

SUPREME COURT OF NIGERIA

6TH MAY, 2005. SC. 33/2000

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

ADECENTRO (NIGERIA) LTD. APPELLANT
AND
COUNCIL OF OBAFEMI
AWOLOWO UNIVERSITY RESPONDENT

CONTRACTS - Building - Where a contractor requests for extension of time - Silence by the Architect - Does not amount to an approval (H1)

EVIDENCE - Proof - Written contract - Claim of right - Where terms are varied by parties conduct - Evidence of oral variation is admissible (H2)

CONTRACTS - Building - Termination of contract - Where contractor abandons work - Pre-termination notice need not be given (H3)

DAMAGES - Special damages - Claim of - Must be specifically proved - Proof must be characterized by testimony - Which ties each item with evidence led (H4)

FACTS

Before the Ile-Ife High court, the plaintiff/appellant instituted an action against the defendant/respondent for wrongful termination of a building contract wherein the sum was revised upwards to N7,356,663.28. The appellant, a building construction company failed to complete the building awarded to him by the respondent within the stipulated period. After several extension of time had been granted to the appellant, again it applied for 67 weeks to complete the job but only 35 weeks was approved by the respondent. The appellant instituted this action on the ground that he was entitled to 67 weeks extension of time to complete the job. He also made claims for various money, damages and certificate for work done.

The trial judge granted a sum of N102,743.73 as due, based on certificate of work done but dismissed other claims. The respondent filed a counter claim for N12,746,616.54 damages as a result of escalated costs that arose because of appellant's incompetence and delay in handling the project. The trial court granted the counter claim in a strange language. The appellant appealed to the Court of Appeal against the decision but the appeal was dismissed. He has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the lower court was correct in upholding the learned trial Judge's decision that the appellant was not entitled to the extension of time sought?

2. Whether the appellant was, in the circumstance and having regard to the contract entitled to any sums of money due in consequence of the extension of 67 weeks sought by it but which the respondent neither formally granted nor refused?

3. Whether the two lower courts did not so misconstrue the first relief sought by the appellant as to occasion a serious miscarriage of justice?

4. Which of the parties, having regard to the contract validly determined the contract or were the two lower courts right in holding that the respondent validly determined the contract?

5. Whether the respondent was entitled to the measure of damages as stipulated under the contract especially in the light of the holding of the court that the respondent did not determine the contract in accordance with the contract document - Exhibit P2, but under the common law?

6. Were reliefs granted in the counter claim proper in the circumstances?

HELD (Unanimously allowing the appeal partly per **PATS-ACHOLONU JSC**)

Where a contractor requests for extension of time

1. Taking issues 1, 2 and 3, argued together, the learned counsel for the appellant submitted as follows and I would here quote him in extenso;

“It is also common grounds that at the time of terminating the

contract in July, 1985, the Architect had not communicated his approval or rejection of the extension of time sought. In substance, if not informed however, he had approved the extension.”

This sort of inferential deduction is obtuse, skewed and incomprehensible. I find it difficult to hold that when the architect on application or request for extension of time though in principle sees nothing intrinsically wrong with such a request and evincing an intention to support it, but failed to communicate same to the appellant or is completely silent, it should be taken as amounting to an approval. The strange and sickening feature of this case is the incessant extensions which according to the appellant was caused by the respondent while the respondent laid the blame at the feet of the appellant who it accused of incompetence, inability to fully mobilize effectively, and needless delay. The submission of the appellant that an approval should be read in non communication of the state of mind of the architect, appears strange having regard to some averments of the appellant in its pleadings. (pp. 1094 H)

Written contract - Claim of right

2. Besides having regard to the result of the intervention of the respondent in the matter the submission of the appellant that the Architect is solely responsible for extension of time can no longer hold. Then it would appear that to all intents and purposes that the implication of the ramifications of the duty and power of the architect is that they had been altered. To this let me restate the evidence of D.W.2.

“The procedure in granting the extension is that the plaintiff applied to the architect for extension of time. A meeting of the consultants, the contractor and the client (defendant) where the issue of extension is discussed and a decision is taken. The architect only made recommendations to the defendants which will give final approval. The defendants had the discretion to grant or reject our recommendations.”

There are two facts that I have found in this matter (a) Whenever any variation in whatever form inclusive of the extension of time is to be made all parties attended i.e., the respondent, its resident engineer, the architects and the appellants. Any extension of time does not depend on

the architect alone having regard to possible financial implication and the informal manner parties had been using without the strict need for any variation being made in writing. (b) The appellant seemed to have recognized this in their suppliant letter to the respondent. I hold that when B a claim of right metamorphoses into one of supplication, it ceases to wear the clothe of a right but a mere privilege. In this case the appellant was literally begging the respondent for mercies. I see nothing to vindicate a so called right of 67 weeks. Further to this parties seemed to have waived the C necessity for written approval in the strict sense since evidence shows that they opted for less formal way of communicating easily in this matter. By so doing they have varied or waived strict compliance with the dictates of the contract. I do not see any merit in these three issues canvassed. To my mind they hold no water. (p. 1098 B & 1099 H) D

Building - Termination of contract

3. There is a complaint that the respondent did not give notice before the termination. In the circumstance of the case need it do so if it felt that the E work had been abandoned? There are facts found by abandonment disguised as a determination of the contract. I believe that in such circumstances the respondent felt that the only reasonable thing to do was termination based on the circumstance that presented itself and not F necessarily on the prescription of the contract. Abandonment denotes animus non furandi i.e., no intention of going back. Relating to a situation such as this L. N. Duncan Wallace in his “*Building and Civil Engineering Standard*” (a commentary on the 4 principal R.I.B.A., F.A.S.S. and I.C.E. G Contract) states at p.117 after detailing the failings on the part of the contractor that would impel the employer to determine the contract.

“*This clause (i.e. R.I.B.A Conditions Clauses 24, 25(1) gives a contract right to the employer to determine the contract in certain defined circumstances since it is expressed to be without prejudice to other rights H and remedies, it is beyond any doubt additional to and not substitution to further common law right to rescind a contract for fundamental breach.*”

It is essential that stipulation that time is of essence must be shown clearly in the contract agreement as a fundamental term. Where time

element is seriously compromised it is a waiver. However where notwithstanding the waiver, the builder's lackadaisical attitude to work and lack of due diligence become suffocating and unbearable and the builder due to his incompetence sought to rely on one subterfuge or the other to suspend or abandon the work evincing the intention not to continue, the employer could forthwith terminate the contract under the common law. B

Whatever might have been any dereliction on the part of the respondent in this matter (if there is any) paled into insignificance when regard is had to the monumental deficiencies that generally characterized the nature of the appellant's work. No notice needed to be given where there has been an effective abandonment. In my view the determination by the respondent is valid. C

I find it utterly indefensible that the appellant should abandon its work on the excuse that certificate 35 was not paid which is indeed a paltry sum compared to sum of N7 Million odd and when the respondent has been lenient by bending backwards to accommodate the appellant on several occasions and when they had not settled down to discuss the matter as has been the practice all along. When a contractor has been guilty of inordinate delay occasioned by late mobilization, indolence, lack of seriousness, persistent shoddy work and in the same vein under a pretence that the employer should have paid him the sum in respect of a certificate for a miserly sum of money viz-a-vis the sum total, and purported to terminate the contract, the court should ignore the pretences and repudiate the so called determination and in its stead affirm a termination made by the employer on the basis of the contractor's abandonment of work. F

(pp. 1104 H & 1106 A & F)

G

Special damages - Claim of

4. It cannot be doubted that the award made by the trial court which came under hammer of the Court of Appeal was ungainly, inelegant, wooly, nebulous, frosty and difficult to discern. Besides, I fail to see the evidence led where the items specified in the counter-claims were proved. Every item contained in the claim of special damage must be specifically proved and such a proof must be characterized by testimony that ties each item H

1090 Adecentro Ltd v Council of O.A.U. (2005) 5 KLR Pats-Acholonu JSC

with the proof proffered i.e. the evidence led. This elementary. See A.G. Leventis (Nig.) Ltd. v. Akpu (2002) 1 NWLR (Pt.747) 182.

The lower court did not make matters easier by its own quibblings and indulging in equivocation. To my mind this counterclaim was not in the least proved. Even the nonchalant opposition of the respondent in this issue shows its unseriousness to contest the argument of the appellant. In my view the claim on the counter-claim not having been proved and the respondent failing or refusing to oppose it by forensic advocacy cannot be sustained. (p. 1109 B)

REPRESENTATION

Adebayo Adenipekun, (with him, Mrs. Remi Awe Osho, Miss M. B. Badmus, and E. A. Fatogun), for the Appellant.

Miss O. N. Lewis, for the Respondent.

CASES REFERRED TO

A.G. Leventis (Nig.) Ltd. v. Akpu (2002) 1 NWLR (Pt.747) 182.

Joseph v. Abubakar (2002) 5 NWLR (Pt.759) 185 CA

Blackwood Hodge (Nig.) Ltd. v. Omun Const. Co. (2002) 12 NWLR (Pt.782) 523 CA

Dev. Co. v. Isaiah (1997) 6 NWLR (Pt.508) 236

Yahaya v. Oparinde (1997) 10 NWLR (Pt.523) 126

Morgan v. Birnie (1833) 9 Bing, 672.

N.B.C.L. v. Sparless Dry Cleaning Nig. Ltd. (1998) 13 NWLR (Pt.580) 11, 21

Yusuf v. Oyetunde (1998) 9-10 S.C 123 (1998) 12 NWLR (Pt.579) 483 at 493

STATUTE REFERRED TO

Evidence Act 1990, s.132

LEAD JUDGMENT BY PATS-ACHOLONU JSC

The appellant, a construction company, had entered into a contract

with the respondent to construct a laboratory building and what is described as the General Service and Supply Centre at an initial price of N2,440,449.00 (Two Million Four Hundred and Forty Thousand Four Hundred and Forty Nine Naira). The sum originally agreed to was later on revised upwards to N7,356,663.28 (Seven Million Three Hundred and Fifty Six Thousand Six Hundred and Sixty Three Naira Twenty Eight kobo). Some of the pertinent terms of the contract are;

(a) That the whole works should be completed within a period of 44 weeks.

(b) That the appellant if occasion so demands may apply for extension of time to complete the job.

(c) That the architect's certificate is a condition precedent for payment.

The construction work was not completed within the due date agreed but 'he parties after several meetings agreed that the completion work be extended to 139 weeks.

As late as the middle of 1985, the appellant applied for further extension of total of 67 weeks. According to the appellant, the consultant architect approved only for an extension of 35 weeks in spite of the protestation of the appellant. The appellant was equally piqued further in this seemingly jaundiced state of affair by the refusal or failure of the respondent to pay its entitlement to certificate No.35 of the sum of N102,743.73. Subsequently the two parties each determined the contract. Feeling sorely about such a development the appellant instituted an action in the High Court.

The respondent on the other hand denied all liabilities and maintained that the unenviable situation was caused by the incompetence of the appellant in not putting the best men on duty and this resulted in perennial requests for extension of time which delayed the work and in turn had the resultant effect of escalating costs. With this in mind, the respondent then counter claimed for damages for a sum of N12,746,616.54. (Twelve Million Seven Hundred and Forty Six Thousand Six Hundred and Sixteen Naira Fifty Four Kobo).

At the High Court the suit of the appellant was dismissed while the

counter claim succeeded. The award of damages was somewhat bizarre in the language it was given. I shall come to this later. An appeal to the Court of Appeal was dismissed hence a final appeal to this court.

B From the dizzying great number of grounds of appeal the appellant formulated 6 (six) issues for determination. They are as follows:

1. Whether the lower court was correct in upholding the learned trial Judge's decision that the appellant was not entitled to the extension of time sought? Grounds 1, 2, 3 and 5.

C 2. Whether the appellant was, in the circumstance and having regard to the contract entitled to any sums of money due in consequence of the extension of 67 weeks sought by it but which the respondent neither formally granted nor refused? Ground 4.

D 3. Whether the two lower courts did not so misconstrue the first relief sought by the appellant as to occasion a serious miscarriage of justice? Ground 17.

E 4. Which of the parties, having regard to the contract validly determined the contract or were the two lower courts right in holding that the respondent validly determined the contract? Grounds 6, 7, 8, 9, 10, 11, 13, 14, 15.

F 5. Whether the respondent was entitled to the measure of damages as stipulated under the contract especially in the light of the holding of the court that the respondent did not determine the contract in accordance with the contract document - Exhibit P2, but under the common law?

Ground 16.

G 6. Were reliefs granted in the counter claim proper in the circumstances? Ground 18.

The respondent on its own adopted the issues framed by the appellant and argued its case based on the manner argued by the appellant.

H The appellant's grouse against the judgment of the Court of Appeal is in the lower court's affirmation of the decision of the trial court. The High Court after dismissing the case of the appellant in particular stated as follows in that judgment;

"As to the plaintiff's claims in paragraphs 26 and 27 of his further amended Statement of Claim, their success depends strongly on Section

25(3)(a) of Exhibit P2, the return of the equipment, tools and materials will wait until the whole project is finally and satisfactorily completed by another contractor. The defendants will then have the responsibility to return whatever remains of the equipment to the plaintiffs.

The counter-claims also succeed but they cannot take effect until B after the successful completion of the project. Section 25(3)(d) which is quoted above supply the full answer.

For the benefit of doubt. I make the following orders:-

On the plaintiff's claims:

1. Relief 1 fails. There is no basis whereby I can grant any extension C of time, how much more of 67 weeks extension. The declaration is refused.

2. Relief 2 also fails with the exception of the sum of N102,743.73k on certificate No.35 which is already due to the plaintiff. The payment of this sum of N102,743.73k by the defendant to the plaintiff shall be D deferred till when the project is finally completed by another contractor and accounts are taken by both parties under Section 25(3)(a) and (3) (d) of Bills of Quantities (Exhibit P2).

3. Relief 3 also fails as the plaintiff was in breach of the contract. E

4. Reliefs (4) and (5) are to be treated in accordance with the provisions of Clause 25(3)(a) of the Bills of Quantities - Exhibit P2.

5. Relief No.6 fails in its entirety and it is hereby dismissed.

6. Reliefs Nos.7, 8 and 9 also fail in their entirety and they are F refused.

On the defendant's Counter-Claims

1. On reliefs 1 and 4 the defendant is entitled to extra expenses to be incurred in completing the project. The calculation of such extra G expenses shall be in accordance with Clause 25(3)(d) of the Bills of Quantities- Exhibit P2.

2. The defendant is entitled to damages for non-completion of the work.

3. Reliefs 3 and 5 have been withdrawn and they are hereby H dismissed.

The Court of Appeal after synthesizing the whole judgment of the High Court and in particular the singular features of the award made by

the High Court observed, and in the light of its comment, held as follows;

In awarding damages on the counter-claim the learned trial Judge found as follows:-

B *1. On reliefs 1 and 4 the defendant is entitled to extra expenses to be incurred in completing the project. The calculation of such extra expenses shall be in accordance with clause 25(3)(d) of the Bills of Quantities - Exhibit P2.*

C *2. The defendant is entitled to damages for non-completion of the contract as to be calculated under clause 22 of the same bills of quantities - Exhibit P2.*

3. Reliefs 3 and 5 have been withdrawn and they are hereby dismissed.”

According to the learned SAN., the learned trial Judge has by implication refused the claims of the respondent but made his own orders. He has submitted that he cannot make an order which the respondent has not sought from him; and placed reliance on the cases of Ajikawo v. Ansaldo Nig. Ltd. (1991) 2 NWLR (Pt. 173) P.303. I do not agree that the learned trial Judge refused the claims. He granted them allright but rather than confine himself to awarding the damages sought he went on to make an order that was not specific, and which after the calculation he has ordered may be in excess of the amounts claimed. By virtue of the settled law in this country a judge in a litigation that involves a claim for damages must as much as it is possible tailor the amount he awards to the amount of damages claimed, but in this case the learned trial Judge had to resort to the relevant clause of the contract binding both parties for the purpose of the assessment.

G *And the issue formulated in this appeal having been discussed thoroughly in this judgment for the forgoing reasoning, I find the grounds of appeal married to the issues have no merit and substance. All the grounds are therefore dismissed. The end result is that the appeal fails in its entirety. I hereby dismiss the appeal and affirm the judgment of Sijuade, J.”*

Taking issues 1, 2 and 3, argued together, the learned counsel for the appellants submitted as follows and I would here quote him in

extenso;

“It is also common grounds that at the time of terminating the contract in July, 1985, the Architect had not communicated his approval or rejection of the extension of time sought. In substance, if not informed however, he had approved the extension.”

This sort of inferential deduction is obtuse, skewed and incomprehensible. I find it difficult to hold that when the architect on application or request for extension of time though in principle sees nothing intrinsically wrong with such a request and evincing an intention to support it, but failed to communicate same to the appellants or is completely silent, it should be taken as amounting to an approval. The strange and sickening feature of this case is the incessant extensions which according to the appellants was caused by the respondent while the respondent laid the blame at the feet of the appellants who it accused of incompetence, inability to fully mobilize effectively, and needless delay. The submission of the appellants that an approval should be read in non communication of the state of mind of the architect, appears strange having regard to some averments of the appellants in its pleadings.

Para 9:

“Under the express terms of the contract the architects have responsibility for approving applications for extension of time”.

Para. 12

“The architects supported the two applications for extension of time but the defendant at all material times prevented the architects from granting and or communicating to the plaintiff the grant of extension of time. The plaintiffs pleads letter dated 10th April, 1984, and May, 1985, and relevant minutes of the meetings”.

Para. 13:

“The plaintiff will at the trial contend that:

(1) The defendant prevented the architects from granting and/or communicating to the plaintiff the grant of extension of time applied for;

(2) The architects failed to act as they should have done under the express terms of the contract;

(3) *The architects delayed the plaintiff's application for extension of time for an unreasonable time; and*

(4) *The architect failed to act impartially and independently and/or abused their powers and/or acted in excess of their jurisdiction in the handling of the plaintiff's applications for extension of time.*

I really do not understand why we were referred to Exhibit 14 which was a minute of a meeting between both parties. I very much doubt if it is in the appellant's interest. Its main complaint in that meeting was the problem of obtaining some materials for construction of the structures as reflected in the minute of the meeting held on 10/4/85. Part of it reads thus;

*"The Engineer said that if however there is evidence of problems in getting anything imported, the consultants could be informed so as to look into any of the contractors problem regarding the forgoing and the consultants may necessarily contact and get the assistance from the University or the Client by a (Sic) way of writing letters to the Federal Authorities in granting necessary documents.....
The Engineer warned the contractors not to seize this opportunity in relaxing their duties of making all efforts to ensure that those required supplies are found delivered to the site of the project."*

The message of the Engineer representing the University is that the respondent would not condone any tardiness or unnecessary delay which the contractors might latch upon by needless application for extension and therefore fail to complete the project in time. In Exhibit 17 the consultant Architect reminded the employers to ensure that a reply to two extensions applied for viz, first for 35 weeks and for 32 weeks was given prompt reply. It is the letter that the appellant has interpreted to mean that the architect was in support. There is indeed nothing in that document to show that the architect was for or against. It can hardly be contested that since the consultant architect was an employee of the respondent any likely extension must be well considered by referring any request or application to the respondent as he who pays the piper dictates the tune.

The appellant equally berated the High Court for holding that it was not within the competence of the court to grant extension of time thereby usurping the power of the Architect, stating that it never sought such relief.

The claim for the declaration in respect of the extension is worded in this manner, that is to say:-

“(1) Declaration that the plaintiff is entitled to 67 weeks extension of time and any sum due in consequence thereof.”

Analytically dissecting this claim which is couched in the present tense by use of the expression “*is entitled*” and not “*was entitled*”, it denotes that it is the appellant’s right still subsisting. It is a claim situate in the present and appearing to show that its grant would enure to the appellant in its future dealings with the respondent. Still on this the Court of Appeal in its consideration of the ramifications of the application referred to Exhibit 68 where the appellant now appealed direct to the respondent humbly pleading for extension of time. Implicit in this unusual request directed at the respondent and not the Architect who the appellant had said held all keys to the grant or disallowance of the application, was that the appellant was aware that it was the respondent that held the key to any extension. That is to say, that the appeal was made over and above the agent, and being made to the principal in a language that bespeaks of a grant of a benefit and not a right. It was couched in the words of supplication. The intended intervention would have the effect of overriding the words of the contract and if so granted, would undeniably and irresistibly affect the agreement whereby the architect might no longer be the person to grant or refuse any extension.

Let me compare the evidence of D.W.1 with that of D.W.2 on this matter. In his evidence-in-chief the plaintiff’s witness testified as follows in respect of the application for the 35 and 32 weeks respectively.

“The plaintiff sought for extension of time in March, 1984. This is a copy of our letter”. Counsel seeks to tender it. “It was admitted and marked Exhibit P. 12 and was approved and 35 weeks extension was given to us. The approval was given at the site meeting to which we were invited by the architect.”

“In November, 1984 the plaintiff applied for extension of another 32 weeks to complete the Contract.....No formal approval was communicated to us.....The architect informed us that the defendant wanted to know the financial implication before a formal

approval is given.”

It is interesting that apart from the fact that notwithstanding that the appellant was given approval for 35 weeks extension they not only failed to complete the job within that period but cheekily applied for another 32 weeks extension. It is to be observed that it asked the High Court for declaration that it is entitled to 67 weeks which is the sum total of 35+32 weeks applied for. **Besides having regard to the result of the intervention of the respondent in the matter the submission of the appellant that the Architect is solely responsible for extension of time can no longer hold.** Then it would appear that to all intents and purposes that the implication of the ramifications of the duty and power of the architect is that they had been altered. To this let me restate the evidence of D.W.2.;

“The procedure in granting the extension is that the plaintiff applied to the architect for extension of time. A meeting of the consultants, the contractor and the client (defendant) where the issue of extension is discussed and a decision is taken. The architect only made recommendations to the defendants which will give final approval. The defendants had the discretion to grant or reject our recommendations.”

There are two facts that I have found in this matter (a) Whenever any variation in whatever form inclusive of the extension of time is to be made all parties attended i.e., the respondent, its resident engineer, the architects and the appellants. Any extension of time does not depend on the architect alone having regard to possible financial implication and the informal manner parties had been using without the strict need for any variation being made in writing. (b) The appellant seemed to have recognized this in their suppliant letter to the respondent. I hold that when a claim of right metamorphoses into one of supplication, it ceases to wear the clothe of a right but a mere privilege. In this case the appellant was literally begging the respondent for mercies. I see nothing to vindicate a so called right of 67 weeks. Further to this parties seemed to have waived the necessity for written approval in the strict sense since evidence shows that they opted for less formal way of communicat-

ing easily in this matter. By so doing they have varied or waived strict compliance with the dictates of the contract. See the operation of Section 132 of the Evidence Act:

“132(1) When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence is admissible under the provisions hereinbefore contained; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence: B C

Provide that any of the following matters may be proved

(a) Fraud, intimidation, illegality; want of due execution; the fact that it is wrongly dated; existence, or want or failure, of consideration; mistake in fact or law; want of capacity in any contracting party, or the capacity in which a contracting party acted when it is not inconsistent with the terms of the contract; or any other matter which, if approved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto; D E

(b) The existence of any separate oral agreement as to any matter on which a document is silent, and is not inconsistent with its terms, if from the circumstances of case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them; F

The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property; G

(d) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property; H

I do not see any merit in these three issues canvassed. To my mind they hold no water.

Issue 4 is asking the court to determine which party validly

determined the Contract. Clause 26 of Exhibit P2 which is the Bill of Quantities and in which the agreement was embodied sets out the conditions under which the contract would stand determined. The appellant referred to the provisions in Clauses 25 and 26 of the contract
B Exhibit P2 and submitted that on 10th July, 1985, it issued Exhibit 47 to the respondent giving it notice to pay the value on certificate No.35 failing which the contract would be determined as non payment within 14 days of non compliance would be a good ground for determining the contract.
C It argued that in response to the letter to the respondent to comply with the demand, the respondent instead determined the contract.

It is difficult to adequately and appropriately discuss which of the two parties validly determined the contract without equally delving into the causative factor that brought about the serious misunderstanding between
D the legal combatants. By this I mean that if as I have held that the appellant is not and was not, and should not be entitled to the 67 weeks it was claiming, the question of whose determination is valid intertwined, or is inextricably involved with the mess associated with the prolonged execu-
E tion of the project. The appellant insists that with the respondent failing or refusing to honour certificate No.35 in time, and was not paid even after 13 weeks of the demand, the lower court should not have held that the respondent's determination came first. The angst of the respondent has
F been the alleged tardiness on the part of the appellant; an attitude that seems to be redolent of indolent nonchalant attitude bordering on sheer levity to work. In other words it found itself in an uncomfortable position to readily accede to the payment even of the certificate No.35. The respondent submitted that there is no way the subsequent events could not be traceable
G to the ungainly and squalid history of the contract execution which it alleged was hinged on the appellant's incompetence. The court below had held as follows:

*"In the instant case, it cannot be said that there was no evidence that
H most of the delays in the execution of the contract was caused by the appellant. There is certainly ample evidence by both sides to buttress the respondent's case that the delay was caused by the appellant".*

Let me review in summary the evidence of the history of the

performance of the contract as considered by the Court of Appeal. On the 24th October, 1983. Exhibit P94 was written to the appellant. It runs thus;

“It is observed that some of the enclosing block walls for the above mentioned shafts are slanting and not at right angles, as specified in the architectural drawings. Consequently the timber frames for the removable panels on the recess are also askew. Please ensure that necessary action is taken to rectify these defects without delay.”

It was signed by the Resident Engineer. On the 18th of November, 1983, and other subsequent dates several letters were addressed to the appellant in respect of complaint of a shoddy work. I shall set all of the letters in extenso:-

OUR REF: REAS/IART/257/GEN

DATE: 18TH November, 1983

Messrs Adecentro Nig. Ltd.,

University of Ife,

Ile-Ife.

Dear Sirs,

I. A. R. & T. Building Nos.2 and 3 - Unife Supply Pipes Shaft in Corridors - Recess for Electrical Board, Control Water Fountain e.t.c.

Further to my letter Ref. RE AS/IART/241/GEN dated 24th October. 1983, on the above subject, please be reminded that all defected walls and frames should be made good before any capable trunking and associated wiring installation can commence.

With particular reference to building 2, in which the above defects have not yet been made good, whilst cable trunking installations have already commenced, please ensure that these installations are removed and the defects corrected prior to any further trunking work.

Attached is a list of those walls and frames which require attention.

Please treat as urgent.

Yours faithfully,

A. Silberman
Egboramy Resident
Engineer

Cc The Clerk of Works Unife.

Our Ref: RACT/IART/310/GEN

Date: 29th February, 1984

Messrs Adecentro Nig. Ltd.,

B University of Ife,

Ile-Ife.

Attention: Site Manager

Dear Sirs,

C RE: I. A. R. & T. Buildings - Wall Tiles in Building No.2

During the inspection tour that took place on the 23rd February, 1984, we noticed that the work applied on part of the wall tiles in building No.2 was carried out not according to acceptable standard.

D You were verbally instructed to take off these tiles and you promised to do so.

We expect you to finish this work as soon as possible and according to good standard.

Your co-operation is appreciated.

E

Yours faithfully,

On Tammuz

F Resident Architect

For Egboramy Company Ltd.

Cc Clerk of Works.

G OURREF: RACT/IART/351/GEN

Date: 28th April, 1984

Messrs Adecentro Nig. Ltd.,

University of Ife,

Ile-Ife.

H

Dear Sirs,

RE: I. A. R. & T. Project

After an inspection tour to the I. A. R. & T. Building Nos.2 & 3, we

would like to draw your attention to some repairs that has (sic) to be done:

(1) You have to execute the work mentioned in site instruction No.27 (9th March, 1982) in building No.2 & 3 before starting any work on the roofing felt.

(2) Building No.2 Annex 2 - you have to chisel the curve in the external southern wall between the Annex and the building before applying the combed Tyrolean. B

(3) Building No.3, Annex 1 - you have to finish the chiselling of the inner side of the eastern wall before applying the plaster on it.

(4) The black terrazzo coping on the roofs parapet is not finished. You have to grind and level it as it has to be done in the inner corridors. C

(5) There are still some repairs that has to be done on the retaining wall. The upper stones have to be replaced as you did in few places. We will instruct you on site. D

(6) Many wooden frames need repairs and some have to be completely replaced. A special inspection tour for this issue will take place on Monday morning at 11.00am on 30th April, 1984.

(7) In some places, the paint you applied on the walls and ceilings inside the rooms is peeling off. You have to rub it and repaint the place before applying the second coat. We shall show you the exact places during the inspection tour mentioned in clause 6.

Your action on the above is needed as soon as possible.

Thank you for your co-operation.

Yours faithfully,

On Tammuz

Resident Architect

For Egboramy Company Ltd. G

Cc Clerk of Works

Cc Kofo Popoola & Partners

OUR REF: RACT/IART/372/GEN H

Date: 21st May, 1984

Messrs Adecentro Nig. Ltd.,
University of Ife,

Ile-Ife.

Dear Sirs,

RE: I. A. R. & T. PROJECT - CONNECTING BRIDGE

B Please be informed that the form work you are carrying out for the connecting bridge between building No.2 & No.3 is not acceptable and will not be approved. The horizontal soffit of the bridge slab is fair faced concrete and the form work for it must be done of undamaged clean and smooth plywood and not of the broken plates you are using.

C We would like to remind you that before you cast any part in the building you have to get our engineer's approval for the form work and the reinforcement, a practice which you did not always follow in the past.

Your co-operation will be appreciated.

D Yours faithfully,

On Tarnmuz
Resident Architect
For Egboramy Company Limited.

E Cc Director of Physical Planning
Cc Clerk of Works
Cc Kofo Popoola & Partners

F P.W.1 received these letters. In his evidence during the cross examination he said:-

G *"All Exhibits P94 - P96(2) relate to the defective work we did on the project. It is not true that it was in the process of correcting the defects that we changed the terrazzo. The Architect was complaining about the peeling of the paint of the wall and not change of colour of the paint in other places which caused the delay in the work"*

In fact the employer was complaining of many defects.

H It is difficult not to associate the delays and defective shoddy work to the incompetence in the civil work. With the plethora of complaints about abyssimal work being done, it was even a surprise that the work was not terminated earlier by the respondent.

There is a complaint that the respondent did not give notice

before the termination. In the circumstance of the case need it do so if it felt that the work had been abandoned? There are facts found by abandonment disguised as a determination of the contract. I believe that in such circumstances the respondent felt that the only reasonable thing to do was termination based on the circumstance B that presented itself and not necessarily on the prescription of the contract. Abandonment denotes *animus non furandi* i.e., no intention of going back. Relating to a situation such as this L. N. Duncan Wallace in his “Building and Civil Engineering Standard” (a commentary on the 4 principal R.I.B.A., F.A.S.S. and I.C.E. Contract) C states at p117 after detailing the failings on the part of the contractor that would impel the employer to determine the contract.

“This clause (i.e. R.I.B.A Conditions Clauses 24, 25(1) gives a contract right to the employer to determine the contract in certain D defined circumstances since it is expressed to be without prejudice to other rights and remedies, it is beyond any doubt additional to and not substitution to further common law right to rescind a contract for fundamental breach.” E

In Hudsons Building and Engineering Contracts 10th Edition at p. 609, 611 and 612 the learned Author states as follows:-

“A further consideration in the case of building contracts is that, even were time to be of the essence, it would afford a building owner little F practical relief against a recalcitrant builder. In most building contracts the contract period is comparatively lengthy, and long before it has expired the owner or his architect will know that the builder is in default on his programme and that completion by the stipulated time is for all G practical purpose impossible. Nevertheless, no right to terminate on this ground could arise until the completion date, while the obligation in most building contracts to make interim periodic payments will continue, in spite of the mounting probability of the employer incurring substantial damage. In addition, if he allows the completion date to pass and H acquiesces in work continuing under the contract, the employer will be held to have waived compliance with the original date for this particular purpose”.

It is essential that stipulation that time is of essence must be shown clearly in the contract agreement as a fundamental term. Where time element is seriously compromised it is a waiver. However where notwithstanding the waiver, the builder's lackadaisical attitude to work and lack of due diligence become suffocating and unbearable and the builder due to his incompetence sought to rely on one subterfuge or the other to suspend or abandon the work evincing the intention not to continue, the employer could forthwith terminate the contract under the common law. Continuing, the learned author says;

"The implication of a fundamental term requiring due diligence by the builder is more essential to the employer in comparatively lengthy contracts for work done such as building contracts, rather than a doctrine which has largely been evolved to suit the requirements of contracts for the sale of land or goods. It is submitted that in most building contracts this term is necessary to give the contract business efficacy, and that where a builder persists in a rate of progress bearing no relation to a specified or reasonable date of completion, and the employer gives him notice requiring a reasonable rate of progress, if he then fails to proceed at a reasonable rate he will be evincing an intention no longer to be bound by the contract and his dismissal would be justified notwithstanding the absence of any express term empowering the employer to determine".

Whatever might have been any dereliction on the part of the respondent in this matter (if there is any) paled into insignificance when regard is had to the monumental deficiencies that generally characterized the nature of the appellant's work. No notice needed to be given where there has been an effective abandonment. In my view the determination by the respondent is valid.

I find it utterly indefensible that the appellant should abandon its work on the excuse that certificate 35 was not paid which is indeed a paltry sum compared to sum of N7 Million odd and when the respondent has been lenient by bending backwards to accommodate the appellant on several occasions and when they had not settled down to discuss the matter as has been the practice all along. When

a contractor has been guilty of inordinate delay occasioned by late mobilization, indolence, lack of seriousness, persistent shoddy work and in the same vein under a pretence that the employer should have paid him the sum in respect of a certificate for a miserly sum of money viz-a-vis the sum total, and purported to terminate the contract, the court should ignore the pretences and repudiate the so called determination and in its stead affirm a termination made by the employer on the basis of the contractor's abandonment of work.

In respect of issue 5, the appellant said that the question for determination is really whether or not the appellant did not do the work covered by valuation 36. I think this is a simple question. The respondent through D.W.1 in his evidence testified as follows;

"The last application submitted by the plaintiff was valuation No.36 - Exhibit 43. We (Quantity Surveyors) were more than half way through in the approval exercise before the notice of termination by the contractors was received."

The appellant argued strongly that as the court found out that some work was done in respect of valuation 36, there ought to be payment for it. On this point the respondent replicando drew the attention of the court to terms of payment, to wit, that there should be a valuation certificate by the quantity surveyors on the basis of which the architect would issue the certificate. The resolution of this matter is not much of a thorny one seeing that D.W.1 has testified that they the quantity surveyors were half way in the approval exercise in respect of valuation 36 before the termination by the appellant. To my mind the ipse dixit of D.W.1 shows that the quantity surveyors had evinced the intention to approve. That being the case notwithstanding that all procedures were not completed, I am of the view that the appellant is entitled to equity in this case as the justice of the situation ought to make the respondent pay for the service rendered and appropriated here. It is my view therefore that the appellant is entitled to the sum of N47,696.03 in respect of the valuation. This is a case where equity should be used to temper rigours of the law.

I now discuss the arguments of both parties in respect to issue No.6.

In the 6th issue the appellant's complaint is on the relief granted to the respondent in its counter-claim. The appellant took issue on this matter and argued that the lower court made an award that was not pleaded and cited *N.B.C.L. v. Sparless Dry Cleaning Nig. Ltd.* (1998) 13 NWLR (Pt.580) 11, 21 and *Yusuf v. Oyetunde* (1998) 9-10 S.C 123 (1998) 12 NWLR (Pt.579) 483 at 493. It further submitted that it is a somersault for the lower court to condemn the trial court for making an order not sought for, and turning round to make the same order that it frowned at and disallowed. The learned counsel for the appellant further submitted that the claim as contained in the counter-claim being the specie of special damages must be specifically proved as each of the claims is itemized and the learned counsel cited *Shell Pet. Dev. Co. v. Isaiah* (1997) 6 NWLR (Pt.508) 236; *Yahaya v. Oparinde* (1997) 10 NWLR (Pt.523) 126; and *Morgan v. Birnie* (1833) 9 Bing, 672.

The respondent in turn submitted that no ground of appeal raised the issue on this part and therefore the court should ignore the argument on this point. I am amazed at the argument of the respondent on this matter. It is certainly not correct to say that the appellant did not raise the question canvassed under this issue. To waive the arguments proffered on this issue as non event amounts to an over simplification of a complex matter.

Ground 18 of the amended notice of appeal reads thus;

18. The Court of Appeal erred in law by granting to the respondent based on its counter-claim reliefs which were not sought, nor specific and supported by evidence.

Particulars

(i) The respondent having failed to adduce evidence in proof of its counter-claims, the reliefs therein were wrongly granted.

(ii) The court lacks the power to make an order that was not specific to grant a relief not sought to or award more than is claimed by a party".

It is evident that ground 18 is the cornerstone of the argument canvassed under issue No.6.

The learned Court of Appeal though agreeing that the trial court awarded the claims made nevertheless held that the trial court "*went to make an order that was not specific and which after the calculation he has*

ordered may be in excess of the amounts claimed.”

The Court of Appeal went on :-

“By virtue of the settled law in this country, a Judge in a litigation that involves a claim for damages must as much as it is possible tailor the amount he awards to the amount of damages claimed. But in this case the learned trial Judge had to resort to the relevant clause of the contract building of both parties for the purpose of assessment.”

It cannot be doubted that the award made by the trial court which came under hammer of the Court of Appeal was ungainly, inelegant, wooly, nebulous, frosty and difficult to discern. Besides, I fail to see the evidence led where the items specified in the counter-claims were proved. Every item contained in the claim of special damage must be specifically proved and such a proof must be characterized by testimony that ties each item with the proof proffered i.e. the evidence led. This is elementary. See A.G. Leventis (Nig.) Ltd. v. Akpu (2002) 1 NWLR (Pt.747) 182.

1. Joseph v. Abubakar (2002) 5 NWLR (Pt.759) 185 CA

2. Blackwood Hodge (Nig.) Ltd. v. Omun Const. Co. (2002) 12 NWLR (Pt.782) 523 CA

The lower court did not make matters easier by its own quibblings and indulging in equivocation. To my mind this counter-claim was not in the least proved. Even the nonchalant opposition of the respondent in this issue shows its unseriousness to contest the argument of the appellant. In my view the claim on the counter-claim not having been proved and the respondent failing or refusing to oppose it by forensic advocacy cannot be sustained. Issue No.6 has merit.

In the final analysis the appeal is only partially successful to the extent that issues Nos.5 & 6 are allowed and the rest fail.

I make no order as to costs. I set aside the judgment of the lower court in respect of payment to valuation No.36, Exhibit 43, and the counter claim. The judgment is confirmed in all other respects.

KUTIGIJSC

I have had the privilege of reading in advance the judgment just delivered 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 therefore succeeds in part only as follows-

1. The plaintiff/appellant is entitled to the sum of N47,696.03 in respect of Valuation No.36 (Exhibit 43).
 2. The awards or orders made in respect of the defendant/respondent's counter-claims are set aside. The counter-claims are dismissed.
 3. The appeal is dismissed in all other respects.
- I also make no order as to costs.

EJIWUNMIJSC

As I have had the privilege of reading before now the judgment just delivered by my learned brother, Pats-Acholonu, JSC., I find myself in agreement with his reasoning leading to the conclusion in the said judgment.

In the result. I also abide by the consequential orders made in the lead judgment.

MUSDAPHERJSC

I have had the preview of the judgment of my Lord, Pats-Acholonu, JSC., just delivered in this matter and I entirely agree. In the aforesaid judgment his Lordship painstakingly discussed all the issues submitted to this court for the determination of the appeal. I accept the reasonings as mine and I accordingly also partially allow the appeal to the extent that issues 5 and 6 are resolved in favour of the appellant while issues 1, 2, 3 and 4 are resolved against the appellant. I make no order as to costs.

AKINTANJSC

The appellant, a building contracting company, was the plaintiff in this case instituted at the Ile-Ife High Court, then in Oyo State but now in Osun State. The respondent was the defendant. The dispute that led to the institution of the claim was over the failure of the appellant to promptly execute the construction of a building contract awarded the plaintiff by the defendant. The defendant had to terminate the contract after the plaintiff failed to complete the building despite the extended time given to the contractor. The plaintiff then instituted this action and his claim, as set out in paragraph 32 of its further amended Statement of Claim is, inter alia, for declaration that the plaintiff was entitled to 67 weeks extension of time to complete the job; claims for various sums of money as amounts due on various heads of claims such as on the certificate of work done issued by the defendant's supervising architect, damages for breach of the contract, return of plaintiff's detained equipment at the building site, among others. B C D

The defendant denied the claim and counter-claimed for N12,746,616.54 being extra expenses incurred by the defendant in completing the job among others. At the conclusion of the trial, the learned trial Judge, Ade Falade, J., granted only the sum of N102,743.75 already due on the certificate No.35 which had earlier been issued by the defendant as due on the contract work done. All the other items of claim were dismissed with N1,500 costs favour of the defendant. E F

The trial court held, inter alia, in respect of the counter-claim, that the defendant is "*entitled to extra expenses to be incurred in completing the project. The calculation of such extra expenses shall be in accordance with Clause 25(3)(d) of the Bill of Quantities - Exhibit P2 (2).....*" The defendant is entitled to damages for non-completion of the contract as to be calculated under Clause 22 of the same Bill of Quantities - Exhibit P2." G

The court did not award any specific sum in respect of the two heads of claim even though the defendant counter-claimed for specific H sums for each item of its counter-claim.

The plaintiff appealed to the court below against the decision. But the defendant did not cross-appeal against the failure of the trial court to

award specific sums as counter-claimed. The lower court dismissed the appeal and hence the present appeal.

The main issues canvassed in this court are that it was wrong of the trial court as well as the court below for not acceding to the appellant's request for the 67 weeks extension sought for the completion of the contract and the refusal of the various items of damages claimed by the appellant. All these issues were fully set out and dealt with in the leading judgment prepared by my learned brother, Pats-Acholonu, JSC. I quite agree with the conclusion reached in the leading judgment that apart from the award of the sum already due to the appellant as contained in the certificate No.35 of job done issued by the respondent, there is totally no merit in the entire appeal. Similarly, the respondent cannot be assisted in respect of the failure of the trial court to make specific awards in respect of the defendant's counter-claim since there was no cross-appeal against that decision to the lower court. The court below was also right in not making any award to the respondent in respect of the counter-claim.

In conclusion, and for the reasons given above and the fuller reasons given in the leading judgment, which I had the privilege of reading before now, I also dismiss the appeal with costs as assessed in the leading judgment.

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