

SUPREME COURT OF NIGERIA
16TH DECEMBER, 2005. SC. 114/2001
CORAM:- I. L. KUTIGI, U. A. KALGO, D. MUSDAPHER,
A. M. MUKHTAR, W. S. N. ONNOGHEN, JJSC

1. O. ARABAMBI

2. NIGERIAN INDUSTRIAL DEVELOPMENT APPELLANTS
BANK LIMITED

(Carrying on business under the name and
style of Oladele Arabambi & Co.)

AND

ADVANCE BEVERAGES

INDUSTRIES LIMITED RESPONDENT

ACTIONS - Issue - Damages - Subject matter of this claim - Has nothing to do with the place of location - Or registration of the factory premises (H1)

ACTIONS - Jurisdiction - Cause of action - Damages - Lex situs of the factory - Is not an issue in this case - As cause of action arose - From the parties' contract (H2)

APPEALS - Action - Basis of - Was rightly held by the Court of Appeal - To be the grant of loan and mortgage agreement between the parties - And not based on the immovable property at Ogun State (H3)

APPEALS - Concurrent findings - Will not be disturbed - Unless they are perverse - And not supported by credible evidence (H4)

EVIDENCE - Pleadings - Proof - Allegation that claim was not proved on preponderance of evidence - Is not substantiated (H5)

PLEADINGS - Evidence - Prima facie case - Averment in pleadings - Are deemed abandoned - Where party who seeks judgment in his favour - Does not produce credible evidence - In support of his pleadings (H6)

PLEADINGS - Evidence - Documents - Where facts are pleaded - Document need not be specifically pleaded (H7)

COURTS - Evidence - Proof - Duty of court - In evaluating evidence - Is to examine and peruse carefully - Documents and oral evidence - Before it (H8)

ACTIONS - Reliefs - Writ of Summons - Pleadings - A party is at liberty - To amend reliefs sought in the Writ - In his Statement of Claim (H9)

EVIDENCE - Proof - Unchallenged evidence - Where a party gives evidence - And it is not challenged by the opposite party - Who has opportunity to do so - It is open to Court - To act on that evidence (H10)

DAMAGES - Special damages - Proof - Kalla case - Purchase price of item - Where not controverted - The award is justified - Though receipt is not tendered (H11)

FACTS

Before the High Court of Lagos State the plaintiff/respondent made claims against the defendants/appellants for a total sum of N30 million naira being special and general damages. The plaintiff is a manufacturer of soft drinks and beverages. It obtained loan from the 2nd defendant for the purchase of plants and machinery to be used in production of the drinks. A mortgage agreement was entered and the loan was added to the plaintiff's other resources to acquire the needed plants. The plaintiff could not commence production due to lack of funds. The 2nd defendant refused the plaintiff's application for working capital and appointed the 1st defendant as Receiver without plaintiff's consent.

The 1st defendant took steps to wind up the plaintiff company by unlawfully selling the plants and machinery. He also terminated the appointment of staff and exposed the factory to various losses. After receiving evidence in the proceeding, the trial Court gave judgment in fa-

vour of the plaintiff against the defendants for a sum of N30 million as special and general damages. Dissatisfied with the decision, the defendants appealed to the Court of Appeal. The defendants' appeal was allowed in part as the general damages was set aside but the special damages award was confirmed. Aggrieved by this decision, the defendants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the court below was right to have held that notwithstanding the *lex situs* of the factory the subject matter of this case, the High Court of Lagos State had the territorial jurisdiction to adjudicate on the case.

2. Whether the Court of Appeal was right in law to have upheld the award of special damages of N25,344,237.00 made by the trial court in favour of the respondent after the respondent had abandoned the declaratory reliefs that served as hanger for the award of damages moreover when the award was based on the mere ipse dixit of a witness where receipt and or invoices ought to have been tendered to ground the award.

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

ACTIONS - Issue - Damages

1. A careful perusal of these factors all put together reveal that the whole transaction took place in Lagos State, and was executed in Lagos State, the fact that the land on which the factory was built or which was used as security for the mortgage, being most immaterial in this case. The registration of Exhibit PI, in the land Registry office in Ogun State, (which learned Senior Advocate is making heavy weather of) became necessary to give the appellants security over the respondent's assets used as security for the loan, as is required by law. Such registration has to be done in the State where the land is situate, and this is why the respondent factory had to be registered in Ogun State, for the land is in Ifo, in Ogun State. The factory was neither affected by the act of the receiver, nor was it sold, so the fact that it is the subject matter of this claim does not arise, as it was never an issue. It was merely a vehicle that needed to carry the respondent to the promised land. (p. 2861 E)

Lex situs of the factory - Is not an issue in this case

2. To say that simply because the plants, machinery and the land on which they were are in Ogun State, and so the action should have been instituted B in Ogun State and not Lagos State, where the process of the transaction started and ended, is, with due respect, a misconception. This is not a suit about the land, so the cases of *Nwabueze v. Okoye* 1988 4 NWLR part 91 page 664 and *Onyeama v. Oputa* 1987 3 NWLR part 69 page 259 cited by C learned Senior Advocate are not relevant to this case. In the like manner the maxim of *quid quid plantatur solo solo credit* is not evocable, as it has no place in the suit. The plaintiffs land where the factory was situate was never sold, and so it did not form part of the respondent's claim in the suit, and the question of the *lex situs* being in Ogun State did not arise. A cause D of action as defined in *Strouds Judicial Dictionary* as set out in the case of *Savage & ors v. Uwechia* 1972 3 S. C. 214 at 221, by *Fatayi-William J.S.C.* (as he then was) is:-

“the entire set of circumstances giving rise to an enforceable claim”

E The learned Supreme Court justice went on to say thus:-

“To our mind, it is, in effect, the fact or combination of facts which give rise to a right to sue and it consists of two elements the wrongful act of the defendant which gives the plaintiff his cause of complaint and the F consequent damage”.

Bearing the above definition in mind, I have no doubt whatsoever in my mind that the cause of action arose from the contractual relationship of the parties in the instant case, and not the *lex situs* of the factory. G (p. 2862 A)

Action - Basis of

3. In view of the above discussions, the learned justice of the Court of Appeal was right when in his judgment he said and opined *inter alia* thus:- H *“If I may say, the very basis of this action is the loan of two million Naira which the 1st defendant/appellant granted the plaintiff/respondent at the request of the latter and which was evidence (sic) by the loan and mortgage agreement entered into by both parties. It is the non-payment of*

*the loan taken that has resulted in the 1st defendant/appellant, exercising whatever right it conceived under exhibit 'p' appointing a receiver to realize the assets of the plaintiff/respondent and the alleged damages said to have been suffered by the plaintiff/respondent by the sale of the assets that informed this action..... I am of the view that by no B
stained constitution of the documents at play in this case can it be correctly said that the suit is on the immovable property at Ifo Ogun State”.*

I am in full agreement with the above finding of the Court of Appeal, and can not fault it in any way. (p. 2862 H) C

Concurrent findings - Will not be disturbed

4. Learned Senior Advocate has kindly expressed his awareness that this is an appeal against concurrent findings of the lower courts but added that this court will be entitled in the circumstances to interfere with the findings D
which are perverse. Learned counsel for the respondent has submitted that the appellants have not discharged the onus on them in alleging perversity, and has urged the court not to disturb the findings of the lower court. I endorse the latter submission for I fail to see that the findings of the lower E
court in connection with the discussion in this issue are perverse, and the learned Senior Advocate has not shown the court how and why they became perverse. The law is well settled that findings of the lower court, more so when they are concurrent ones will not be disturbed unless they F
are perverse and are not supported by unchallenged credible evidence, as is the position in the instant case. (p. 2863 D)

EVIDENCE - Pleadings - Proof

5. One of the grouses of the learned Senior Advocate under this issue is G
that the respondent/plaintiff did not prove its case on preponderance of evidence as required by law; and according to him in a situation like this the opponent is not required to answer any case. He placed reliance on the cases of Kola v. Potiskum 1998 3 NWLR part 540 page 1, and Braimah H
v. Adasi 1978 13 NWLR part 581 page 167. I agree with the learned Senior Advocate that that is the position of the law, but I will look at the pleadings vis a vis the evidence adduced to determine whether in fact the Respon-

dent/Plaintiff proved its case, and whether or not its evidence were contrary to the pleadings.

I fail to see that the respondent/plaintiff gave evidence that was contrary to its pleadings, unless what the learned Senior Advocate is alluding to is the averment in the respondent/plaintiffs paragraph (6) of his pleadings and the evidence under cross examination where P.W.1 said, “every money spent on the industry was from the second defendant. We never got a kobo.” Even if that is what he was referring to as contradiction, I don’t see that it has any significance. Learned Senior Advocate should have been specific on the areas of contradictions he has professed. (pp. 2864 B/ 2866 D)

Prima facie case - Averment in pleadings

6. The appellants did not adduce evidence so the aforementioned document was not produced and admitted in court. The law is clear and settled that pleading is not synonymous with evidence and so cannot be construed as such in the determination of the merit or otherwise of a case. A party who seeks judgment in his favour is required by law to produce adequate credible evidence in support of his pleadings, and where there is none then the averments in the pleadings are deemed abandoned. The same principle of law goes for whatever defence a defendant seeks to rely on in the process of demolishing the case against him. The reproduced averment of the appellants/defendants have therefore not been proved, and so the trial court could not have dealt with it.

I am not unmindful of the position of the law that a defendant is not bound by law to call a witness or witnesses to establish his defence where a prima facie case has not been proved by plaintiff, but that position is valid only if (I emphasis) a prima facie case has not been established by the party in whose favour judgement will be given if he fails to adduce evidence. In the instant case, the situation is not so, as the plaintiff did establish a prima facie case. (p. 2868 H)

Documents - Where facts are pleaded

7. Now, in the first place, the facts leading to Exhibit P. 10 was pleaded,

as can be seen in the following averment in the further amended statement of claim.

12. The 1st Defendant apparently relying on the said letter of 23rd September, 1988 started performing the duties of a Receiver by requesting for the statement of affairs of the plaintiff company which plaintiff B supplied.

A party is not expected to plead evidence, but facts, and this is a cardinal principle of law in this country which must be adhered to. To say therefore that because Exhibit P.10 as a document was not specifically C pleaded, it becomes inadmissible is a misconception. (p. 2871 A)

Duty of court - In evaluating evidence

8. As for the learned trial judge privately investigating the Exhibits D especially Exhibit P. 10 I cannot see that the learned trial judge did any such thing as this is not reflected in the judgment. I cannot fathom what gave the learned Senior Advocate the idea, for I sniff some mischief in that submission, the learned Senior Advocate with due respect certainly went E too far and I don't hesitate to express the view that he was most unfair on the learned trial judge. A trial judge whilst evaluating evidence is at liberty to examine and peruse most carefully documents and oral evidence before him. That is part of his judicial function, and if he fails to do so then he is failing in this duty. In fact even where necessary a judge ought to comb F any crucial evidence before him with the finest tooth comb to ensure that the credibility and reliability of the evidence is ascertained and applied towards the just determination of the case. If doing that is what, the learned senior counsel say is tantamount to private investigation, then it is most G unfortunate.

In view of the above discussion and reasoning I am of the firm view that the respondent proved its case on the preponderance of evidence and balance of probability as required by the law. (p. 2871 D)

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Reliefs - Writ of Summons - Pleadings

9. The fact is that the respondent/plaintiff sought the reliefs he wanted from the court, the fact that it had earlier sought some reliefs in the writ

of summons, which it later dropped being immaterial. It had the right and prerogative to alter/add, or decrease the number of reliefs it seeks right from the initial stage of the litigation i.e. from the writ of summons to the final pleadings which is to say that it amended the statement of claim until it got to its further amended statement of claim, which was the final pleadings. It is a cardinal principle of law that a statement of claim supersedes a writ of summons, and where whatever is in the writ of summons is excluded in a statement of claim, it is what is in the statement of claim that a court will take cognisance of and use for the determination of a case, as what was excluded will be deemed abandoned. The law gives party in a civil suit the liberty to amend its pleadings and thus change the contents and reliefs in the pleadings, and by so doing abandon some claims and add some. It is not forbidden, and the fact that the respondent/plaintiff in this case abandoned the declaratory reliefs does not derogate from the fact that he set out a case that the appointment of the Receiver and the sale that lead to the claim of damages was unlawful. (p. 2872 F)

E EVIDENCE - Proof - Unchallenged evidence

10. Now, having failed to debunk the evidence given by the witness of the respondent (P.W.2), the learned trial judge had no choice other than to rely on the evidence, and assess it as credible evidence which he ought to use for the just determination of the case before him. The cardinal principle of law is that evidence that is related to a matter in controversy that is neither successfully debunked, nor controverted at all, for that matter is good and credible evidence that ought to be relied upon by a trial judge. Unity life and Fire Insurance Co. Ltd. V. International Bank of West Africa Ltd. 2001 7 NWLR part 713 page 610, where in a case that had similar omissions as the present one, Iguh, JSC said inter alia as follows :-

“Where, however, one party fails or refuses to submit the issues he has raised in his pleadings for trial and does not give or call evidence in support thereof, the trial court, unless there are other legal reasons to the contrary, may resolve such issues against such defaulting party.

In the same vein, where evidence given by a party to any proceeding was not challenged by the opposite party who Had the opportunity to do

so, it is always open to the court seized of the matter to act on such unchallenged evidence before it.”

I am fortified by the above principle. (p. 2874 E)

Special damages - Proof

11. The learned Senior Advocate made efforts to distinguish the case on hand with the case of West Africa Shipping Agency (Nig) Ltd. & Another v. Kalla 1978 3 S.C. page 21, which the learned trial judge relied upon in evaluating the evidence on the claimed special damages. His view is that the item claimed for being beans could not have had receipt covering it, as a matter of common knowledge. It may well be so, but it does not derogate from the fact that the evidence adduced in proof of the claim was not controverted. In the Kalla case supra, Eso JSC reiterated the principle of law and laid emphasis on it thus:-

“In this case, the plaintiff evidence in regard to the purchase price of the beans in uncontroverted. He paid for them and he would know what they cost him. He has that peculiar knowledge. As evidence of what he paid for the beans, uncontroverted as it were is sufficient proof of his claim for special damages and the learned trial judge is perfectly justified in this award.” Underline is mine.

Indeed not only did the learned trial judge rightly rely on the uncontroverted evidence of the respondent/plaintiff, the Court of Appeal also found solace in the principle in the Kalla's case, and affirmed the finding of the trial court as follows:-

“Guided by the principle enunciated in the Kalla's case which is binding on this court, I say that the award of 125,344,237.00 as special damages is on a firm terra.” I endorse the above finding. This again is a concurrent finding of fact which this court cannot disturb, for it is based on credible evidence, and so is not perverse. (p. 2875 B)

NOTABLE POINTS OF INTEREST

KALGOJSC

1. When purchase receipt is not a must in proof special damages

The submission of the learned counsel for the appellant in his brief is that

since the items claimed as special damages by the respondent are those for which receipts or invoices should normally have been obtained or issued, the only way he would be held to have proved his claim is by tendering the receipts or invoices in support. Learned Counsel further submitted that since the respondent failed to produce the receipts or invoices in evidence, the evidence of damages is inchoate and the respondent could not be entitled to judgment on the claim. He cited some decided cases in support which I read and do not find them to be relevant to his submission.

With due respect to the learned counsel and from what I have said above, I think it is now well settled that a Court can properly accept and rely upon any evidence before it which is unchallenged and uncontroverted provided that it is relevant to the issues before it. In this case the evidence of Mr. Oke was unchallenged and uncontroverted and so the lower courts are entitled to rely on it on the issue of special damages claimed. See for example *West Africa Shipping Agency (Nig) Ltd. & Anr v Kalla* (1978) 3 SC 21. In the circumstances I hold that the Court of Appeal was perfectly right in affirming the award by the learned trial judge to the respondent in the sum of N25,344,237.00. I find no merit in the appeal. (p. 2878 B)

ONNOGHENJSC

2. Award of damages - Must not be based on a declaration

Learned counsel for the appellant has argued that since the declaratory reliefs in the Amended statement of claim were abandoned in the further Amended Statement of claim, there was no basis for the claim and award of special damages. I hold the view that the submission of learned SAN on this issue is erroneous, the simple reason being the principle that where there is a right which is breached, or where there is a wrong, there must be a remedy. The trial Judge having made the specific findings reproduced earlier in this judgment, the result is that the respondent's right to judgment was thereby established. A formal declaration of those rights as found by the court is not necessary - it becomes superfluous. (p. 2882 E)

3. Where purchase receipt was not pleaded - It must not be tendered

I agree with the submission of learned Senior Counsel for the appellant that

the general principle of law in relation to claims for special damages is that such claims must be specifically pleaded and strictly proved. This is trite law. However, the issue is whether the ipse dixit of PW1 in this case satisfies the strict proof requirement for award of special damages.

There is no disputing the fact that respondent specifically pleaded and gave particulars of the special damages claimed. It should also be noted that respondent never pleaded in the relevant paragraphs of this further Amended Statement of Claim or at all that reliance would be placed at the trial on purchase receipts and or invoices. In fact there is evidence that appellant paid for most of the items direct to the suppliers from the loan granted the respondent. This clearly means that appellant is aware of what amount it paid for the items and can easily prove same if what is being claimed by the respondent is more than what was actually paid for; but the appellant never testified nor tendered any evidence even under cross examination of PW1 to disprove the claims. I hold the view that the respondent having not pleaded that it would rely on purchase receipts and or invoices on proof of the items of special damages at trial, the court cannot, under the circumstances hold that respondent ought to have tendered receipts and or invoices before the items can be said to have been strictly proved particularly since appellant never challenged the evidence of the respondent on the issue under cross examination nor offered any in rebuttal. In the circumstances the lower court was thus left with the unchallenged evidence of the respondent on the issue and I hold the view that, the trial court was right in relying on same to make the award and that the lower court was also right in confirming that award.

(p. 2883 D)

REPRESENTATION

Mr. Yusuf Alli SAN, with him K. K. Eleja. and Mr. S. A. Oke for the Appellants.

Mr. A. Awosanya for the Respondent.

CASES REFERRED TO

Tukur v. Government of Gongola State 1989 4 NWLR part 117 page 557

2854 Arabambi v. Advance Beverages Ltd (2005) 12 KLR Mukhtar JSC

- Savage & ors v. Uwechia 1972 3 S. C. 214 at 221
Nwabueze v. Okoye 1988 4 NWLR part 91 page 664
Onyeama v. Oputa 1987 3 NWLR part 69 page 259
Ibrahim v. Osun 1988 3 NWLR part 82 page 251
B Chief Buraimoh v. Chief Maliki Adeniyi Esa 1990 4 S.C. 1
Chief J. A. Ojo v. Sola Akinluyi Ojo 2004 5 S.C. part 1 page 1
Chief Aseimo & ors v. Chief Abraham & ors 2001 16 NWLR pt. 738 p 20
Emegokwe v. Okadigbo 1973 NWLR 129
Adimora v. Ajufo 1989 3 NWLR part 80 page 1
C Olorunfemi and Ors. V. Asho and ors 2000 2 NWLR part 643 page 143
Allied Bank (Nig.) Ltd. V. Akubueze 1997 6 NWLR part 509, page 373
Okagbue v. Romaine 1982 5 SC. 133
Anyanwu v. Mbara 1992 2 NWLR part 242 - page 386
D Anyah v. A.N.N. Ltd. 1992 1 NWLR part 247 page 319

STATUTES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1979 s. 236
E Evidence Act ss. 135, 137

LEAD JUDGMENT BY MUKHTAR JSC

- In its further amended statement of claim before the Lagos High
F Court the respondent who was then the plaintiff claimed the following
damages :-

“PARTICULARS OF SPECIAL DAMAGES

FIXED ASSETS:

	<i>DM</i>	<i>N</i>
G <i>Plant and Machinery</i>		
<i>(DM 1 N4.06)</i>	5,473,380	22,221,922.00
<i>Import duty Clearing</i>		338,997.00
<i>Transportation Insurance</i>		16,774.00
H <i>Preliminary expenses</i>		5,000.00
<i>Generator 590 KVA</i>		
<i>Generator 12.5 KVA</i>		
<i>(second hand value)</i>		250,000.00

2 No. Yamaha Water pump	1,800.00	
1 No. 7.5hp Booster pump	3,000.00	
2 No. 2Hp Water pump sub-mersible with accessories	8,880.00	
Hand drill	400.00	
Diesing machine	460.00	B
NEPA transformer	37,440.00	
2 No. Water tanks	25,000.00	
2 No. Oil tanks	25,000.00	
Furniture and fittings	16,065.00	
CURRENT ASSETS:		
Stocks - raw materials and packing materials including		C
Corks and laboratory equipment	842,828.00	
Cash at UBA Otta	9,325.00	
Pre-operation expenses	<u>1,541,346.00</u>	
	N25,344,237.00	D
General Damages	<u>4,655,763.00</u>	
TOTAL	<u>N30,000,000.00"</u>	

The controversy that led to the above claims against the 2nd respondent, a chartered accountant and the 1st appellant bank is the appointment of the 2nd appellant by 1st appellant as a receiver, and the sale of the respondent's plants and machinery. The plaintiff/respondent manufactures, bottles, distributes and sell soft drinks and beverages. The plaintiff obtained a loan from the 2nd defendant for the purchase of plants and machinery for use for production of the aforementioned drinks. A mortgage agreement was entered, and the loan was added to the plaintiffs other resources to acquire the needed plants. After the acquisitions the plaintiff could not commence production due to lack of funds, and the 2nd defendant refused the plaintiffs application for working capital, and advised him to look elsewhere, and in the process of looking the 2nd defendant appointed the 1st defendant as Receiver, without the plaintiffs consent vide a letter dated 23rd September 1988, which contained instruction for the management of the plaintiffs affairs, and not to sell the plaintiffs plants and machinery. Rather than manage the business of the plaintiff, the 1st defendant took steps to wind up the company by unlawfully selling the plants and machinery, and terminating the appointment of the

staffs and exposing the factory to various losses. As a result of the losses the plaintiff claimed the supra reproduced damages.

The 1st and 2nd defendants denied most of the above allegations. According to the defendants the mortgage agreement entered into by the B parties contained the term that the 2nd defendant may appoint a Receiver over the premises any time the loan became due. Consequent upon the failure to pay instalments that were due, the 2nd defendant appointed the 1st defendant as a Receiver, and he took the steps of selling the plaintiffs plants and machinery, as that was the only way the 2nd defendant could realize C the debt.

After pleadings had been exchanged to wit a reply to the statement of defence was also filed, the plaintiff adduced evidence, and learned counsel to both sides addressed the court. Learned trial judge considered D and appraised all that was before him and found for the plaintiff thus:-

“In the final analysis -judgement is hereby entered in favour of the Plaintiff against the Defendants jointly and severally for the total sum of N30,000,000.00 being special and general damages”.

E Dissatisfied with the decision the defendants appealed to the Court of Appeal on eleven grounds of appeal. In the Court of Appeal learned justices of the court after treating the issues raised allowed the appeal in part set aside the award of general damages of N4,655,763.00 but F confirmed the award of N25,344,237.00 as special damages. Again, the defendants were not happy with the judgment of the Court of Appeal and so they appealed to this court originally on three grounds of appeal, which were increased to 6 vide this court’s order of 3/4/2002.

G Learned counsel exchanged briefs of argument, which were adopted at the hearing of the appeal. In the appellants’ brief of argument are the following issues raised for determination:-

1. Whether the court below was right to have held that notwithstanding the lex situs of the factory the subject matter of this case, the High H Court of Lagos State had the territorial jurisdiction to adjudicate on the case.

2. Whether the Court of Appeal was right in law to have upheld the award of special damages of N25,344,237.00 made by the trial court in

favour of the respondent after the respondent had abandoned the declaratory reliefs that served as hanger for the award of damages moreover when the award was based on the mere ipsedixit of a witness where receipt and or invoices ought to have been tendered to ground the award.

Three issues for determination were formulated by learned counsel B for the respondent in the respondent's brief of argument. The issues are

1. Whether having regard to the cause of action and the claim there from, particularly the fact that all the transactions relating to the loan Agreement and the sale of the respondent's chattels took place in Lagos the Court of Appeal was justified in upholding the decision of the trial court C that it had jurisdiction to try and determine the claim within the jurisdiction of the court.

2. Whether the respondent's only claim, the subject matter of this suit as contained in paragraph 22 of the respondent's further amended D statement of claim has to do with the lex situs of the respondent's factory or arose from the unlawful act i.e. sale by the appellants of the plants and machinery belonging to the respondent, which were purchased from the loan from the appellants under the loan agreement. E

3. Whether the Court of Appeal was justified in law and infact in upholding the award of special damages made by the trial court in favour of the respondent claim having regard to its findings as to :-

- (a) The cause of action; F
- (b) The jurisdiction of the trial court to hear and determine the claim;
- (c) The admitted unchallenged and uncontradicted testimony of the Respondent in support of its claim; and
- (d) The absence of any testimony by the Appellants in denial of the respondent's claim and/or in support of the material averments in the G appellants' pleadings at the court of trial.

Issues (1) and (2) are in pari materia with the appellants' issue. (1) supra. I will commence with the treatment of these issues. Learned Senior Advocate for the appellants in proffering argument on this issue referred H to clause D in Exhibit 'p' (the mortgage Agreement). It is the submission of learned Senior Advocate that the forum convenience for adjudication on the respondent's factory would be a court at the lex situs of the factory

i.e. Ogun State, not Lagos State as it is in this case, and that a court could be competent to adjudicate a matter when the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction. Learned Senior Advocate placed
B reliance on the cases of *Madukolu v. Nkemdilim* 1962 2 S.C. NLR 314, and *A-G Anambra State v. A-G Federation* 1993 6 NWLR part 302 page 692.

Learned counsel for the Respondent is of the view that the above
C is a serious misconception of the cause of action, as *lex situs* cannot be the cause of action, the action not relating to the site of the factory of the respondent, but to the act of the appellants that was complained of. It is pertinent at this juncture that I look at the pleadings to determine the position. The relevant paragraphs of the further amended statement of
D claim are in my view as follows:-

“11. Whilst in the process of procuring working capital the 2nd
Defendant without plaintiffs consent purportedly by letter dated 23rd
September, 1988 copy of which 1st Defendant supplied to the plaintiff
E appointed 1st Defendant as Receiver with his powers stated therein.

12. The 1st Defendant by another letter dated 25th October, 1988 informed the plaintiff of his appointment as a Receiver by virtue of the said letter of 23rd September, 1988.

F 14. The plaintiff shall contend that the 1st Defendant under and by virtue of the letter of appointment dated 23rd September, 1988 was entitled only to manage but not and had no power to sell plaintiffs plant and machinery and that the purported sale was wrongful and unlawful.

G 15. The plaintiff avers that instead of carrying on the business of the company in pursuance of his letter of appointment the 1st Defendant took steps and decisions amounting to winding up of the plaintiffs company.

Particulars

H (a) The 1st Defendant terminated the appointment of all staffs of the company.

(b) Acting upon a purported subsequent instrument by 2nd Defendant dated 21/10/88 unlawfully (sic) the plaintiff and machinery of the

plaintiff.

(c) *Installed security officers in the factory who have forcefully prevented the Directors, staffs, servants of the plaintiff from entering the plaintiffs premises.*

(d) *With his servants and/or agents broke into the plaintiffs factory stores by force and removed there from plaintiffs stock of raw materials.*

(e) xxxxxxxxx

(f) xxxxxxxxx

16. *Plaintiff avers further that further to paragraph 19(b) (sic) herein the purported sale by the 1st Defendant of plaintiff s plants and machinery under the instrument dated 21st October, 1988 is null and void and of no effect.*

Particulars

(a) *The instrument aforesaid did not empower the 1st Defendant to sell plants and machinery of the plaintiff.*

(b) *In effecting the purported sale 1st Defendant did not comply with the provisions of clause 36 of the deed of mortgage which was a condition precedent to the exercise of power of sale.*

(c) *The said instrument was not registered as an instrument in accordance with the provisions of Land Instrument Registration law of Ogun State 1978 or Land Registration law of Lagos State 1973.*

(d) xxxxxxxxx

22. *By reason of the purported sale, plaintiff has suffered irreparable damage and loss of business."*

A very careful perusal of the above averments definitely reveals that sale of the plants and machinery by the appellants gave rise to the claim. The acts complained of are the manner of the appointment of the receiver, the manner in which the receiver violated the conditions of his receivership and what eventually turned out to be wrongful sale of the respondent's properties in the factory. A cause of action arises from circumstances containing different facts that give rise to a claim that can be enforced in court, and thus lead to the right to sue a person responsible for the existence of such circumstances. There must therefore be a wrongful act of a party i.e. the party sued, which has injured or given the plaintiff a

reason to complain in a court of law of consequent damage to him. The cause of action contained in the above averments is the injury suffered by the plaintiff as a result of the 1st defendant's act, which was propelled by the 2nd defendant, not the land upon which the plants and machinery sold were situate.

Learned Senior Advocate has submitted that the unlimited jurisdiction conferred on the State High Court by S.236 of the 1979 Constitution is also circumscribed by the territorial area of the state where the State High Court is situate. According to him in this case all matters pertaining to the enforcement of clauses of Exhibit PI in so far as they pertain to the factory which was situate in Ogun State can only be taken by a court situate in Ogun State in that:-

(i) The factory is situate in Ifo, Ogun State;

(ii) The consent to mortgage the property was given under the provisions of the Land Use Act by the Governor of Ogun State;

(iii) Exhibit PI was registered at the Lands Registry office, Abeokuta, Ogun State;

(iv) The receiver was appointed over the said property in Ifo, Ogun State;

(v) The power of sale exercised was on the factory also at Ogun State;

(vi) It was of no moment where the parties are or carry on their businesses.

Learned counsel for the respondent on the other hand is of the view that the substance of the reliefs and surrounding facts determines jurisdiction and these in this case are:-

(i) This claim arose from the loan agreement between the parties, which gave rise to this claim for the unlawful interference by the appellants with the respondent's plants and machinery.

(ii) At the time of this agreement both parties were resident in Lagos, the Bank's Headquarters being at 63/71, Broad street, Lagos.

(iii) The Respondent was at the same time resident in Lagos state at 71, Palm Avenue, Mushin, Lagos state.

(iv) The loan agreement giving rise to the subject matter of this

claim was made and executed in Lagos see Exhibit PI, notwithstanding that the *lex situs* of respondent's factory was outside Lagos.

(v) The plants and machinery the subject matter of this claim were ordered in Lagos paid for in Lagos by the appellants on behalf of the respondent from the said loan and delivered in Lagos to the respondent and not at factory site in Ogun State. B

(vi)

(vii) The instrument Exhibit P5 complained of was made and executed between the two appellants in Lagos but was registered neither in Lagos nor in Ogun State. C

(viii) The plants and machinery were sold by the receiver to another company Nigerian Distilleries company limited based at Apapa, Lagos State.

(ix) Repayment of the loan is made payable in Lagos, in the absence of any provision to the contrary in the loan agreement where both parties reside and have their respective Head offices. D

(x)

(xi) None of the whole transactions took place in Ogun State. E

A careful perusal of these factors all put together reveal that the whole transaction took place in Lagos State, and was executed in Lagos State, the fact that the land on which the factory was built or which was used as security for the mortgage, being most immaterial in this case. The registration of Exhibit PI, in the land Registry office in Ogun State, (which learned Senior Advocate is making heavy weather of) became necessary to give the appellants security over the respondent's assets used as security for the loan, as is required by law. Such registration has to be done in the State where the land is situate, and this is why the respondent factory had to be registered in Ogun State, for the land is in Ifo, in Ogun State. The factory was neither affected by the act of the receiver, nor was it sold, so the fact that it is the subject matter of this claim does not arise, as it was never an issue. It was merely a vehicle that needed to carry the respondent to the promised land. See Tukur v. Government of Gongola State 1989 4 NWLR part 117 page 557. F
G
H

To say that simply because the plants, machinery and the land on which they were are in Ogun State, and so the action should have been instituted in Ogun State and not Lagos State, where the process of the transaction started and ended, is, with due respect, a misconception. This is not a suit about the land, so the cases of *Nwabueze v. Okoye* 1988 4 NWLR part 91 page 664 and *Onyeama v. Oputa* 1987 3 NWLR part 69 page 259 cited by learned Senior Advocate are not relevant to this case. In the like manner the maxim of *quid quid plantatur solo solo cedit* is not evocable, as it has no place in the suit. The plaintiffs land where the factory was situate was never sold, and so it did not form part of the respondent's claim in the suit, and the question of the *lex situs* being in Ogun State did not arise. A cause of action as defined in *Strouds Judicial Dictionary* as set out in the case of *Savage & ors v. Uwechia* 1972 3 S. C. 214 at 221, by *Fatayi-William J.S.C.* (as he then was) is:-

“the entire set of circumstances giving rise to an enforceable claim”

The learned Supreme Court justice went on to say thus:-

“To our mind, it is, in effect, the fact or combination of facts which give rise to a right to sue and it consists of two elements the wrongful act of the defendant which gives the plaintiff his cause of complaint and the consequent damage”.

See the case of *Ibrahim v. Osun* 1988 3 NWLR part 82 page 251 where *Uwais J.S.C.* (as he then was) referred to the *Savage and Uwechia's* case supra. **Bearing the above definition in mind, I have no doubt whatsoever in my mind that the cause of action arose from the contractual relationship of the parties in the instant case, and not the *lex situs* of the factory. As I have said earlier on it is the unlawful sale of the plants and machinery of the plaintiff factory that gave rise to the cause of action. See the case of *Abusonwan v. Mercantile Bank Ltd.* (No. H 2) 1987 3 NWLR part 60 page 196.**

In view of the above discussions, the learned justice of the Court of Appeal was right when in his judgment he said and opined *inter alia* thus:-

“If I may say, the very basis of this action is the loan of two million Naira which the 1st defendant/appellant granted the plaintiff/respondent at the request of the latter and which was evidence (sic) by the loan and mortgage agreement entered into by both parties. It is the non-payment of the loan taken that has resulted in the 1st defendant/appellant, exercising whatever right it conceived under exhibit ‘p’ appointing a receiver to realize the assets of the plaintiff/respondent and the alleged damages said to have been suffered by the plaintiff/respondent by the sale of the assets that informed this action..... I am of the view that by no stained constitution of the documents at play in this case can it be correctly said that the suit is on the immovable property at Ifo Ogun State”.

I am in full agreement with the above finding of the Court of Appeal, and can not fault it in any way.

Learned Senior Advocate has kindly expressed his awareness that this is an appeal against concurrent findings of the lower courts but added that this court will be entitled in the circumstances to interfere with the findings which are perverse. He referred to the cases of Atoyebi v. Governor of Oyo State 1974 5 NWLR part 344 page 290, and Ojo-Osagie v. Adunni 1994 6 NWLR part 349 page 131. **Learned counsel for the respondent has submitted that the appellants have not discharged the onus on them in alleging perversity, and has urged the court not to disturb the findings of the lower court.** He placed reliance on the cases of Lawal v. Dawodu 1972 8-9 S.C. 1414. Balogun v. Agboola 1974 10 S.C. 111, Oduntan v. Akiku 2000 7 S.C. part 11 page 106, and Ezeokonkwo v. Okeke 2002 5 S.C. part 1 page 60. **I endorse the latter submission for I fail to see that the findings of the lower court in connection with the discussion in this issue are perverse, and the learned Senior Advocate has not shown the court how and why they became perverse. The law is well settled that findings of the lower court, more so when they are concurrent ones will not be disturbed unless they are perverse and are not supported by unchallenged credible evidence, as is the position in the instant case. See Chief Buraimoh v. Chief Maliki Adeniyi Esa 1990 4 S.C. 1, Chief**

J. A. Ojo v. Sola Akinluyi Ojo 2004 5 S.C. part 1 page 1, and Chief Aseimo & ors v. Chief Abraham & ors 2001 16 NWLR part 738 page 20.

For the foregoing reasoning the answer to issue (1) in the appellant's brief of argument which is covered by grounds (1) and (2) is (answered) **B** in the affirmative.

Now, to issue (2) in the appellant's brief of argument. **One of the grouses of the learned Senior Advocate under this issue is that the respondent/plaintiff did not prove its case on preponderance of evidence as required by law; and according to him in a situation like this the opponent is not required to answer any case. He placed reliance on the cases of Kola v. Potiskum 1998 3 NWLR part 540 page 1, and Braimah v. Adasi 1978 13 NWLR part 581 page 167. I agree with the learned Senior Advocate that that is the position of the law, but I will look at the pleadings vis a vis the evidence adduced to determine whether in fact the Respondent/Plaintiff proved its case, and whether or not its evidence were contrary to the pleadings.** The relevant averments as in the further amended statement of claim are those **E** already reproduced above and in the following paragraphs :-

"6 (a) By a loan and mortgage agreement dated the 25th May, 1983 and registered as No. 18 at page 18 in volume 216 of the Land Registry in the office at Abeokuta made between the plaintiff and the 2nd defendant (as **F** lender the plaintiff by way of legal mortgage..... which in addition to plaintiffs other resources was used for the purchase of the plants and machinery and other equipment and expenses.

7. The plaintiff avers that it has acquired all necessary machineries for the production of soft drink but could not commence production due **G** to want of working capital.

8. Lack of working capital has been necessitated by the Naira devaluation and the rise in foreign exchange.

15(f) The 1st Defendant acting on 2nd Defendant's directive had **H** turned down plaintiffs proposals to procure working capital to commence business but has made up his mind to close down plaintiffs factory by selling an otherwise very viable project.

Now, to the evidence in support of the pleadings. P.W.1 the

Managing Director of respondent/plaintiff s company gave the following testimonies inter alia :-

“..... we have a loan agreement with the 3rd Defendant for the sum of N2 million..... This is the loan agreement”
..... The 2nd Defendant opened letter of credit on our B
behalf and ordered. The plants and machineries from Western Germany.
The 2nd Defendant paid for these plants and machineries, out of the
loan.....

The payment was to commence 1st January, 1985. We complained about C
the delay. At that time our import license was about to expire. So the
2nd Defendant wrote to the Ministry of Industry to extend the life as the 2nd
Defendant was enable (sic) to give us the money in time. The 2nd
Defendant gave us a copy of the letter..... We sent D
for the erection from Western Germany. The plaintiff did this arrangement
but it was paid for out of the loan. These erection (sic) did not come all
at a time. They were coming in groups. They started to arrive in March,
1986 and ended in May, 1987..... After the erection the
plaintiffs sent for the erection (sic) to come and commission the plant. But E
we could not do the commissioning because we ran short of working
capital. Then we approached the 2nd Defendant to give us additional loan.
It was rejected, we were to look else where for
loan.....

We the plaintiffs bought raw materials and packing materials. We F
purchased tanks.....

Later we received a letter from the 1st defendant saying that he has
been appointed a receiver to which was attached a letter from the 2nd G
defendant dated 23/9/98.

we did not receive any memorandum either from the defendants or
from both. We did not receive any notice of sale from the defendants. We
are not aware of any notice of public sale. All the properties were
completely sold”. H

When cross-examined P.W.1 gave the following helpful pieces of
testimonies.

“The purpose of working capital is for running day to day activities

of the company or industry as the case may be. To buy raw materials to maintain machinery and so on. Commissioning means when all the machineries had been installed and everything is in place when to start work is called commissioning. Every money spent on the industry was from the second defendant. We never got a kobo We have not paid any money as instalment to the 2nd Defendant -but we have been paying interest which is already built into the account..... The 2nd Defendant wrongly appointed a Receiver to an ongoing company or project. The 2nd Defendant is specially set up to assist development project and to see it through and not to sell it. By implication there is an agreement to that effect. On re-examinants the witness added this :-

"We have virtually completed everything except commissioning. Under Exhibit P2 we have one year after commissioning to start to pay instruments, (sic)."

I fail to see that the respondent/plaintiff gave evidence that was contrary to its pleadings, unless what the learned Senior Advocate is alluding to is the averment in the respondent/plaintiffs paragraph (6) of his pleadings and the evidence under cross examination where P.W.1 said, "every money spent on the industry was from the second defendant. We never got a kobo." Even if that is what he was referring to as contradiction, I don't see that it has any significance. Learned Senior Advocate should have been specific on the areas of contradictions he has professed.

Clause (37) of Exhibit P1, the mortgage agreement stipulates the following:-

"37. At any time after the moneys and liabilities hereby secured became payable the lender may by writing under the hand of any Director or Manager or official for the time being of the lender appoint any person or persons to act as a receiver or receivers of the premises and either assets hereby charged or any part thereof and remove any receiver or receivers so appointed and appoint another or others in his or their place and receiver or receivers so appointed shall have power;

(1) To take possession of, collect and enter property hereby charged

and for that purposes to take any proceedings in the name of the borrower or otherwise as may deem expedient.

(2) To carry or manage or concur in carrying on and managing the business of the Borrower at any part thereof and for any of those purposes to raise or borrow any money that may be required upon the security of the whole or any part of the premises hereby charged.

(3) Forthwith and without the restriction to sell or concur in letting and to accept surrender, of leases or tendencies of all or any of the property hereby charged and to carry any sale letting or surrender into effect by conveying leasing letting or accepting surrenders in the name and on behalf of the Borrower or other estate owner..... Plant machinery and other fixtures may be severed and sold separately from the premises containing them without the consent of the Borrower being obtained thereto.”

The letter of appointment of the 1st appellant/defendant as a receiver by the 1st appellant/defendant Exhibit P. addressed to the 1st appellant/defendant and dated 23rd September, 1988 bears the folio wing:-

"APPOINTMENT AS A RECEIVER TO ADVANCE BEVERAGES INDUSTRIES LIMITED

Pursuant to clause 37 of a Deed of Legal mortgage dated the 25th day of May, 1983 and registered as No. 18 at page 18 in volume 216 of the Lands, Registry at Abeokuta and made between ADVANCE BEVERAGES INDUSTRIES LIMITED (other wise referred to as ‘the Borrower’) and NIGERIAN INDUSTRIAL DEVELOPMENT BANK LIMITED (otherwise referred to as “the lender’). We, as lender hereby appoint you as Receiver to take over the physical control of all the assets (fixed and current) of the Borrower with immediate effect.

We also hereby authorize you to exercise the following particular powers in addition to any other general powers under the laws:-

1. To take possession of, collect and get in any property charged under the aforementioned mortgage and for that purpose to take any proceedings in the name of the Borrower or otherwise as you may deem expedient.

2. To carry on or concur in carrying on the business of the Borrower

or any part thereof and for any of these purposes to raise or borrow any money that may be required upon the security of the whole or any part of the premises charged under the said mortgage.

B *3. To make and effect all repairs, renewals, and improvement of the Borrower's plant and machinery and effect and to maintain or renew all insurances.*

C *4. To do all such other acts as may be considered by the lender to be incidental or conclusive to any of the matters or powers aforesaid and which you may lawfully do as Agent of the Borrower.....”*

D There is nothing in the said Exhibit P. 6 that gave the 1st appellant/defendant power or authority to sell the plants and machinery in the respondent/plaintiffs factory. I have not lost sight of clause 37(3) of Exhibit P.1, but the point is that the 2nd appellant/defendant did not invoke
E that clause for the purpose of the appointment of receiver, as can be seen in Exhibit P.6. It is patently clear that the 1st appellant went beyond the powers vested in him by Exhibit. P.6 and that is the pivot of the respondent's case. See paragraphs (14) and (15) of the further statement
F of claim. The 1st appellant/defendant did not comply or adhere to the directive of the 2nd appellant/defendant, but instead undertook an adventurous journey on his own, so to speak.

I must again not loose sight of the averment in paragraph (16) of the further amended statement of claim, which talks about an instrument
F dated 21st October, 1988. I believe this averment is sequel to paragraph (9) of the statement of defence on page (155) of the printed record of proceedings, which state:

G 9. On the 23rd of October, 1988, the 1st and 2nd defendants entered into a Deed of Appointment appointing the 1st defendant Receiver of the income and process of sale of all the property comprised in or subject to the mortgage and in accordance with the terms of the mortgage deed averred in paragraph 5 herein.

H **The appellants did not adduce evidence so the aforementioned document was not produced and admitted in court. The law is clear and settled that pleading is not synonymous with evidence and so cannot be construed as such in the determination of the merit or**

otherwise of a case. A party who seeks judgment in his favour is required by law to produce adequate credible evidence in support of his pleadings, and where there is none then the averments in the pleadings are deemed abandoned. The same principle of law goes for whatever defence a defendant seeks to rely on in the process of demolishing the case against him. The reproduced averment of the appellants/defendants have therefore not been proved, and so the trial court could not have dealt with it. See Emegokwe v. Okadigbo 1973 NWLR 129, Adimora v. Ajufu 1989 3 NWLR part 80 page 1 and Olorunfemi and Ors. V. Asho and ors 2000 2 NWLR part 643 page 143.

I am not unmindful of the position of the law that a defendant is not bound by law to call a witness or witnesses to establish his defence where a prima facie case has not been proved by plaintiff, but that position is valid only if (I emphasis) a prima facie case has not been established by the party in whose favour judgement will be given if he fails to adduce evidence. In the instant case, the situation is not so, as the plaintiff did establish a prima facie case. See Section 137 of Evidence Act 1990 laws of the Federation of Nigeria cap. 112.

As for the argument of learned Senior Advocate that Exhibits PI - 10 were merely dumped on the court, I fail to find substance in this argument. It is on record that most of the exhibits were admitted in evidence, without objection, and Exhibit 'P 10' upon which learned Senior counsel specifically made heavy weather of, (even though objected to) was eventually admitted in 'evidence, but learned Senior Advocate expressed the view that PW 1 merely recited the figures in the document, and did not give evidence on how the figures were arrived at. Learned Senior Advocate submitted that the learned trial judge was not entitled to conduct private investigations on documents tendered, and on which no evidence was led and thereby arrived at conclusions adverse to the other party. He further submitted that a trial court has no power nor the duty to do cloistered justice by privately going into chambers to examine documents and start to find faults therein. This is a new one, for I have never heard a judge conducting private, investigations on evidence before him, (not that he would use privately acquired knowledge of facts he knew

about a case before him), but that he will go out of his way to do his own investigations. That a learned judge privately went into chambers to examine documents is not improper. That is the normal practice and that is how a judge discharges his judicial function. A judge takes all evidence
B given in court i.e. oral and documentary et al, and at the end of the day after evidence has been concluded, he retires to his chambers or even his residence, as it is always the case, to consider and appraise all the evidence. He cannot and is not expected to do this in open court and in the process
C of hearing the case or trial.

Learned Senior Advocate cited the cases of *Durminiya v. C.O.P.* 1961 NWLR 70; *Coker v. Adetayo* 1992 6 NWLR part 249 page 612, and *Nkeogwuile v. Otu* 2001 16 NWLR part 738 page 58.

Learned counsel for the respondent has in reply submitted that the
D attack on the trial judge was unjustified. He also contended that Exhibits P1 - P10 were ostensibly related to matters and facts that were pleaded, and are mere documentary evidence which on authorities need not be pleaded. The supra authorities cited by learned Senior Advocate are
E distinguishable from the case in hand, for in those cases the efficacy of the exhibits and reliance on them by the trial judge was at stake. Like in the *Nteogwuile* case supra *Ogwuegbu JSC* treated an exhibit that was in controversy thus:-

F *“Granted that the plaintiff tendered Exhibit C’ it was no licence for the learned trial judge to comb the said exhibit and use any material that came his way as if they were facts pleaded and evidence adduced at the trial. Assuming that the parties joined issue on the founding of old Unyeada, before the opinion expressed in Exhibit ‘C’ could become part*
G *of the evidence which the trial court could act upon and in the absence of the writer as a witness, such opinion must be put to another expert in the same field who is a witness in the case for his confirmation. Where this is done, the opinion properly becomes part of the evidence in the case and*
H *the trial judge is entitled to consider it as such. See Concha v. Murrieta 1889 40 Ch. D. 543 at 554 and R. v. Somers (1963) 3 All E.R. 808. Exhibit ‘C’ does not qualify as an opinion of a writer on Nigerian law whose opinion can be cited before the courts with persuasive effect. To say the*

least, what the learned trial judge did with Exhibit 'C' is a kin to an investigation out of court".

Now, in the first place, the facts leading to Exhibit P. 10 was pleaded, as can be seen in the following averment in the further amended statement of claim.

12. The 1st Defendant apparently relying on the said letter of 23rd September, 1988 started performing the duties of a Receiver by requesting for the statement of affairs of the plaintiff company which plaintiff supplied.

A party is not expected to plead evidence, but facts, and this is a cardinal principle of law in this country which must be adhered to. To say therefore that because Exhibit P. 10 as a document was not specifically pleaded, it becomes inadmissible is a misconception. See Thanni v. Saibu 1977 2 SC. 89,' Allied Bank (Nig.) Ltd. V. Akubueze 1997 6 NWLR part 509, page 373, and Okagbue v. Romaine 1982 5 SC. 133.

As for the learned trial judge privately investigating the Exhibits especially Exhibit P. 10 I cannot see that the learned trial judge did any such thing as this is not reflected in the judgment. I cannot fathom what gave the learned Senior Advocate the idea, for I sniff some mischief in that submission, the learned Senior Advocate with due respect certainly went too far and I don't hesitate to express the view that he was most unfair on the learned trial judge. A trial judge whilst evaluating evidence is at liberty to examine and peruse most carefully documents and oral evidence before him. That is part of his judicial function, and if he fails to do so then he is failing in this duty. In fact even where necessary a judge ought to comb any crucial evidence before him with the finest tooth comb to ensure that the credibility and reliability of the evidence is ascertained and applied towards the just determination of the case. If doing that is what, the learned senior counsel say is tantamount to private investigation, then it is most unfortunate.

In view of the above discussion and reasoning I am of the firm view that the respondent proved its case on the preponderance of evidence and balance of probability as required by the law. See

Section 135 of the evidence Act supra. See Anyanwu v. Mbara 1992 2 NWLR part 242-page 386, Imana v. Robinson 1979 3- SC. 1, and Anyah v. A.N.N. Ltd. 1992 1 NWLR part 247 page 319.

The cases of Ugbo v. Akurime 1994 8 NWLR part 360, page 1; B Jalko Ltd. V. Owoniboys Technical Service Ltd. 1995 4 NWLR part 391 page 534, cited by learned Senior Advocate are therefore immaterial.

Another grouse of the appellant is the effect of the abandonment of the declaratory reliefs sought earlier in the writ of summons, in the further amended statement of claim. The learned Senior Advocate has submitted that in view of the peculiar circumstances of this case, before the respondent could be entitled to any form of damages it must first of all successfully and validly seek declaratory reliefs that would set aside the appointment of the 2nd appellant and the exercise of power of sale. He D further submitted that the claim for damages is only an ancillary claim to relief (d) on the amended writ of summons, the said ancillary relief being totally dependent on reliefs (a), (b) and (c), and so there was no substratum or hanger on which the damages awarded could be hanged. In that event E there was no principal or factual basis to award the special damages. Learned Senior Advocate referred to the cases of Odje v. Ovien 1992 7 NWLR part 253 page 309, and Akinbobola v. Plisson Fisko and ors 1991 1 NWLR part 167 page 270.

F The argument canvassed above is not plausible and cannot hold water in the circumstance of this case. **The fact is that the respondent/**
plaintiff sought the reliefs he wanted from the court, the fact that
it had earlier sought some reliefs in the writ of summons, which it
later dropped being immaterial. It had the right and prerogative to
G **alter/add, or decrease the number of reliefs it seeks right from the**
initial stage of the litigation i.e. from the writ of summons to the
final pleadings which is to say that it amended the statement of claim
until it got to its further amended statement of claim, which was the
H **final pleadings. It is a cardinal principle of law that a statement of**
claim supersedes a writ of summons, and where whatever is in the
writ of summons is excluded in a statement of claim, it is what is in
the statement of claim that a court will take cognisance of and use

for the determination of a case, as what was excluded will be deemed abandoned. See Shell BP Petroleum Dev. Co. (Nig.) Ltd. V. Onasanya 1976 6 SC. 89; Udechukwu v. Okwuka 1956 SCNLR 18, and Gbadamosi v. Dairo 2001 6 NWLR part 708 page 137. **The law gives party in a civil suit the liberty to amend its pleadings and thus change the contents and reliefs in the pleadings, and by so doing abandon some claims and add some. It is not forbidden, and the fact that the respondent/plaintiff in this case abandoned the declaratory reliefs does not derogate from the fact that he set out a case that the appointment of the Receiver and the sale that lead to the claim of damages was unlawful.**

At any rate the averments that complained of the illegality are still very much alive in the body of the pleadings. The submission that the absence of the specific declaratory reliefs or the position of the Receiver and setting aside of the sale, should affect the claim for damages has no basis. I disagree that the claim for damages is dependent on the declaratory reliefs. The most important thing is that the learned trial court found the appointment of the 1st appellant/defendant void, and the sale unlawful in his judgment, based on the evidence adduced by the respondent/plaintiff The relevant extracts of the judgment are:-

“I therefore hold that the 2nd Defendant wrongly exercised its power of appointment of 1 Defendant as Receiver.....

But the 1st Defendant exercised the right of sale which in any way he had not got on the 12th day of February, 1989”.

Now, to the grouse on the damages. Learned Senior Advocate has submitted that a party seeking claim for special damages is duty bound to plead same with particularity and strictly prove the damages. He placed reliance on the cases of Olufosoye v. Fakorede 1993 1 NWLR part 272; Onuigbo v. Nweke & Sons 1993 3 NWLR part 283 page 533. Learned Senior Advocate has conceded that particulars of the damages claimed were pleaded, but his quarrel is with the evidence in support, which were not supported with receipts. The learned Senior Advocate has submitted that strict proof of special damages, even though does not mean unusual proof, requires a claimant to tender receipts of purchase of items where

it is normal that receipts are issued for goods and services. He further submitted that where a party claiming special damages ought to tender receipts, but has not done so, the fact that his evidence was one way or that he was not cross-examined on the bland testimonies on the special damages will not entitle a trial court to award such nebulous claim. He cited the cases of *Owena Bank Nigeria Ltd. v. NSCC*. 1993 4 NWLR part 290 page 712; *Omonuwa v. Wahalei* 1976 4 SC. 37; *Admiralty Commissioners v. Susquehanna (Owners)* (1926) All E. R. 124, and *Odumosu v. A.C.B. Ltd.* 1976 11 S.C. 55. Learned counsel further submitted that the testimony of P.W. 2 and the contents of Exhibit P. 10 cannot salvage nor cure the hiatus manifest in the respondent's case. Learned counsel for the respondent however held on tightly to the fact that the evidence on the special damages was neither challenged by the appellants, neither did they adduce evidence to counter the evidence adduced, nor any evidence at all. They sought to oppose the case of the respondent/plaintiff vide amended statement of defence, but they failed to do so by supporting it with evidence, and as I have stated earlier on, pleading is not synonymous with evidence. **Now, having failed to debunk the evidence given by the witness of the respondent (P.W.2), the learned trial judge had no choice other than to rely on the evidence, and assess it as credible evidence which he ought to use for the just determination of the case before him. The cardinal principle of law is that evidence that is related to a matter in controversy that is neither successfully debunked, nor controverted at all, for that matter is good and credible evidence that ought to be relied upon by a trial judge.** See *Adejumo v. Ayantegbe* 1989 3 NWLR part' 110 page 417; *Unity life and Fire Insurance Co. Ltd. V. International Bank of West Africa Ltd.* 2001 7 NWLR part 713 page 610, where in a case that had similar omissions as the present one, *Iguh, JSC* said inter alia as follows :-

"Where, however, one party fails or refuses to submit the issues he has raised in his pleadings for trial and does not give or call evidence in support thereof, the trial court, unless there are other legal reasons to the contrary, may resolve such issues against such defaulting party. See Imana v. Robinson (1979) 3-4 SC. 1 (1979) 12 NSCC 1 at 5. In the same

vein, where evidence given by a party to any proceeding was not challenged by the opposite party who Had the opportunity to do so, it is always open to the court seized of the matter to act on such unchallenged evidence before it.”

I am fortified by the above principle.

The learned Senior Advocate made efforts to distinguish the case on hand with the case of West Africa Shipping Agency (Nig) Ltd. & Another v. Kalla 1978 3 S.C. page 21, which the learned trial judge relied upon in evaluating the evidence on the claimed special damages. His view is that the item claimed for being beans could not have had receipt covering it, as a matter of common knowledge. It may well be so, but it does not derogate from the fact that the evidence adduced in proof of the claim was not controverted. In the Kalla case supra, Eso JSC reiterated the principle of law and laid emphasis on it thus:-

“In this case, the plaintiff evidence in regard to the purchase price of the beans in uncontroverted. He paid for them and he would know what they cost him. He has that peculiar knowledge. As evidence of what he paid for the beans, uncontroverted as it were is sufficient proof of his claim for special damages and the learned trial judge is perfectly justified in this award.”

Underline is mine.

Indeed not only did the learned trial judge rightly rely on the uncontroverted evidence of the respondent/plaintiff, the Court of Appeal also found solace in the principle in the Kalla's case, and affirmed the finding of the trial court as follows:-

“Guided by the principle enunciated in the Kalla case which is binding on this court, I say that the award of 125,344,237.00 as special damages is on a firm terra.” I endorse the above finding. This again is a concurrent finding of fact which this court cannot disturb, for it is based on credible evidence, and so is not perverse. The position of the law in this regard has already been clearly stated in this judgment. In fact the appeal itself is based on concurrent findings of facts, and the settled law is that the decisions of the lower courts will not be interfered

with once they are supported by credible (as in is in the instant case) evidence. The judgments of the trial court, and the court of Appeal are definitely not perverse, and so they are hereby affirmed.

In the final analysis the appeal fails in its entirety and it is hereby dismissed. I award the sum of N10,000.00 as costs to the respondent against the appellant.

KUTIGIJSC

I have had the privilege of reading before now the judgment just delivered by my learned brother Mukhtar JSC. I agree with her that the appeal lacks merit and ought to be dismissed. It is clear that the cause of action in this case is the unlawful sale of the plants and machinery of the Plaintiff by the Defendants. At the trial the Plaintiff called evidence to support his claims while the Defendants offered no evidence at all, not even to cross-examine the Plaintiff's witness on the special damages claimed. I think the Court of Appeal was right when it set aside the award of general damages and affirmed the award of special damages awarded by the trial High Court. The appeal is accordingly dismissed with costs as assessed.

KALGOJSC

I have had a preview of the judgment just delivered by my learned brother Mukhtar JSC in this appeal, and I fully agree that there is no merit in the appeal. I entirely adopt the reasoning and conclusions reached in the said judgment and adopt same as mine. There are only two issues for determination in this appeal.

On issue 1, there is no doubt that the transactions that gave rise to the cause of action as per the writ of summons took place and were committed in Lagos State and not Ogun State. This automatically and legally gives Lagos High Court the jurisdiction to entertain the case. And although the factory in respect of which all the transactions giving rise to the dispute was properly sited at lib, Ogun State, Ogun State could only have jurisdiction in a dispute concerning the factory itself, or the land upon which it was built. This was not the case here, I am therefore of the clear view, that the Lagos High Court and not Ogun state High Court, has

jurisdiction to try this case which it has done. I also resolve this issue against the appellant.

Issue 2 raises the question of proof of special damages in a civil trial. It is common ground and trite law that special damages must be strictly proved. See *A-G Oyo State & Anr v. Fair lakes Hotel & Anr* (1989) 5 NWLR (Pt.121) 255; *Osuji v. Isiocha* (1989) 3 NWLR (Pt.111) 623; *Kosile v. Folarin* (1989) 3 NWLR (Pt. 107) 1. This Court has held that strict proof of special damages “*means no more than such proof as would readily lend itself to qualification and assessment. It is such proof that the law will not infer from the nature of the act*” but is exceptional in character. And special damages denote those pecuniary losses which have crystallized in terms of cash and value before trial.” See also *Akinfosile v. Mobil* (1969) NCLR 253; *Ijebu Ode Local Govt. v. Adedeji Balogun & Co.* (1991) 1 NWLR (Pt. 166) 136 at 158.

In the instant case, the respondent claimed N25,344,237.00 as special damages and pleaded all the particulars making up the total amount claimed. At the trial, one Mr. Oke, the Finance Manager of the respondent, gave detailed evidence in support of the claim and in accordance with the particulars thereof as pleaded. What he did not do, was to produce any receipts or invoices for the materials bought or services rendered. But his evidence covered all the items of claim and the actual amounts paid in respect thereof. The evidence of Mr. Oke was neither challenged nor contradicted in any way by the appellant at the trial. The learned trial judge awarded the whole amount claimed as special damages by the respondent. The Court of Appeal affirmed the award and held that:-

“Although no receipt was tendered in respect of any of the items claimed under special damages, that will not, in law deprive the plaintiff/respondent from getting that award, particularly in a situation where the ipse dixit of Oke the Finance Manager has not been challenged or controverted”

Where however, as in this case, a party claiming special damages gives evidence to support his claim for a specific amount, which evidence is unchallenged or uncontradicted by the other party, the trial judge would be entitled to accept the evidence as sufficient proof of the claim. This

The submission of the learned counsel for the appellant in his brief is that since the items claimed as special damages by the respondent are those for which receipts or invoices should normally have been obtained or issued, the only way he would be held to have proved his claim is by tendering the receipts or invoices in support. Learned Counsel further submitted that since the respondent failed to produce the receipts or invoices in evidence, the evidence of damages is inchoate and the respondent could not be entitled to judgment on the claim. He cited some decided cases in support which I read and do not find them to be relevant to his submission.

G Finally, for the above and the more reasons given in the leading judgement of Mukhtar JSC, I also dismiss this appeal. I abide by the consequential orders made therein including the order as to costs.

I have had the honour to have read the judgment of Mukhtar, JSC just delivered with which I entirely agree. In the aforesaid judgment, all the issues submitted to this Court for the determination of the appeal, have

been meticulously and exhaustively dealt with. I, with respect adopt all the reasons for the judgment as mine and I find the appeal as unmeritorious and accordingly dismiss it. I abide by the order for costs contained in the aforesaid judgment.

ONNOGHENJSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, Mukhtar, JSC just delivered. I agree with her reasoning and conclusion that the appeal lacks merit and should be dismissed.

The facts of the case have been fully stated in the lead judgment. I therefore do not intend to repeat them here except as may be needed to emphasize the point(s) being made.;

Two issues call for determination in this appeal;

(a) jurisdiction of the Trial Court, and

(b) award of special damages when respondent is alleged to have abandoned his declaratory reliefs and the award is based on the ipse dixit of a witness.

My contribution is in relation to the second issue. There is no doubt that the respondent abandoned the declaratory reliefs contained in the Amended writ of summons and the Amended statement of claim when it filed the further amended statement of claim in which it claimed N30,000,000.00 special and general damages.

However, the respondent pleaded inter alia as follows:-

“11. Whilst in the-process of procuring working capital the second defendant without plaintiff’s consent purportedly by letter dated 23rd September, 1988 copy of which 1st Defendant supplied to the plaintiff appointed 1st Defendant as the receiver with his powers stated therein. Plaintiff shall rely on the said letter at the trial.

14. The plaintiff shall contend that the 1st Defendant under and by virtue of the letter of appointment dated 23rd September, 1988 was entitled only to manage but not and had no power to sell plaintiff’s plant and machinery and that the purported sale was wrongful and unlawful

15. The plaintiff avers that instead of carrying on the business of the company in pursuance of his letter of appointment the 1st defendant

took steps and decisions amounting to winding up of the plaintiff's company.

PARTICULARS

B *(a) The 1st Defendant terminated the appointment of all staff of the company.*

(b) Acting upon a purported subsequent instrument by 2nd Defendant dated 21st October, 1988 unlawfully sold the plant and machinery of the plaintiff.

C *(c) With his servants and/or agents broke plaintiffs factory stores by force and removed therefrom plaintiffs stock of raw materials*

D *16. Plaintiff avers further that further to paragraph 15(b) herein the purported sale by the 1st Defendant of plaintiff's plant, and machinery under the instrument dated 21st October, 1988 is null and void and of no effect.*

PARTICULARS

(a) The instrument aforesaid did not empower the 1st Defendant to sell plant and machinery of the plaintiff.

E *(b) In effecting purported sale 1st Defendant did not comply with the provisions of clause 36 of the Deed of Mortgage which was condition precedent to the exercise of power of sale.*

F *(c) The said instrument was not registered as an instrument in accordance with the provision of Land Instrument Registration of Ogun State, 1978 or Land Registration Law of Lagos State, 1973.*

(d) The said instrument cannot be pleaded or given in evidence in court."

G *The respondent went on to plead in paragraph 22 that it had suffered damage by virtue of this purported sale and gave particulars of special damages thereunder.*

The question then is whether there is evidence on record in support of the pleadings.

H *At pages 253 - 254, pw. 1 stated during examination in chief as follows:-*

"The 2nd Defendant opened letter of credit on our behalf and ordered the plants and machineries from Western Germany. The 2nd

Defendant paid for these plants and machineries out of the loan. The amount paid by the 2nd Defendant in DM473, 380."

At page 255 - 256, pw. 1 continued as follows:-

"We did not receive any notice of sale from the Defendant, we are not aware of any notice of public sale. All the properties were completely sold. Both capital equipment, plants and machineries including Co2 every item was sold."

Continuing at page 263, pw.1 stated thus:

"At the time of sale the value of bottling plant and machinery was N22,221,922.00, Twenty Two Million, Two Hundred and Twenty One Thousand, Nine Hundred and Twenty Two Naira. I paid import duty on the plant and machinery which was N338,977, Three Hundred and Thirty Eight Thousand, Nine Hundred and Ninety Seven Naira. We incurred preliminary expenses which was N16,774.... We bought two generators. The first is 12KV which cost N500,000.00. We had a big tank within the generator which cost us N12,500.00. We have another tank for oil diesel which cost us N12,500.00. We bought two water tanks which cost us the total sum of N25,000.00. We bought NEPA Transformer for N3,440.00. We bought stock of raw materials totalling N842,828.... We bought Crown Cocks, bottles circles, concentrated, diesel oil..... chemical and working machine also additives. We incurred pre-operational expenses amounting to N1,541,346 We are claiming a total sum of N30,000,000.00 including general damages....."

Under cross examination PW1 stated at pages 283 -284 as follows:-

"We never got a kobo, we only gave our invoice to the second defendant who will then issue their cheque to the supplier... The 2nd Defendant wrongly appointed a receiver to an ongoing company or project... Under exhibit 12 we have one year after commissioning to start to pay instruments. Installation cost was also paid by 2nd Defendant..."

As can be noticed, appellants' counsel did not challenge the figures given by PW1 as special damages. Going through the statement of claim it is very clear that respondent did not plead that they were going to rely on any receipt of payment for the items claimed. Appellant did not call any witness in support of their defence. That being the case, the facts are as

given in evidence by the respondent.

The learned trial judge in the judgment held, inter alia, as follows:-

"I therefore hold that the 2nd Defendant wrongly exercised his power of appointment of 1st Defendant as Receiver. It is void" - See pages B 331 - 332.

The Judge went on to find and hold as follows at pages 332 - 333:

"In addition the duration of the purported appointment of the 1st Defendant was for three months -see exhibit P6 page 2 According to exhibit P6 - the appointment took effect from 23rd September, 1988. By C 23rd day of December, 1 988 the purported appointment came to an end. There is no evidence that the duration was extended. But the 1st Defendant exercised the right of sale - which in anyway he had not got on the 12th day of February, 1989. with these defaults I have no difficulty D at all of finding the 2nd Defendant liable"

From the pleadings, evidence and judgment of the trial court, it is very clear the trial Judge made specific findings on the main complaints of the respondent to wit: the wrongful appointment of the Receiver and the E invalidity of the sale of respondent's plants, machineries, raw materials etc, etc. The findings were direct and positive on the issues.

Learned counsel for the appellant has argued that since the declaratory reliefs in the Amended statement of claim were abandoned in the further Amended Statement of claim, there was no basis for the claim F and award of special damages. I hold the view that the submission of learned SAN on this issue is erroneous, the simple reason being the principle that where there is a right which is breached, or where there is a wrong, there must be a remedy. The trial Judge having made the specific G findings reproduced earlier in this judgment, the result is that the respondent's right to judgment was thereby established. A formal declaration of those rights as found by the court is not necessary - it becomes superfluous.

The second arm of issue 2 deals with award of special damages. I H had earlier in this judgment reproduced the pleadings and evidence of PW1 in relation to the claim for special damages. I had also stated that appellant did not in anyway, challenge the evidence of the respondent on the matter. The trial Judge relied on the unchallenged evidence of the respondent and

awarded the special damages claimed, which award was confirmed by the lower court upon appeal.

Learned senior counsel for the appellant has argued that the lower court erred in relying on the ipse dixit of PW1 particularly as the law is that special damages must not only be specifically pleaded but must also be strictly proved; that since the items of the claim for special damages are of the nature that attract receipts which were not tendered in this case, the special damages cannot be said to have been strictly proved. Learned senior counsel sought to distinguish the case of West Africa Shipping Agency (Nig) Ltd. & Anor v. Kalla (1978) 3 S.C 21 which was relied upon by lower court in affirming the award of special damages by stating that the items for which special damages was claimed in Kalla's case was beans which hardly attracts purchase receipts in this country. That in the present case the items of special damages are such that receipts of purchase and or invoices are issued at the time of purchase.

I agree with the submission of learned Senior Counsel for the appellant that the general principle of law in relation to claims for special damages is that such claims must be specifically pleaded and strictly proved. This is trite law. However, the issue is whether the ipse dixit of PW1 in this case satisfies the strict proof requirement for award of special damages.

There is no disputing the fact that respondent specifically pleaded and gave particulars of the special damages claimed. It should also be noted that respondent never pleaded in the relevant paragraphs of this further Amended Statement of Claim or at all that reliance would be placed at the trial on purchase receipts and or invoices. In fact there is evidence that appellant paid for most of the items direct to the suppliers from the loan granted the respondent. This clearly means that appellant is aware of what amount it paid for the items and can easily prove same if what is being claimed by the respondent is more than what was actually paid for; but the appellant never testified nor tendered any evidence even under cross examination of PW1 to disprove the claims. I hold the view that the respondent having not pleaded that it would rely on purchase receipts and or invoices on proof of the items of special damages at trial, the court

cannot, under the circumstances hold that respondent ought to have tendered receipts and or invoices before the items can be said to have been strictly proved particularly since appellant never challenged the evidence of the respondent on the issue under cross examination nor offered any in rebuttal. In the circumstances the lower court was thus left with the unchallenged evidence of the respondent on the issue and I hold the view that, the trial court was right in relying on same to make the award and that the lower court was also right in confirming that award.

The greatest hurdle which appellant failed to get to, let alone clear, has to do with the legal consequences of the concurrent findings of facts by the trial and lower courts on the issue of award of special damages. The law is that the Supreme Court will not interfere with concurrent findings of facts made by the trial court and the Court of Appeal unless such findings are perverse; or are not supported by the evidence; or are reached as a result of a wrong approach to the evidence; or as a result of a wrong application of evidence; or as a result of a wrong application of any principle of substantive law -or procedure - See Enaney vs. Adu (1981) 11-12 S.C 25; Nwadike vs Ibekwe (1981) 4 NWLR (No. 67) 18; Igwego vs Ezengo (1992) 6 NWLR (pt.249) 561; Afegbai vs Edo State (2001) 14 NWLR (pt.733) 425.

I hold the view that learned senior counsel for the appellant has not brought this case within the ambit of any of the exceptions to the general rule stated supra. On the contrary there is evidence on record in support of the findings and I hold the view that the decision of this court in the Kalla's case apply to the facts of this case and that the lower court is right in applying same.

In conclusion, I too find no merit in this appeal which is accordingly dismissed with costs as assessed and fixed in the lead judgment of my learned brother, Mukhtar, JSC including other consequential orders therein contained.

Appeal dismissed.