondent was valid in law.

2. Whether the learned Justices of the Court of Appeal were right in law to have granted the 1<sup>st</sup> relief claimed by the respondents in their counter-claim.

3. Whether the learned Justices of the Court of Appeal were right in law to hold that the appellant were indebted to the respondents.

4. Whether the learned Justices of the Court of Appeal, were right in law to hold that the learned trial Judge properly evaluated the evidence proffered in the case.

The respondent adopted the 4 issues formulated by the appellants. On issue one the fon et origo of the appellants' case is that as the 2<sup>nd</sup> appellant was a mere minor incapable of holding a valid certificate of occupancy having regards to Section 7 of the Land Use Act Cap. 202 Laws of the Federation 1990, the respondent could not use or rely on a void document to secure a mortgage. Relying on the case of Michael Igbonisa v. Cole E. Aiyobagbiegbe (1969) ANLR 95 and Hunter v. Walters (1871) LR 2 Ch App 77, the counsel for the appellants submitted that the so called mortgage contract was a non-issue and is void. By the same token, the appellants reason that the contract supposedly entered by the 2<sup>nd</sup> appellant for the benefit of the 3<sup>rd</sup> appellant is voidable as an infant cannot stand surety or be guarantee by way of providing security or

collateral for a Mortgage Deed.

On this point the respondents' counsel argued with verve that the appellants knowing fully well that the 2<sup>nd</sup> appellant was a minor when the Deed was executed which he signed cannot take advantage of the illegal act by reaping some benefits or rewards. There are certain empirical B factors that I would consider in this case. If as it is agreed by both sides that the 2<sup>nd</sup> appellant in a strict sense by the operation of Section 7 of the Land Use Act could not hold a valid certificate of occupancy, there is no doubt that the subject matter used to secure the loan did not really belong C to him. In other words he got no property although it must be said that the State had long relinquished its control to the minor. This is the fiction of the law but in actual fact, the 1<sup>st</sup> appellant used that property that he is now denying to secure a loan. He expects the court to agree with him D that no real deed was executed. He is therefore sending the message across which could be put this way.

*“ Yes I used an illegally obtained property to secure or obtain some benefits but I shall state that no action can lie on my act and the illegality will afford me a basis to repudiate any claim that you will have E on me.”*

Now in his testimony in court, the 2<sup>nd</sup> appellant stated as follows:-

*“ I know the property situate at Damboa Road covered with Certificate of Occupancy No. BO 1621. The property belonged to me. I have F the Certificate of Occupancy to show that the property belonged to me. On 13<sup>th</sup> October, 1982, I was together with my father, 1<sup>st</sup> plaintiff at Kumshe Ward Maiduguri, one man came in and introduced himself as Bank Manager of Bank of the North. He gave my father a bulky document to sign. After my father, 1<sup>st</sup> plaintiff signed he told me to also sign G the document. He gave me a photocopy of a letter from Ministry of Land and Survey.”*

Further down in that testimony he said that he had no relationship H with the respondent as he was not an employee of the bank and the bank has no right to sell his property having earlier acknowledged that he had been granted Certificate of Occupancy of the property sought to be sold although the certificate of occupancy was in the possession of the father,

the 1<sup>st</sup> appellant.

During the cross-examination in answer to the question from the learned counsel for the respondent, 2<sup>nd</sup> appellant testified as follows:-

“By 1982 I was seven years old. I could not read or write that time. By 1982 any document signed by me was at the directives of my father (1<sup>st</sup> plaintiff). I did not ask my father why I signed the document in 1982. It is true since 1982 to date I never had the opportunity to read Exhibit “E”. My father did not inform me that as a result of the document we signed in 1982 we have been dragged to court. I do not know whether the transaction was done by my father. I did not ask the Bank why they wanted to sell my property.”

Now a proper examination and analysis of the 2<sup>nd</sup> appellant’s testimony in court demonstrates the subtleties and subterfuge employed by the 1<sup>st</sup> appellant to secure for himself immeasurable benefits from the transaction but he later saw it justifiable to rely on the same deceit and element of concealment or sleaze to tell the respondents to jump into the lake as the deal was manifestly illegal. It is manifestly evident that to all intents and purposes, the father of the 2<sup>nd</sup> appellant was the de facto “owner” of the property. Why the 2<sup>nd</sup> appellant signed the document was not explained to him. As far as he was concerned, that property, i.e., the Certificate of Occupancy was really the father’s who used his position to secure the loan by relying on the Certificate of Occupancy for the mortgage which he turned round to repudiate. This seeming nefarious and ignoble act by which he seeks to take refuge by making a remarkable volte-face is as alarming as it is surprising. The appellants asking this court to support the ignoble act and, effectively repudiate the deal they had undertaken. It is in my opinion, invidious on his part to use the under age of his son to repudiate the Deed of Mortgage he had entered. As at the time the 2<sup>nd</sup> appellant was giving evidence in court, he was already grown up then, he never asked about the property for which he had the Certificate of Occupancy. The necessary inference is that the property although ostensibly for some sinister purpose was made out in 2<sup>nd</sup> appellants’ name, the 1<sup>st</sup> appellant really had the effective control and possession of the property which he used to secure a loan. It will be unjust for

any tribunal of justice to lend a willing hand in using subterfuge to defeat the rights of another when the evidence shows that implicit in the deal and the act of the 1<sup>st</sup> appellant is an attempt to pull a fast one on the respondent. I refuse to lend any hand in giving substance and credibility to this sort of questionable deal. B

Still on this point let me now view this issue raised from another angle. Indeed it is easily discernible that the appellant did not appeal to the lower court against the dismissal by the trial court of the question of the validity of the Deed of Legal Mortgage. Since this court has no jurisdiction to entertain an appeal from the High Court directly, the ground of appeal based on this issue together with the part of the brief where the issue is argued by the appellants becomes incompetent and is therefore jettisoned by the court as being of no value or substance. In other words whichever way one looks at the matter, the appellants have not succeeded in making any dent and therefore have failed to establish this issue. C D

The 2<sup>nd</sup> issue is on the granting of the relief claimed in the counter claim. The counter claim is to the effect that the respondents are entitled to the outstanding loan of N1,858,622.15 at the interest of 30% up to January, 1994 and 21% on the outstanding amount from the date. The appellants in their brief find it hard to understand why the Court of Appeal, after holding that the respondent did not react to the counter-claim, went ahead and affirmed the judgment of the court below when no evidence was offered by the respondent in respect of the counter claim. The appellants referred to the court's statement of the law as espoused by the Edozie, JCA., (as he then was), in this case to ram it in on the necessity of proof by evidence. The cases of Iselo v. Eweka (1981) 1 S.C. 1 and Ogbonna v. A.G. Imo State (1992) 1 NWLR 647 at 698, were cited. Now the lower court in its judgment had this to say. E F G

*"The Respondent requested for security and the appellants had to provide the properties covered by Certificate of Occupancy Nos. BO/1621 and NE/1367 which were mortgaged to the respondent. Having done so, it does not lie in their mouth to now impugn the validity of Exhibit E. (the Deed of Mortgage) on the ground that the transfer of the* H

*properties in question were irregular”.*

I have said earlier that there was no appeal on the validity of “Exhibit E”. There was no reference whatsoever in that Deed of Mortgage where the 2<sup>nd</sup> appellant was regarded as a minor. Besides having relied on a document which according to him is worthless and which he said transferred no property but which was effectively used to secure a loan from which the appellants must have undesirable, obtained some benefits, they are being clever by half to turn round to say that “Exhibit E” was illegal, and should be discountenanced by the court. This court being a Court of Justice is a temple of justice adhering to the symbol of a blindfolded woman with a scale on one hand and a sword on the other to render “justice” (not injustice), to all manner of people. Indeed the beauty and greatness, nay, the purity of justice, in all its consuming allure and essence is to ferret out from the mass of facts and law before it, relevant points in order to give remedy to anyone who comes for that. It is not justice meted to someone who does not deserve it when that person craving for it has his hand soiled, blemished, and besmirched. It is my view that the appellants cannot eat their cake and have it. I believe that it is not only the litigants in this case but millions of our country men with an abiding faith in the nature of our jurisprudence as practiced in our courts who have access to the courts to seek justice, not adulterated justice, or justice shrouded in clouds of euphemisms or where the court would wring its hands and declare that the case does follow a regular or laid down pattern that would benefit from justice founded on law and ethics. In my view that issue is decided against the appellants. I believe that a law that is bereft of ethical contents is barren.

The third issue was whether the appellants were in fact indebted to the respondents. The appellants after referring to the plethora of evidence which shows that they could not conceivably have been indebted to the respondent said the Court of Appeal still went to say that it does not appear that they disputed that they were indebted to the respondent. In examination of the contents of the evidence adduced by both sides, D.W.1 said as follows in his evidence in court:

*“The figure shown on Exhibit B shows that overdraft account is*



*closed. On the 1<sup>st</sup> November, 1982, a loan account was opened for the plaintiff and the amount is N487,375.52. As far as overdraft account is concerned plaintiffs are not owing the Bank but only in respect of the loan account."*

What is evident from the nature of this evidence is that D.W. 1 B made a distinction between overdraft account and loan account; a distinction the appellants neither appreciated nor understood as it turned out. Continuing his evidence D.W. 1 said;

*"The balance of overdraft in accounts No. 400127 was converted C to a loan in November, 1982. In 1982 I was not in the main branch. The first Legal Mortgage was in respect of NE154 which was released to NBCI. The operation on account No. 400127 stopped when we received the payment from NBCI. I cannot remember the date. I now say the date is 24<sup>th</sup> September, 1984. Account 400127 was closed on 24<sup>th</sup> September, D 1984. I was not in the Bank when the account was opened. There must be an agreement as to what interest is chargeable but there is no fixed charge. The interest charge varies depending on the Central Bank Policy. There are variations in the interest rate. The variations were conveyed to the E plaintiffs through their statement of account. It is not possible to state interest rate on the statement of account but they are usually kept informed as to the rate chargeable. Exhibits B and J3 were never separated, they were duly sent to the plaintiff together. We complied with F instruction given to us by the plaintiffs. We handed over the documents to the Chartered Accountants. We have the document giving the instruction. As at November, 1982, the amount was N487,375.52 but interest rate kept on increasing. It was an excess on overdraft loan. The approved G amount was N80,000.00. 3<sup>rd</sup> plaintiff was allowed to withdraw money from the overdraft account within its limit of N80,000.00. Exhibit B is in respect of overdraft account No. 400127. 1<sup>st</sup> plaintiff incurred the debt of One Million Naira through his application. 2<sup>nd</sup> plaintiff is not owing the bank (Defendant), 3<sup>rd</sup> plaintiff is owing the bank sum of N1,858,620.15 H as at 28<sup>th</sup> July, 1993. Both 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs are owing the same amount. It is not correct to say that 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs did not take any money from the defendant in respect of account No. 400127/62586. Re-ex by*

*defence counsel; - Account No. 400167 is the same as account No. 62586”.*

P.W. 1 the first appellant had said in his evidence “*I do not have any other account for 3<sup>rd</sup> plaintiff apart from AC No. 400127. I did not make any agreement with the defendant that the excess sum of N487,375.52 be transferred to the loan account in 1982*”. The 1<sup>st</sup> appellant had throughout his evidence denied owing any money to the respondent. It is not correct as the Court of Appeal had held that he did not dispute the debt. He did however, the issue is that there are 3 plaintiffs as there are 3 appellants. The fact that the 1<sup>st</sup> appellant denied owing any money does not mean in particular that the 3<sup>rd</sup> appellant wholly owned by the 1<sup>st</sup> appellant was not owing. That may be why the court below used the term “they” for not disputing the collective debt instead of the term “he” as applying to the 1<sup>st</sup> appellant. It is instructive that both the court of 1<sup>st</sup> instance and the Court of Appeal believed that the amount said to be owed as claimed in the counter claim had not been paid as the lower court did not fault the judgment of the High Court in this regard. The two lower courts find as a fact, and believe the evidence of D.W. 1 The issue is not really a question of whether the court below came to a wrong conclusion by stating that the appellants did not deny the debt but whether 1<sup>st</sup> court believed and came to the conclusion that the debt was outstanding, and that the re-affirmation of the Court of Appeal led to a miscarriage of justice. The court of 1<sup>st</sup> instance held the opinion that the debt was outstanding. This was endorsed by the Court of Appeal but said in language that was a bit confusing. I hold that in this case where there is a concurrent findings of fact and there is no discernible pervasion, the verdict should not be disturbed by this court. See Chukwuwendu v. Mbamali (1980) NSCC 127 at 128, where the Supreme Court held as follows. In cases where there are concurrent findings of fact their findings cannot be disturbed without substantial error apparent on the record of proceedings. See also Fashanu v. Adekoya (1976) 6 S.C.P. 83. As I held before, although it would appear from the nature of the evidence of the appellants that they did dispute the amount, it must be stated they did not quite come openly to deny it. The matter is not made easy by their claiming that they agreed on the interest rate of 13% when there was no

such clause in the Deed of Legal Mortgage and when it is a well-known fact which this court takes judicial notice of that interest rates are dependent on the policy of the Central Bank. No interest rate is static. It is not immutable. It varies depending on the nature of Government policy which follows the state of the economy. In my view issues No. 3 and 4 formulated by the appellants have not been shown to have affected the mind of this court to disagree with the judgment of the lower court. B

On the whole, the appeal fails and is hereby dismissed. I affirm the judgment of the court below and abide by the consequential order in the lead judgment. C

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