

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 2005. SC. 290/2000
CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, U. A. KALGO,
D. MUSDAPHER, I. C. PATS-ACHOLONU, JJSC

OBASI BROTHERS MERCHANT CO. LTD. APPELLANT
AND
MERCHANT BANK OF AFRICA
SECURITIES LTD. RESPONDENT

ESTOPPEL - Res judicata - Final judgment - Is one which decides the rights of the parties - On the merits of the case (H1)

ESTOPPEL - Res judicata - Case that was not decided on the merits - But was struck out by court - Without delivering final judgment - Cannot ground res judicata (H2)

ACTIONS - Termination on merit - Circumstances on how case ended - Are what denotes finality of its termination - Not mere use of the words dismissal or striking out (H3)

EVIDENCE - Proof - Burden on plaintiff - Demands presentation of substantial evidence - That outweighs that of the defendant (H4)

EVIDENCE - Clarity - Where plaintiff's evidence - Demonstrates inexplicable ignorance of necessary facts - Court cannot find in his favour (H5)

BANKING - Loan indebtedness - Balance at a date - Plaintiff's reply to Bank's letter demanding the balance - Shows acceptance of indebtedness (H6)

ACTIONS - Legal practitioners - Facts of a case - Must be mastered - And be properly presented to the court by counsel - For seasoned advocacy (H7)

FACTS

Sometime in May, 1990, plaintiff/appellant applied to the defendant/respondent for a short term loan facility. The loan was to be used for the importation of assorted wines. The total grant as at October, 1991 was over 1.4 million naira. Appellant had agreed to deposit 6,921 cartons of wine and equitable mortgages of their landed properties at Lagos and Abuja with the respondent as security for the loan. Though it deposited the said mortgages, appellant delivered only 3,040 cartons of wines to the respondent. Appellant defaulted in the repayment of the loan facility. In October, 1992, respondent filed an action for the recovery of the outstanding amount plus interest payable as at that time. The suit was struck out by the Lagos High Court for lack of diligent prosecution.

In November, 1993, appellant instituted the present action against the respondent. It claimed inter alia, over 5 million naira for 4,040 cartons of wine which respondent took delivery of but refused to render account. It also sought to recover certificates of occupancy it delivered to the respondent for its lands at Lagos and Abuja. The respondent denied liability and counter claimed the sum of over 4 million naira as balance plus interest outstanding in the loan transaction. It also claimed an order of enforcement of the right of sale of the appellant's mortgaged property. The trial court dismissed the appellant's claim, and granted respondent's counter claim. Appellant's appeal to the Court of Appeal was dismissed. It has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding that the appellant has not discharged the burden of proof placed on it by law, when facts admitted need not be proved.

2. Whether the Court of Appeal was right in holding that an order of dismissal of the respondent's claim in Suit No. LD/3356/92 did not create a bar to subsequent suit and thereby did not operate as estoppel per rem judicata.

3. Whether the Court of Appeal was right in holding that the

respondent's counter-claim was unchallenged and proved.

HELD (Dismissing the appeal per **PATS-ACHOLONU JSC**, Kalgo JSC dissenting in part)

Res judicata - Final judgment

1. The cornerstone of the appellant's case here is that since the respondent filed a suit on a similar matter in contents as its counter-claim which it withdrew and which was struck out that the decision of the court in regard to that suit should operate as an estoppel per rem judicata and therefore the counter-claim should be ignored. A final judgment is one which decides the rights of the parties. In other words, it is a decision on the merits of the case where the matter is assiduously canvassed and the rendition of a judgment is based on what is canvassed and agitated before the courts by the legal combatants. (p. 480 A)

Res judicata - Case that was not decided on the merits

2. Therefore the doctrine of res judicata to operate as estoppel, in all its ramifications, it is important that the case between the parties presently in court had been adjudicated between them before on its merits and the court had reached and delivered a final judgment. The doctrine does not operate in an inchoate manner, id est, it rests on a priori conception that the rights agitated and assiduously canvassed by the parties on the issues in controversy had earlier been determined. It is erroneous to construe a mere striking out of a case on the basis that because the proponent of the action had become lethargic or non-chalant to prosecute a case and the court relying on its inherent powers to strike out the case, it amounts to dismissal on the merit. See Rankin Udo & Ors. v. Mbiam Obot and Ors. (1989) 1 S.C (Pt. I) 64; 1 NWLR (Pt. 95) at p. 59 at 72. (p. 480 D)

ACTIONS - Termination on merit

3. In the present case nothing had been done at all. When a party who files an action in the court commences giving evidence which is in conflict with the facts pleaded and raises such confusion that it becomes difficult to determine whether the plaintiff knows the facts of his case, and at a stage

he asks the court to strike out the case, the court should dismiss it because there is nothing more to urge on the court as the case sought to be put forward is visionless and worthless. This is not the case here where the original plaintiff abandoned its case. It is not even in all cases where a matter is dismissed that it completely terminates the case. Indeed where a case is said to have been dismissed in the High Court but the circumstances show that such dismissal could not possibly connote or denote - the determination - as to put a finality to the case, the court views such dismissal as a mere striking out. See, for example, Order 30 Rules 3 and 4 of the Lagos 2004 High Court Rules. It is my view that the determination of the suit hitherto instituted by the respondent was definitely not on merit. (p. 481 E)

D Proof - Burden on plaintiff

4. Did the appellant as the plaintiff discharge the burden of proof placed on him. In other words, to have the judgment of the court in its favour it must place before the court weighty and substantial evidence which would outweigh whatever the respondent places before the court. The law is that the facts elicited from the evidence of the plaintiff should so preponderate in favour of the claims made that the court should on balance decide in his favour. (p. 482 A)

F

Where plaintiff's evidence - Demonstrates inexplicable ignorance

5. The parade of such inexplicable ignorance of the detailed facts that would persuade the court by the evidence of the appellant's sole witness is not only disconcerting but seriously undermines the nature of the case being put forward by the appellant. First, he did not know why the cartons of wine were delivered for warehousing; next, he did not know which Bank the money was paid into; thirdly, he did not know the purpose of warehousing the wine. What was he then to prove - was it merely to parrot what the company or the Managing Director, his elder brother, had asked him to say? It is not the duty of the court to speculate or base its decision on a mere conjecture. It is long a settled law that the evidence of facts and circumstances on which a plaintiff relies and to which he seeks the court

to find in his favour and the inferences deducible therefrom must so preponderate in favour of the basic proposition he is seeking to establish that it must have the distinctive quality of clarity, for clarity of expression bespeaks the clarity of the mind. In my view there is nothing to urge in favour of the appellant as its case is utterly watery, lacking in substance B and weight. (p. 484 A)

Loan indebtedness - Balance at a date

6. In another letter to which the attention of Prince Obasi was drawn, his company was asked to liquidate or offset the total indebtedness which C stood at N3,748,446.55 as at 30th September, 1993. In a reply to the letter demanding the repayment of that debt, the appellant wrote as follows inter alia:

“We are writing in respect of the above subject matter, and also to D thank you for the patience exhibited so far on our side concerning this issue We wish to inform you that efforts are being made to see that we settle this debt as soon as possible. We hope to pay in at least N.5m as soon as the cement we negotiated arrives.” E

The inference is (i) that the computation of the outstanding amount as made out by the respondent was accepted by the appellant as it did not refute it but rather pleaded for time (ii) it was in breach for delivering for warehousing far less than half of the cartons agreed by the terms of the F contract. It is therefore from my point of view inconceivable for the appellant to question why the amount realized from the sale of wine (most of which went bad and unsold) was not accounted for. The simple answer to that is that it was used to defray and cut down the indebtedness the G appellant owed, which he never queried then.

It is disingenuous and a skewed thinking on the part of the appellant to maintain after tacitly and inferentially accepting the indebtedness as mentioned above to turn round and claim for accounts of the proceeds of the wine sold by the respondent which was used to step down the amount H owed. It cannot possibly approbate and reprobate at the same time. (p. 485 E)

Legal practitioners - Facts of a case

7. It is always tempting for lawyers to concentrate on the law and relegate the facts which give rise to the law to the background. The tool or the magic that should be in the possession of a seasoned advocate is the mastery of the facts of the case. I have always stated that knowledge of the facts of a case must be assiduously and painstakingly pursued. The facts must then be subjected to scrupulous analysis, and serious efforts made by the counsel to know how to elevate them to the pedestal that would convince the court to find in favour of the party seeking the courts' intervention. I fail to see how very sparse or improvised stories or crass ignorance of essential facts by the appellant in this case could readily persuade a court to find in its favour. The passion for facts must be so all embracing and encompassing that it should always be in the mind of a counsel to a plaintiff, and reach a crescendo of addiction - metaphorically speaking. With such a weapon craftily grafted in a beautiful flowing prose in the pleading a good case for the proponent of the action is made unless the story told is riddled with falsehood, conjectures and speculations.

Indeed, the handling of the case in the lower courts lacked professionalism and proper appreciation of the elementary principle of law, to wit, that facts - the inimitable stories surrounding a case, i.e., on which most if not all cases depend; are the fountain heads or spring board of law. The case is dead right from the word go. There is nothing to commend it. (p. 486 D)

NOTABLE POINTS OF INTEREST

KALGO JSC (DISSENTING IN PART)

1. Documents - A party is bound to sort out his case, not the judge

It is not enough in my view, for the respondent to aver in the Statement of Defence that the proceeds of sale of the wines sold was used to off-set part of the indebtedness of the appellant, it must go ahead to show by evidence how much was the total indebtedness and how much was used to off-set it and how much was the balance outstanding. This was not done, and therefore the respondent must account for the proceeds of the sale to the appellant. The admission of Exhibits F-Q in evidence at the trial

is not a cure to this either because it is well settled that a judge cannot sit down out of court on his own and examine documents to sort out the case of a party. It is the duty of the party itself to elicit such evidence in court through its witnesses especially as in this case where various documents are involved. (p. 493 E)

B

2. Appellant is to recover the amount admitted by respondent

The only witness for the respondent, one Mr. Ifeanyi Hyacinth Odunwa, merely adopted the averments in the statement of defence and tendered documents which were admitted in evidence and marked Exhibits F-Q. His evidence did not carry any weight at all since it is trite law that pleadings alone do not constitute any evidence at all in a case. And any admission in pleading binds a party making it.

C

Therefore from the above, it appears to me very clearly that the respondent has, by its own admission, collected a total of 3040 cartons of assorted wines which he sold and realized N479,314.00 and N104,960.00 totalling N584,274.00. There is evidence of P.W.1 Mr. Obasi to the effect that the respondent sold the wines but did not pay anything to the appellant. I find therefore that the appellant was entitled to judgment for the sum of N584,274.00 being the sale value of the 3040 cartons of wines sold by the respondent on its own admission as they failed to show how the amount was offset in the loan. To that extent, I answer issue 1 in the negative. (p. 494 A)

D

E

F

REPRESENTATION

No appearance for or by the Appellant.

U. Udom, for the Respondent.

G

CASES REFERRED TO

Rankin Udo & Ors. v. Mbiam Obot and Ors. (1989) 1 S.C (Pt. I) 64; 1 NWLR (Pt. 95) at p. 59 at 72

H

Durumin Iya v. C.O.P. (1961) NRNL 70 at 73

Onibudo v. Akibu (1982) 7 S.C. (Reprint) 29; (1982) 7 S.C. 60 at 62

F.C.D.A. v. Naibi (1990) 3 NWLR (Pt. 138) 270

Hachful v. Biney (1971) 1 All NLR 268

U.D.C. v. Ladipo (1971) 1 All NLR 102

Edokpolo & Co. Ltd. v. Sam Edo Wire Industries Ltd. (1989) 4 NWLR (Pt. 116) 473

B Uredi v. Dada (1988) 1 NWLR (Pt. 69) 237

Agwunedu & Ors. v. Christopher (1994) 1 NWLR (Pt. 321) 375 at 401
Broadline Enterprises Ltd. v. Monterey Maritime Corporation & Anor. (1995) 9 NWLR (Pt. 417) 1 at 29

C **RULES REFERRED TO**

Lagos State High Court Rules, 2004 O. 30 rr. 3 & 4

LEAD JUDGMENT BY PATS-ACHOLONU JSC

D This is an action commenced by the appellant (Plaintiff) in which
it claimed the sum of N5,040,500.00 (Five Million, Forty Thousand, Five
Hundred Naira) being the total amount due to the appellant for the 4040
cartons of wine which the respondent (as defendant) took delivery thereof
E from the appellant of which the said respondent refused to render an
account. It equally claimed interest at the rate of 21% per annum until the
judgment is finally liquidated, and an injunction mandating (sic) the
(defendant) respondent to release to the plaintiff its certificate of occu-
F pancy in respect of Plot K Ojota - Ogudu GRA Scheme, Lagos and
certificate of occupancy in respect of Cadastral Zone, Abuja.

The respondent as the defendant denied any liability and in fact
counter-claimed for the sum of N4,019,052.51. In the action that finally
gave rise to this appeal, the appellant had averred it had instructed or
G authorized the respondent to issue a Bank draft of N1,000,000.00 (One
Million Naira) in favour of its subsidiary company, Pole Star Industries
Ltd., to debit the appellant's facility yet to be opened with the defendant.
The money was required to clear containers containing 6921 cartons of
H assorted wine. One of the conditions was that to enable the respondent
recover its money within 6 months it should exercise a lien over the goods
and to warehouse the goods to this effect. However, as it turned out only
2712 cartons were delivered and which the appellant said was worth

N3,993,700.00. Further 1328 cartons of assorted wine were received by the respondent which the appellant claimed the respondent sold but did not give any account of, and notwithstanding all these acts of the respondent, it still retained and detained the appellants' title documents used as security for the grant of the facility.

B

While basically denying the claims of the appellant, the respondent stated that substantial quantity of the wine in its custody went bad and further added that though it was agreed that the respondent was to warehouse 6,921 cartons of wine, the appellant in its breach of the contract diverted 5 containers containing 4,209 cartons of wine to another warehouse. It added further that of the 2,712 of the wine in its warehouse only 1,344 were sold for the sum of N479,314.00 as the rest had gone terribly bad to the knowledge of the appellant. In its counter-claim, it claimed a sum of N4,019,052.51 which it averred was the outstanding balance as at 31st of October, 1993, with interest at the rate of 85% on the debt up to December, 1993 and thereafter on interest at 21% till final liquidation of the debt. It also claimed an order of enforcement of the right of sale of the mortgaged property. Now prior to this action, the respondent had filed a suit against the appellant on the same subject matter which it withdrew, and it was struck out.

C

D

E

In the High Court, the appellant's claim was dismissed but judgment was given to the respondent in respect of the counter-claim. On an appeal by appellant to the Court of Appeal that court equally dismissed the appeal, hence a further appeal to this court.

F

The appellant framed 3 issues for determination which are as follows:-

1. Whether the Court of Appeal was right in holding that the appellant has not discharged the burden of proof placed on it by law, when facts admitted need not be proved.

G

2. Whether the Court of Appeal was right in holding that an order of dismissal of the respondent's claim in Suit No. LD/3356/92 did not create a bar to subsequent suit and thereby did not operate as estoppel per rem judicata.

H

3. Whether the Court of Appeal was right in holding that the

respondent's counter-claim was unchallenged and proved.

The respondent replicando framed more or less identical issues for considerations. It is not in my view necessarily to re-state the issues formulated by the respondent.

B In this case I propose to take issue No 2 first. **The cornerstone of the appellant's case here is that since the respondent filed a suit on a similar matter in contents as its counter-claim which it withdrew and which was struck out that the decision of the court in regard to that suit should operate as an estoppel per rem judicata and therefore the counter-claim should be ignored. A final judgment is one which decides the rights of the parties. In other words, it is a decision on the merits of the case where the matter is assiduously canvassed and the rendition of a judgment is based on what is**
C **canvassed and agitated before the courts by the legal combatants.**
D The question to resolve here is whether such is the position in the earlier Suit No. LD/3356/92 hitherto filed in the High Court by the respondent. **Therefore the doctrine of res judicata to operate as estoppel, in all**
E **its ramifications, it is important that the case between the parties presently in court had been adjudicated between them before on its merits and the court had reached and delivered a final judgment. The doctrine does not operate in an inchoate manner, id est, it rests on**
F **a priori conception that the rights agitated and assiduously canvassed by the parties on the issues in controversy had earlier been determined. It is erroneous to construe a mere striking out of a case on the basis that because the proponent of the action had become lethargic or non-chalant to prosecute a case and the court relying on**
G **its inherent powers to strike out the case, it amounts to dismissal on the merit. See Rankin Udo & Ors. v. Mbiam Obot and Ors. (1989) 1 S.C (Pt. I) 64; 1 NWLR (Pt. 95) at p. 59 at 72.**

H The learned counsel for the appellant has tended to make a heavy weather in the case of Eronini v. Iheuko (1989) 3 S.C. (Pt. I) 30; (1989) 2 NWLR (Pt. 101) 46. An analytical and forensic comparison with that case shows a distinctive characteristic easily distinguishable. In the present case the respondent in this matter in its Suit No. LD/3359/92 did

nothing whatsoever to proceed with the action it initiated. In such a situation the court using its inherent powers struck out the case after the initiator of the action seriously manifested or evinced an intention not to continue or follow up, pursue or persevere with the case. The respondent would be presumed to have developed cold feet. The court seised with such proceedings would not ordinarily allow the case for which no further interest appeared to have been shown by the initiator of the action to stay in the court list. It therefore used its untrammelled judicial powers which inhere in it to strike out the case. In the case of Leonard Eronini & Ors. v. Francis Iheuko (supra), the plaintiff who later was the respondent had initiated an action against the appellant. When he started to give evidence, his testimony markedly contradicted the facts averred in his pleadings. There was such a confusion in the presentation of the case that the plaintiff's counsel decided to discontinue with the case and asked that the case be struck out. The defence counsel in that case wanted outright dismissal. Of course in the Supreme Court, this court held that the right decision the court below should have made was to dismiss the case. It was obvious that the case of the plaintiffs (respondent) in that matter was in tatters as it had no remedying factor. In other words he fired his last salvo. His case was found to be completely bereft of any substance, being completely empty of any remedying feature. **In the present case nothing had been done at all. When a party who files an action in the court commences giving evidence which is in conflict with the facts pleaded and raises such confusion that it becomes difficult to determine whether the plaintiff knows the facts of his case, and at a stage he asks the court to strike out the case, the court should dismiss it because there is nothing more to urge on the court as the case sought to be put forward is visionless and worthless. This is not the case here where the original plaintiff abandoned its case. It is not even in all cases where a matter is dismissed that it completely terminates the case. Indeed where a case is said to have been dismissed in the High Court but the circumstances show that such dismissal could not possibly connote or denote - the determination - as to put a finality to the case, the court views such dismissal as a mere striking out.**

See, for example, Order 30 Rules 3 and 4 of the Lagos 2004 High Court Rules. It is my view that the determination of the suit hitherto instituted by the respondent was definitely not on merit.

I now deal with issue No. 1. **Did the appellant as the plaintiff discharge the burden of proof placed on him. In other words, to have the judgment of the court in its favour it must place before the court weighty and substantial evidence which would outweigh whatever the respondent places before the court. The law is that the facts elicited from the evidence of the plaintiff should so preponderate in favour of the claims made that the court should on balance decide in his favour.** The appellant had submitted in its brief that the respondent substantially admitted the facts at paragraphs 2-3 of the record. It is to be expected that the purpose of the sale of wine by the respondent was to recoup for itself the loan facility extended to the appellant in the event of the respondent being unable to repay the money within 6 months. To clearly understand the nature of the transaction that took place, let me recapitulate as to what really took place. The appellant had averred as follows at paragraphs 4 and 5 respectively of its pleadings, to wit:

Paragraph 4 : The said sum was required by the plaintiff to enable it clear its 8 by 20 containers of 6921 cartons of wine at the Apapa Wharf Terminal which said wine was valued at over N4 million naira at the date of clearance as (sic) the market price.

Paragraph 5: As a condition in order to enable the defendant recover its money within the stipulated six months duration the plaintiff agreed that the defendant should take a lien on the cartons of wine as added security. It was also agreed that the defendant should warehouse the goods and effect sales thereof. The plaintiff shall rely on its letter to the defendant dated 24th September, 1991, and do hereby give notice to the defendant to produce the original.

While the respondent not only refuted and denied emphatically that the price of the wine cleared was worth over a million naira, it nevertheless averred at p. 8 thus:

Further to paragraph 7b (supra) the defendant avers that although defendant agreed to warehouse the wines, i.e. 6921 cartons (8 containers

of wine) after clearance at the wharf, the plaintiff surreptitiously and in a brazen breach of contract diverted 5 containers (4,209 cartons) of the said wines to another warehouse without the knowledge of the defendant and had been selling same and keeping the proceeds of the wines. Uptill now, the plaintiff is still keeping those wines at his warehouse and has made no repayment to the defendant whose funds had been committed by the plaintiff.

The argument of the appellant is from my observation woolly, to say the least. The contract agreement was for the warehousing of 6,921 cartons of wine but for some unaccountable reasons the appellant made available only about a third of that to the respondent. Using the expression of the respondent in its pleadings, “the plaintiff surreptitiously and in a brazen breach of contract diverted 5 containers (4,209 cartons) of the said wine without the knowledge of the defendant and had been selling some and keeping the proceeds of the wines.” The intent of the parties was that the cartons of the wine and the title deeds used in the mortgage would help to shore up the necessary security the bank needed. It is to be noted that even though the appellant filed a reply to the statement of defence, it did not challenge the allegation of the surreptitious act that sort of breached the contract. In his evidence in court the sole witness for the appellant in cross-examination said:

“All the cartons have been sold and the proceeds paid into a Bank. I cannot confirm to which Bank the proceeds was paid. I do not know why the plaintiff gave the defendant only a part of the consignment and not the whole I am not aware that the plaintiff delivered the wine to the defendant as a lien to secure the prepayment of the loan.”

In fact the evidence is so sparse and prefatory that it is difficult to discern whether the plaintiff was serious with the case. The answers given in the cross-examination were so paltry that not much came out of it. The appellant stealthily kept the larger consignment of the cartons of wine that were meant to be added security. Even if some cartons of wine were sold, it was to help reduce and defray the cumulative loan facility. It is incumbent on the appellant to show that it was not owing any money to the respondent and I believe that this could have been effectively done if it had applied for

or subpoenaed its accounts with the bank.

The parade of such inexplicable ignorance of the detailed facts that would persuade the court by the evidence of the appellant's sole witness is not only disconcerting but seriously undermines the nature of the case being put forward by the appellant. First, he did not know why the cartons of wine were delivered for warehousing; next, he did not know which Bank the money was paid into; thirdly, he did not know the purpose of warehousing the wine. What was he then to prove - was it merely to parrot what the company or the Managing Director, his elder brother, had asked him to say? It is not the duty of the court to speculate or base its decision on a mere conjecture. It is long a settled law that the evidence of facts and circumstances on which a plaintiff relies and to which he seeks the court to find in his favour and the inferences deducible therefrom must so preponderate in favour of the basic proposition he is seeking to establish that it must have the distinctive quality of clarity, for clarity of expression bespeaks the clarity of the mind. In my view there is nothing to urge in favour of the appellant as its case is utterly watery, lacking in substance and weight.

The 3rd issue is in respect of the nature of the defence put up by the respondent, and the counter-claim made. To be factual, this issue is really connected to issue No. 1. I observe that most of the evidence adduced by the respondent were in form of documentary exhibits. The angst of the appellant is that the respondent did not account for the money realized by the latter after the sales. However, let me carefully examine the documents i.e., the exhibits tendered in the court by the respondent. Exhibit 'F', which was a letter from the appellant to the respondent reads as follows:-

"We will very much appreciate it if you let us know your terms for the finance, we do not mind sharing a percentage of the profit with your organization. Our immediate concern is to get the goods out of the wharf to avoid further demurrage or subsequent auctioning by government as overtime cargo."

The facility was approved as made out in Exhibit 'H'. Exhibit 'L'

shows that further facility of N459,714.00 was again provided by the Bank. In Exhibit 'M', the respondent wrote to the appellant as follows:-

"We refer to our numerous correspondence in the above regard, most of which you preferred not to respond to. Your failure or unwillingness to remit the collections on the 3561 cartons of wine stored at your Oregon warehouse is, to say the least, an act of dishonesty and a breach of good faith."

Acting on the directive of our Board of Directors, we are going ahead to arrange for the sale of the inventory at Kirikiri Road Warehouse. You will be duly informed afterwards on the terms and conditions of the sales and any short-fall arising therefrom must be made good by you."

As at May 31, 1992, total outstanding on your facility stood at N1,842,467.23, and until this is liquidated, interest shall continue to accrue at a market-determined rate, currently 45% per annum. Finally, please note that in the event of non-co-operation on your part in augmenting the wine sales proceeds, we would not hesitate to revisit the legal recovery option."

Exhibit 'O' was a letter warning the appellant of the lethargic manner it was treating the whole transaction, and the respondent wondered why the appellant was silent and could not reply its letters. It hinted taking drastic measures. **In another letter to which the attention of Prince Obasi was drawn, his company was asked to liquidate or offset the total indebtedness which stood at N3,748,446.55 as at 30th September, 1993. In a reply to the letter demanding the repayment of that debt, the appellant wrote as follows inter alia:**

"We are writing in respect of the above subject matter, and also to thank you for the patience exhibited so far on our side concerning this issue We wish to inform you that efforts are being made to see that we settle this debt as soon as possible. We hope to pay in at least N.5m as soon as the cement we negotiated arrives."

The inference is (i) that the computation of the outstanding amount as made out by the respondent was accepted by the appellant as it did not refute it but rather pleaded for time (ii) it was in breach for delivering for warehousing far less than half of the cartons

agreed by the terms of the contract. It is therefore from my point of view inconceivable for the appellant to question why the amount realized from the sale of wine (most of which went bad and unsold) was not accounted for. The simple answer to that is that it was used to defray and cut down the indebtedness the appellant owed, which he never queried then.

It is disingenuous and a skewed thinking on the part of the appellant to maintain after tacitly and inferentially accepting the indebtedness as mentioned above to turn round and claim for accounts of the proceeds of the wine sold by the respondent which was used to step down the amount owed. It cannot possibly approbate and reprobate at the same time. Thus Shakespeare said in Macbeth “such welcome and unwelcome news at once. It is too hard to reconcile”. One of the problems in this case is the dearth of facts.

It is always tempting for lawyers to concentrate on the law and relegate the facts which give rise to the law to the background. The tool or the magic that should be in the possession of a seasoned advocate is the mastery of the facts of the case. I have always stated that knowledge of the facts of a case must be assiduously and painstakingly pursued. The facts must then be subjected to scrupulous analysis, and serious efforts made by the counsel to know how to elevate them to the pedestal that would convince the court to find in favour of the party seeking the courts’ intervention. I fail to see how very sparse or improvised stories or crass ignorance of essential facts by the appellant in this case could readily persuade a court to find in its favour. The passion for facts must be so all embracing and encompassing that it should always be in the mind of a counsel to a plaintiff, and reach a crescendo of addiction -metaphorically speaking. With such a weapon craftily grafted in a beautiful flowing prose in the pleading a good case for the proponent of the action is made unless the story told is riddled with falsehood, conjectures and speculations.

Indeed, the handling of the case in the lower courts lacked professionalism and proper appreciation of the elementary principle

of law, to wit, that facts - the inimitable stories surrounding a case, i.e., on which most if not all cases depend; are the fountain heads or spring board of law. The case is dead right from the word go. There is nothing to commend it.

In the circumstances, I dismiss the appeal and affirm the judgment of the court below. B

There shall be costs to the respondent which I assess at N10,000.00.

KUTIGIJSC

C

I have had the privilege of reading in advance the judgment just rendered by my learned brother, Pats-Acholonu, JSC. I agree with his reasoning and conclusions. He has adequately dealt with all the issues canvassed before us. The appeal lacks merit. It is therefore dismissed with N10,000.00 costs in favour of the defendant/respondent. D

KATSINA-ALUJSC

E

I have had the advantage of reading in draft the judgment delivered by my learned brother, Pats-Acholonu, JSC. I agree entirely with it and, for the reasons he gives, I, too, dismiss the appeal and affirm the decision of the court below. I also award costs of N10,000.00 to the respondent. F

MUSDAPHERJSC

I have had the honour to read before now, the judgment of my Lord, Pats-Acholonu, JSC., just delivered, with which I entirely agree. For the same reasons contained in the aforesaid judgment which I respectfully adopt as mine, I too dismiss the appeal and affirm the decision of the court below. I abide by the order costs proposed in the leading judgment. G

H

KALGO JSC (DISSENTING)

I have read in draft the leading judgment of my learned brother,

Pats-Acholonu, JSC., in this appeal but with due respect I cannot support it in respect of the conclusions reached on issue 1 of the appellant.

By paragraph 15 of the statement of claim, the appellant, who was the plaintiff in the trial court, claimed against the defendant now respondent :-

(i) *the sum of N5,040,500.00 (Five Million, Forty Thousand, Five Hundred Naira) being the total amount due to the plaintiff for the 4,040 cartons of wine of which the defendant took delivery from the plaintiff and of which the defendant has refused to account to the plaintiff, plus interest at the rate of 21% per annum until the judgment debt is finally liquidated.*

(ii) *an injunction mandating the defendant to release to the plaintiff its certificate of occupancy of plot 1, Block K, Ojota-Ogudu GRA scheme, Lagos, and the Certificate of Occupancy of 17 Cadastral Zone 6A, Abuja Federal Capital Territory, being unlawfully held by the defendant.”*

In the trial court the parties filed their respective pleadings, and exchanged them between them. The defendant/respondent (hereinafter referred to simply as the respondent) filed a counter-claim against the plaintiff/appellant (also referred hereinafter as the appellant) for:-

(a) *The sum of N4,019,052.51 being balance outstanding as at the 31st October, 1993, on the trade finance advanced to the plaintiff;*

(b) *Interest at the rate of 85% per annum on the said debt from 1st November, 1993, till December, 1993; and thereafter 21% per annum till final liquidation;*

(c) *An order of the court enforcing the defendant’s right of sale of the properties known as Plot 1 Block K, Ojota-Ogudu, Lagos, and Plot 17 Cadastral Zone, Abuja FCT, both held by the defendant as equitable mortgagee.*

(d) *N2 million damages for breach of contract.”*

At the trial each party called only one witness who testified and tendered documents admitted in evidence in support of their respective claims. Learned counsel for the parties then filed and exchanged their written addresses which they adopted on 29th May, 1995, and the judgment was reserved. On 14th July, 1995, the learned trial Judge

Akinsanya, J., in a considered judgment dismissed the appellant's claims for failure to prove the claim on the balance of probabilities. On the respondent's counterclaim, the learned trial Judge held that the only defence to it by the appellant was the plea of *res judicata* which has failed. The learned trial Judge then proceeded and held:-

"I therefore enter judgment in favour of the defendant on the counter-claim in the sum of N4,019,052.51 being the amount outstanding against the defendant at 31st October, 1993, with interest at the rate of 6% per annum from the date of judgment until final liquidation of the debt.

I also grant in the alternative an order enforcing the defendant's right of sale of the properties known as Plot 1 Block K, Ojota Ogudu, Lagos and Plot 17 Cadastral Zone Abuja Federal Capital Territory, both held by the defendant as equitable mortgagee."

Dissatisfied with this decision, the appellant appealed to the Court of Appeal, Lagos, which after hearing the appeal dismissed the appeal and affirmed the decision of the trial court. The appellant now appealed to this court.

In this court, both parties filed their written briefs and exchanged same as required by the rules of court. Both counsel raised 3 issues for the determination of this court in their respective briefs and these issues are very similar in all respects. They also appear to me to be properly distilled from the grounds of appeal filed by the appellant in the notice of appeal to this court. I will therefore adopt and consider in this appeal the issues set out by the appellant's counsel in the brief which read:-

"1. Whether the Court of Appeal was right in holding that the appellant has not discharged the burden of proof placed on it by law, when facts admitted need not be proved.

2. Whether the Court of Appeal was right in holding that an order of dismissal of the respondent's claim in Suit No.LD/3356/92 did not create a bar to subsequent suit and thereby did not operate as estoppel per rem judicata.

3. Whether the Court of Appeal was right in holding that the respondent's counter-claim was unchallenged and proved."

The facts giving rise to this action are clear and not very much in

dispute. Sometimes in May 1990, the appellant applied to the respondent for a short term loan facility to finance the payment of import duties and customs clearance of a consignment of assorted wines ordered by the appellant from outside Nigeria through the Apapa port. See Exhibit F. By
 B October 1991, the appellant was granted additional facility by the respondent making a total of N1,429,714.47 (One Million Four Hundred and Twenty Nine Thousand Seven Hundred and Fourteen Naira, Forty Seven Kobo) and the appellant had agreed to deposit 6,921 cartons of assorted
 C wines and equitable mortgages of their landed properties at Lagos and Abuja with the respondent as security for the loan. The appellant delivered to the respondent only a total of 3040 cartons of assorted wines in designated warehouse but deposited the title deeds of their landed
 D properties at Plot 1, Block K Ojota Ogudu, Lagos and Plot 17 Cadastral Zone, Abuja Federal Capital Territory as agreed.

The appellant defaulted in the repayment of the loan facility as agreed and all demands made to it failed to achieve any success. On the 28th of October 1992, the respondent instituted an action in the Lagos High
 E Court claiming the outstanding amount payable to it by the appellant at that time in Suit No. LD/3356/92. This action was not pursued by the respondent and on the 26th of May, 1993, it was dismissed for lack of diligent prosecution by Famakinwa, J. On the 4th of November 1993, the
 F appellant instituted the present action. The parties joined issues in the action and the respondent also filed a counter-claim to the action. These briefly are the relevant facts leading to the appeal.

I will now consider the issues ad seriatem. In issue 1, the main argument of the learned counsel for the appellant was that the respondent
 G in its Statement of Defence had admitted the claim of the appellant as per its Statement of Claim and so there was no necessity for calling any further evidence to prove its case. What is admitted, learned counsel submitted, needs no proof.

H The learned counsel for the respondent on the other hand contended in his brief that it fully joined issue with the appellant in answer to the appellant's Statement of Claim and therefore as in all civil matters of this nature, the burden of proof lies on the appellant as plaintiff to prove his case

on the balance of probabilities to be entitled to the judgment of the court. He cited the case of Agwunedu & Ors. v. Christopher (1994) 1 NWLR (Pt. 321) 375 at 401. Learned counsel examined the evidence of the only witness called by the appellant at the trial and submitted that evidence was inconsistent and contradictory and displayed complete misunderstanding B of the transaction which took place between the parties. Counsel also pointed out that the finding of the trial court that the evidence of the appellant's witness was inconsistent and contradictory as confirmed by the Court of Appeal and which saw no reason to interfere with it. Counsel C therefore further argued that this amounts to the concurrent findings of the trial court and the Court of Appeal on this issue. He, therefore asked this court not to interfere with the finding in the absence of any special D circumstance shown and there was none shown here. He cited in support the case of Eholo v. Osayande (1992) 6 NWLR (Pt. 249) 524 at 548.

In the final submission in the brief, learned respondent's counsel pointed out that the appellant's substantial argument in this issue was the complete reliance on his pleadings, the averments in which, without any evidence in support, do not constitute or tantamount to any evidence. He E relied on the case of Broadline Enterprises Ltd. v. Monterey Maritime Corporation & Anor. (1995) 9 NWLR (Pt. 417) 1 at 29.

It is not in dispute that pleadings were ordered, filed and exchanged in this case at the trial. The respondent has even filed a counter-claim, F which in law is a separate and independent action by itself. I shall now refer to the relevant paragraphs of the pleadings of the parties.

Paragraph 6 of the appellant's Statement of Claim reads:-

"The plaintiff on the instruction of the defendant did deliver 2,712 G cartons of assorted wine to the defendant company's Warehouse Part View Investment and Property Company Ltd., Shamrock House at Plot 10, Apapa-Oshodi Expressway, Olodi Apapa, Lagos."

Paragraph 9a of the respondent also says:-

"The defendant in answer to paragraph 6 of the statement of H claim asserts only to the extent that 2712 cartons (3 containers) of wine were delivered to the defendant's warehouse at Kirikiri area of Lagos."

From the above, there is no doubt that by paragraph 9a, the respondent has admitted (by assertion) that it received 2712 cartons of wine delivered to it by the appellant in its warehouse in Lagos.

Also the appellant, by paragraph 9 of the Statement of Claim averred that:-

“The defendant on the 14th of April 1992, did also take delivery of 328 cartons of La Boheme wines from the Plaintiff’s Warehouse, which 328 cartons was at N600.00 (Six Hundred Naira) each”

And the respondent in its Statement of Defence, paragraph 9c, said:-

“In further reply to paragraph 9 of the statement of claim, the defendant admits only to the extent that it took delivery of 328 cartons of La Boheme wines from the plaintiff’s warehouse.”

There is also no doubt that from the above paragraph 9c, the respondent has admitted taking delivery of 328 cartons of La Boheme from the appellant.

It is also not in dispute between the parties that the respondent apart from having a lien on the goods delivered to it in this agreement, it was also given the authority to sell the goods as an added security. (See Exhibit A). In pursuance of this, the respondent as per paragraph 9b of its Statement of Defence averred that:-

“Out of the 2712 cartons delivered at the defendant’s warehouse at Kirikiri one (1) carton got broken, leaving 2711 cartons under defendant’s custody. Of the 2711 cartons left, defendant sold 1344 cartons at various prices amounting to N479,314.00 leaving behind 1367 cartons which had since gone terribly bad and could not be sold to the public. The said sum realized had been used to offset part of the plaintiff’s indebtedness to the defendant.”

The respondent also said in paragraph 9c of the Statement of Defence that:-

“In further reply to paragraphs 9, 10 and 11 of the Statement of Claim the defendant admits only to the extent that it took delivery of 328 cartons of La Boheme wines However, the 328 cartons of La Boheme Wines were sold at N320.00 per carton amounting to N104,960.00

in all. This amount had been used to further off-set part of plaintiff's debt owed the defendant."

It is therefore very clear that the respondent has admitted in the pleadings that it collected from the appellant 2712 cartons of assorted wines, and 328 cartons of La Boheme wine under the agreement. It is also clear that the respondent sold part of the 2712 cartons and realized N479,314.00 and all the 328 cartons of La Boheme wine at N104,960.00.

The only witness of the appellant at the trial was one Mr. Aina Obasi, P.W.1, the Sales Manager of the appellant. He testified that the appellant supplied some wines to the respondent worth N5,000,000.00 under a loan agreement. He further testified that the respondent was in the possession of the appellant's title documents in respect of the properties at Plot I, Block K, Ojota, Ogudu G.R.A Scheme Lagos and Certificate of Occupancy of 17 Cadastral Zone 6A Abuja Federal Capital Territory. The respondent, according to the witness, has not returned the cartons of wine it collected nor has it paid for them. He also tendered documents which were admitted in evidence as Exhibits A, B, C, D, D1 and E. He also confirmed in cross-examination that they first gave the respondent 2712 cartons of wine and later 328 cartons totalling 3040 cartons in all.

It is not enough in my view, for the respondent to aver in the Statement of Defence that the proceeds of sale of the wines sold was used to off-set part of the indebtedness of the appellant, it must go ahead to show by evidence how much was the total indebtedness and how much was used to off-set it and how much was the balance outstanding. This was not done, and therefore the respondent must account for the proceeds of the sale to the appellant. The admission of Exhibits F-Q in evidence at the trial is not a cure to this either because it is well settled that a judge cannot sit down out of court on his own and examine documents to sort out the case of a party. It is the duty of the party itself to elicit such evidence in court through its witnesses especially as in this case where various documents are involved. See *Durumin Iya v. C.O.P.* (1961) NRNLR 70 at 73 (cited also by the appellant in the brief) which was followed by this court in *Onibudo v. Akibu* (1982) 7 S.C. (Reprint) 29; (1982) 7 S.C. 60 at 62. The appellant's witness finally ended his evidence by saying that he

was unaware of the fact that the appellant delivered the wine to the respondent as a lien to secure the repayment of the loan.

The only witness for the respondent, one Mr. Ifeanyi Hyacinth Odunwa, merely adopted the averments in the statement of defence and
B tendered documents which were admitted in evidence and marked Exhibits F-Q. His evidence did not carry any weight at all since it is trite law that pleadings alone do not constitute any evidence at all in a case. (See F.C.D.A. v. Naibi (1990) 3 NWLR (Pt. 138) 270; Hachful v. Biney (1971) 1 All NLR 268; U.D.C. v. Ladipo (1971) 1 All NLR 102. And any admission
C in pleading binds a party making it. (See Edokpolo & Co. Ltd. v. Sam Edo Wire Industries Ltd. (1989) 4 NWLR (Pt. 116) 473 and facts admitted need no proof (see Uredi v. Dada (1988) 1 NWLR (Pt. 69) 237.

Therefore from the above, it appears to me very clearly that the
D respondent has, by its own admission, collected a total of 3040 cartons of assorted wines which he sold and realized N479,314.00 and N104,960.00 totalling N584,274.00. There is evidence of P.W.1 Mr. Obasi to the effect that the respondent sold the wines but did not pay anything to the appellant.
E I find therefore that the appellant was entitled to judgment for the sum of N584,274.00 being the sale value of the 3040 cartons of wines sold by the respondent on its own admission as they failed to show how the amount was offset in the loan. To that extent, I answer issue 1 in the negative.

Issue 2 deals with whether the dismissal of the respondent's claim
F in Suit No. LD/3356/92 by Fawakinwa, J., created a bar to a subsequent claim and operated as estoppel per rem judicatam. This issue has fully embraced the principle of res judicata and issue estoppel. It is now trite law and well settled that where a court of competent jurisdiction has settled,
G by a final decision, the matters in dispute between the parties, neither party nor his privy may relitigate that issue again by instituting a fresh action on the same matters. See Osunrinde v. Ajamagun (1992) 6 NWLR (Pt. 246) 156 at 187; Ogbogu v. Ndiribe (1992) 6 NWLR (Pt. 245) 40 at 61; Akpan
H v. Utiru (1996) 7 NWLR (Pt. 463) 634 at 673.

The Court of Appeal in considering this issue, examined a plethora of decided cases of this court and other jurisdictions in order to determine the legal position touching on the issue of res judicata or estoppel per rem

judicatam. In particular they closely examined this court's decisions in *Fadiora v. Gbadebo* (1978) 3 S.C. (Reprint) 149; (1978) 3 S.C. 219 at 228 - 229 and *Oshodi v. Eyifunmi* (2000) 7 S.C. (Pt. II) 145; (2000) 13 NWLR (Pt. 684) 298 at 326 where this court fully and clearly laid down conditions which must be established or fulfilled before issue estoppel or the plea of *res judicata* can be sustained. They then carefully applied them to the facts of the instant case, and found that all the necessary conditions to the application of the principle of *res judicata* applied to the case in point except "*the finality of the dismissal judgment.*" The learned Justices found that *Famakinwa, J.*, who dealt with the case in question dismissed the claim for non-prosecution, i.e., lack of diligent prosecution. In other words, no evidence was produced or taken at the trial and the respondent who was the plaintiff was even not in court when the order was made. Therefore *res judicata* or estoppel per rem judicatam could not apply to this case.

The learned counsel for the appellant submitted in his brief that the Court of Appeal was wrong in finding that the dismissal of the respondent's case did not amount to a final decision because it failed to follow the decision of this court in *Eronini v. Iheuko* (1989) 3 S.C. (Pt. I) 30; (1989) 2 NWLR (Pt. 101) 46. But the learned counsel for the respondent submitted also in his brief that none of the issues or claims made by the respondent in the case was determined on the merits and therefore the judgment or order of dismissal could not be final. He cited in support the cases of *Udo & Ors. v. Obot & Ors.* (1989) 1 S.C. (Pt. I) 64; (1989) 1 NWLR (95) 59 at 72; *Hi-Flow Farms Industries Nig. Ltd. v. University of Ibadan* (1993) 4 NWLR (Pt. 290) 719 at 737; *Egwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561. Learned counsel also referred to the case of *Eronini v. Iheuko* (supra) and submitted that it is distinguishable from this case because in that case evidence was called by the plaintiff at the trial before he applied to discontinue the case, and the case was then dismissed. That dismissal was held to be final by this court as some evidence was taken at the trial which makes it different from this case where no iota of evidence was called before the dismissal order was made, counsel argued.

I have carefully examined the cases cited by the learned counsel in their argument in this issue particularly the *Eronini* case (supra) and I am

satisfied that the finding of the Court of Appeal in this issue cannot be faulted. The order of dismissal made by Famakinwa, J., was not a final order since no evidence was adduced at the trial by either party and what is more the respondent who was the plaintiff was absent in court when the order was made. In the Eronini case (supra), evidence was called by the plaintiff and it was only when the plaintiff realized that the evidence was tilting against him that he decided to apply for discontinuance of the action and it was dismissed. It is also to be noted here that the plaintiff was physically present in court when he made the application to discontinue the case. Therefore in my view, the peculiar facts of Eronini case (supra) must be confined to that case and being dissimilar to the instant case cannot apply to it. I, therefore entirely agree with the Court of Appeal when it held:

“..... the previous case i.e. LD/3356/92 was dismissed for want of prosecution as neither the plaintiff nor its counsel appeared in court. The issues were never examined and no evidence whatsoever was led..... Be that as it may, it does not matter whether it is striking out or dismissal the true position of the law is that any such order made for want of prosecution of a case cannot operate as *res judicata*. See *Okoronkwo v. Chukwere* (1992) 1 NWLR (Pt. 216) 176 at 190-191”.

For all what I said above in this case, I answer it in the affirmative.

The third and last issue concerns the counter-claim of the respondent. A counter-claim is an independent and separate action by itself. It has to be proved, if not admitted, like all other civil actions, on the balance of probabilities.

I have already set out in this judgment the counter-claim of the respondent as it appeared on p 10-11 of the record of appeal. Let me however set it out again for purposes of clarity. It reads:-

“The defendant repeats the promises above and counterclaims against the plaintiff for:-

a) *The sum of N4,019,052.51 being balance outstanding as at the 31st October, 1993, on the trade finance facilities advanced to the plaintiff;*

(b) *Interest at the rate of 85% per annum on the said debt from 1st*

November, 1993, till December, 1993 and thereafter 21% per annum till final liquidation;

(c) An order of the court enforcing the defendant's right of sale of the properties known as Plot I, Block K Ojota, Ogudu, Lagos and Plot 17 Cadastral Zone, Abuja, F.C.T., both held by the defendant as equitable mortgage;

(d) N2 million damages for breach of contract."

In the reply to the defendant's Statement of Defence filed by the appellant on the 11th August, 1995, in the trial court, the appellant made the following averments:-

"Save and except same consists of admissions, the plaintiff joins issue with the defendant on their Statement of Defence.

1. With reference to paragraphs 3,4, 5, 6, 7a, 7b, 7c, 8, 9a, 9b, 9c, 9d, 9e, 10, 11, 12a, 12b, 12c, and 13 of the defendant's Statement of Defence, the plaintiff denies ever been (sic) advanced the sum stated or any sum whatsoever.

2. The plaintiff shall rely on the record of proceeding in Suit No. LD/3356/92 Merchant Bank of Africa Securities Ltd. and Obasi Brothers Merchant Company Ltd. & Prince Obasi Uba Obasi.

3. The plaintiff shall in reply to the defendant's Statement of Defence and Counter-Claim rely on the defendant's Writ of Summons and Statement of Claim in Suit No. LD/3356/92 dated 28th October 1992, and the judgment of Hon. Justice Victor Famakinwa dated 26th day of May, 1993, in Suit No. LD/3356/92 between Merchant Bank of Africa Securities Ltd. and Obasi Brothers Merchant Company Ltd. & Prince Obasi Uba Obasi.

4. In reply to the Counter-Claim, the plaintiff avers that the defendant had on the 28th October, 1992, taken out a Writ against the plaintiff and the said Suit has since been dismissed on the 26th day of May, 1993 for want of prosecution.

5. The defendant has deliberately, carelessly or wantonly in disregard of the rules of court filed a counter claim as a delay tactic with full knowledge that the suit in LD/3356/92 had been dismissed and has resorted to self help".

From the above, it is abundantly clear that the appellant joined issue with the defendant only on the Statement of Defence and not on the counter-claim as the counter-claim was not under any paragraph of the Statement of Defence. Also in paragraph 1, no mention was made of the counter-claim. The word counter-claim only appeared in paragraphs 3,4 and 5 of the reply but even then the only relevant averment made therein was that the defendant took out an action by a writ of summons against the appellant on 28th October, 1992, which action was dismissed by Famakinwa, J., on 26th of May 1992, for want of prosecution. What is reasonably gleaned from all the averments in paragraphs 3,4 and 5 of the reply is that the appellant relied, very strongly, on res judicata or issue estoppel, as a defence to the defendant's counter-claim. He did not specifically deny it in his reply to the defendant's pleadings. And nowhere in the evidence of his only witness for the defence Mr. Obasi, (p.15 of the record) was the counter-claim denied or even mentioned. It appears to me therefore that the appellant did not contest the counter-claim and was relying upon the fact that the defendant's action in the trial court in case No. LD/3356/92 which was the same as the counter-claim was dismissed by Famakinwa, J., and so it could not be revived due to estoppel or res judicata, in this case by way of counter-claim. But from what I found in issue 2 above, the plea of estoppel or res judicata has flatly failed and so his only defence to the counter-claim is non-existent. In addition, the only witness of the respondent at the trial testified that:-

"I have seen the Statement of Defence and the Counter-claim filed by the defendant. I have read the contents, I do verify the contents of the Statement of Defence and the counter-claim being the facts of the case and I do adopt them to (sic) toto as my testimony in this case."

This means that the witness's testimony is as was set out in the pleadings of the respondent at the trial. He also tendered 11 documents which were admitted in evidence as Exhibits F-Q". At the end of his evidence-in-chief, he urged the court to award the respondent the sum of N4,109,052.51 against the appellant as counter-claim. He was not shaken in cross-examination. From the exhibits admitted in court without objection, the details of the whole transaction between the parties was exposed

and in some of them, particularly Exhibit M, the outstanding amount at a particular date was shown and Exhibit Q disclosed the acknowledgement of debt by the appellant though the actual amount was not specified. All these will in my view, go to support the counter-claim of the respondent, as none of the exhibits has proved any payment made by the appellant to B reduce his indebtedness. In view of all this, and the fact that the plea of estoppel and res judicata have failed to apply in this case, there is no iota of evidence of defence put in by the appellant in defence of the counter-claim. The counter-claim of the respondent therefore stood unchallenged C and I so hold. The Court of Appeal was right in so holding too and I agree with them. I answer this issue in the affirmative.

In the final analysis, I have found issue 1 in favour of the appellant and he is entitled to judgment in the sum of N584,274.00 without any interest since there was no proof of such interest in evidence. I found D issues 2 and 3 in favour of the respondent. The respondent is entitled to judgment on the counter-claim without any interest or damages which were not proved by evidence at the trial. In sum, this appeal is allowed in part and I make the following orders:- E

(1) I enter judgment in favour of the appellant in the sum of N584,274.00 being the amount realized from the sale of the wines by the respondent;

(2) I affirm the decision of the Court of Appeal confirming that of F the trial court in respect of the counter-claim of the respondent for the sum of N4,019,052.51 and the alternative order for enforcement of the respondent's right of sale of the properties mortgaged to it by the appellant.

I make no order as to costs in the circumstances of this appeal. G