

**SUPREME COURT OF NIGERIA**

17TH JUNE, 2005. SC. 129/1999

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

PAUL E. EDEM ..... APPELLANT

AND

1. CANON BALLS LTD. .... RESPONDENTS

2. FELIX OKON NSEMO

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APPEALS - Issues - Relevance of - Where issues raised are not relevant to questions in dispute - Such issues will be rejected (H1)

AGENCY - Agency relationship - Exists where a person called agent - Has the right to act - On behalf of another called principal (H2)

**FACTS**

Before the High Court of Cross-River State at Calabar, the plaintiffs/respondents filed this suit against the defendant/appellant for a sum of US \$14,000.00 being the amount given by the plaintiffs to the defendant for a purchase of one M.A.N. Diesel tractor . The defendant as alleged, neither supplied the tractor nor refunded the plaintiffs' US \$14,000.00. The action was, on the application of the plaintiffs, entered on the undefended list. The defendant filed a notice of intention to defend the suit and an affidavit setting forth his defence to the plaintiffs suit. The learned trial Judge, in a considered ruling on the defendant's application, held that the defendant had no good defence to the action. Judgment was therefore entered for the plaintiffs in the sum of US \$14,000 or N1,120,000 being money had and received by the defendant from the plaintiffs.

The defendant, dissatisfied with judgment brought an appeal before the Court of Appeal where the appeal was allowed partially. The defendant has further appealed to the Supreme Court. The defendant's/appellant's contention was that since he actually bought and paid for the tractor but it was delivered late by the sellers who failed to ship same on

time, and since the plaintiffs sent a fax to the sellers requesting that the tractor be shipped directly to them the appellant should no longer be liable.

**ISSUES FOR DETERMINATION**

*1. Whether the Court of Appeal was light in failing to consider appellant's issues "Nos. 2, 3 and 4.*

*2. Whether the intervention and directives of the plaintiffs/respondents to WASCO International to ship the tractor to the plaintiffs/respondents at Port Harcourt did not discharge the defendant/appellant from further responsibility to deliver."*

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

***Issues - Relevance of***

1. The law is settled that a court should confine itself to the issues raised by the parties in the case before it. Thus, apart from the questions raised in the brief of the parties that are relevant to and arise from the issues raised in the case, all other secondary issues are irrelevant and should rightly be ignored because they invariably obscure the main or real issues requiring determination. See *Din v. African Newspaper of Nigeria Ltd.* (1990) 3 NWLR (Pt. 139) 392. In the instant case, I have no doubt that the three issues not considered by the court below are totally irrelevant to the questions in dispute in the appeal before the court. They were therefore rightly rejected. Similarly, the court below was right when it formulated the two new issues with which it resolved the questions raised in the appeal. There is therefore no merit in the appeal as it relates to the appellant's issue 1. (p. 1763G)

***Agency relationship***

2. The contention of the appellant, as canvassed in Issue 2, is that the intervention of the respondents when they made direct contact with the company from whom the appellant claimed he bought the tractor, was sufficient to discharge him from further responsibility to deliver the tractor to the respondents. It is submitted that the respondents' act had reduced the appellant's relationship with the respondents to that of principal and

that of a disclosed agent. I have no doubt in dismissing this submission as totally inapplicable to the instant case. This is because an agency relationship exists only where a person called the agent has the authority to act on behalf of another called principal. But the facts of the instant case do not support that contention. This is because the facts in this case are that the respondents merely wrote to the company in Belgium, from whom the appellant claimed he bought the tractor, asking for information about the purchase made by the appellant and to which there was no reply. That act is definitely not enough to reduce the relationship existing between the parties to that of principal and agent. There is therefore no merit in the appeal as it relates to the second issue. ((p.1764B)

## **NOTABLE POINTS OF INTEREST**

### **OGUNTADEJSC**

#### *1. When court of appeal should consider all issues raised*

When the above grounds of appeal are compared with issues 2 to 4 raised by the appellant before the court below, it is manifest that those issues without any doubt whatsoever, flowed or arose from the grounds of appeal raised by the defendant/appellant. The court below is in its judgment on 6/5/78 did not offer any explanation as to why it declined to consider the appellant's issues 2 to 4. Whatever reasons there might have been were not shown on the face of the record. Why then did the court below substitute the two new issues formulated by it for the five, which the defendant had raised in their brief? An intermediate court as the court below, does not have the liberty to decline a consideration of issues raised before it, unless it proposes to order a retrial and it is felt that a consideration of the issues raised may prejudice a fresh hearing before the trial court. This is because a further appeal against the judgment of the Court of Appeal may unsettle the decision of the court on the issues considered. (p. 1772F)

#### *2. Reframing of issues by appellate court-Guideline*

Notwithstanding the fact that there is power in the Court of Appeal to

reframe issues for determination in an appeal before it, it is to be stressed that such power falls to be exercised only in very limited circumstances, which include the following:

(1) Where the grounds of appeal raised are repetitive with the result  
B that issues formulated from them also are repetitive.

(2) Where the issues formulated do not flow from the grounds of appeal raised.

(3) Where the issues are poorly drafted in an appeal where the  
C grounds of appeal are explicit.

(4) Where issues framed have been unnecessarily fragmented with the result that multiple issues are framed by parties

In all the above situations, which are not exhaustive, the invariable  
D rule is that the issues reframed must flow from or reflect the matters agitated or raised in the grounds of appeal. The power to reframe issues for determination in an appeal is not to be exercised capriciously or too readily or whimsically. Upon the conclusion of the reframing exercise by the Court of Appeal, it must be patent that the resultant issues flow only  
E from the grounds of appeal raised by the appellant. If the Court of Appeal were to assume the duty to reframe issues for determination for parties without heeding these basic guidelines, it may find itself deciding appeals outside the dispute properly deserving of resolution as between the parties;  
F or more pointedly adjudicating on matters not contemplated by parties. An appeal is brought by an appellant. He brings it with a view to correcting identified errors in the judgment of the court. A court assuming the role of reframing issues without adhering to the necessary constraints may in fact unwittingly destroy the fundamental basis of the appellate system and  
G render irrelevant the right of fair hearing in an appeal as guaranteed for parties to a dispute under our Constitution (p. 1774F)

### 3. *Contract -Where time for performance is not stated*

H There is no deposition from the plaintiffs as to the time agreed for the delivery of the tractor. The law however, is that if the contract agreement is silent as to the time of performance of a contractual obligation, the court will read into the contract a term that the performance is to be given within

a reasonable time. It is my view that the failure of the defendant to deliver the tractor within ten months between 10/12/93 to 20/10/94 was sufficient evidence of the defendant's unwillingness or inability to perform the contractual duty. I decide issue 2 against the defendant/appellant.

(p. 1777D)

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### **REPRESENTATION**

Mr. Nella Andem-Ewa, (with him, L. O. Garrick), for the Appellant.  
Respondent absent and unrepresented.

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### **CASES REFERRED TO**

UBA Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254

Bamgboye v. University of Ilorin (1991) 8 NWLR (Pt.168) 415

Ogbuanyinya v. Okudo (No.2) (1990) 4 NWLR (Pt. 146) 551

Atanda v. Ajani (1989) 6 S.C. (Pt. II) 87; (1989) 3 NWLR (Pt. III) 511  
at 539

Ebamawo v. Fadiyo (1973) 1 All NLR 134

Okoji v. Njokanma (1991) 7 NWLR (Pt.202) 131

Hick v. Raymond (1893) AC 22

Hulthen v. Stewart & Co. (1903) AC. 89

Monkland v. Jack Barclay Ltd. (1951) 2 KB 252

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### **LEAD JUDGMENT BY AKINTAN JSC**

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The respondents, as plaintiffs, commenced this action against the appellant, as defendant, at Calabar High Court in Cross River State. Their claim, filed as Suit No.C/446/94, was “*for a return, refund, restitution or repayment of the liquidated sum of US\$14,000 or N1,120,000 being money had and received by the defendant from the plaintiffs in furtherance of a business transaction for supply of one M.A.N. Diesel Tractor since December. 1993, upon which transaction the defendant has since failed to perform.*” The plaintiffs also claimed “*12% interest upon the dollar per annum, or 15% interest upon the naira, per annum, either from the time of receipt by the defendant, until judgment.*”

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The action was, on the application of the plaintiffs, entered on the

undefended list. The defendant, however, upon service, filed a notice of intention to defend the action. He deposed to an affidavit in which he set out his defence to the claim. The matter thereafter came up for hearing before Onnoghen, J., as he then was. The learned trial Judge, in a  
 B considered ruling on the defendant's application, held that the defendant had no good defence to the action. Judgment was therefore entered for the plaintiffs in the sum of US\$14,000 or N1,120,000 being money had received by the defendant from the plaintiffs. The court also awarded 12%  
 C interest on the Dollar or 15% interest on interest in Naira from December, 1991, till date of judgment.

The defendant was not satisfied with the judgment and his appeal to the court below which was dismissed on the substantive claim but allowed in respect of the interest awards made by the trial court. He has  
 D now appealed to this court. Seven grounds of appeal were filed against the judgment.

The appellant filed an appellant's brief and a reply brief in this court. The respondent filed a respondents' brief. The appellant formulated the  
 E following two issues as arising for determination in the appeal:

*"1. Whether the Court of Appeal was light in failing to consider appellant's issues "Nos. 2, 3 and 4.*

*2. Whether the intervention and directives of the plaintiffs/*  
 F *respondents to WASCO International to ship the tractor to the plaintiffs/*  
*respondents at Port Harcourt did not discharge the defendant/appellant*  
*from further responsibility to deliver."*

The above two issues formulated in the appellants' brief were adopted by the respondent.

G On the appellant's Issue L, it is submitted that the appellant formulated five issues for determination in the brief he filed at the court below. The court is said to have, instead of considering the five issues, went on its own to formulate two issues and decided the appeal on the two  
 H issues formulated by the court. It is submitted that it was wrong of the court to raise new matters for the parties. The Court of Appeal is said to have improperly determined the appeal as a result of its failure to follow the issues formulated by the appellants.

Reference is made to the aspect of the appellant's defence which was that he actually bought and paid for the tractor but that it was the delay on the part of the sellers to ship the vehicle on time that made the respondents commence their action. It is further argued that since the respondents were aware of the fact that the appellant in fact bought the tractor because they (respondents) sent a fax message to the company requesting that the tractor be shipped to them directly, the appellant should no longer be liable. The court below was said to have failed to consider these facts before coming to the decision it reached in the case. If the court had duly considered this aspect, it would have come to the conclusion that the trial court was in error when it held that the appellant had no good defence to warrant transferring the case from the undefended list. This failure is said to have led to a miscarriage of justice. C

It is submitted in reply in the respondents' brief that while it is true that a court should confine itself to the issues raised by the parties, it is also the law that in appropriate cases, an appellate court is free to formulate such issues as are consistent with the grounds of appeal filed in pursuit of the proper administration of justice. It is also argued that if an appellate court is of the view that a consideration of one issue is enough to dispose of an appeal, it is under no obligation to consider all the other issues posed. The decision in *Anyaduba v. Nigeria Renowned Trading Co. Ltd.* (1992) 5 NWLR (Pt.243) 535 is cited in support of this submission. D E F

It is also submitted that failure of an appellate court to consider and pronounce on all issues submitted to a court will not necessarily amount to a denial of fair hearing. It has to be shown that such failure was a fundamental vice which occasioned a miscarriage of justice. It is further argued that, in the instant case, the appellant's complaint has no basis because the step taken by Salami, JCA., in the leading judgment was quite appropriate. Reference is made to the relevant passage of the leading judgment where the learned justice said, *inter alia*, G

"The learned counsel for the appellant failed to relate the grounds of appeal to the issues formulated by him in the appellant's brief." H

It is contended that, having made the above observation, the learned Justice went ahead to formulate the two issues which he considered

appropriate in resolving the questions raised in the appeal and that he then said thus:

“These two issues essentially embrace appellant’s issues (1) and (5) and the respondent’s issues 1, 2 and 6. All the other issues do not belong to this appeal.”

It is then submitted that it was not correct to say that the appellant’s said issues were not considered. The issues are said to have been considered and rightly discountenanced as they did not form part of the appeal before the court.

It is further submitted that for an issue formulated to be relevant in an appeal, it must relate to the grounds of appeal and must also arise from the judgment appealed against. Where, therefore, a ground of appeal complains of an issue which was not canvassed by the parties and contained in the judgment appealed against, such a ground will be incompetent. *Salami v. Mohammed* (2000) 6 S.C. (Pt. II) 37; (2000) 9 NWLR (Pt.673) 469 and *Biocon Agrochemical (Nig.) Ltd. v. Kudu Holdings (Pty) Ltd.* (2000) 12 S.C. (Pt. I) 139; (2000) 15 NWLR (Pt.691) are cited in support of the above submission. As the decision of the trial court in the instant case was based on the evidence contained in the affidavits filed by the parties in the undefended matter, the three issues not considered by the court below are said to be based on facts not contained in the affidavits placed before the court. The court is therefore said to have rightly ignored the three issues.

As I have already mentioned above, the decision of the trial court was incorporated in the ruling of the court on the application of the appellant to have the case transferred from the undefended list. The learned trial Judge considered the evidence as deposed to by the plaintiffs/respondents in the affidavit filed in support of their application and those contained in the affidavit filed by the defendant/appellant. The facts relied on by the plaintiffs/respondents are set out in paragraphs 4 to 12 of their affidavit in support of their application for a Writ of Summons under the undefended list. They are as follows:

*“4. That sometime in 1993 about the 10th December thereof, the defendant received the sum of \$14,000 from the plaintiffs and issued a*



*receipt in acknowledgment thereof, which copy is attached here and marked Exhibit 'A'.*

*5. That the defendant caused the plaintiffs to give him the aforesaid amount by way of payment for supply of one M.A.N. Savien Tractor required by the plaintiffs for business.*

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*6. That despite instant receipt of the full amount by the defendant from the plaintiffs as agreed, the defendant either failed neglected, refused or otherwise defaulted in the supply of this item to the plaintiffs, and for which he received full payment in advance.*

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*7. That on added pressure on the defendant by the plaintiffs soon after the contract, the defendant actually showed the plaintiffs a letter from his supplier in Belgium which showed that as far as January, 1994, the tractor was supposed to be leaving Belgium. A copy of that letter is attached here as Exhibit 'B'.*

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*8. That after the defendant gave the plaintiffs the supposed proof of prospective receipt, the plaintiffs still had to wait until July, 1994, without any further reaction or delivery from the defendant.*

*9. That on 12th July, 1994, the plaintiff decided to write the supposed suppliers in Belgium to make enquiry and to urge the soonest delivery of their requisition. A copy of the letter from the plaintiffs in that regard is attached here and marked Exhibit 'C'.*

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*10. That till date of instituting these presents, there has been no reply or reaction to this letter.*

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*11. That not long after issuing this letter, the plaintiffs again met the defendant and asked for refund of the \$14,000 (Fourteen Thousand Dollars) being that the defendant was unable to supply the equipment as promised and contracted.*

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*12. That since then, until now, the defendant has again failed to effect refund of the money whilst still persisting in the failure to supply the item for which the money was paid."*

The facts relied on by the defendant/appellant are, on the other hand, as set out in paragraphs 5-10 and 12 of his affidavit in support of notice of intention to defend the action. The paragraphs read as follows:

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*"5. That sometime in 1991 the 2nd plaintiff approached me as the*

*first offer on board National Shipping Line Boat and pleaded with me to buy him M.A.N Diesel Tractor for his Gas Company at Ikot Omin, Calabar.*

B 6. *That as a result of his plea and to further cement our relationship, I went with him to Bureau de Exchange where he exchanged N35.00 for a Dollar and gave me \$14,000 (Fourteen Thousand Dollars) with specific instructions to purchase the said M.A.N. Diesel Tractor with accessories.*

C 7. *That in keeping with his instructions on arriving Belgium I bought the said M.A.N. Diesel Tractor from the firm of WASCO INTERNATIONAL ANTWERPEN-BELGIUM. The photocopy of the receipt from the said company dated 10th November, 1993, is attached herewith and marked Exhibit '1'.*

D 8. *That I also bought AXEE JACK, 2 tyres, wheel Spanner and 8 commercial batteries for the sum of \$2,000.00. The photocopy of the receipt attached and marked Exhibit '2'.*

9. *That I spent the balance of \$3,000.00 local transport and travelling in Belgium.*

E 10. *That on the 1st January, 1994, I received a fax message from the company WASCO International Belgium informing me that the truck will put on the next boat going to Port Harcourt. The copy of the fax message is attached and marked Exhibit '3'.*

F 12. *That before this date I had on 20th day of September, 1993, sent a fax message to WASCO International, Belgium threatening police action if it failed to ship the Tractor. Photocopy of the fax Message and marked Exhibit '4'."*

G The plaintiffs'/respondents' case as set out in their affidavit in support briefly is that they paid the defendant/appellant the sum of US\$14,000 for the purchase from abroad and delivery to the said plaintiffs/ H respondents in Nigeria a M.A.N. tractor and that the defendant/appellant failed to deliver the said tractor or refund the money paid to him despite repeated demands. The defence of the defendant/appellant, as set out in his affidavit, is that he bought the vehicle but it was yet to be delivered to him by the person from whom he bought the vehicle.

The three issues formulated in the appellant's brief in the brief filed

at the Court of Appeal which was not considered by that court are as follows:

*“2. Having established that the defendant actually bought the tractor in Belgium with the money supplied by the plaintiff, whether the failure to deliver the same to the plaintiff at the commencement of the action constituted a breach on the part of the defendant.* B

*3. Whether the relationship between the plaintiff and the defendant was not of the principal and agent in which case the direct communication by the plaintiffs with the supplier in Belgium directing the later to ship the tractor directly to the plaintiff had the effect of discharging the defendant from further responsibility (if any).* C

*4. Whether the mere admission by the defendant that he received the sum of \$14,000 from the plaintiffs amounted to acceptance of liability when it was clear from the evidence on both sides that the defendant actually bought the tractor with the money as requested by the plaintiffs.”* D

The main dispute between the parties, in my view, was the refund of the money paid to the defendant/appellant for a failed consideration. The question whether the appellant actually bought the tractor from a dealer who failed to deliver to him as raised in his said issue 2 not considered at the court below is, in my view, totally irrelevant. Similarly, the fact that the appellant disclosed the name of the company from whom he claimed he bought the tractor and that the respondents wrote the said company a letter to which there was no reply, as raised in the appellant’s issue 3 in the court below, is also irrelevant. So also is the contention of the appellant that he received the money and made the purchase from a supplier, who failed to deliver as raised in the issue 4 no defence to his liability for the plaintiffs’ claim. E F G

**The law is settled that a court should confine itself to the issues raised by the parties in the case before it. See UBA Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254; and Rabi v. Abasi, supra. Thus, apart from the questions raised in the brief of the parties that are relevant to and arise from the issues raised in the case, all other secondary issues are irrelevant and should rightly be ignored because they invariably obscure the main or real issues requiring** H

determination. See *Din v. African Newspaper of Nigeria Ltd.* (1990) 3 NWLR (Pt. 139) 392. In the instant case, I have no doubt that the three issues not considered by the court below are totally irrelevant to the questions in dispute in the appeal before the court. They were therefore rightly rejected. Similarly, the court below was right when it formulated the two new issues with which it resolved the questions raised in the appeal. There is therefore no merit in the appeal as it relates to the appellant's issue 1.

The contention of the appellant, as canvassed in Issue 2, is that the intervention of the respondents when they made direct contact with the company from whom the appellant claimed he bought the tractor, was sufficient to discharge him from further responsibility to deliver the tractor to the respondents. It is submitted that the respondents' act had reduced the appellant's relationship with the respondents to that of principal and that of a disclosed agent.

I have no doubt in dismissing this submission as totally inapplicable to the instant case. This is because an agency relationship exists only where a person called the agent has the authority to act on behalf of another called principal. See *Bamgboye v. University of Ilorin* (1991) 8 NWLR (Pt.168) 415. But the facts of the instant case do not support that contention. This is because the facts in this case are that the respondents merely wrote to the company in Belgium, from whom the appellant claimed he bought the tractor, asking for information about the purchase made by the appellant and to which there was no reply. That act is definitely not enough to reduce the relationship existing between the parties to that of principal and agent. There is therefore no merit in the appeal as it relates to the second issue.

In the final result, I hold that there is totally no merit in the appeal and I accordingly dismiss it with N10,000 costs in favour of the respondents.

**KUTIGIJSC**

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Akintan, JSC. I agree with his reasoning and conclusions. The facts are simple and straight forward. The defendant collected the sum of US\$14,000 or N1,120,000 from the defendants for B the supply of one M.A.N. Diesel tractor only. The tractor was never supplied and the defendants went to court. They were entitled to recover their money from the defendant. They got it. Both the trial High Court and the Court of Appeal were right in their judgments. The appeal has no merit. C It is accordingly dismissed with N10,000.00 costs against the defendant/appellant and in favour of the plaintiffs/respondents.

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**MUSDAPHERJSC**

I have had the honour to read in advance the judgment of my Lord Akintan, JSC., just delivered, with which I entirely agree. For the same reasons so clearly advanced in the aforesaid judgment which I respectfully adopt as mine, I too dismiss this appeal, as it is without any merit. I abide E by the order for costs contained in the aforesaid judgment.

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**PATS-ACHOLONUJSC**

I agree. I have nothing more to add. It is a thoroughly bad case which the learned counsel for the appellant tried, though unsuccessfully, to garnish and burnish with forensic advocacy. It did not work. I too G dismiss the appeal and abide by the costs in the leading judgment.

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**OGUNTADEJSC**

The respondents brought their suit at the Calabar High Court of H Cross-River State claiming against the appellant as the defendant for the sum of \$14,000.00 being the amount given by the plaintiffs to the defendant for the purchase of one M.A.N. diesel tractor. It was alleged that

the defendant neither supplied the tractor nor refunded plaintiffs' \$14,000.00.

The action was brought under the Undefended List Procedure of Cross-River State, pursuant to Order 23 rule 1, of the State High Court Rules, 1987. The defendant, filed a notice of intention to defend the suit and an affidavit setting forth his defence to plaintiffs' suit. After hearing arguments on the application, Onnoghen, J., (as he then was), on 20/11/95 held that, the defendant's affidavit, did not disclose a defence to the suit. He accordingly granted plaintiffs' claims.

The defendant, dissatisfied with the judgment, brought an appeal before the Court of Appeal sitting at Enugu (hereinafter referred to as the court below'). On 6/5/98, the court below, in its judgment partially allowed the appeal by setting aside the interest awarded. It affirmed the judgment of the trial court on the principal sum of \$14,000.00 as claimed. It was also ordered that the trial court should consider anew, the interest to be awarded. Still dissatisfied with the judgment of the court below, the defendant has brought this further appeal before this court. In the appellant's brief filed, the appellant identified two issues for determination. These are:

*"1. Whether the Court of Appeal was right in failing to consider appellant's issues Nos. 2, 3 and 4....."*

*2. Whether the intervention and directives of the plaintiffs/respondents to WASCO International to ship the tractor to the plaintiffs/respondents at Port-Harcourt did not discharge the defendant/appellant from further responsibility to deliver."*

As I observed earlier, this was an action under the Undefended List Procedure. The plaintiffs/respondents filed an affidavit in support of their Writ of Summons. Paragraphs 4-14 of the affidavit filed by the plaintiffs/respondents read thus:

*"4. That sometime in 1993 about the 10th of December thereof, the defendant received the sum of \$14,000.00 from the plaintiff and issued a receipt in acknowledgement thereof, which copy is attached here and marked Exhibit 'A'.*

*5. That the defendant caused the plaintiffs to give him the aforesaid amount by way of payment for supply of one M.A.N Savien Tractor*

*required by the plaintiffs for business.*

6. *That despite instant receipt of the full amount by the defendant from the plaintiffs as agreed, the defendant either failed, neglected, refused or otherwise defaulted in the supply of this item to the plaintiffs, and for which he received full payment in advance.*

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7. *That on added pressure on the defendant by the plaintiffs soon after the contract, the defendant actually showed the plaintiffs a letter from his supplier in Belgium which showed as far as January, 1994, the tractor was supposed to be leaving Belgium. A copy of that letter is attached here as Exhibit 'B'*

C

8. *That after the defendant gave the plaintiffs the supposed proof of prospective receipt, the plaintiffs still had to wait until July, 1994, without any further reaction or delivery from the defendant.*

9. *That on 12th July, 1994, the plaintiff decided to write the supposed suppliers in Belgium to make enquiry and to urge the soonest delivery of their requisition. A copy of the letter from the plaintiffs in that regard is attached here and marked Exhibit 'C'.*

10. *That till date of instituting these presents, there has been no reply or reaction to this letter.*

E

11. *That not long after issuing this letter, the plaintiffs again met the defendant and asked for refund of the \$14,000 (Fourteen Thousand Dollars) being that the defendant was unable to supply the equipment as promised and contracted.*

F

12. *That since then, until now, the defendant has again failed to effect refund of the money whilst still persisting in the failure to supply the item for which the money was paid.*

13. *That the plaintiff's solicitor now advises me and I verily believe that this is a proper case in which the court can grant an order, and determine this action under the undefended list, more so because even the interest claimed in addition can be computed into a definite figure.*

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14. *That the plaintiffs solicitors further advise me and I verily believe that the court may in the circumstance award judgment in the currency by which the transaction was consummated, and only in the alternative, order payment in local currency, against the going rate of the*

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dollar to the Naira.

*The defendant's defence to the suit is as disclosed in the affidavit which he filed. In paragraphs 2 to 15 thereof, the defendant deposed:*

*"2. That I have been served with the Writ of Summons and Affidavit B of the plaintiffs and this affidavit is deposed to in response thereto.*

*3. xxxxxxxxxxxxxxxxxxxxxxx*

*4. That 1 and the 2nd plaintiff are friends.*

*5. That some time in 1991 the 2nd plaintiff approached me as the C first offer on board National Shipping Line Boat and pleaded with me to buy him M.A.N Diesel Tractor for his Gas Company at Ikot Omin, Calabar.*

*6. That as a result of his plea and to further cement our relationship, I went with him to Bureau de Exchange where he exchanged N35.00 for D a Dollar and gave me \$114,000 (Fourteen Thousand Dollars) with specific instructions to purchase the said M.A.N. Diesel Tractor with accessories.*

*7. That in keeping with his instructions on arriving Belgium I E bought the said M.A.N. Diesel Tractor from the firm" of WASCO INTERNATIONAL ANTWERPEN-BELGIUM. The photocopy of the receipt from the said company dated 10th November, 1993, is attached herewith and marked Exhibit '1'.*

*8. That I also bought AXEE JACK, 2 Tyres, wheel Spanner and 8 F commercial batteries for the sum of \$2,000.00. The photocopy of the receipt attached and marked Exhibit '2'.*

*9. That I spent the balance of \$3,000.00 local transport and G travelling in Belgium.*

*10. That on the 1st day of January, 1994, I received a fax Message from the company WASCO International Belgium informing me that the truck will put on the next boat going to Port Harcourt. The copy of the fax message is attached and marked Exhibit '3'.*

*11. That I do not know the 1st plaintiff in this case as I have never H got any transaction with it.*

*12. That before this date I had on 20th day of September, 1993 sent a fax message to WASCO International, Belgium threatening police action*



if it failed to ship the Tractor. Photocopy of the fax message and marked Exhibit '4'."

13. That I strongly deny owing the plaintiffs the sum of \$14,000.00 as endorsed on the Writ of Summons.

14. That I have good defence to the plaintiffs' claim and it is in the interest of justice that the matter be transferred to the ordinary list for proper resolution of all the issues raised. B

15. That I depose this affidavit in good faith believing the contents to be true, correct and in accordance with the oaths Act, 1990.

A comparison of the extracts from the plaintiffs' and the defendant's affidavits reproduced above shows that the defendant admitted receiving \$14,000.00 from the plaintiffs. The defendant also agreed that the money was meant for the purchase of a M.A.N. diesel tractor for the plaintiffs and that as at 17/3/95 when he deposed to the affidavit, the tractor had not been delivered. The defendant stated that he had purchased the tractor from a seller in Belgium and fully paid for it. The defendant stated that in agreeing to help the plaintiffs acquire the tractor, he acted in the spirit of friendship between him (i.e. the defendant) and the 2nd plaintiff. D E

It was the appellant's first issue that, whereas he raised five issues in his appellant's brief before the court below, that court erroneously considered just two of such issues and that issues 2, 3 and 4 in his appellant's brief were not considered. Appellant's counsel argued in his brief that the court below was in error not to have considered the said issues 2, 3 and 4. At pages 47-48 of the record, the appellant's issues for determination before the court below were stated to be the following: F

*"(1). Whether the defendant's affidavit did not disclose a defence on the merit and whether it was open to the learned trial Judge to hold that no defence known to law was disclosed when the plaintiffs did not state that in their belief there was no defence to the action as required by law. G*

*(2) Having established that the defendant actually bought the tractor in Belgium with the money supplied by the plaintiffs whether the failure to deliver the same to the plaintiffs at the commencement of the action constituted a breach on the part of the defendant. H*

*(3) Whether the relationship between the plaintiffs and the defen-*

*dant was not that of the principal and agent in which case the direct communication by the plaintiffs with the supplier in Belgium directing the later to ship the tractors directly to the plaintiffs had the effect of discharging the defendant from further responsibility (if any).*

B (4) *Whether the mere admission by the defendant that he received the sum of \$14,000.00 from the plaintiffs amounted to acceptance of liability when it was clear from the evidence on both sides that the defendant actually bought the tractor with the money as requested by the plaintiffs."*

C (5) *Whether the claim for interest at 12% and 15% respectively did not in the circumstances amounted to a claim for special damages which ought to have been specifically pleaded and proved (but which was not done) and whether it was right to order such interest to run from December D 1991 when it was the plaintiff's case that the defendant received the money on 10th December, 1993."*

The court below, for reasons which it did not state and which were not explicit on the face of the record, elected to consider just 2 of E appellant's five issues. In coming to this conclusion, the court below at page 101 of the record said:

"The issues calling for determination in the circumstance of the present appeal are as follows -

F i. *Whether in the absence of an averment in the affidavit in support of the claims under undefended list that in their brief the defendant now appellant has no defence to the action, the suit is still maintainable on undefended list.*

G ii. *Whether the respondent proved the basis for awarding interest to them, if so from what time did interest commence to accrue.'*

H These two issues essentially embrace appellant's issues (1) and (5) as well as respondents' issues 1, 2 and 6. All other issues do not belong to this appeal, some of which can only be answered if evidence were H proffered."

In approaching a resolution of appellants' first issue in this appeal, it is important to ascertain whether or not the appellant's issues 2, 3 and 4, which he claimed were not considered, did in fact arise from the

grounds of appeal filed. The appellants' grounds of appeal Nos.2 to 5 which cover the issues not considered read:

**“(2) ERROR IN LAW**

The learned trial Judge erred in law when he failed to hold that time was not of the essence of the contract (and it was not so averred) and that the failure to deliver the M.A.N. diesel tractor between January and July 1994 did not constitute a breach of contract on the part of the defendant having regard to the combined effect of the plaintiffs' Exhibits 'B' and 'C'. B

**Particulars of Error:**

(i) The plaintiff did not treat the contract as having ended nor did he exercise any option to repudiate the same. C

(ii) The contract was still subsisting and it was wrong to order refund of the money paid on the same in the face of the evidence that the defendant actually placed order for the tractor in Belgium to the knowledge of the plaintiff and in the face of the evidence that the nondelivery of the tractor was due to no fault of the defendant. D

**3. ERROR IN LAW**

The learned trial Judge erred in law when he failed to hold that the defendant was at all material time merely an agent or servant of the plaintiff for the purpose of placing an order for the tractor, the plaintiff having adopted the transaction between the defendant and the Belgium supplier as per his Exhibit 'C'. E

**Particulars of Error**

(i) When the plaintiff wrote to the Belgium supplier directing that the tractor be shipped to him directly, the defendant stood discharged from any liability for the non-delivery of the tractor. F

(ii) By writing to the Belgium supplier the plaintiff as principal assumed responsibility and assumed full control of the order and delivery to the exclusion of the defendant and the liability of the defendant if any was extinguished. G

**4. ERROR IN LAW**

The learned trial Judge erred in law when he regarded the defendant's admission of the receipt of the sum of \$14,000.00 at the exchange rate of N35.00 to the dollar as an admission of liability to the plaintiff's claim. H

Particulars of Error

(i) The money so received was to the knowledge of the plaintiff fully paid to the Belgium supplier and the non-delivery of the tractor was not proved in evidence to be due to the defendant's negligence or omission or default.

(ii) The \$14,000.00 received by the defendant was accepted by both parties as having left the possession of the defendant to the knowledge of the plaintiffs and was shown to be in hands of the Belgium supplier.

5. ERROR IN LAW

The learned trial Judge erred in law by ordering for the payment of interest at the rate of 12% and 15% respectively in the absence of evidence as to the basis of such interest and when the claim for interest in the circumstances did not amount to a liquidated sum.

Particulars of Error

(i) Evidence was necessary (but there was none) as to how the interest was arrived at.

(ii) The interest if at all was in the nature of special damages which ought to have been particularized and proved in evidence.

(iii) The plaintiff not being a money lender and the transaction not being in the nature of a loan could not attract any interest whatsoever.

(iv) The payment of interest as from December, 1991 when the money was paid in 1992 was unjustified.

When the above grounds of appeal are compared with issues 2 to 4 raised by the appellant before the court below, it is manifest that those issues without any doubt whatsoever, flowed or arose from the grounds of appeal raised by the defendant/appellant. The court below in its judgment on 6/5/78 did not offer any explanation as to why it declined to consider the appellant's issues 2 to 4. Whatever reasons there might have been were not shown on the face of the record. Why then did the court below substitute the two new issues formulated by it for the five, which the defendant had raised in their brief?

In *Ogbuanyinya v. Okudo* (No.2) (1990) 4 NWLR (Pt. 146) 568, this court, per Karibi-Whyte, JSC., adopted two of the four issues formulated by the appellant as the basis to decide the appeal. The learned

Justice of the Supreme Court however, gave his reason for adopting the course when he said:

*“I shall for the purpose of this judgment consider issues (a) and (d) together which deal with the question of presumptions. I will then deal with the issue of who has the burden of proof as to whether the Writ of Summons was signed by a Judge. These two issues in my opinion adequately cover all the grounds of appeal filed.”* (Underlining mine) B

Quite apart from the fact that the learned Justice of the Supreme Court was delivering the judgment of this court from which there would be no further appeal, he still saw the need to explain why there was no necessity to consider the other issues raised. An intermediate court as the court below, does not have the liberty to decline a consideration of issues raised before it, unless it proposes to order a retrial and it is felt that a consideration of the issues raised may prejudice a fresh hearing before the trial court. This is because a further appeal against the judgment of the Court of Appeal may unsettle the decision of the court on the issues considered. D

Similarly in Bankole v. Pelu (1991) 8 NWLR (Pt.211) 523 at 537, E this court per Uche-Omo, JSC., observed:

“..... As this court has stated so often, what the Court of Appeal has to consider are not grounds of appeal but issues for determination framed vide Ogbuanyinya v. Okudo (No.2) (1990) 4 NWLR (Pt. 146) 551. These issues may be those framed by either one or both parties or those reframed, after a consideration of issues set out and the grounds of appeal filed, by the Court of Appeal. The Court of Appeal is at liberty to reject all the issues framed by the parties and frame its own issues if, in its view, the issues as formulated will no lead to a proper determination of the appeal. In the present appeal, the appellants in their brief of argument filed in the Court of Appeal, set out issues for determination which have been set out earlier in this judgment. It is those issues and not the grounds of appeal that the Court of Appeal should address. The judgment of the court below shows that it fully appreciated this duty because after setting out the claim, and the submission of counsel, the lead judgment of Awogu, JCA.), went on to state thus:- G H

The first issue to be resolved in this appeal is the identity of the land in dispute.

Although that issue was not so framed by the appellants, it was raised by the respondents in their brief and considered therein at some length. It was also addressed under their issue 7 by the appellants who submitted that the respondents from their evidence seemed confused as to the 'land in dispute'. Under this first issue as posed by it, the lower court considered the salient points of the sub-issues raised under their issues 1, 2 and parts of 3 to 6. Under its second issue of customary tenancy parts of appellants issues 3 to 6 were also addressed. The court below therefore covered all the issues raised for determination by the parties. Even though the grounds as framed and the submission thereon are misconceived, a close look at the two sets of grounds of appeal filed by the appellants will show that they really cover identical grounds and raise the same issues. The difference between them is merely as to numbering, length and phraseology. More specifically grounds 1 and 4 of the amended grounds of appeal alleged not covered by the original grounds of appeal are taken care of by ground 1 particulars 3 and 4 thereof, and ground 4 by the first issue considered by the judgment of the Court of Appeal. The answer to the first half of issue 1 framed by the appellants is therefore in the affirmative."

There again, it is seen that this court offered an explanation of the circumstances which may enable the Court of Appeal to exercise the power to reframe issues for determination for parties. Notwithstanding the fact that there is power in the Court of Appeal to reframe issues for determination in an appeal before it, it is to be stressed that such power falls to be exercised only in very limited circumstances, which include the following:

- (1) Where the grounds of appeal raised are repetitive with the result that issues formulated from them also are repetitive.
- (2) Where the issues formulated do not flow from the grounds of appeal raised.
- (3) Where the issues are poorly drafted in an appeal where the grounds of appeal are explicit.

(4) Where issues framed have been unnecessarily fragmented with the result that multiple issues are framed by parties.

In all the above situations, which are not exhaustive, the invariable rule is that the issues reframed must flow from or reflect the matters agitated or raised in the grounds of appeal. The power to reframe issues for determination in an appeal is not to be exercised capriciously or too readily or whimsically. Upon the conclusion of the reframing exercise by the Court of Appeal, it must be patent that the resultant issues flow only from the grounds of appeal raised by the appellant. If the Court of Appeal were to assume the duty to reframe issues for determination for parties without heeding these basic guidelines, it may find itself deciding appeals outside the dispute properly deserving of resolution as between the parties; or more pointedly adjudicating on matters not contemplated by parties. An appeal is brought by an appellant. He brings it with a view to correcting identified errors in the judgment of the court. A court assuming the role of reframing issues without adhering to the necessary constraints may in fact unwittingly destroy the fundamental basis of the appellate system and render irrelevant the right of fair hearing in an appeal as guaranteed for parties to a dispute under our Constitution.

The court below as I observed earlier did not state why it elected to consider issues 1 and 5 only and not the other issues 2, 3 and 4. All that it said was “all other issues do not belong on this appeal, some of which can only be answered only if evidence were proffered.” With respect to their Lordships of the court below, I think that all the five issues raised by the appellant properly flow from the grounds of appeal raised. Although parties did not lead oral evidence before the trial court, the affidavit evidence available was sufficient a basis upon which to hinge the grounds of appeal raised and the issues for determination culled from them. For instance, under issue No.2, appellant posited that the fact that he did not deliver the tractor before the commencement of the action did not lead to a conclusion that he was in breach of the agreement with the plaintiffs. Under issue 3, the appellant was contending that he was, on the affidavit evidence before the court, the plaintiffs’ agent and further that as the 1st plaintiff had entered into a direct communication with the overseas sellers

of the tractor, he (the defendant) was discharged from further responsibility. And finally, under issue 4, the appellant raised the point that the mere fact that he admitted receiving US\$14,000.00 from the plaintiffs did not make him liable to plaintiffs' claim. It could not escape notice that the matters agitated under each of appellant's issues 2, 3 and 4 differed from those under issues 1 and 5 which the court below elected to consider. As appellant's issues 2, 3 and 4 flowed legitimately from the appellants' grounds of appeal, he had a constitutional right to have the issues considered. The court below could not under our laws refuse to consider issues arising legitimately from appellant's grounds of appeal.

In *Atanda v. Ajani* (1989) 6 S.C. (Pt. II) 87; (1989) 3 NWLR (Pt. III) 511 at 539, this court stressed the necessity for a court to give a full and dispassionate consideration to issues raised before it. The court said: "A court must give full and dispassionate consideration to all issues. *Polycarp Ojobue & Anor. v. Aje Nubia & Anor.* (1972) 6 S.C. 27; *Oyediran & Family v. Arise & Ors.* (1970) 1 All NLR 313 at 317."

Speaking in the same vein, this court in *Okonji v. Njokanma* (1991) 7 NWLR 9 (Pt.202) 131 at p. 150 per Uwais, Ag. CJN., (as he then was), said

*"It is the duty of a court whether of first instance or appellate to consider all the issues that have been joined by parties and raised before it for determination. If the court failed to do so, without a valid reason, then it has certainly failed in its duty, for in our judicial system, it is a fundamental principle of administration of justice that every court has a duty to hear, determine and resolve such questions."*

See also *Ebamawo v. Fadiyo* (1973) 1 All NLR 134 and *Okoji v. Njokanma* (1991) 7 NWLR (Pt.202) 131 at 134. It is, therefore, my firm view that the court below erred by failing to consider appellant's issues 2, 3 and 4, which said issues properly flowed from appellant's grounds of appeal. And in any case, where there are grounds for refraining appellant's issues or discountenancing those formulated, the Court of Appeal must in my humble view, state why it is, in place of appellants' issues, framing new issues.

In this appeal, the appellant has re-submitted to us for consideration



those issues raised by him before the court below which were not considered. Unless the appellant adopts such a course, he might be confronted with the argument that he was trying to raise a fresh issue in this appeal which had not been previously raised before the court below. As I am satisfied that those issues were erroneously not considered, I shall now consider them. I am adopting this course because the evidence upon which the issues were based did not involve a question of credibility of witnesses.

In the affidavit filed by the plaintiffs, it was deposed that the sum of \$14,000.00 was given to the defendant on 10/12/93 for the purchase of a tractor. Three months later in January, 1994, the defendant showed a letter from the overseas sellers of the tractor to the plaintiffs in an attempt that the tractor be shipped early. The tractor was not shipped. On 20/10/94, plaintiffs instituted his suit. Had not the plaintiffs waited long enough before resorting to litigation? There is no deposition from the plaintiffs as to the time agreed for the delivery of the tractor. The law however, is that if the contract agreement is silent as to the time of performance of a contractual obligation, the court will read into the contract a term that the performance is to be given within a reasonable time: See *Hick v. Raymond* (1893) AC 22; *Hulthen v. Stewart & Co.* (1903) AC. 89 and *Monkland v. Jack Barclay Ltd.* (1951) 2 KB 252. It is my view that the failure of the defendant to deliver the tractor within ten months between 10/12/93 to 20/10/94 was sufficient evidence of the defendant's unwillingness or inability to perform the contractual duty. I decide issue 2 against the defendant/appellant.

It was the defendant's case on his affidavit that he had paid the price of the tractor to its sellers in Belgium. However, the tractor was not shipped to Nigeria. The bedrock of plaintiffs' case was that the tractor was not delivered. Not that it was not paid for. It is irrelevant that the defendant had paid for the tractor in Belgium when the agreement of parties was that the tractor be delivered in Nigeria, I, therefore, decide issue 3 against the defendant/appellant.

The defendant admitted that he received the sum of \$14,000.00 from the plaintiffs on the understanding that he would help the plaintiffs

procure a tractor. The defendant did not deliver a tractor nor returned plaintiffs' money. The issue of agency as between the plaintiffs and the defendant was irrelevant. The liability of the defendant to the plaintiffs as found by the trial court did not arise from the mere fact that the defendant received \$14,000.00 from the plaintiffs. Nor did it arise from the fact that the defendant did not purchase the tractor. Rather, it arose from the fact that the defendant/appellant failed to deliver the tractor to the plaintiffs. The argument by the defendant that he was plaintiffs' agent was an attempt to becloud a very simple and straightforward transaction.

Having disposed of the issues 2, 3 and 4 which were not considered by the court below, I now consider appellant's issue No.2 raised in his brief before this court. It was the contention of the appellant that the plaintiffs having themselves written directly to the overseas sellers of the tractor had thereby absolved him from further responsibility to deliver the tractor. The plaintiffs deposed that the defendant in an attempt to convince them that the tractor was soon to be delivered showed them a letter from the sellers. The 2nd plaintiff on 12/7/94 then wrote a letter to the sellers. The letter reads:

"Samson C. Lal  
Fax (03) 233 4006  
HR Antweroeb

Mr. Felex Okon Nsemo  
Fax 234-84-230238  
No. 6A Udom Street,  
D. Line Port Harcourt.  
Nigeria

Dear Sir,

12th July, 1994.

SHIPPMENT OF ONE TRACTOR PAID FOR BY MR. PAUL EDEM

I wish to refer to your fax of First January, 1994, and this recent one to Mr. Paul Edem.

I am Mr. Felix O. Nsemo whom I hope Mr. Paul must have mentioned to you as this owner of this tractor.

Mr. Ndem whom I gave money for this purchase of the tractor informed me that gave you \$11,000.00.

Please I would wish you to despatch this tractor to me as a matter of great urgency to Port Harcourt or Lagos.

This order was placed in 1991 and I had hoped to collect this said tractor for use in our business since then.

The delay in this shipment of this tractor is causing us a great deal of problem.

Thanks for your co-operations.

B

Yours sincerely,

Felix Okon Nsemo

Now, all that the 2nd plaintiff did by the above letter was to plead with the sellers that the tractor be shipped urgently. The letter did not change or alter the nature of the contractual relationship between the plaintiff and the defendant on the supply of the tractor. It did not relieve the defendant of his obligation to deliver the tractor. It is plainly unarguable that the letter had absolved the defendant/appellant of his contractual obligation to deliver the tractor.

D

It is my view that the appeal of the defendant/appellant is devoid of merit. It is for this reason and the more elaborate reasons discussed in the lead judgment of my learned brother, Akintan, JSC., that I would also dismiss this appeal. I subscribe to the order on costs made in the lead judgment.

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