

SUPREME COURT OF NIGERIA
16TH DECEMBER, 2005. SC. 157/2001
CORAM:- S. U. ONU, A. I. KATSINA-ALU, N. TOBI,
M. MOHAMMED, W.S.N. ONNOGHEN, JJSC

EMMANUEL OLAMIDE LARMIE APPELLANT
(Trading under the business name
BASEMAN SYSTEMS ASSOCIATES)

AND

DATA PROCESSING MAINTENANCE RESPONDENT
SERVICES (D.P.M.) LIMITED

CONTRACTS - Documents - Terms of contract - Oral testimony is not
admissible - To contradict the written document (H1)

CONTRACTS - Written agreement - Disagreement thereto - Is resolved
vide the parties' written contract (H2)

CONTRACTS - Binding nature of - Formation of - Business of court - Is
not to make contracts for the parties before it (H3)

APPEALS - Issue - Relevance of - Where main claim of damages fails -
Issue of interest claimed on that amount - Becomes irrelevant (H4)

APPEALS - Grounds of appeal - Obiter - Judgment - Not everything a
Judge says - Constitute a subject for appeal - Especially when it does not
go - To the root of the decision (H5)

JUDGMENTS - Quantum meruit - Appeals - Leave - Fresh issues -
Allegation that lower court - Decided fresh issues raised without leave -
Is unfounded and academic - As Court of Appeal's decision - Was not
based on those issues (H6)

APPEALS - Reversal - Leave - Judgment - Error therein - Will not al-

ways warrant a reversal - Save miscarriage of justice was occasioned (H7)

JUDGMENTS - Error - Appeals - Miscarriage of justice - Definition - Miscarriage should be declared unto a reversal - Where a result more favourable to appellant - Would have been reached - In the absence of the error (H8)

FACTS

Before the High Court of Lagos, the plaintiff/appellant instituted an action against the defendant/respondent making claims inter alia, for remuneration of US\$430,317.01 being the agreed 5% commission on the total computer contract price, the plaintiff having initiated defendant's business contract with the Nigerian Agricultural and Co-operative Bank. The parties on the 3rd of March, 1992 had a meeting where the appellant discussed a business proposal aimed at facilitating the award of a computer contract to the respondent by the Nigerian Agricultural and Co-operative Bank at a commission of 5% on the contract sum to be paid by the respondent.

Appellant testified to the fact that he subsequently took up the respondent on the issue of terminal date of 31-12-1992 as contained in exhibit B as it was not part of their oral agreement, and was assured that the date was put in the letter in question for administrative convenience. However, the contract for which the agreed 5% commission was payable was not won before the terminal date. It was won 3 months after the said terminal date. The respondent filed a statement of defence maintaining that the contract is as contained in exh. B which was terminated on 31-12-1992, but did not testify at the trial. The trial court gave judgment in favour of the appellant which made the Respondent's appeal to the Court of Appeal was successful as it set aside the judgment of the trial court. The Appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"3.1.1 Whether from the evidence available the Court of Appeal did not err when it held that there was no agreement between the parties,

which the plaintiff could enforce.

3.1.2 Whether the Court of Appeal was right in holding that the plaintiff was not entitled to interest on the 5% commission not paid by the defendant even when such commission is due.

3.1.3. Whether the Court of Appeal was right in deciding on fresh issues raised by the appellant without requisite leave to that effect.”

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

Terms of contract - Oral testimony

1. It is the law that where parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. In the present case the oral testimony of the appellant regarding the meeting of 3rd March, 1992 as it concerned the agreement between the parties with particular reference to the issue of terminal date of the contract which testimony is at variance with paragraph 3 of exhibit B, was to contradict the contents of the said exhibit B which section 132(1) of the Evidence Act, 1990 frowns upon and such evidence was inadmissible in law and the trial court ought not to have acted upon same - see *Union Bank of Nigeria Ltd. vs Ozigi* (1994) 3 NWLR (pt. 333) 385. (p. 2821 C)

Written agreement - Disagreement thereto

2. It follows therefore that where there is any disagreement between parties to a written agreement on any particular point, as in the present case, the authoritative and legal source of information for the purpose of resolving that disagreement or dispute is the written contract executed by the parties, which in the present case is exhibit B. (p. 2821 G)

CONTRACTS - Binding nature of - Formation of

3. It is always not the business of the court to make a contract for the parties before it or to re-write the one already made by them. Once the conditions precedent to formation of contract are fulfilled by the parties thereto, they are bound by it.

Having regards to the facts of the case and the relevant law, I hold

the view that issue No. 1 be and is hereby resolved against the appellant.
(p. 2821 H)

APPEALS - Issue - Relevance of

B 4. It should be noted that having resolved issue No.1, which is the main
issue in this appeal against appellant, issue No.2 dealing with interest on an
unearned 5% commission becomes irrelevant, appellant having been held
not to be entitled to claim any commission since exhibit B was never
C revalidated and the contract which would have entitled appellant to earn the
5% commission on which any interest would have been claimable, was
awarded after the expiration of the terms of contract between the parties.
(p. 2823 B)

D Grounds of appeal - Obiter

5. That apart, it is very clear that what the lower court said on the matter
was by the way as it stated at page 224 as follows:-

*“Such an award of interest if the plaintiff/respondent had been
E adjudged by this court to be successful would make a mockery of the
exercise of judicial discretion particularly with relation to the foreign
currency taking into consideration the local circumstances of our country.
I observe that the award of 21% per annum to run from April, 1993 till
F full liquidation that again labours under the misconception of the law.
Interest on judgment debt has statutory flavour and it normally starts to
run from the date of judgment till liquidation, but I am yet to come across
any rule of court which stipulate 21% interest on judgment debt from the
date of judgment till final liquidation.*

G *From all I have said, the interest rate of 21% is outrageous and if
the plaintiff/respondent had been adjudged to be successful that award
would have been disallowed.”*

H We must always bear in mind that it is not everything a judge says
that should constitute a subject of a ground of appeal particularly when
what is said does not go to the root of the matter as decided by the court.
In the instant case, the court merely made an observation and did not
follow it up with an order setting aside the award of the said interest by the

trial court. From the emphasis supplied on the passage of the judgment supra, what I have stated becomes very clear and instructive. The question is from the passage reproduced supra; which is the bedrock of the complaint of the appellant; how can a resolution of the issue involved positively affect the fortunes of the appeal? I hold the view that the issue B is irrelevant and therefore undeserving of the attention of this court and is accordingly discountenanced. (p. 2823 D)

Quantum meruit - Appeals - Leave

6. I have carefully gone through the judgment of the lower court and I hold C the view that that judgment was not based on the issues of quantum meruit, special damages and interest rate or contract price as canvassed by learned counsel for the appellant. It is very clear that the issue of quantum meruit D was introduced for the first time in the judgment of the trial judge and that both counsel never addressed that court on the matter. It is equally true and I agree with the view of the lower court expressed in it's judgment at page 218 of the record thus ".... *The claim of the plain tiff/respondent is not rooted in quantum meruit. And being a crucial point of law raised by E the trial judge himself in the course of writing his judgment, the appellant is on firma terra in law to raise it before us.*"

Despite the above holding the lower court did not dismiss the appellant's claim on the basis that appellant is not entitled to claim on F quantum meruit but on the basis that the contract relied upon by appellant in founding his claim having been terminated it cannot in law sustain the appellant's case. That decision is the same with the decision of this court in the resolution of issue No.1 in this appeal which issue forms the main G plank in the case of the appellant. Going through the judgment of the lower court, I confirm that the issue of general and special damages though canvassed by the respondent in its brief before the lower court did not feature at all in the reasoning that led to decision of the Court of Appeal on H the matter - that is the dismissal of the claim of the appellant before the court of trial. In the circumstance, I agree with the views of the learned counsel for the respondent that issue 3 as argued is merely academic. (p. 2825 C)

APPEALS - Reversal - Leave

7. I should, in no way, be understood as saying that the law is no longer that for a party to raise a fresh issue on appeal he must first obtain leave of the appellate court. I am however saying that even if the Court of Appeal allowed the respondent to raise fresh issues without leave, since the decision of that court did not take into cognisance those issues or the issues did not form the basis of the decision of that court, that error by the Court of Appeal is not sufficient to result in the setting aside of that decision. To result in the invalidation of the decision of the lower court, as canvassed by the learned counsel for the appellant, it must be demonstrated that the error was substantial and formed the basis of the decision complained of and resulted in a miscarriage of justice. The law is still that it is not every error committed by the lower court that will result in the judgment of that court being set aside by an appellate court. (p. 2826 A)

APPEALS - Reversal - Leave

8. The term “*miscarriage of justice*” has been variously defined but its essence is that it is the decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial rights of a party. As it is used in constitutional standard of reversible error in judgment, miscarriage of justice means a reasonable probability of more favourable outcome for the defendant.

It is the law that miscarriage of justice warranting a reversal of a decision should be declared only when the court, after examination of the entire case, including the evidence is of the opinion that it is reasonably probable that a result more favourable to the appellant would have been reached in the absence of the error. A miscarriage of justice therefore means such a departure from the rules which permeates a judicial procedure as to make that which happened not in the proper sense of the word a judicial procedure at all - see *Nnaji for vs Ukonu* (1986) 4 NWLR (pt.36) 505. I find no miscarriage of justice in the instant case which should enable the court to interfere. (p. 2826 D)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. When quantum meruit may avail if pleaded

I must observe that though appellant must feel bad in the way things turned out between the parties particularly after doing so much to enable the respondent secure the award of the contract in question and naturally expected some compensation for his efforts, the way the action is framed and pursued denied him of any compensatory remedy. Learned counsel for the appellant threw all the eggs into one basket as a result of which they all broke when the basket came crashing down. A little care would have led to an alternative plea for compensation on the principle of quantum meruit which might have grounded the appellant a remedy. That is just by the way. (p. 2826 H)

TOBI JSC

2. Burden of proof - Mere ipse dixit cannot alter a document

The case made is that prior to Exhibit B, there was an oral agreement foisting another date on the parties, contrary to the contents of Exhibit B.

The burden of proof of such oral agreement is on the appellant. This is the position of our adjectival law which says that the plaintiff has a duty to prove his case. Where a plaintiff fails to prove his case on the balance of probability or on the preponderance of evidence, it crumbles and he will not obtain judgment. The case will be dismissed.

Did the appellant prove the existence of oral agreement?

In the circumstances of this case, mere ipse dixit of the witness cannot alter the contents of Exhibit B, particularly in the light of the denial in paragraph 8 of the statement of defence as it relates and affects paragraph 8 of the statement of claim. Let me read paragraph 8 of the statement of claim:

“When plaintiff observed that an expiry date was inserted in the letter and that it was unnecessary for such a contract, Defendant’s former Managing Director explained that it was just for Defendant’s administrative convenience and that in any case the date would be automatically

extended once the contract award process was still on.”

As the above was denied by the respondent in the statement of defence, the burden of proof was on the appellant. I do not think the appellant was able to prove the averment in the light of Exhibit B. In B paragraph 8 of the statement of claim, it was averred that “*the date would be automatically extended once the contract award process was still on.*” This is contrary to the contents of Exhibit B which clearly stated that the “*agreement will remain valid till 31st December 1992 at which date it would be negotiated.*” A contract which is subject to negotiation, or should C I say renegotiation, cannot be said to have an automatic renewal in terms of extension of date. (p. 2831 D)

3. The place of oral evidence in a written agreement

D And that takes me to section 132(2) of the Evidence Act. By the subsection, oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, grant or disposition of E property.

Although the Evidence Act does not define “*documentary memorandum*”, I am of the view that Exhibit B is not a documentary memorandum. Assuming that I am wrong, and Exhibit B qualifies as such a F memorandum, the second arm of the subsection does not vindicate the position taken by the learned trial Judge. This is because Exhibit B was clearly intended to have legal effect in the contractual bargain between the parties. As a matter of law and fact, Exhibit B is the hub or central pin of the contractual relationship between the parties.

G The stringent position of section 132(1) is to ensure that a party to a contract in writing, does not change his position midstream to his undeserved advantage and to the detriment of the unsuspecting adverse party. Litigation is not a game of trick and ambivalent short cuts covered H with the catching baits of the fisherman but one in which the parties come out openly to make their case for the decision of the court. The principles of equity and fair play will not side a party who comes to court with filthy and unclean hands. (p. 2835 A)

4. Failure of defendant to give evidence - Does not shift burden of proof to him

Learned counsel for the appellant made some big weather out of the respondent not giving evidence at the trial. I do not see the reason for such weather, because that does not shift the burden of proof on the respondent. The Court of Appeal was correct when it said at page 218 of the Record:

“Generally, in law, where the evidence is uncontradicted, the onus of proof is satisfied on a minimal proof since there is nothing on the other side of the scale.”

Yes, that is the position of the law. But minimal proof remains minimal and does not mean no proof. The failure on the part of a defendant to give evidence does not exonerate the plaintiff from proving his case though minimally, an expression that means “*as little as possible or very little*”. I do not see the very little proof by the appellant, particularly in the face of the clear contents of Exhibit B. (p. 2835 F)

5. Interpretative jurisdiction of court - How used

It is good law that courts of law have no jurisdiction to write contracts for the parties. As a matter of law, they have no competence in such matters and therefore cannot find themselves altercating or vexing the exclusive terrain of the parties in making the contract. Courts of law use their interpretative jurisdiction to construe the contract made by the parties and come out with their intention or presumed intention, if the intention is not clear on the face of the contract. If this Court accepts the invitation of learned counsel for the appellant to construe the agreement he had with the respondent, in the way he wants it, it will be changing place with the parties to the contract. This Court cannot take such a position which is against the law. (p. 2837 F)

MOHAMMEDJSC

6. Plain written obligation - Will not be altered

With regard to the clear contents of Exhibit ‘B’, the obligation of the parties contained therein are quite plain. The parties are bound by the terms therein

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until 31-12-1992, and certainly not beyond. The law is trite regarding the bindingness of terms of agreement on the parties. Where parties enter into an agreement in writing, they are bound by the terms thereof. This court, and indeed any other court will not allow anything to be read into such agreement, terms on which the parties were not in agreement or were not ad-idem.

In the result, the appellant having failed to show the existence of an oral agreement between the parties extending the terminal date of the agreement between them beyond 31-12-1992, the court below was right in allowing the respondent's appeal and dismissing the claim of the appellant as plaintiff against the respondent as defendant. (p. 2840 H)

REPRESENTATION

D Oluseye Opasanya Esq. for the appellant.

F. R. A. Williams Jnr. with M. Sallau Esq. for the respondent

CASES REFERRED TO

E Union Bank of Nigeria Ltd. vs Ozigi (1994) 3 NWLR (pt. 333) 385

Eke vs Odofin (1961) All NLR 842

Colonial Development Board vs Kamson (1955) 21 NLR 75

Molade vs Molade (1958) SCNLR 206

F Oyenuga vs Provisional Council of the University of Ife (1965) NMLR 9

Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283

Mrs. Olaloye v. Madam Balogun (1990) 5 NWLR (Pt. 148) 24

Olaoye v. Balogun (1990) 5 NWLR (pt.148) 24

Koiki v. Magnusson (1999) 8 NWLR (pt.615) 492 at 514

G Baba v. Nigerian Civil Aviation Training Centre Zaria (1991) 5 NWLR (pt.192) 388

Union Bank of Nigeria Ltd. v. B. U. Umeh & Sons Ltd. (1996) 1 NWLR (pt.426) 565

H S.C.O.A. Nigeria Ltd. v. Bourdex Ltd. (1990) 3 NWLR (pt.138) 380

Koiki v. Magnusson (1999) 8 NWLR (pt.615) 492 at 514

Colonial Development Board v. Kamson (1955) 21 NLR 75

Molade v. Molade (1958) SCNLR 206

RULES REFERRED TO

High Court of Lagos State (Civil Procedure) Rules O. 38 r. 7

LEAD JUDGMENT BY ONNOGHEN JSC

The appellant instituted an action against the respondent in the High Court of Lagos State claiming the following reliefs in paragraph 27 of the Statement of Claim:

"27. In view of the Defendant's aforesaid breaches more particularly set out in paragraph 25 above, the plaintiff claim as against the defendant the following reliefs and remedies: -

(i) A declaration that the plaintiff is entitled as against the defendant to specific performance of defendants obligations and undertaking under an agreement evidenced by defendant's letter of appointment to plaintiff dated 5th March, 1992 and all other verbal assurances promises and commitments made by defendant's officials to plaintiff to obtain his assistance in securing the Nigerian Agricultural and co-operative Bank's Computer Sales Contract award in defendant's favour.

(ii) A declaration that the plaintiff is entitled to the remuneration of 5% of the total Computer Contract price stipulated in the said letter of appointment, the plaintiff having initiated the business contract of the Nigerian Agricultural and Co-operative Bank's multi-million dollars computer contract to defendant for which plaintiff had not yet been paid any fee whatsoever.

(iii) A declaration that the purported terminal date of 31st December, 1992 in plaintiffs letter of appointment is of no effect and cannot terminate plaintiffs right to full payment for services already rendered to defendant prior to that terminal date, in introducing the Computer Sales Contract and pursuing the lobbying activities up to the submission of defendant's bid and thereafter, since the defendant had already stipulated in the letter that the time of payment of the 5% of the sales commission to plaintiff would be whenever defendant was fully paid, which in effect meant that the actual terminal date agreed by the parties for payment to plaintiff was open ended, i.e as soon as defendant received full payment

and the plaintiff was paid.

(iv) An injunction restraining the defendant from remitting out of Nigeria or otherwise paying out to any person or authority or expending the sum of USD430, 317.01 being 5% commission of the contract sum of USD8, 606, 340.12 payable on the Nigerian Agricultural and Co-operative Bank's Computer Contract award to the Plaintiff.

(v) Special damages for breach of contract committed by defendant against plaintiff are as follows:-

(a) The sum of USD430,317.01 being the agreed 5% commission on the USD8,340.12 dollar contract price on the Nigerian Agricultural and Co-operative Bank's Computer contract award to defendant.

(b) The sum of N90,287.50 being 5% of the naira 1,805,750 price of the same Computer Sales Contract.

(c) 5% of the Annual Maintenance charges being ancillary services under the computer contract calculated upon the charges the defendant made on the ancillary and maintenance contract on the computer equipment supplied under the Nigerian Agricultural and Co-operative Bank's computer contract.

(d) Interest of 21% per annum on items (a) - (c) from the date payments were received from the Nigerian Agricultural and Co-operative Bank by the defendant until the date of this writ of summons.

(vi) General and exemplary damages for breach of contract in the sum of N100 million representing compensation to plaintiff for the loss of business opportunities and the commitment of the human material and financial resources to the enhancement of the core business interest of the defendant in Nigeria from March, 1992 up to date.

(vii) An order compelling defendant to immediately pay into an escrow account, in Nigeria in the joint names of plaintiff and defendant the amounts claimed under paragraph (v), (a)-(c) above until the final judgment of this court."

The facts of the case as can be gleaned from the record are that there was a meeting between the parties on the 3rd day of March, 1992 in which appellant discussed a business proposal aimed at facilitating the award of a computer contract to the respondent by the Nigerian Agricul-

tural and Co-operative Bank at a commission of 5% on the contract sum to be paid by the respondent. Exhibit B is evidence of the agreement in relation to the transaction. However, exhibit B contains a terminal date of 31st December, 1992 which appellant contends, both in pleadings and evidence, was not part of the oral agreement reached by the parties on the 3rd March, 1992 meeting. Appellant testified to the fact that he subsequently took up the respondent on the issue of terminal date as contained in exhibit B and was assured that the date was put in the letter in question for administrative convenience. However, the contract for which the agreed 5% commission was payable was not won before the terminal date; it was won on 3rd April, 1993 which is more than three months after the said terminal date.

The respondent filed a Statement of Defence but did not testify at the trial though it maintained that the contract between the parties is as contained in exhibit B which was terminated on 31st December, 1992 and consequently it was under no obligation to pay 5% commission to the appellant.

At the conclusion of trial, the learned trial judge found for the appellant as a result of which the respondent appealed to the Court of Appeal which set aside the judgment of the trial court in its judgment of 16th December, 1999. The present appeal is against that judgment.

In the appellant's brief filed on 21/01/02, learned counsel for the appellant OLUSEYE OPASANYA Esq formulated three issues for the determination of the appeal. These are as follows:-

“3.1.1 Whether from the evidence available the Court of Appeal did not err when it held that there was no agreement between the parties, which the plaintiff could enforce.

3.1.2 Whether the Court of Appeal was right in holding that the plaintiff was not entitled to interest on the 5% commission not paid by the defendant even when such commission is due.

3.1.3. Whether the Court of Appeal was right in deciding on fresh issues raised by the appellant without requisite leave to that effect.”

Learned counsel for the respondent in the respondent's brief filed by IFEANYI NWEZE Esq on 9th June, 2003 also identified three issues

which are substantially the same with the issues formulated by learned counsel for the appellant. The issues are as follows:-

(i) *“Whether on the evidence before the court, the plaintiff was entitled to judgement.*

B (ii) *Whether the lower court was right when it commented that the interest awarded by the trial court was outrageous; and*

(iii) *Whether the Court of Appeal based its decision on fresh issues not raised before the trial court.”*

C In arguing issue No.1, learned counsel for the appellant submitted that the fulcrum of the relationship between the parties is the meeting on 3rd March, 1992 which resulted in the deal giving rise to the action and that exhibit B appointed the appellant a Marketing Consultant for the purpose of procuring the Nigerian Agricultural and Co-operative Bank’s Computer
D Sales Contract. Learned counsel then submitted that the lower court failed to accord the meeting of 3rd March, 1992 its pride of place in the transaction; that exhibit B did not displace or extinguish the earlier oral contract between the parties on 3rd March, 1992. Learned counsel further
E submitted that to determine whether there is a contract between the parties the lower court ought to have considered all the evidence, documentary and oral tendered by the appellant as was decided in *Shell B.P vs Jammal Engineering* (1974) 4 S.C. 33 but that the Court of Appeal ignored the oral
F testimony of PW1; that contrary to the decision of the lower court, exhibit B does not require acceptance by the appellant for it to become binding on the respondent thereby making this case different from *Afolabi vs Polymera Industries (Nig) Ltd.* (1967) 1 ACR Commercial 184. Submit-
G ting in the alternative, counsel stated that appellant accepted the terms by subsequent conduct by arranging meetings and introducing the respon-
H dent to Nigerian Agricultural and Co-operative Bank; that the lower court was wrong in holding that the award of contract to the respondent on or before the 31st December, 1992 is a fundamental term of the contract reached by the parties. Arguing further, learned counsel for the appellant submitted that though the appointment of appellant as Marketing Consultant took immediate effect his remuneration was payable as at the time of final payment from customer which cannot be determined without

reference to the oral account of the meeting of 3rd March, 1992 as narrated by PW1, particularly as the matter is not dealt with in exhibit B. Learned counsel went on to argue that the 31st December, 1992 date is therefore relevant from the point of determining when the terms set out in exhibit B could be renegotiated, not when the respective obligations imposed on the parties were expected to be performed. B

Submitting further in the alternative counsel stated that “*at any rate evidence on the records show that the stipulation of 31st December, 1992 was modified by the parties orally and that from the 5th March, 1992 parties understood that reference to date was only for administrative convenience,*” and that renewal of exhibit B was therefore a matter of course or “*automatic*”. Learned counsel then urged the court to resolve the issue in favour of the appellant. C

On his part, learned counsel for the respondent referred to exhibit D 3 particularly the clause dealing with 31st December, 1992 and submitted that that date was to terminate the contractual relationship between the parties; that this interpretation is so understood by the appellant that is why he admitted in exhibit 3 that the validity of exhibit B expired on 31st E December, 1902 subject to a renegotiation and that he failed in his attempt to get the agreement revalidated. Counsel further submitted that this is inconsistent with appellant’s oral testimony in court that he queried the terminal date in exhibit B; that exhibit C is consistent with the testimony F of the appellant under cross examination at page 51 that he acknowledged the receipt of exhibit B and did not respond to it; that the terminal date on exhibit B is the date on which the obligation of the parties to each other came to an end. Turning to the distinction being made by counsel for the appellant between the time the commission was earned and when it G became payable, learned counsel for the respondent submitted that the said distinction is without basis in this case because it is not disputed that the contract for which the commission was to have been paid was awarded in April, 1993 by which time the contract had not only terminated but was H not revalidated; that extrinsic evidence to vary the terms of exhibit B was not necessary having regards to the contents of exhibit C and that the trial judge was therefore wrong in relying on the oral evidence to vary the terms

of the contract. Learned counsel then urged the court to resolve the issue against the appellant.

I have carefully gone through the record and the briefs filed by both counsel. Appellant's Reply Brief does not contain anything new but
B reargued the issues in the appeal. From the record and the briefs, the following facts are not in dispute:-

- (a) that the parties entered into a contract as evidenced in exhibit B.
- (b) that the said exhibit B contains a terminal date of 31st December, 1992 - when the obligations of the parties to each other would terminate;
C
- (c) that the said terminal date could be extended by negotiation by the parties to the contract;
- (d) that exhibit B came into existence after a meeting between the parties where the terms and conditions governing their relationship were
D discussed and agreed upon;
- (e) that appellant made efforts to renegotiate the validity of exhibit B which efforts were futile;
- (f) that before the terminal date contained in exhibit B, appellant
E worked hard for the realization of the aim of the contract between the parties though the contract was not awarded to the respondent before the said terminal date;
- (g) that the claim of the appellant before the trial court which has
F also been reproduced earlier in this judgment is not based on the principles of quantum meruit but on exhibit B and an alleged oral agreement varying the terminal date contained therein.

The argument of learned counsel for the appellant on the issue
G under consideration is simply that exhibit 3 does not exclusively govern the agency contract between the parties but that the oral agreement reached prior to exhibit B particularly on 3rd March, 1992 form part and parcel of the contract as regards the question of terminal date. The
H foundation of the dispute between the parties is therefore the issue of terminal date -whether it is as contained in exhibit B said to be the contract between the parties or exhibit B in addition to the prior oral agreement on the issue between the parties. While appellant and the trial court took the view that exhibit B and the alleged oral agreement on terminal date

constitute the contract between the parties, the respondent and the lower court are of the opinion that the contract between the parties is as contained in exhibit B and it terminated on 31st December, 1992 before the award of the contract in relation to which the claim is made by the appellant. The issue under consideration is therefore simply to determine the correct view B of the evidence.

Exhibit B which is dated 5th March, 1992 provides, inter alia, as follows:-

“RE: APPOINTMENT AS MARKETING CONSULTANT” C

We are happy to inform you that we have appointed your company as Marketing Consultants for the sale of computer equipment and related services to NIGERIAN AGRICULTURAL AND COOPERATIVE BANK.

The remuneration of your company will be 5% (five percent) of the total contract value payable as at time of final payment from customer. D

This agreement will remain valid till 31st December, 1992, at which date it could be negotiated.

We look forward to a successful cooperation between our companies”..... Emphasis supplied. E

There is no document on record showing that after the receipt of exhibit B with the terminal clause which appellant contends is at variance with the oral agreement reached by the parties in a meeting of 3rd March, 1992, appellant wrote either protesting against the clause or rejecting the said exhibit B. However there is exhibit C dated April 2nd, 1993, also F tendered by appellant which contains, inter alia, the following:-

“RE: APPOINTMENT AS MARKETING CONSULTANT-NIGERIAN AGRICULTURAL AND COOPERATIVE BANK

(NACB) G

Please refer to Mr. Jacques Boissier’s letter of March 5th 1992 on the above subject, (copy attached) and my discussion with you this morning.

I am glad to let you know that the award of the contract to DPMS H is almost concluded.

I would therefore like to refer to paragraph 3 of the letter under reference which stipulates that the validity of the agreement expired on

December 31st, 1992 and was subject to negotiation thereafter.

Shortly, before the expiration, I tried without success to see Mr. Boissier who I was told had travelled out of the country and was expected back sometime in January, 1993. I was therefore, unable to revalidate the agreement. Other reasons were that by the time he returned, I had travelled. When I came back, I came to see him but was informed that he was in a meeting with you. He gave me an appointment for the following week when I had to undergo a surgery from which I am not fully recovered. By this time he had left for his new appointment”

Exhibit C speaks for itself and it is very clear that it is not a protest on the issue of terminal date in exhibit B neither does it indicate any misconception about that terminal date, which had by then, become effective. Appellant was, therefore, in no doubt that exhibit B had terminated hence his stating:

“I was therefore unable to revalidate the agreement.” I hold the view that this piece of evidence clearly shows that appellant cannot be telling the truth when he stated that the terminal date was for an administrative convenience upon his inquiries from an officer of the respondent after the receipt of exhibit B, nor does it support the argument of learned counsel for the appellant that with that assurance from an official of the respondent revalidation of exhibit B was no longer relevant but “automatic.”

I agree with the submission of learned counsel for the respondent that the relevant portion of exhibit C is consistent with the fact that both parties were not in doubt as to the purport of paragraph 3 of exhibit B on terminal date. If the oral testimony of the appellant on the matter were true as learned counsel for the appellant has argued before this court, then the question is why did appellant, in his own words as evidenced in exhibit C tendered by him make efforts to revalidate exhibit B?

Learned counsel for the appellant sought to draw a distinction between the time the commission was earned and when it became payable as stipulated in exhibit B and submitted that since payment of the commission cannot be made until after respondent had been paid then the terminal date cannot relate to the earned commission. I agree with the

submission of learned counsel for the respondent that the distinction sought has no basis. The distinction does not relate to the facts of this case; it is rather hypothetical because the contract for which appellant based his claim for commission was not even awarded within the life span of the agreement between the parties i.e before 31st December, 1992. It was awarded, as agreed by both parties, in April, 1993 by which time exhibit B had not only expired but was also not revalidated in accordance with its terms. I hold the view that the argument of learned counsel for the appellant on the matter would have been relevant if that issue were to have been a live issue in the case, by which I mean, if the contract had been awarded within the life span of exhibit B; which is not the case as agreed by both parties.

It is the law that where parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. In the present case the oral testimony of the appellant regarding the meeting of 3rd March, 1992 as it concerned the agreement between the parties with particular reference to the issue of terminal date of the contract which testimony is at variance with paragraph 3 of exhibit B, was to contradict the contents of the said exhibit B which section 132(1) of the Evidence Act, 1990 frowns upon and such evidence was inadmissible in law and the trial court ought not to have acted upon same - see Union Bank of Nigeria Ltd. vs Ozigi (1994) 3 NWLR (pt. 333) 385; Eke vs Odofoin (1961) All NLR 842; Colonial Development Board vs Kamson (1955) 21 NLR 75; Molade vs Molade (1958) SCNLR 206.

It follows therefore that where there is any disagreement between parties to a written agreement on any particular point, as in the present case, the authoritative and legal source of information for the purpose of resolving that disagreement or dispute is the written contract executed by the parties, which in the present case is exhibit B.

It is always not the business of the court to make a contract for the parties before it or to re-write the one already made by them.

Once the conditions precedent to formation of contract are fulfilled by the parties thereto, they are bound by it - see *Oyenuga vs Provisional Council of the University of Ife* (1965) NMLR 9.

Having regards to the facts of the case and the relevant law, I hold the view that issue No. 1 be and is hereby resolved against the appellant.

On issue No.2 learned counsel for the appellant submitted that since the facts show that the issue of interest claimed by appellant was never contended by respondent, the lower court was in error in querying the award of 21% of judgment debt per annum to the appellant; that the issue was raised suo motu by the lower court contrary to the decision of this court in *Nwokoro vs Onuma* (1990) 3 NWLR (pt. 136) 22 at 33 and without the parties being given opportunity to be heard on it.

Learned counsel further submitted that the relevant considerations for award of interest are as laid down by this court in *Ekwunife vs Wayne* (1989) 5 NWLR (pt. 122) 422; that a party who should pay money to a third party but has wrongfully withheld, driving the other party to institute action to recover the money ought not to be allowed the benefit of having the money; that it is in evidence that respondent agreed to pay 5% commission out of the money paid by Nigerian Agricultural and Cooperative Bank as contract price and that respondent failed or refused to pay appellant after receiving the payment. Learned counsel finally submitted that the Court of Appeal decision that the appellant is not entitled to interest is unjustified in the light of the facts pleaded, evidence adduced, and applicable legal authorities on the point and urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent stated that the only evidence on record in respect of interest in this matter is at page 50 where pw.1 said, “*Also interest on the 5% sales commission due to him at 21%.*”

Counsel submitted that there is no evidence to suggest that the 21% quoted is anything but an arbitrary figure; that the trial court awarded interest per annum at 21% from April, 1993 till full liquidation when evidence shows that April, 1993 was when the contract was awarded not when payment was made to the respondent and that evidence was not led

as to when final payment was made to the respondent so as to make exhibit B operative.

Referring to order 38 Rule 7 of the High Court of Lagos State (Civil Procedure) (Rules) learned counsel submitted that most judgment interest is awarded at a rate not exceeding seven and a half per centum per annum (7.5%), but the trial court awarded 21% from April, 1993 till final payment. Learned counsel then urged the court to resolve the issue against the appellant.

It should be noted that having resolved issue No.1, which is the main issue in this appeal against appellant, issue No.2 dealing with interest on an unearned 5% commission becomes irrelevant, appellant having been held not to be entitled to claim any commission since exhibit B was never revalidated and the contract which would have entitled appellant to earn the 5% commission on which any interest would have been claimable, was awarded after the expiration of the terms of contract between the parties. That apart, it is very clear that what the lower court said on the matter was by the way as it stated at page 224 as follows:-

“Such an award of interest if the plaintiff/respondent had been adjudged by this court to be successful would make a mockery of the exercise of judicial discretion particularly with relation to the foreign currency taking into consideration the local circumstances of our country. I observe that the award of 21% per annum to run from April, 1993 till full liquidation that again labours under the misconception of the law. Interest on judgment debt has statutory flavour and it normally starts to run from the date of judgment till liquidation, but I am yet to come across any rule of court which stipulate 21% interest on judgment debt from the date of judgment till final liquidation.

From all I have said, the interest rate of 21% is outrageous and if the plaintiff/respondent had been adjudged to be successful that award would have been disallowed.”

We must always bear in mind that it is not everything a judge says that should constitute a subject of a ground of appeal particularly when what is said does not go to the root of the matter as decided

by the court. In the instant case, the court merely made an observation and did not follow it up with an order setting aside the award of the said interest by the trial court. From the emphasis supplied on the passage of the judgment *supra*, what I have stated becomes very clear and instructive. The question is from the passage reproduced *supra*; which is the bedrock of the complaint of the appellant; how can a resolution of the issue involved positively affect the fortunes of the appeal? I hold the view that the issue is irrelevant and therefore undeserving of the attention of this court and is accordingly discountenanced.

On issue No. 3 learned counsel for the appellant submitted that from the pleadings, evidence and addresses of the parties at the trial court, the issues of quantum meruit, special damages and interest rate or contract price were not in controversy; that the trial court did not base its judgment on quantum meruit otherwise it would not have awarded the entire 5% commission to the appellant; that the lower court presided over a case different from what was heard by the trial court relying on *Oredeyin vs Arowolo* (1989) 4 NWLR (pt.114) 172 at 192; that respondent needed leave of the lower court to raise the issues which leave was never sought and that the grounds of appeal filed without leave should be struck out relying on *Maigoro vs Garba* (1999) 10 NWLR (pt.624) 555. Finally learned counsel urged the court to resolve ¹ the issue in favour of the appellant and allow the appeal.

On his part, learned counsel for the respondent submitted that the case of the respondent at the Court of Appeal which led to the dismissal of the case of the appellant was not based on any of the issues being complained of in the issue under consideration. Referring to page 217 of the record, learned counsel stated that the lower court clearly said therein that the appellant's case as formulated before the trial court had no semblance of quantum meruit and that it was an issue of law which suddenly raised its head in the course of writing the judgement by the trial judge; that the lower court consequently held at page 218 of the record that the claim of appellant was not rooted in quantum meruit, and that since it was raised in the judgment of the trial judge, respondent herein was right

in law in raising the issue before the lower court.

Learned counsel further submitted that the decision of the lower court to dismiss the case of the appellant was not on the basis that appellant was not entitled to his claim on quantum meruit but on the basis that the contract relied upon for the case having been terminated cannot sustain the appellant's case; that the issue of general and special damages though canvassed in defendant/appellant's brief did not feature at all in the reasoning leading to the decision of the lower court to dismiss appellant's claim and that issue 3 is academic. Learned counsel then urged the court to resolve the issue against the appellant and dismiss the appeal.

I have carefully gone through the judgment of the lower court and I hold the view that that judgment was not based on the issues of quantum meruit, special damages and interest rate or contract price as canvassed by learned counsel for the appellant. It is very clear that the issue of quantum meruit was introduced for the first time in the judgment of the trial judge and that both counsel never addressed that court on the matter. It is equally true and I agree with the view of the lower court expressed in it's judgment at page 218 of the record thus ".... The claim of the plain tiff/respondent is not rooted in quantum meruit. And being a crucial point of law raised by the trial judge himself in the course of writing his judgment, the appellant is on firma terra in law to raise it before us."

Despite the above holding the lower court did not dismiss the appellant's claim on the basis that appellant is not entitled to claim on quantum meruit but on the basis that the contract relied upon by appellant in founding his claim having been terminated it cannot in law sustain the appellant's case. That decision is the same with the decision of this court in the resolution of issue No.1 in this appeal which issue forms the main plank in the case of the appellant. Going through the judgment of the lower court, I confirm that the issue of general and special damages though canvassed by the respondent in its brief before the lower court did not feature at all in the reasoning that led to decision of the Court of Appeal on the matter - that is the dismissal of the claim of the appellant before the court of trial. In the

circumstance, I agree with the views of the learned counsel for the respondent that issue 3 as argued is merely academic. I should, in no way, be understood as saying that the law is no longer that for a party to raise a fresh issue on appeal he must first obtain leave of the appellate court. I am however saying that even if the Court of Appeal allowed the respondent to raise fresh issues without leave, since the decision of that court did not take into cognisance those issues or the issues did not form the basis of the decision of that court, that error by the Court of Appeal is not sufficient to result in the setting aside of that decision. To result in the invalidation of the decision of the lower court, as canvassed by the learned counsel for the appellant, it must be demonstrated that the error was substantial and formed the basis of the decision complained of and resulted in a miscarriage of justice. The law is still that it is not every error committed by the lower court that will result in the judgment of that court being set aside by an appellate court.

The term “miscarriage of justice” has been variously defined but its essence is that it is the decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial rights of a party. As it is used in constitutional standard of reversible error in judgment, miscarriage of justice means a reasonable probability of more favourable outcome for the defendant.

It is the law that miscarriage of justice warranting a reversal of a decision should be declared only when the court, after examination of the entire case, including the evidence is of the opinion that it is reasonably probable that a result more favourable to the appellant would have been reached in the absence of the error. A miscarriage of justice therefore means such a departure from the rules which permeates a judicial procedure as to make that which happened not in the proper sense of the word a judicial procedure at all - see *Nnajifor vs Ukonu* (1986) 4 NWLR (pt.36) 505. I find no miscarriage of justice in the instant case which should enable the court to interfere.

I must observe that though appellant must feel bad in the way things

turned out between the parties particularly after doing so much to enable the respondent secure the award of the contract in question and naturally expected some compensation for his efforts, the way the action is framed and pursued denied him of any compensatory remedy. Learned counsel for the appellant threw all the eggs into one basket as a result of which they all broke when the basket came crashing down. A little care would have led to an alternative plea for compensation on the principle of quantum meruit which might have grounded the appellant a remedy. That is just by the way.

In conclusion I hold the view that this appeal is totally without merit and is accordingly dismissed with N10,000.00 costs against the appellant. Appeal dismissed.

ONUJSC

I have had the opportunity to read in draft the judgment of my learned brother Onnoghen, JSC just delivered. I am in entire agreement with him that the appeal lacks substance and I too dismiss it. I make similar consequential orders inclusive of those as to costs.

KATSINA-ALU JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother Onnoghen JSC. I agree with it. I would however make a few comments on whether on the evidence before the court of trial, the Plaintiff was entitled to judgment.

At the trial the Plaintiff testified that he met with the Defendant on the 3rd of March, 1992, with a business proposal to facilitate the award of a Computer Contract to the Defendant. It was his case that a 5% commission on the contract sum was agreed to be paid to him. In support of this agreement, he tendered Exhibit “B” which is a letter from the Defendant and which letter substantially corroborates his oral testimony except in one very important aspect. This is on the terminal date of the agreement which is included in Exhibit “B”. The Plaintiffs case was that

the terminal date of 31st December, 1992, was not part of the agreement reached on 3rd of March, 1992.

The Plaintiff said he took up the aspect of the terminal date with the Defendant who assured him that the date was put in there for administrative convenience. The contract was won on 3rd of April 1993, more than 3 months after the terminal date of 31st December, 1992.

The Defendant, in the course of the trial contended that the contract between the parties as contained in Exhibit “B” terminated on 31st December, 1992 before the award of the contract. It said it was under no obligation therefore to pay the 5% commission to the Plaintiff.

The Plaintiff’s case before this court in summary is that Exhibit “B” does not govern the agency contract between the parties exclusively. He contended that the oral agreement prior to Exhibit “B” on the 3rd of March, 1992, formed part of the contract in so far as the issue of terminal date for the contract is concerned.

The question therefore before this court is simple. It is whether the Defendant and the Court of Appeal are right that the contract between the parties came to an end on the 31st December, 1992 as per Exhibit “B” or whether the Plaintiff and the trial court were right that the contract continued until April, 1993, when the contract was won.

At this stage, it is necessary to read Exhibit “B”. It reads in part thus:

“Re: Appointment As Marketing Consultant:

We are happy to inform you that we have appointed your company as Marketing Consultants for the sale of Computer equipment and related services to Nigerian Agricultural and Co-operative Bank.

The remuneration of your company will be 5% (five percent) of the total contract value payable as at time of final payment from customer. This agreement will remain valid till 31st December, 1992 at which date it could be negotiated.”

I think the effect of the terminal date inserted in Exhibit “B” is to terminate the contractual relationship between the parties on 31st December, 1992. I believe the Plaintiff understood it so. I say so in view of his admission in his letter Exhibit “3”. In para. 3 of Exhibit “3” he wrote as follows:

“I would therefore like to refer to paragraph 3 of the letter under reference which stipulates that the validity of the agreement expired on December, 31, 1992, and was subject to negotiation thereafter.”

In paragraph 4 of Exhibit “3” the Plaintiff talked of his failed attempts to re-negotiate the agreement. He said:

“I was therefore unable to invalidate the agreement.”

In the light of paragraphs 3 and 4 of Exhibit “3” it seems clear to me that the Plaintiff was under no misconception that the agreement had terminated. In my Judgment the Court of Appeal was right when it held that:

“It is manifest from the judgment that the lower court appreciated that the Plaintiff could not recover on the strict terms of the contract. The lower court then resorted to the invocation of the doctrine of quantum meruit, but clearly the case before the court was not fought on that basis. While the position of the Respondent evokes sympathy but it must be borne in mind that sympathy is not always a good forerunner for justice. This case ought to have been approached solely on the basis of the rights conferred on the parties by the contract relied upon by the Plaintiff. The lower court ought to have dismissed The Plaintiffs case.”

I also dismiss the appeal. I, too, make no order as to costs.

TOBI JSC

The appellant, as plaintiff, in the High Court filed a fairly loaded and ambitious claim against the respondent, who was the defendant. In sum, the appellant sought three declaratory reliefs, one injunctive relief, and reliefs of special and general damages. There was also one on payment of part of the special damages into an escrow account in Nigeria, until the final judgment of the court.

The appellant called one witness. The respondent did not call any witness. He appears to have yielded to the evidence of the appellant, which circulates round Exhibit B, or should circulate round Exhibit B. It is in main, the agreement, although the witness thinks differently. As far as he is concerned, Exhibit B did not constitute the whole agreement. To him,

Exhibit B did not tell the whole story of the transaction and that there was some verbal agreement, apparently stating the contrary of the contents of Exhibit B in favour of the appellant. The witness will not let that go. He holds firmly and tightly to the verbal agreement like a child zealously B guiding its share of sweet at the breakfast table. The learned trial Judge believed the evidence of the appellant. He entered judgment accordingly in his favour.

Dissatisfied, the defendant, as appellant, appealed to the Court of C Appeal. That court set aside the judgment of the learned trial Judge and entered judgment in favour of the defendant which is the respondent in this appeal.

The fulcrum of this matter predicates on dates as they convey events surrounding the contractual relationship of the parties. And here, D two dates are each competing for first and final place. One is 31st December, 1992. The other is 3rd April, 1993.

The submissions of counsel have understandably painted different pictures in respect of the dates, as they support or vindicate their clients E cases. Learned counsel for the appellant submitted that beyond Exhibit B was an oral contract between the parties at the meeting of 3rd March, 1992 which was binding on them. Learned counsel for the respondent did not see any such contract. He relied on the contents of Exhibit B to the hilt. To F him, it is either Exhibit B or nothing.

What is Exhibit B? Exhibit B is the letter from the respondent to the appellant. It reads in relevant part:

“The remuneration of your Company will be 5% (five percent) of the total contract value payable as at time of final payment from customer. G This agreement will remain valid till 31st December 1992 at which date it could be negotiated.”

As a Judge I can only interpret the wording of a contract and not introduce new words. But for that I should have thought that the last word H ought to read, “renegotiated”. That will make a lot of sense and meaning, particularly in the light of the fact that Exhibit B stands as a negotiation and any other one coming after it is a re-negotiation. But that is not important for the purpose of this appeal. I merely thought aloud and I do not see any

harm thinking aloud as my thoughts here do not affect the live issues for determination.

The duty of a Judge is to interpret the contract entered between the parties in the light of their clear intention as conveyed by the language. I should therefore read the second sentence I quoted above, even at the expense of prolixity:

“This agreement will remain valid till 31st December 1992 at which date it could be negotiated.”

The language is clear and it is that the life span of the agreement will remain till 31st December, 1992. Putting it in another language, the agreement will expire after 31st December, 1992. In other words, Exhibit B will be dead after 31st December, 1992 unless renegotiated.

Was there any renegotiation of Exhibit B? No. No such case is made and so I will not go there. The case made is that prior to Exhibit B, there was an oral agreement foisting another date on the parties, contrary to the contents of Exhibit B.

The burden of proof of such oral agreement is on the appellant. This is the position of our adjectival law which says that the plaintiff has a duty to prove his case. Where a plaintiff fails to prove his case on the balance of probability or on the preponderance of evidence, it crumbles and he will not obtain judgment. The case will be dismissed.

Did the appellant prove the existence of oral agreement? I should go to the evidence of the only witness called by the appellant. He said in examination-in-chief:

“Exhibit B does not constitute the Agreement between us not in whole because I quickly pointed out to the M.D. when I received the letter that the terminal date indicated was not in our agreement; it was verbal; and he replied that it was purely for administrative convenience.”

In the circumstances of this case, mere ipse dixit of the witness cannot alter the contents of Exhibit B, particularly in the light of the denial in paragraph 8 of the statement of defence as it relates and affects paragraph 8 of the statement of claim. Let me read paragraph 8 of the statement of claim:

“When plaintiff observed that an expiry date was inserted in the

letter and that it was unnecessary for such a contract, Defendant's former Managing Director explained that it was just for Defendant's administrative convenience and that in any case the date would be automatically extended once the contract award process was still on."

B As the above was denied by the respondent in the statement of defence, the burden of proof was on the appellant. I do not think the appellant was able to prove the averment in the light of Exhibit B. In paragraph 8 of the statement of claim, it was averred that "the date would be automatically extended once the contract award process was still on."

C This is contrary to the contents of Exhibit B which clearly stated that the "agreement will remain valid till 31st December 1992 at which date it would be negotiated." A contract which is subject to negotiation, or should I say renegotiation, cannot be said to have an automatic renewal in terms of

D extension of date.

If parties had earlier agreed orally on a particular point and later enters into a written agreement or contract, it is part of general commercial practice to reduce the oral agreement as part of the contents of the written

E agreement which is later in time. See generally *Eke v. Odolofin* (1961) 1 All NLR (Pt. 2) 404. I am surprised that the appellant did not insist on this generally accepted commercial practice. It is however a different situation where the oral or parole evidence comes after the written agreement. But

F that is not the situation here as far as the case of the appellant is concerned.

I should also examine the law on the place of oral evidence in respect of, or better still, in swaying documentary evidence. In other words, can oral evidence be led and admitted to contradict documentary evidence? I think I can shop from section 132 of the Evidence Act.

G The section is in three subsections. I intend to take subsection (1) and (2). Subsection (3) is not apposite For the purpose of this appeal, by subsection (1), when a contract has been reduced to the form of a document or series of documents, no evidence may be given of such

H contract, nor the contents of such document or documents be contradicted, altered, added to or varied by oral evidence. As the proviso to the subsection is not applicable to this case, I shall not take it.

The case law is in great proliferation. Let me take a few of them.

In *Abiodun v. Chief Ogunyomi* (1962) 1 All NLR 550, the Federal Supreme Court held that once a certificate is issued in satisfaction of the requirement of registration under the Land Registration Act, Cap. 99, Laws of the Federation, 1958, oral evidence of the sale would be excluded under section 131 of the Evidence Act. That is now section 132 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. B

In *Macaulay v. NAL Merchant Bank Ltd.* (1990) 4 NWLR (Pt. 144) 283, this Court held that where a defendant has himself admitted that the terms and conditions of the agreement between him and the plaintiff, which is the subject of the dispute before the court, have been reduced into writing, by the provisions of section 131(1) of the Evidence Act, such a defendant cannot be heard to say that besides those written terms and conditions, there is other evidence of the terms of the agreement. It is only the written conditions and terms of such agreement that are evidence of the agreement's terms and conditions. D

In *Mrs. Olaloye v. Madam Balogun* (1990) 5 NWLR (Pt. 148) 24, this Court, again held that once there is a document evidencing sale of land, oral evidence of the sale would be excluded and the question as to what land was sold has to be settled by reference to the document. In *Union Bank of Nigeria Ltd. v. Professor Ozigi* (1994) 3 NWLR (Pt. 333) 385, this Court also held that the general rule is that where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. See also *Colonial Development Board v. Kamson* (1955) 21 NLR 75; *Molade v. Molade* (1958) SCNLR 206. F

Following the above position of the case law, I held in the more recent case of *Ezemba v. Ibemene* (2004) 14 NWLR (Pt. 894) 617 in a dissenting judgment, that it is the principle of the common law, section 132 of the Evidence Act apart, that where parties have reduced their transaction in writing, oral or extrinsic evidence is not admissible to add to, vary, subtract from or contradict the written terms of the transaction. H

The common law position is clearly adumbrated by Phipson on Evidence, one of the greatest authorities on the Law of Evidence in the common law system. He said at paragraph 42: 11-12, pages 1165 and

1166:

“When a transaction has been reduced to, or recorded in writing, either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document... The grounds of exclusion commonly given are: (1) that to admit inferior evidence when the law requires superior would be to nullify the law; and (2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intention, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory...”

By the above passage, Phipson drew a dichotomy between superior and inferior evidence vis-a-vis documentary and oral or extrinsic evidence respectively. In other words, to Phipson, documentary evidence is superior evidence, while oral or extrinsic evidence is inferior evidence. A court of law will certainly go for superior evidence as opposed to inferior evidence in the event when all other parameters show equality and justice. After all, anything superior is better in quality or value or of a high quality as opposed to anything inferior which is not good or less good in quality or value or of lower position. Why should a court of law, a legal institution, commanding all the superiority, not go for superior evidence?

Did the trial Judge go for Phipson’s superior evidence? Let me also pose the reverse question, which is: did the trial Judge abandon Phipson’s superior evidence and pick inferior evidence? I should get an answer from the Record of Appeal. In his judgment at page 70 of the Record, the learned trial Judge said:

“It would not on the award or commission, but on extension of time, which both parties have anticipated in Exhibit B. It is my view that the extension of time is within the reasonable anticipation of both parties. So defendant cannot be heard to say, that 31st December, 1992 was the very essence of the contract. It is not.”

With the greatest respect, the learned trial Judge got it all wrong. In the light of Exhibit B, the conclusion the learned trial Judge arrived at was

not really available to him. By his conclusion, the trial Judge gave Exhibit B a burden it cannot carry.

And that takes me to section 132(2) of the Evidence Act. By the subsection, oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, grant or disposition of property.

Although the Evidence Act does not define “*documentary memorandum*”, I am of the view that Exhibit B is not a documentary memorandum. Assuming that I am wrong, and Exhibit B qualifies as such a memorandum, the second arm of the subsection does not vindicate the position taken by the learned trial Judge. This is because Exhibit B was clearly intended to have legal effect in the contractual bargain between the parties. As a matter of law and fact, Exhibit B is the hub or central pin of the contractual relationship between the parties.

The stringent position of section 132(1) is to ensure that a party to a contract in writing, does not change his position midstream to his undeserved advantage and to the detriment of the unsuspecting adverse party. Litigation is not a game of trick and ambivalent short cuts covered with the catching baits of the fisherman but one in which the parties come out openly to make their case for the decision of the court. The principles of equity and fair play will not side a party who comes to court with filthy and unclean hands.

Learned counsel for the appellant made some big weather out of the respondent not giving evidence at the trial. I do not see the reason for such weather, because that does not shift the burden of proof on the respondent. The Court of Appeal was correct when it said at page 218 of the Record:

“Generally, in law, where the evidence is uncontradicted, the onus of proof is satisfied on a minimal proof since there is nothing on the other side of the scale.”

Yes, that is the position of the law. But minimal proof remains minimal and does not mean no proof. The failure on the part of a defendant to give evidence does not exonerate the plaintiff from proving his case though minimally, an expression that means “*as little as possible or very*

little". I do not see the very little proof by the appellant, particularly in the face of the clear contents of Exhibit B.

Learned counsel for the appellant submitted that "*the wrong decision of the Court of Appeal stemmed from its lack of appreciation or refusal to accord the meeting of 3rd March 1992 of its importance.*" Quoting paragraph one of Exhibit B, learned counsel submitted that the paragraph supports the appellant's claim of a prior contract.

With respect, I am not with him at all. I do not think the witness of the appellant said in evidence that at the meeting of 3rd March, 1992, there was a verbal agreement that the terminal date of the contract will be 3rd April, 1993. The evidence of the witness relating to 3rd March, 1992 is at pages 47 developing to page 48. I will quote the evidence in some detail:

"*I made my contact with the Def. - the M.D. on or about 3rd March, 1992. When I met with the M.D. I intimated him with the possibility of nominating and recommending the company for this contract. The M.D. is JACQUES BUISSIER. I further intimated him that the contract would not be less than \$5m. I further..... the Company would be interested in its nomination and the M.D. replied in the affirmative. I assured him that if I nominated the company, it would surely get the contract. I also hinted him that I intended making the same offer to other Computer Companies. We agreed on an introduction fee of 5% of the contract sum. He later gave me a letter of appointment as a marketing consultant - tendered - no objection, admitted and marked Exhibit B. After Exhibit B, I had the task of convincing my contacts.*"

It is clear from the ipse dixit of the only witness that the 3rd March, 1992 meeting discussed the possibility of nominating the respondent for the contract, the financial worth of the contract, the assurance by the witness that the respondent will get the contract on nomination by him and an introduction fee of 5% contract sum. All these culminated in Exhibit B. I ask: where is the discussion on the shifting of the terminal date of the contract from December 1992 to April, 1993? I do not see that and it is not in the record. The submission of counsel therefore baffles me to my bones. It is elementary law that parties are bound by the Record of Appeal and an appellate court has no jurisdiction to go outside the Record in search

of evidence. Such is the invitation by the counsel for the appellant and I am not prepared to accept the invitation because it is clearly not borne out from our adjectival law.

Let me read paragraph 1 of Exhibit B here to see how it supports the submission of counsel for the appellant:

“We are happy to inform you that we have appointed your Company as Marketing Consultants for the sale of computer equipment and related Services to Nigerian Agricultural Cooperative Bank.”

By way of recapitulation, I should say that it was the submission of counsel for the appellant that the above paragraph supports the appellant’s claim of a prior contract. How? In what way? In what circumstance? I have questions and questions galore but I can stop here. In my humble view, there is no nexus, not even a minute nexus, between paragraph one of Exhibit B and the appellant’s claim of a prior contract.

Paragraph 1 is clearly an independent sentence conveying an appointment of the appellant’s company for the sale of computer equipment. It has nothing to do with a prior contract; no, not the least.

The paragraph starts authoritatively with the plural pronoun, “We”, standing in the place of the respondent. It could have been a different matter if the paragraph had commenced thus or something along this trend:

“With reference to our prior oral agreement on the terminal date of the contract, we...”

It is good law that courts of law have no jurisdiction to write contracts for the parties. As a matter of law, they have no competence in such matters and therefore cannot find themselves altercating or vexing the exclusive terrain of the parties in making the contract. Courts of law use their interpretative jurisdiction to construe the contract made by the parties and come out with their intention or presumed intention, if the intention is not clear on the face of the contract. If this Court accepts the invitation of learned counsel for the appellant to construe the agreement he had with the respondent, in the way he wants it, it will be changing place with the parties to the contract. This Court cannot take such a position which is against the law.

I think I can stop here. I do not want to take the other issues because

they are parasitic on the issue I have taken. To me, date 31st December, 1992 wins the day. Date 3rd April, 1993 fails. It is for the above reasons and the fuller reasons given by my learned brother, Onnoghen, JSC, in his judgment that I too dismiss the appeal and I award N10,000.00 in favour
B of the respondent.

MOHAMMED JSC

C I have had the opportunity of reading in draft, the lead judgment of my learned brother Onnoghen JSC which he has just delivered. I agree entirely with him that the appellant's appeal is devoid of merit and therefore must fail. I will only contribute to those aspects of the judgment dealing with the first issue for determination in both the appellant's and the
D respondent's briefs of argument, which in fact is the only main and really live issue for determination in this appeal. The issue is whether having regard to the case framed by the appellant in his pleading and the evidence led by him in support of those facts pleaded by him, he was able to show
E the existence of a contract agreement between the parties which the appellant could enforce to support his claims.

As the respondent led no evidence at all at the trial court, this means the resolution of this central issue depends entirely on the case made out
F by the appellant as the plaintiff at the trial court. The basis of the contractual relationship between the parties is contained in the letter dated 5-3-1992 Exhibit 'B' written to the appellant by the respondent, appointing the appellant a marketing consultant for a specified transaction. Having regard to the significance of this letter of appointment in the nature of the
G relationship between the parties in this appeal, I shall quote the letter in full. The letter reads-

"Data Processing Maintenance and Services Limited
March 5, 1992
H *Baseman Systems Associates*
4, Folashade Close
P.O. Box 3719
Surulere

Lagos

Attention: Mr. Olamide E. Larmie

Dear Sir,

RE: APPOINTMENT AS MARKETING CONSULTANT

We are happy to inform you that we have appointed your company B as Marketing consultants for the sale of Computer equipment and related services to NIGERIAN AGRICULTURAL AND CO OPERATIVE BANK.

The remuneration of your company will be 5% (five percent) of the total contract value payable as at time of final payment from customer. C

This agreement will remain valid till 31st December, 1992, at which date it could be negotiated.

We look forward to a successful cooperation between our companies.

Yours sincerely,

Signed

J. P. BOISSIER

Managing Director"

From the oral evidence on record adduced by the appellant himself E and the documents tendered and received in evidence in the course of the hearing at the trial court, the appellant did not take any step to react to the letter of his appointment by the respondent until 2-4-1993. The appellant's response is contained in his letter to the respondent which was in evidence F as Exhibit C. I do not find it necessary to quote the contents of the appellant's letter Exhibit 'C', because it is quite clear from the contents of the respondent's letter Exhibit 'B', the appellant's letter Exhibit 'C' was written at the time when his appointment as a Marketing Consultant to the respondent for the named transaction, had already lapsed since 31-12-1992. To put it plainly, the appellant was no longer an employee of the respondent as a Marketing Consultant for the purpose of sale of the computer equipment and related services to the Nigerian Agricultural and Cooperative Bank. G H

Another significant factor emerging from the evidence adduced by the appellant in support of his case, is the fact that the contract for the sale of computers and other services for which he was appointed a Marketing

Consultant, was not awarded to the respondent until the third week of April 1993. This important event again in the relationship between the parties namely, the award of the contract the subject of the agreement between the parties in Exhibit 'B', took place after the appointment of the appellant under the written agreement had lapsed. The question is, whether there is anything from the evidence on record on which the appellant can hang to show the existence of a binding agreement between him and the respondent, which the appellant can enforce against the respondent for the payment of the earlier agreed 5% of the contract sum.

Learned counsel to the appellant in his arguments in support of this issue for determination made a heavy weather of the existence of oral agreement between the parties on the extension of the terminal date of the contract being 31-12-1992 contained in Exhibit 'B'. The terms of the agreement to extend the date of the contract beyond 31-12-1992, are not contained anywhere other than the oral evidence of the appellant which evidence grossly contradicted the contents of the appellant's letter to the respondent Exhibit 'C' dated 2-4-1993, in which he mentioned the efforts he made to have the terminal date extended without success. Indeed an oral agreement between the parties to extend the terminal date of the contract beyond 31-12-1992, could be binding provided there is clear evidence of the existence of this oral contract in terms of offer, acceptance and consideration. Can the oral evidence of the appellant alone, without more on the existence of this oral contract be sufficient in law to prove its existence? The answer of course is in the negative. This is because section 132(1) of the Evidence Act CAP 112 Laws of the Federation of Nigeria 1990, says the appellant can not by oral evidence vary the terms of Exhibit 'B' containing a definite terminal date for the enforcement of the agreement between the parties being 31-12-1992. See *Olaoye v. Balogun* (1990) 5 NWLR (pt.148) 24 and *Koiki v. Magnusson* (1999) 8 NWLR (pt.615) 492 at 514.

With regard to the clear contents of Exhibit 'B', the obligation of the parties contained therein are quite plain. The parties are bound by the terms therein until 31-12-1992, and certainly not beyond. The law is trite regarding the bindingness of terms of agreement on the parties. Where

parties enter into an agreement in writing, they are bound by the terms thereof. This court, and indeed any other court will not allow anything to be read into such agreement, terms on which the parties were not in agreement or were not ad-idem. See *Baba v. Nigerian Civil Aviation Training Centre Zaria* (1991) 5 NWLR (pt.192) 388; *Union Bank of Nigeria Ltd. v. B. U. Umeh & Sons Ltd.* (1996) 1 NWLR (pt.426) 565; *S.C.O.A. Nigeria Ltd. v. Bourdex Ltd.* (1990) 3 NWLR (pt.138) 380 and *Koiki v. Magnusson* (1999) 8 NWLR (pt.615) 492 at 514.

In the result, the appellant having failed to show the existence of an oral agreement between the parties extending the terminal date of the agreement between them beyond 31-12-1992, the court below was right in allowing the respondent's appeal and dismissing the claim of the appellant as plaintiff against the respondent as defendant. As I have already indicated earlier in this judgment, I am in complete agreement with the lead judgment of my learned brother Onnoghen JSC. Accordingly, I also hereby dismiss this appeal and abide by the order on costs in the lead judgment.

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