

SUPREME COURT OF NIGERIA

20TH MAY, 2005. SC. 114/2000

CORAM:- M. L. UWAIK CJN, A. I. KATSINA-ALU, D. MUSDAPHER, D. O. EDOZIE, G. A. OGUNTADE, JJSC

MARTCHEM INDUSTRIES NIGERIA LTD. APPELLANT
AND
M. F. KENT WEST AFRICA LTD. RESPONDENT

COURTS - Evidence - Where unchallenged - Judge is still expected to examine - Whether or not it was sufficient - To establish the claims made by the party - Who made it (H1)

ACTIONS - Detinue - Unchallenged evidence - Claim in detinue - In order to succeed - Must meet certain requirements of law (H2)

COURTS - Evidence - Evaluation - Judgments - Where trial Court did not properly evaluate evidence - Appellate court cannot set the judgment aside - Without evaluating the evidence (H3)

PRACTICE & PROCEDURE - Courts - Pleadings - Where matters are not pleaded - Trial Judge should not decide on such points (H4)

PLEADINGS - Averments - Do not amount to evidence - Which Court can rely on (H5)

TORTS - Bailment - Possession - Where plaintiff had paid for goods - And taken delivery of part of them - Constructive bailment contract exists between the parties (H6)

TORTS - Detinue - Claimant is to establish his title - Or right to immediate possession - In order to succeed (H7)

FACTS

Before the High Court of Kano, the plaintiff/appellant sued the defendant/respondent claiming for (a) An immediate delivery of one Doz. 50 KVA generator, (b) Receipt of payment to the defendant by the plaintiff the sum of N556,500.00 and documents of purchase of the 2 generators and other goods purchased by the defendant (c) The sum of N8,000.00 per day as rent due and payable to the plaintiff by the defendant from 9th September 1994 to the date of the delivery of the generator to the plaintiff or judgment in the suit.

The plaintiff claimed that it bought several items including one Doz. 50 KVA generator from the defendant. The plaintiff paid a total sum of N556,500 to the defendant, N256,000.00 by cash and N300,000 .00 through the defendant's commercial bank account. The plaintiff took delivery and carted away all items except the Doz 50 KVA generator. The plaintiff made several attempts to take the generator, but did not succeed. It therefore brought this action. The court granted the claims of the plaintiff. The defendant dissatisfied with the judgment appealed to the Court of Appeal. The Court of Appeal allowed the appeal of the defendant and set aside the judgment of the trial court and plaintiff's claim was dismissed. The Plaintiff has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether or not the lower court was right in setting aside the judgment of the court of first instance in favour of the appellant in an uncontested action when the appellant had proved its entitlement to judgment by credible evidence.

2. Whether the Court of Appeal was right in re-evaluation (sic) the appellant's evidence which was neither contradicted nor controverted at the trial and in ascribing probative values to the averments in the Statement of Defence not proved by any evidence.”

The respondent formulated three issues for determination, namely:

“3.1 Whether the Court of Appeal was right to hold that the appellant had failed to establish a claim in detinue.

3.2 Whether the Court of Appeal was right to hold that the trial court erred in failing to evaluate evidence of the appellant before reaching

its decision.

3.3 Whether the Court of Appeal was correct to interfere with the findings of the trial court by re-evaluating the evidence."

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)

Evidence - When unchallenged

1. Even if, as was the case here, the evidence in a case went in one direction in that it was unchallenged, the trial Judge is still expected to examine whether or not the unchallenged evidence was sufficient to establish the claims made by the party in whose favour the unchallenged evidence was given. (p. 1236 C)

Detinue - Unchallenged evidence

2. The plaintiff's case was an action in detinue. A claim in detinue, in order to succeed, must meet certain technical requirements of law. It is therefore necessary and important for the Judge to satisfy himself that the evidence called satisfied the requirements of law. It is certainly not in consonance with the law to say that in every case in which the evidence called in support of the plaintiff's case is unchallenged, judgment must be given in favour of the plaintiff. On the contrary, it is possible and there are several known examples that evidence called in support of plaintiff's case even if unchallenged may still be insufficient to sustain plaintiff's claims. (p. 1236 D)

Evidence - Evaluation - Judgments

3. I do not think that the court below would have been right to set aside the judgment of the trial court solely on the ground that the trial court had not, as it should do, properly evaluated the evidence. I say this because it is now trite law that when evidence is unchallenged and uncontroverted, the same may be accepted by the trial court for the purpose the evidence is offered provided the evidence itself is in its nature credible:

Notwithstanding that the trial court had failed or neglected to evaluate the evidence of plaintiff's witness before giving judgment in favour of the plaintiff, the court below, under the above Section 16, had

the power and the duty to determine whether or not the evidence called by the plaintiff was sufficient to sustain or grant plaintiff's claims since the said evidence was unchallenged and uncontradicted. It has become necessary for me to say this in view of the conclusion of the court below
B in its judgment at page 22 where it said:

"The failure of the learned trial Judge to assess and evaluate the evidence tendered or proffered before him was fatal to his determination because the respondent failed to prove his claim satisfactorily on credible evidence the respondent failed to make a clean breast of the matter he put forward for adjudication. The appeal succeeds and is allowed by me. The decision of the trial court including order to costs is set aside and the claim is consequently dismissed." (Underlining mine)
C

It is a contradiction in terms to say that the appeal was being allowed
D because the learned trial Judge failed to assess and evaluate the evidence while at the same time reaching the conclusion that the plaintiff's claim be dismissed. The court below could only have reached the conclusion to dismiss the plaintiff's case if it was of the view that the evidence called by
E the plaintiff, unchallenged as it was, was still not good enough to enable the plaintiff get the judgment in its favour. (p. 1238 C & 1239 B)

Where matters are not pleaded

4. None of the parties pleaded an antecedent sale of the 50 KVA generator to Sunday Jegede. To hold the plaintiff to an explanation as to whether it or Sunday Jegede bought the generator first from the defendant when the defendant did not plead a sale of the generator to Jegede, was to decide the case of the parties on matters not pleaded by them. In *Orizu v. Anyaegbunam*
G (1978) 5 S.C. 21 at p. 36, this court, per Idigbe, JSC., said:

*"In our view, it is patent that the learned trial Judge took the case completely out of the realm contemplated by the pleadings in these proceedings and, decided it in points not raised in the said pleading. At
H no time, not even during the address by learned counsel in the lower court did the plaintiff base his case on 'customary title.' This court has stated times without number that it is not within the province and competence of a judge to evolve case for the parties. In this case, it is not possible to say*

that the conclusions of the learned trial Judge would have been the same had he not departed from the case placed before him and considered the issues that were not matters of contest between the parties.” (p. 1240 A)

Averments - Do not amount to evidence

B

5. In reacting to the reasoning of the court below and respondent’s counsel, it is important to bear in mind that the evidence called by the plaintiff/appellant was unchallenged. Although the defendant/respondent pleaded that he had no contract with the plaintiff/appellant, that averment at the end of the trial was not made out, as the defendant/respondent did not call any evidence in support of it. Averments in a pleading do not amount to evidence, which a court could rely upon. (p. 1242 F)

C

Bailment - Possession

D

6. Given this state of affairs, could it be said that there was no contract of bailment between the parties as would ground an action in detinue? I think not. When the plaintiff/appellant had paid for the goods and taken delivery of part of them, ownership and possession of the goods in respect of those the plaintiff/appellant took delivery passed to the plaintiff/appellant. In respect of the 50 KVA generator, ownership similarly passed to the plaintiff/appellant. What remained with the defendant/respondent thereafter was a bare possession. That possession was to come to an end when the defendant/respondent procured an alternative generator. Clearly, therefore there was a constructive bailment contract between the parties.

F

The evidence in this case falls in into the third class above, that is, commodatum. The plaintiff/appellant without a reward allowed the defendant/respondent to keep the 50 KVA generator which it had purchased from the defendant/respondent for a period of time till it procured an alternative. Although the bailment occurred almost contemporaneously with a sale, it is nonetheless a bailment. I think the court below fell into error by not closely scrutinising the evidence available. (p. 1244 C)

G

H

Detinue - Claimant is to establish his title

7. "As regards the second question concerning the right to sue for detinue,

it is settled law that a plaintiff in such an action must first establish that he is the owner of the thing the recovery of which he is seeking. A claim for detinue can succeed only if the plaintiff has established ownership in the six cranes, the subject-matter of the alleged contract."

- B I have no doubt that the reasoning that a plaintiff claiming in detinue must establish his title to the chattel claimed or right to immediate possession is correct. I am satisfied however that on the facts of this case the plaintiff/appellant duly established his right to the ownership of the 50 KVA generator. It cannot also be forgotten that the same set of facts may
C give rise to or sustain a claim in detinue and an action for breach of a contract. (p. 1246 A)

REPRESENTATIONS

- D Kayode Olatunji Esq., (with him Charles Asogwa Esq.), for the Appellant.
V. I. Udo Esq., for the Respondent.

CASES REFERRED TO

- E Sodimu v. Nigeria Ports Authority (1975) 4 S.C. (Reprint) 11; (1975) 4 S.C. 15
General and Finance Facilities Ltd. v. Cooks (Romford) Ltd. (1963) 2 All ER 314, 317
F Alhaji Garba G. Haruna v. J. D. Salau (1998) 7 NWLR (Pt. 559) 659, 1 Adejumo v. Ayantegbe (1989) 6. S.C. (Pt. I) 76; (1989) 8 NWLR (Pt.10) 417
Owoniyyin v. Omotosho (1961) 1 All NLR 304.
Nigeria v. Simon Ossezuah & Anor. (1997) 2 NWLR (Pt.489) 28 at 42;
G J. E. Oshevire Ltd. v. Tripoli Motors (1997) 5 NWLR (Pt. 503) 1 at 5
Paul Ordia v. Piedmont (Nigeria) Ltd. (199)

STATUTES REFERRED TO

- H Court of Appeal Act Cap. 75 Laws of the Federation of Nigeria 1990, s.16

LEAD JUDGMENT BY OGUNTADE JSC

The appellant was the plaintiff at the Kano High Court where it

claimed against the respondent, as the defendant, for the following reliefs:

“(a) An immediate delivery of the one Doz. 50 KVA generator which is the most important item purchased by the plaintiff from the defendant.

(b) Receipt of payment to the defendant by the plaintiff, the sum of B N556,500.00 plus the documents of purchase of the two (2) generators and other goods purchased by the plaintiff from the defendant.

(c) The sum of N8,000.00 per day as rent due and payable to the plaintiff by the defendant from 9th September, 1994 to the date of delivery of the generator to the plaintiff or judgment in this suit.”

The plaintiff filed an amended Statement of Claim dated 4th November, 1996. The defendant had filed a Statement of Defence dated 28th November, 1994. The case was heard by Ubaonu, J. At the hearing, the plaintiff called four witnesses in support of its case. The defendant, although granted several adjournments to enable it put across its defence did not call any evidence. On 3/12/97, the trial Judge granted the claims of the plaintiff in his judgment. The defendant was dissatisfied with the judgment of the trial court. It brought an appeal against it before the Court of Appeal, Kaduna Division (hereinafter referred to as ‘the court below’). On 15th December, 1999, the court below in its unanimous judgment allowed the defendant’s appeal. The judgment of the trial court was set aside and plaintiff’s claims dismissed. The plaintiff was dissatisfied with the judgment of the court below. It has brought this appeal against it before this court. In the appellant’s brief filed for the plaintiff, the issues for determination in this appeal were identified as the following:

“1. Whether or not the lower court was right in setting aside the judgment of the court of first instance in favour of the appellant in an uncontested action when the appellant had proved its entitlement to judgment by credible evidence.

2. Whether the Court of Appeal was right in re-evaluation (sic) the appellant’s evidence which was neither contradicted nor controverted at the trial and in ascribing probative values to the averments in the Statement of Defence not proved by any evidence.”

The respondent formulated three issues for determination, namely:

“3.1 Whether the Court of Appeal was right to hold that the appellant had failed to establish a claim in detainue.

3.2 Whether the Court of Appeal was right to hold that the trial court erred in failing to evaluate evidence of the appellant before reaching its decision.

3.3 Whether the Court of Appeal was correct to interfere with the findings of the trial court by re-evaluating the evidence.”

A comparison of the sets of issues for determination formulated by the parties shows that in substance the two sets of issues are the same. In other words, respondent’s three issues are amply covered by the appellant’s two issues. I intend to take the appellant’s two issues together.

Now, in its amended Statement of Claim, the plaintiff pleaded that on 9th September, 1994, it purchased from the defendant for N556.500 (Five Hundred and Fifty Six Thousand Naira) the following:

“(a) 3 Nos. 40 inches storage containers.

(b) 7 Nos. 20 inches storage containers.

(c) 1 No. 50 KVA Doz generator plant in good working condition.

(d) 1 No. 64 KVA Ford generator plant which is not working.

(e) 2 Nos. Fiat container.....”

It was pleaded that a sum of N256.500.00 was paid in cash to defendant in its office in the presence of witnesses and the balance of N300.000.00 was on the direction of the defendant paid into the defendant’s bunk account No. 274732 at the Credit Lyonnais Nigeria Ltd., 8, Lagos Street Kano. Before the purchase, plaintiffs managing director was introduced to one Alhaji Ali Kura, who represented himself as an employee of the defendant. The defendant delivered the goods purchased to the plaintiff except the 50 KVA Doz generator, which the defendant promised to deliver later Plaintiff’s solicitor sent a letter dated 27/10/94 to the defendant. On 11th September, 1995, plaintiff’s Managing Director was invited to Sharada Phase 11 Police Station to inspect one 50 KVA Doz generator with a view to confirming if it was the generator sold to the plaintiff. The plaintiff confirmed it. The defendant later took the generator away from the Police Station and has since not delivered it to the plaintiff. The plaintiff therefore sued claiming as stated earlier in this judgment.

The defendant in its Statement of Defence denied selling any goods to the plaintiff or having any contract with it. The defendant also denied that the plaintiff paid any money into its account. The defendant pleaded that it sold goods to Alhaji Kura Enterprises for N486, 500.00 and duly issued to the firm the material waybill/transfer of ownership. It denied also that Alhaji Kura Enterprises or Alhaji Ali Kura was its employee. The goods that the defendant agreed it sold to Alhaji Kura Enterprises were:

- “(a) 3 Nos. 40 containers.
- (b) 7 Nos. 20 containers.
- (c) 2 Nos. 50 KVA Doz Generator.
- (d) 2 Nos. Fiat containers at.....”

At the trial, the 1st P.W. was the Managing Director of plaintiff company. He testified in conformity with the averments in the Amended Statement of Claim. Some documents were also tendered. Three other witnesses testified in support of the case for the plaintiff. The trial Judge in his judgment set out the pleadings of the parties and proceeded to reproduce the substance of the evidence given by the plaintiff’s witnesses. At the conclusion of this exercise, the trial Judge said at page 48 of the record of proceedings:

“Since the defendant did not proffer any evidence to rebut the evidence adduced by the plaintiff, the court has to accept the evidence of the plaintiff as uncontroverted.”

Without more than I have reproduced above the trial Judge proceeded to make his final orders wherein he granted all the claims of the plaintiff. The court below in reacting to the very unsatisfactory manner in which the trial court gave judgment in favour of the plaintiff said:

“I agree with the submission of the learned counsel for appellant that even where the evidence is one way in that the other party did not lead evidence in proof of averments in its Statement of Defence the court is not relieved of its bounding duty to consider and evaluate the body of evidence adduced by the plaintiff before ascribing probative value to the pieces of evidence tendered. The trial court must ascertain that the evidence before it is credible, admissible and goes into (sic) issue before giving judgment to the plaintiff. It is not sufficient, even where the evidence is only one way,

as in this case, to give judgment to the plaintiff by merely summarizing the evidence adduced. The learned trial Judge is required to ascribe probative value to the witnesses, review and evaluate the evidence tendered before him. It is only after this exercise that the plaintiff will be entitled to judgment: Okebor v. Police Council (1998) 9 NWLR (Pt. 566) 534, 544-5; Haruna v. Salau (1998) 7 NWLR (Pt. 559) 653, 659 and Nwabuoku v. Ottih (1961) All NLR 487; Balogun v. United Bank of West Africa (1992) 6 NWLR (Pt.247) 336, 354."

I think that the court below was right in the views it expressed in the passage reproduced above. **Even if, as was the case here, the evidence in a case went in one direction in that it was unchallenged, the trial Judge is still expected to examine whether or not the unchallenged evidence was sufficient to establish the claims made by the party in whose favour the unchallenged evidence was given.**

The plaintiff's case was an action in detinue. A claim in detinue, in order to succeed, must meet certain technical requirements of law. It is therefore necessary and important for the Judge to satisfy himself that the evidence called satisfied the requirements of law. It is certainly not in consonance with the law to say that in every case in which the evidence called in support of the plaintiff's case is unchallenged, judgment must be given in favour of the plaintiff. On the contrary, it is possible and there are several known examples that evidence called in support of plaintiff's case even if unchallenged may still be insufficient to sustain plaintiff's claims. In Alhaji Garba G. Haruna v. J. D. Salau (1998) 7 NWLR (Pt. 559) 659,1 said concerning unchallenged evidence:

"The argument that because the plaintiff's evidence was unchallenged, judgment should be given in his favour is patently unsound. It is trite that in an action, the evidence of a plaintiff may be so weak and so discredited under cross-examination that it is unnecessary for the defendant to testify. It is also trite that the evidence given by the plaintiff even if unchallenged, may still be insufficient to sustain the claim made by the plaintiff. In the case at hand, no reasonable court or tribunal could have given judgment in favour of the plaintiff when the plaintiff had by his own

mouth given evidence that he agreed to sell his property to the defendant that he had been paid the agreed purchase price.”

The court below in setting aside the judgment of the trial court said at pages 20 to 22:

“The learned trial Judge failed to resolve which of the sales, to B
Jegede and the respondent, is first in time. It is only after the respondent
has established that his buying the generator in dispute is prior in time that
property can vest in him. The respondent did not produce evidence of the
time the equipment was sold to Jegede and the trial court could not have
determined the issue. It is equally incumbent on the trial court to decide C
whether payment meant for M. F. Kent West Africa Limited is good
payment if it is paid to one M. F. Kent. He also did not consider the effect
of the respondent not producing a single document showing that there is
a transaction between it and the appellant. As I observed earlier in this D
judgment, the only document produced by the respondent tending to show
a relationship between it and the appellant was Exhibit 1, the teller which
is not in the name of the appellant but one M. F. Kent. It is elementary that
payment to M. F. Kent cannot be equated, under any known principle of E
law, to a payment to M. F. Kent West Africa Limited without more:
Solomon v. Solomon & Co. (1897) AC 22. The respondent would be
required to proffer explanation for the manner he effected the payment
because merely producing the teller in evidence is not, to my mind, F
sufficient. The effect is that the respondent did not offer consideration for
the Doutz 50 KVA Generator it is laying claim to. He equally failed to
resolve the identity of the party who actually sold the generator in dispute
to the respondent. Is it Ali Kura Enterprises or M. F. Kent West Africa G
Limited? The Managing Director of respondent’s first meeting Alhaji Ali
Kura on his arrival at the premises of the appellant is not fortuitous.

Finally, an essential element of an action lying in detinue is bailment. H
The respondent is required to show through credible evidence that the
Doutz generating set belongs to it and entrusted it to the appellant. The
respondent has merely shown that it bought the generating plant from the
appellant which refused to deliver the equipment to it. It is not sufficient
for the appellant to claim that he had bought and there had been breach of

contract, in this case, a default on the part of the defendant, the seller, to perfect the sale by delivery up the chattel to the purchaser. The respondent has not established its right to the property which it could have entrusted to the appellant. Thus, in absence of bailment an action in detinue does not lie. See *Sodimu v. Nigeria Ports Authority* (1975) 4 S.C. 15, (1975) 4 S.C. (Reprint) 11 and *General and Finance Facilities Ltd. v. Cooks (Fomford) Ltd.* (1963) 2 All ER. 314. The action of the respondent should have either been brought for specific performance of the contract of sale or recession of the contract and damages.”

Was the court below right in its views above that the plaintiff was not entitled to the judgment in its favour? Before answering this question, let me say that the court below was right in considering the merits of the plaintiff’s case in the light of the evidence called in its support. **I do not think that the court below would have been right to set aside the judgment of the trial court solely on the ground that the trial court had not, as it should do, properly evaluated the evidence. I say this because it is now trite law that when evidence is unchallenged and uncontroverted, the same may be accepted by the trial court for the purpose the evidence is offered provided the evidence itself is in its nature credible:** See *Adejumo v. Ayantegbe* (1989) 6. S.C. (Pt. I) 76; (1989) 8 NWLR (Pt.10) 417 and *Owoniyin v. Omotosho* (1961) 1 All NLR 304.

Section 16 of the Court of Appeal Act, Cap. 75 Laws of the Federation of Nigeria, 1990 provides:

“16. The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may

re-hear the case in whole or in part or may remit it to the court below for directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."

Notwithstanding that the trial court had failed or neglected to evaluate the evidence of plaintiff's witness before giving judgment in favour of the plaintiff, the court below, under the above Section 16, had the power and the duty to determine whether or not the evidence called by the plaintiff was sufficient to sustain or grant plaintiff's claims since the said evidence was unchallenged and uncontradicted. It has become necessary for me to say this in view of the conclusion of the court below in its judgment at page 22 where it said:

"The failure of the learned trial Judge to assess and evaluate the evidence tendered or proffered before him was fatal to his determination because the respondent failed to prove his claim satisfactorily on credible evidence the respondent failed to make a clean breast of the matter he put forward for adjudication. The appeal succeeds and is allowed by me. The decision of the trial court including order to costs is set aside and the claim is consequently dismissed." (Underlining mine)

It is a contradiction in terms to say that the appeal was being allowed because the learned trial Judge failed to assess and evaluate the evidence while at the same time reaching the conclusion that the plaintiff's claim be dismissed. The court below could only have reached the conclusion to dismiss the plaintiff's case if it was of the view that the evidence called by the plaintiff, unchallenged as it was, was still not good enough to enable the plaintiff get the judgment in its favour.

The court below in its judgment stated some reasons why it thought that plaintiff's case should have failed before the trial court. The first of these reasons is that the learned trial Judge did not determine which of the sales, to Sunday Jegede and the plaintiff, was first in time. It must be said here that a civil case commenced in the High Court is fought only on the pleadings of parties. The plaintiff's case on the pleading was that he bought

the generator from the defendant and paid for it. The defendant on the other hand pleaded that it had no transaction of any kind with the plaintiff. **None of the parties pleaded an antecedent sale of the 50 KVA generator to Sunday Jegede. To hold the plaintiff to an explanation as to whether it or Sunday Jegede bought the generator first from the defendant when the defendant did not plead a sale of the generator to Jegede, was to decide the case of the parties on matters not pleaded by them. In Orizu v. Anyaegbunam (1978) 5 S.C. 21 at p. 36, this court, per Idigbe, JSC., said:**

“In our view, it is patent that the learned trial Judge took the case completely out of the realm contemplated by the pleadings in these proceedings and, decided it in points not raised in the said pleading. At no time, not even during the address by learned counsel in the lower court did the plaintiff base his case on ‘customary title.’ This court has stated times without number that it is not within the province and competence of a judge to evolve case for the parties. In this case, it is not possible to say that the conclusions of the learned trial Judge would have been the same had he not departed from the case placed before him and considered the issues that were not matters of contest between the parties.”

The name of Sunday Jegede only crept into the proceedings when P.W.3, a Police Inspector, testified for the plaintiff. P.W.3 was trying to explain the circumstances in which the 50 KVA generator brought to Sharada Police Station was released to Sunday Jegede P.W.3 said at page 33:

“I went to Enugu Road Sabon Gari Kano, saw the generator and one Sunday Jegede who was claiming ownership of the generator. I took Sunday Jegede and the generator to the Police Station, Sharada. At the police station both parties identified the generator as the actual one in dispute. The DPO cautioned Sunday Jegede about how he got the generator. Sunday produced documents to the DPO which showed that Sunday Jegede bought the generator from one Ali Kura who was working at M. F. Kent as stated by the document. The DPO permitted both parties to settle. The parties are the plaintiff and the defendant in this case. They

continued fixing date for settlement but this was not possible. The DPO then decided to release the generator to Sunday Jegede, I can identify same. (witness shown Exhibit 6A). Yet this is the photograph of the said generator. The defendant company came to the Police to report that they have seen the generator somewhere. Mr. Martin Nwaokoli made a statement to the Police. Eze Nnadi that is all for him.” B

The court below should have disregarded the above testimony of P.W.3. as it went to no issue raised on parties’ pleadings. Whether or not the generator was sold to Sunday Jegede before the sale to the plaintiff was irrelevant. The plaintiff’s case was that it bought from the defendant a generator which the defendant failed and or neglected to deliver to him. C

The court below also stated that Exhibit 1, a bank teller tendered by the plaintiff, was in the name of M. F. Kent and not in the name of the defendant “M. F. Kent West Africa Ltd.” It seems to me that the court below had not adverted its mind to the evidence of P.W.1 at page 27 of the record, where he said: D

“I paid N256,500.00 cash to the defendant and the remaining amount of N300,000.00 was paid into the defendant’s bank as I was instructed to do. One Jerry who was the defendant’s manager took me to their Bank-Credit Lyonnais at Lagos Street, Kano, and I paid the N300,000.00 into the defendant’s account with the Bank. I asked the Bank to give me a photocopy of the document hearing the amount I paid into the defendant’s account with the Bank.” F

The plaintiff had pleaded in its Statement of Claim the fact upon which the above piece of evidence was given. The defendant had its counsel in court when the evidence was given. The defendant did not call evidence to show that it had no account at the Credit Lyonnais, Lagos Street, Kano, or that the sum of N300,000.00 was not paid into its account on 9/9/94 as shown in Exhibit 1. No evidence was called by the defendant that payment made in the name of F. M. Kent did not or would not be credited to it. It is therefore, an irrelevant consideration to say that because Exhibit 1, a teller, bears the name M. F. Kent instead of the defendant’s known name, M. F. Kent West Africa Ltd., no payment was made to the defendant. G H

Finally, the court below relying on *Sodimu v. Nigeria Ports Authority* (1975) 4 S.C. (Reprint) 11; (1975) 4 S.C. 15 and *General and Finance Facilities Ltd. v. Cooks (Romford) Ltd.* (1963) 2 All ER 314, 317 reasoned that in the absence of a bailment, an action in detinue could not lie. The court below said that the plaintiff should have brought a claim for specific performance of the contract of sale or rescission of the contract and damages.

In this court, the respondent's counsel, in his brief, has taken the argument further by contending that the appellant did not establish his right to the possession of the 50 KV generator. It was contended that the appellant did not establish that he was the owner of the generator. Counsel relied on *Union Bank of Nigeria v. Simon Ossezuah & Anor.* (1997) 2 NWLR (Pt.489) 28 at 42; *J. E. Oshevire Ltd. v. Tripoli Motors* (1997) 5 NWLR (Pt. 503) 1 at 5; *A. O. Sodimu v. NPA* (1975) 4 S.C. (Reprint) 11; (1975) NSCC 188; *Chief Paul Ordia v. Piedmont (Nigeria) Ltd.* (1995) 2 NWLR (Pt. 379) 516 at 526; *Udechukwu v. Onwuka* (1956) 1 FSC 70 at 71. It was submitted further that as there was controversy over the ownership of the generator, it could not be said that the appellant established that he was the owner of the generator. Counsel relied on *Alhaji M. Shuwa v. Chad Basin Development Authority* (1991) NWLR (Pt. 205) 550.

In reacting to the reasoning of the court below and respondent's counsel, it is important to bear in mind that the evidence called by the plaintiff/appellant was unchallenged. Although the defendant/respondent pleaded that he had no contract with the plaintiff/appellant, that averment at the end of the trial was not made out, as the defendant/respondent did not call any evidence in support of it. Averments in a pleading do not amount to evidence, which a court could rely upon. Now in paragraphs 3, 4, 9 and 11 of its Amended Statement of Claim, the plaintiff/appellant pleaded:

On the 9th September, 1994, the plaintiff purchased from the defendant the following items (goods):

- “(a) 3 Nos. 40 inches storage containers.
- (b) 7 Nos. 20 inches storage containers.

(c) 1 No. 50 KVA Doz Generator plant in good working condition.

(d) 1 No. 64 KVA Ford Generator Plant which is not working.

(e) 2 Nos. Fiat container all (a-e) valued at N556,500.00 (Five Hundred and Fifty-Six Thousand, Five Hundred Naira only).

4. On the same date 9th September, 1994, the plaintiff paid the whole purchase price in the following manner as directed by the defendant's purchasing manager, a Mr. Jerry;

(a) The sum of N256,500 was paid to the defendant in cash in its office in the presence of several witnesses.

(b) The sum of N300,000.00 in cash was paid to the defendant's Bank 'Commercial Bank (Credit Lyonnais Nigeria Ltd.) situate at Audu Lukat House, 8 Lagos Street, Kano, at the request and the direction of the defendant through its said purchasing manager, a Mr. Jerry who led the plaintiff's Managing Director a Mr. Martin Nwaokili to the defendant's said Bank to lodge the N300,000.00 in the name of the defendant and in its account No. 274432.

9. The defendant did not issue receipt of payment of the said sum of N556,500.00 to the plaintiff when requested to do so. The defendant's purchasing manager, Mr. Jerry informed the plaintiff's representative that he will compile the serial numbers of all the goods purchased by the plaintiff before issuing a receipt with the serial numbers written in the receipt and deliver same to the plaintiff.

11. The defendant neglected or refused to deliver the 50 KVA Doz Generator which is in perfect condition to the plaintiff and has been using the Generator since the purchase and payment of the goods.

In his evidence, P.W.1 said at page 29 of the record:

"I then was asked to go and carry the goods. I went and hired a vehicle that would carry the generator when I brought a vehicle to carry the generator, the defendant said that I should carry only one generator that was not in good condition, that before I should have finished carrying the generator that was not good and the containers, they would release the other good. Generator to me. I left the good, generator of 50 KVA Doz engine and carried the containers and the 64 KVA that was not in good condition. I paid N256,500.00 to the defendant in the defendant's office

and the other N300,000.00 was paid to the defendant's bank. When I went to carry the other generator Doz 50 KVA, the defendant refused to release same saying that they had not got another generator to release that one for me."

B The above evidence shows that the contract of sale was fully completed. The plaintiff/appellant fully paid and took delivery of all the goods he bought except the 50 KVA generator, the subject-matter of this dispute. The understanding between the parties as given in evidence was that the 50 KVA generator could be collected last after the plaintiff/
C appellant had taken delivery of the other goods. This was to allow the defendant/respondent procure an alternative generator. Both parties on the evidence agreed on this arrangement. **Given this state of affairs, could it be said that there was no contract of bailment between the parties**
D **as would ground an action in detinue? I think not. When the plaintiff/appellant had paid for the goods and taken delivery of part of them, ownership and possession of the goods in respect of those the plaintiff/appellant took delivery passed to the plaintiff/appel-**
E **lant. In respect of the 50 KVA generator, ownership similarly passed to the plaintiff/appellant. What remained with the defendant/re-**
F **spondent thereafter was a bare possession. That possession was to come to an end when the defendant/respondent procured an alter-**
F **native generator. Clearly, therefore there was a constructive bail-**
F **ment contract between the parties.**

In his book 'Jones on Bailment' (1st edition) Sir Williams Jones classified bailments into five classes namely -

- G 1. Depositum or the deposit of a chattel with the bailee who is simply to keep it for the bailor without reward;
2. Mandatum, where the bailee has, without reward, to do something for the bailor to or with the chattel bailed.
3. Commodatum, where the bailor, without recompense lends a
H chattel to the bailee for him to use;
4. Pignus sometimes called vadium or pawn, where the bailee holds the chattel confided to him as a security, for loan or deed or the fulfilment of an obligation; and

5. Locatio conductio where chattels are levied reward.

The evidence in this case falls in into the third class above, that is, commodatum. The plaintiff/appellant without a reward allowed the defendant/respondent to keep the 50 KVA generator which it had purchased from the defendant/respondent for a period of time till it procured B an alternative. Although the bailment occurred almost contemporaneously with a sale, it is nonetheless a bailment. I think the court below fell into error by not closely scrutinising the evidence available.

In *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* (1963) 2 All ER 314 at 317-318, Diplock, LJ., discussed the C distinctions between conversion and a cause of action in detinue thus:

“There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; D the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue. It is important to keep distinction clear, for confusion sometimes arises from the historical E derivation of the action of conversion from detinue sur bailment and detinue sur trover; of which one result is that the same facts may constitute both detinue and conversion. Demand for delivery up of the chattel was an essential requirement of an action in detinue and detinue lay only when F at the time of the demand for delivery up of the chattel made by the person entitled to possession, the defendant was either in actual possession of it or was estopped from denying that he was still in possession. Thus, if there had been an actual bailment of the chattel by the plaintiff to the defendant G the latter was estopped from asserting that he had wrongfully delivered the chattel to a third person or had negligently lost it before demand for delivery up and the plaintiff could sue in detinue notwithstanding that the defendant was not in actual possession of the chattel at the time of the demand.” H

In *Sodimu v. Nigerian Ports Authority* (1975) 4 S. C. (Reprint) 11; (1975) NSCC 188 at 194, this court per Elias ,CJN., observed:

“As regards the second question concerning the right to sue

for detainee, it is settled law that a plaintiff in such an action must first establish that he is the owner of the thing the recovery of which he is seeking. A claim for detainee can succeed only if the plaintiff has established ownership in the six cranes, the subject-matter of the alleged contract.”

I have no doubt that the reasoning that a plaintiff claiming in detainee must establish his title to the chattel claimed or right to immediate possession is correct. I am satisfied however that on the facts of this case the plaintiff/appellant duly established his right to the ownership of the 50 KVA generator. It cannot also be forgotten that the same set of facts may give rise to or sustain a claim in detainee and an action for breach of a contract.

It is inconceivable that one could accept that the plaintiff became the owner of the other goods it purchased from the defendant/respondent at the same time with the generator and still come to the conclusion that plaintiff did not become owner of the 50 KVA generator when there was unchallenged evidence that the defendant pleaded with the plaintiff/appellant to be allowed to retain the 50 KVA generator for sometime till it procured an alternative generator.

In the final conclusion, this appeal is allowed. The judgment of the court below is set aside and that of the lower court is restored. There will be costs in favour of the plaintiff/appellant for the appearances in court below and this court which I fix at N5,000.00 and N10,000.00 respectively.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother, Oguntade, JSC. I entirely agree with him. The Court of Appeal was in error to dismiss the claim brought in the High Court by the plaintiff/appellant against the defendant/respondent herein.

I too hereby allow the appeal and set aside the decision of the court below with costs as assessed in the leading judgment of my learned brother, Oguntade, JSC.

KATSINA-ALUJSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Oguntade, JSC. I entirely agree with it and there is nothing I can usefully add.

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MUSDAPHERJSC

I have had the opportunity to read in advance the judgment of my Lord, Oguntade, JSC., just delivered with which I entirely agree. I adopt the reasonings as mine and accordingly allow the appeal. I set aside the decision of the Court of Appeal and restore the decision of the trial High Court. I abide by the order for costs contained in the aforesaid lead judgment.

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EDOZIEJSC

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I was privileged to have read in draft the leading judgment of my learned brother, Oguntade, JSC. I am in complete agreement with his reasoning and conclusion in allowing the appeal. The facts of the case have been set out with clarity in the said judgment. Briefly stated, the plaintiff's case was that it bought from the defendant several items of goods including one Doutz 50 KVA generator. For all the items, it paid the sum of N556,500.00 by paying a cash sum of N256,000.00 to the defendant's manager, Mr. Jerry Clune and the balance of N300,000.00 to the defendant's bank account at Commercial Bank, Credit Lyonnaise (Nigeria) Ltd., as requested by the defendant. Thereafter, the plaintiff took delivery and carted away all the items of the goods except the Doutz 50 KVA generator, the most valuable of the items which the defendant retained for its use pending a replacement. The plaintiff made several attempts to take the generator to no avail hence the plaintiff's action.

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At the close of the pleadings, the main issue joined by the parties was whether according to the plaintiff, the defendant, it sold the goods in question to it or as contended by the defendant, nothing to the plaintiff but sold certain items of goods to Ali Kura Enterprises. The defendant led no evidence in support of its pleadings but the plaintiff and its witnesses gave evidence which the trial court found to be credible and unchallenged and

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based on that evidence entered judgment in favour of the plaintiff in terms of its claim.

On appeal by the defendant to the Court of Appeal, that court held that the defendant did not properly evaluate the evidence. It embarked upon highlighting vital evidence that was not properly evaluated and at the end of it, reversed the judgment of the trial court. Part of the reasons given by the Court of Appeal in allowing the appeal was as stated on p. 194 of the record thus:-

“His inability to know who between a blackman and a whiteman refused to release the plant to him tend to support the appellant’s defence to the effect that he had no contractual relation with the respondent but with one Ali Kura Enterprises.”

In that passage, the Court of Appeal was evaluating the evidence of P.W.4, Shafiu Garba, a professional driver who stated that he drove the vehicle crane lorry hired by the plaintiff to carry the generator but that the defendant refused to release the generator and that he did not know the name of the person who refused to release same. In my view, the Court of Appeal, with respect was in error to have used that evidence to support the case of the defendant. It is an elementary principle that averments in the pleadings are no evidence and cannot be so construed. Such averments must be proved by evidence subject of course to admission by the other party: See *Akinfosile v. Ijose* (1960) SCNLR 447; *Akonmu v. Adigun* (1993) 7 NWLR (Pt. 304) 218 at 231; *Insurers Brokers of Nigeria v. Atlantic Textile Manufacturing Co. Ltd.* (1996) 8 NWLR (Pt. 466) 316.

In the instant case, since the defendant led no evidence in support of its defence that it had no contractual relation with the plaintiff but with Ali Kura Enterprises, that defence had been abandoned. Averments that had been abandoned cannot be supported by evidence. Such evidence goes to no issue.

In another passage, the Court of Appeal commented on Exhibit 1 which is a bank teller dated 9/9/94 issued to the plaintiff upon its payment of N300,000.00 to the defendant’s account at the Commercial Bank (Credit Lyonnais Nig.) Ltd. As reflected on Exhibit 1, the amount into which the money was paid was that of M. F. Kent and not M. F. Kent West

Africa Limited. In its comment, the Court of Appeal at p. 202 observed thus:

“It is elementary that payment to M. F. Kent cannot be equated under any known principle of law, to a payment of M. F. Kent West Africa Limited without more: Solomon v. Solomon & Co. (1897) BC22. The respondent would be required to proffer explanation for the manner he effected the payment because merely producing the teller in evidence is not to my mind, sufficient. The effect is that the respondent did not offer consideration for the Doutz 50 K.V.A generator it is laying claim to.” C

With profound respect, the above finding is erroneous. It was not the defendant’s case that the money was not paid into its account. It is a fundamental principle in the determination of disputes between parties that judgment must be confined to the issues raised by the parties in the pleadings. The court is not competent suo motu to make a case for either or both of the parties and then proceed to adjudicate on the issue so raised. See Commissioner for Works, Benue State & Anor. v. Devcon Development Consultant Ltd. & Anor. (1988) 7 S.C (Pt.I) 29; (1988) 3 NWLR (Pt. 83) 407; Nigerian Housing Development Society Ltd. v. Yaya Mumuni (1977) 2 S.C 57. Even if it was the defendant’s case that the money was not paid into its account, it would have been estopped from leading evidence to that effect because it was the Managing Director of the defendant, Mr. Jerry Clune, who took the plaintiff’s Director to the bank and directed him to pay the money into the defendant’s account. The plaintiff having made payment upon that representation, the defendant could not be heard to say that the account into which it advised the plaintiff to pay was not its account. The finding by the Court of Appeal that the plaintiff offered no consideration for the Doutz 50 KVA generator was with respect erroneous. D E F G

In the light of the foregoing and the comprehensive analysis of the issues raised in the appeal in the leading judgment, I am of the view that the appeal is meritorious. I also allow the appeal with costs as contained in the said judgment. H