

COURT OF APPEAL  
BENIN DIVISION  
18TH MAY, 2004, CA/B/6/99  
CORAM:- M. S. MUNTAKA-COOMASSIE,  
P. I. AMAIZU, A. A. AUGIE, JJCA

1. UNOKAN ENT. LTD. .... APPELLANTS

2. DANIELE. UNOKAN

AND

1. CHIEF P.O. OMUVWIE ..... RESPONDENTS

2. PAMOL (NIG.) LTD.

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APPEALS - Issues - Adoption - Grounds of appeal - Where no cross appeal or respondent's notice was filed - Respondent cannot depart from the issues - Raised by the appellant (H1)

APPEALS - Issues - Principal issues raised - Subdivision of - Is not acceptable to the court - Which will restrict itself only to the principal issues (H2)

COURTS - Claims - Relief not sought - In a party's pleadings - Should not be granted by the court (H3)

ACTIONS - Issues - Courts - Pleadings - Where non of the parties raised the issue of fraud - Trial Court was wrong - To raise and decide it suo motu (H4)

ACTIONS - Counter claim - Courts - Fair hearing - Trial court's dismissal of the counter claim - Without hearing the defendants - Is not fair (H5)

ACTIONS - Courts - Fair hearing - Retrial - Where right to fair hearing was breached - The entire proceedings are a nullity - And retrial will be ordered (H6)

### **FACTS**

Before the Sapele High Court of Delta State, the plaintiff/respondent filed an action against the 1st defendant (now 2nd respondent). But upon an application by the 2nd and 3rd defendants/appellants, they were joined as defendants in the suit. Plaintiff claimed that the defendants be ordered to return the disputed generating set to him or pay the current value of the 500KVA Skoda generator assessed at N3 Million. He also claimed N100,000.00 as general damages for trespass to the generator or for loss of its use. The defendants/appellants in denying the claim, filed a counter claim against the plaintiff.

In his judgment, the trial court, suo motu introduced the issues of fraud, falsehood and perjury not pleaded nor raised by any of the parties and found in favour of the plaintiff. It relied on morality in granting reliefs that were not claimed by the plaintiff. Trial court dismissed the appellant's counter claim without granting them any hearing, seeing that counter claim is a distinct and separate action. Being dissatisfied, appellants have appealed to the Court of Appeal.

### **ISSUES FOR DETERMINATION**

(a) Was the learned trial Judge right to have set aside the contract of sale between the appellants and the 1st defendant on the grounds of fraud, falsehood and perjury?

(b) Was the learned trial Judge right to have dismissed the counter-claim when no defence was filed to the said counter-claim?

(c) Was the learned trial Judge's consideration of the appellants' case and counter-claim fair in the circumstances of this case?

**HELD** (Unanimously allowing the appeal per **AUGIE JCA**)

***Where no cross appeal or respondent's notice was filed***

1. Before addressing the substantive issues in this appeal, I wish to restate the well known principle that where there is no cross-appeal or a respondent's notice, the respondent can only either adopt the issues as formulated by the appellant based on the grounds of appeal, or at best recast them by giving them a slant favourable to the respondent's point of

view, but without departing from the complaint by the grounds of appeal. Where a respondent does not cross-appeal or file a respondent's notice, he must formulate issues for determination with reference to the grounds of appeal filed by the appellant. The respondent's issues (i) and (ii) does not flow from any of the grounds of appeal and are therefore liable to be struck out on that account. Apart from that, the respondent filed five issues for determination to the appellant's four grounds of appeal. It is trite law that whilst an issue may encompass one or more grounds of appeal, the issues formulated must not be more than the grounds of appeal as the appellate courts frown on proliferation of issues. (p. 3167 D)

***Principal issues raised - Subdivision of***

2. The appellants' issues (a) and (b), each of which was sub-divided into (i) & (ii) are out of line as well. Authorities abound which state that it is clearly unacceptable for an issue to raise in it other issues. It is well settled that most appeals are won on a few cogent and substantial issues, well-framed, researched and presented than on numerous trifling slips. See *Iloabuchi v. Ebigbo* (2000) 8 NWLR (Pt. 668) 197; *Ehikhamwen v. Iluobe* (supra) where the court also held that the practice of splitting issues is likely to confuse consideration of principal issues with subsidiary issues. In my view, the appellant's subsidiary issues (i) & (ii) in issues (a) & (b) are superfluous. The principal issues simpliciter capture in a nutshell the essence of the complaints in the grounds of appeal, and I will adopt them in dealing with this appeal. (p. 3168 A)

***Claims - Relief not sought***

3. In other words, contrary to what the respondent would have us believe, the learned trial Judge did not only pronounce on the nullity of the contract of sale, but he proceeded to also set aside the said contract of sale, a relief not claimed by the plaintiff who had merely prayed the lower court to enjoin the defendants to return the said generating set to him failing which to pay him the "current value of the 500 KVA Skoda generator assessed at N3,000,000" and "N100,000.00 as general damages for trespass to the generating set or for loss of its use", The learned trial Judge did grant the

first relief sought as he ordered “the 1st defendant to return the said generator to the plaintiff, but that is not the issue in this appeal. What the appellants are complaining about is that the plaintiff did not ask for the setting aside of the transaction between the parties, and their standpoint is that in making the said order, the learned trial Judge fell into the twin errors of making out a case for a party, and granting him a relief which he did not ask for.

The appellants are quite right, a court of law cannot give and should never award a relief that is not sought or pleaded by a party. Courts of law are legal institutions for the adjudication of matters and award of relief or reliefs duly sought by the parties in the litigation process. To put it in simple language, a court should not award a relief not specifically pleaded or sought. (p. 3172 F)

***Where non of the parties raised the issue of fraud***

4. In this case, however indignant the learned trial Judge was at the action of the 3rd appellant in selling what did not belong to him, the point still remained that none of the parties asked him to set aside the contract of sale. It is clear from the pleadings and evidence of the parties in this case, that none of the parties pleaded and/or relied on any of the grounds relating to “*fraud, falsehood and perjury*” as a ground for any relief. Courts of law do not pursue moral issues outside the precincts of the law. A court of law must not grant to a party a relief, which he has not sought or which is more than he has claimed. The fate of every case depends on the pleadings and the evidence in support, and it is not the duty of the court to make up a case for a party. It is not open for a court to raise a point suo motu, no matter how clear it may be, and proceed to resolve it one way or the other without hearing the parties. Where a court does this, it would have breached the parties’ right to fair hearing. The rationale of the rule which forbids gratuitous award by the court contrary to the rule of practice and pleadings, is to avoid surprises during proceedings and to ensure fair hearing to the parties without showing favour to one or to the other. Evidently, the learned trial Judge got it all totally wrong and thus erred. (p. 3174 A)

***Fair hearing - Trial court's dismissal of the counter claim***

5. Agreed, a counter-claim, as the appellants rightly submitted, is treated as an independent action, the trial or success of which does not depend on the success or failure of the original suit. It is substantially a cross-action and not merely a defence to the plaintiff's case, and is to be treated for all purposes for which justice requires it to be treated as an action, which is not pivoted on another action, j As a general rule, where the plaintiff fails to file a defence to the counter-claim, the trial court would assume that the plaintiff has no defence and enter judgment for the defendant/counter-claimant. Nevertheless, the respondent is also right that a counter-claim is a claim, which must also be proved to the satisfaction of the trial court as required by law. The onus of proof, which lies on the plaintiff to prove his claim, is also on the defendant to prove the averments in his counter-claim against the plaintiff, or he will fail in his claim.

In this case, the learned trial Judge did not address his mind to the above nuances of the law; he merely tarred the counter-claim with the same brush with which he had painted the appellants in the main claim, and dismissed the counter-claim with N1,000.00 costs. His reason was that since the 3rd appellant had "*induced the contract between them and the 1st defendant by misrepresentation and perjury*", the said contract was "*invalid and therefore unenforceable*", applying "*the Latin maxim ex turpi contractu action non oritur (A contract founded upon an illegal or immoral consideration cannot be enforced by action)*". But is that fair? To adjudge someone guilty of fraudulent behaviour in a judgment, without hearing him out first?

Obviously not, and this brings us to the last issue for determination, that is whether the learned trial Judge's consideration of the appellants' case and counter-claim was fair.

Suffice it to say, that courts have a duty to administer justice to all manner of people without showing favour to one party or disfavour to the other side, and to this end, a court of law is not to adjudicate or decide on issues not placed or raised before it. (p. 3177 D)

***Fair hearing - Trial court's dismissal of the counter claim***

6. Where the right to fair hearing has been breached, as in this case, the entire proceedings are a nullity, and I so hold.

B The end result of the foregoing is that the appeal succeeds and is allowed. The judgment of Nwulu, J., delivered on the 7th of November, 1997 is hereby set aside. This case is remitted back to the High Court in Sapele for retrial before another Judge. (p. 3179 B)

C **CASES REFERRED TO**

Mkpedem v. Udo (2000) 9 NWLR (Pt. 673) 631

Geidam v. N.E.P.A. (2001) 2 NWLR (Pt. 696) 45

Chia v. The State (1996) 6 NWLR (Pt. 445) 465

D Ehikhamwen v. Iluobe (2002) 2 NWLR (Pt. 750) 151

Obaditan v. Kwara State Polytechnic (1995) 9 NWLR (Pt. 418) 228

Majekodunmi v. Co-operative Bank Ltd. (1997) 10 NWLR (Pt. 524) 198

Lawal v. Salami (2002) 2 NWLR (Pt. 752) 687

E N.B.C.I. v. Standard (Nig.) Eng. Co. Ltd. (2002) 8 NWLR (Pt. 768) 104

Ndulue v. Ibezim (2002) 12 NWLR (Pt. 780) 139

Ogun v. Asernah (2002) 4 NWLR (Pt. 756) 208

Ayalogu v. Agu (2002) 3 NWLR (Pt. 753) 168

F Akinboni v. Akinboni (2002) 5 NWLR (Pt. 761) 564

Total Nigeria Plc. v. Morkah (2002) 9 NWLR (Pt. 773) 492

Walter v. Skyll (Nig.) Ltd. (2001) 3 NWLR (Pt. 701) 438

Ekwunife v. Ngene (2000) 2 NWLR (Pt. 646) 650

G **REPRESENTATION**

Chief V. E. Otomiewo for the Appellants.

Hudson A. Ororho, Esq. for the Respondent.

H **LEAD JUDGMENT BY AUGIE JCA**

This is an appeal against the Judgment of Nwulu, J., delivered on the 7th day of November, 1997, wherein he entered judgment for the plaintiff and dismissed the 2nd and 3rd defendants' counter-claim. At first,

the plaintiff, (respondent herein) claimed only against the defendant/respondent, but on the application of the 2nd and 3rd defendants, (appellants herein) the respondent was ordered to join them as defendants in the suit and to amend his writ of summons and statement of claim to reflect their joinder, which he did, claiming the following reliefs - B

1. An order enjoining the defendants to return the said generating set to the plaintiff at Sapele in Delta State failing which to pay the plaintiff current value of the 500 KVA Skoda generator assessed at N3,000,000.

2. N100,000.00 as general damages for trespass to the generating set or for loss of its use. C

At the end of the trial and after hearing the addresses of counsel, the learned trial Judge delivered his judgment, wherein he held as follows -

“V. E. Otomiewo, Esq., counsel for the 2nd and 3rd defendants had submitted that this court is not competent to declare the sales transaction illegal because the plaintiff has not asked for same. Unfortunately I have had no access to the authorities cited by him as he did not leave any for me and the High Court library has none of them. I have therefore not had the privilege of reading through the said legal authorities. *But will it be just, will it be equitable to allow such a contract induced by fraud, falsehood and perjury to stand, merely to satisfy the demands of legal technicalities? Justice demands that it be set aside as being invalid. Accordingly, the purported contract of sale of the 500KVA Skoda generator made between the 1st defendant on the one hand and the 2nd and 3rd defendants on the other is hereby set aside.*” (Italics mine) D E F

“*The 1st defendant company itself who is in custody of the 500 KVA Skoda generating set is ready and willing to return the said generating set to the plaintiff if this court finds that he is the owner. I accordingly order the 1st defendant to return the said generator to the plaintiff*” G

“*In the instant case, the purported trespass to the plaintiff’s property i.e. the 500KVA Skoda generator by the 1st defendant was induced by the misrepresentation and perjury of the 3rd defendant for which the 1st defendant cannot in my view be held liable. If ever there is a trespasser, it was the 3rd defendant. But the plaintiff before me has said he has no claims against him. Accordingly, the claim of N1,000.00 against* H

the 1st defendant is hereby dismissed make no order as to costs. “

“I am now left with the counter-claim of the 2nd and 3rd defendants.....

It is hardly necessary for me to repeat that the defendants and in particular the 3rd defendant induced the contract between them and the 1st defendant by misrepresentation and perjury. I had declared the said contract invalid and therefore unenforceable. The Latin *maxim ex turpi contractu action non oritur* (A contract founded upon an illegal or immoral consideration cannot be enforced by action) here applies. *In view of the above, this counter-claim against the plaintiff and the 1st defendant is dismissed with N1,000.00 cost in favour of each of the plaintiff and the 1st defendant*”. (Italics mine)

Aggrieved by the decision of the lower court, the appellants filed a Notice of Appeal containing four grounds of appeal. In compliance with the rules of this court, parties filed briefs, and the following issues for determination were formulated in the appellants’ brief prepared by Chief V. E. Otomiewo

(a) Was the learned trial Judge right to have set aside the contract of sale between the appellants and the 1st defendant on the grounds of fraud, falsehood and perjury when:

(i) None of the parties at the trial in their pleadings and evidence raised the issues of fraud, falsehood, and perjury.

(ii) The plaintiff/respondent did not claim any relief for the setting aside of any sale.

(b) Whether the learned trial Judge was right to dismiss the appellants’ counter-claim on:

(i) A ground not relied upon by any of the parties as a defence of same and;

(ii) No defence was filed to the said counter-claim.

(c) Whether the learned trial Judge’s consideration of the appellants’ case and counter-claim was fair in the circumstances of the case/trial.

On the part of the respondent, it was submitted in his brief prepared by Hudson A. Ororho, Esq., that the following issues arise in this appeal

(i) Whether the defendants/appellants has locus standi to maintain an action (by way of counter-claim) against the plaintiff/respondent.

(ii) Whether, assuming without conceding that the defendants/appellants have locus standi the non-filing of defence to the counter-claim, in the circumstances of this case, automatically decree judgment for the defendants/appellants on their counter-claim. B

(iii) Whether the learned trial Judge was right in holding that the purported contract of sale between the defendants/appellants, and the 1st defendant/respondent is null and void ab initio.

(iv) Whether the learned trial Judge was right in his finding that the generator is the property of the plaintiff/ respondent. C

(v) Whether the learned trial Judge was right in his judgment that the generator be returned to the owner, the plaintiff/respondent as prayed in his statement of claim and evidence. D

**Before addressing the substantive issues in this appeal, I wish to restate the well known principle that where there is no cross-appeal or a respondent's notice, the respondent can only either adopt the issues as formulated by the appellant based on the grounds of appeal, or at best recast them by giving them a slant favourable to the respondent's point of view, but without departing from the complaint by the grounds of appeal. See *Mkpedem v. Udo* (2000) 9 NWLR (Pt. 673) 631; *Geidam v. N.E.P.A.* (2001) 2 NWLR (Pt. 696) 45; *Chia v. The State* (1996) 6 NWLR (Pt. 445) 465. Where a respondent does not cross-appeal or file a respondent's notice, he must formulate issues for determination with reference to the grounds of appeal filed by the appellant. See *Ehikhamwen v. Iluobe* (2002) 2 NWLR (Pt. 750) 151; *Obaditan v. Kwara State Polytechnic* (1995) 9 NWLR (Pt. 418) 228; *Majekodunmi v. Co-operative Bank Ltd.* (1997) 10 NWLR (Pt. 524) 198. The respondent's issues (i) and (ii) does not flow from any of the grounds of appeal and are therefore liable to be struck out on that account. Apart from that, the respondent filed five issues for determination to the appellant's four grounds of appeal. It is trite law that whilst an issue may encompass one or more grounds of appeal, the issues formulated must not be more than the grounds of**

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appeal as the appellate courts frown on proliferation of issues. See *Lawal v. Salami* (2002) 2 NWLR (Pt. 752) 687.

**The appellants' issues (a) and (b), each of which was sub-**  
divided into (i) & (ii) are out of line as well. Authorities abound which  
state that it is clearly unacceptable for an issue to raise in it other  
issues. It is well settled that most appeals are won on a few cogent  
and substantial issues, well-framed, researched and presented than  
on numerous trifling slips. See *Iloabuchi v. Ebigbo* (2000) 8 NWLR  
(Pt. 668) 197; *Ehikhamwen v. Iluobe* (supra) where the court also  
held that the practice of splitting issues is likely to confuse consid-  
eration of principal issues with subsidiary issues. In my view, the  
appellant's subsidiary issues (i) & (ii) in issues (a) & (b) are  
superfluous. The principal issues simpliciter capture in a nutshell  
the essence of the complaints in the grounds of appeal, and I will  
adopt them in dealing with this appeal. In other words, the issues for  
determination are as follows-

(a) Was the learned trial Judge right to have set aside the contract  
of sale between the appellants and the 1st defendant on the grounds of  
fraud, falsehood and perjury?

(b) Was the learned trial Judge right to have dismissed the counter-  
claim when no defence was filed to the said counter-claim?

(c) Was the learned trial Judge's consideration of the appellants'  
case and counter-claim fair in the circumstances of this case?

As to whether the learned trial Judge was right to have set aside the  
contract of sale on the grounds of fraud, falsehood and perjury, it is the  
appellants' submission that none of the parties pleaded and/or relied on any  
of those grounds for any relief. The court was referred to paragraph 12  
of the amended statement of claim, wherein the respondent declared as  
follows -

"With full knowledge of the plaintiff's ownership of the said  
generating set and in spite of repeated demands, the defendants have  
continued to retain the said generating set and have refused and or  
neglected to deliver up possession of the said generator to the plaintiff and  
has continued to detain the same against the wishes of the plaintiff.

*Wherefore the plaintiff claims against the defendants as follows: -*

1. *An order enjoining the defendants to return the said generating set to the plaintiff at Sapele in Delta State failing which to pay the plaintiff current value of the 500 KVA Skoda generator assessed at N3,000,000.*

2. *N100,000.00 as general damages for trespass to the generating set or for loss of its use.” (Italics mine)*

It was further submitted for the appellants that the respondent did not ask for the setting aside of the transaction between the appellants and the 1st respondent even though he became aware of same when the motion to join the appellants was argued and before he settled and filed his amended statement of claim, and that it is trite law that it is not the duty of the court to make out a case for the parties. Furthermore, that courts have also been cautioned on the danger of granting a relief not asked for. It is also their contention that the learned trial Judge probably out of unintended zeal fell into the twin errors of making out a case for the respondent and granting him a relief, which he did not ask for when he held

*“But will it be just, will it be equitable to allow such a contract induced by fraud, falsehood and perjury to stand, merely to satisfy the demands of legal technicalities? Justice demands that it be set aside as being invalid. Accordingly, the purported contract of sale of the 500 KVA Skoda generator made between the 1st defendant on the one hand and the 2nd and 3rd defendants on the other is hereby set aside”.*

The court was referred to the following authorities - *Eyibagbe v. Eyibagbe* (1996) 1 NWLR (Pt. 425) 408 at 415 and *Okefi v. Ogu* (1996) 2 NWLR (Pt. 432) 603 at 612, and the decisions therein.

In *Eyibagbe v. Eyibagbe* (*supra*), this court per Mukhtar, JCA held- *“It is trite law that a court of law is not a charitable organization that may give or donate beyond what is asked for. A court is bound by the relief sought by a party and must confine itself to it. Where it must in the interest of justice deviate from what is sought, then it must not be more than that relief which was sought. To go beyond that would be going against the principle of law that a litigant does not get what he does not claim”.*

And in *Okefi v. Ogu* (*supra*) Ubaezonu, JCA held as follows -

*“It is correct law that a trial court, or indeed any court does not make out a case for any of the parties to a suit. The issues to be determined in a case must be raised in the pleadings and given in evidence unless the particular averment in the statement of claim is admitted in the statement of defence. In such a case, it may not be necessary to lead evidence on admitted facts. In other words, a court must decide a case on the facts of ground raised by the parties to the case”.*

The appellants further submitted that the learned trial Judge erred in this case when he awarded a relief not claimed and based his judgment on an issue not raised by the parties in their pleadings, and that the error constitutes a denial of the appellants’ right to fair hearing and has occasioned *substantial* miscarriage of justice which should vitiate the whole judgment. It is also their contention, citing *Akpunonu v. Bekaert Overseas* (1995) 5 NWLR (Pt. 393) 42, that the error is compounded by the fact that the new issues raised suo motu by the court borders on allegation of crime in a civil proceedings, which should be proved beyond reasonable doubt.

The respondent however submitted that a trial court is bound to make findings of fact on issues in controversy between the parties, and that what was in controversy was the propriety of the alleged sale of the generator and the trial court only pronounced on the nullity of the contract of sale between the appellants and the 1st defendant/ respondent following the finding that the appellants have no interest in the generator, the subject matter of the suit - citing *Olufosoye v. Olounfemi* (1981) 1 NWLR (Pt. 95) 26. It was further submitted that this finding has not occasioned a miscarriage of justice as the principle “*nemo dot quod non habet*” applies to the illegal sales transaction - citing *Ibodo v. Enarofia* (1980) 5 - 7 SC 42.

“*Nemo dot quod non habet*” is a Latin phrase meaning “*no one can give one what he does not have*”, if the learned trial Judge had made a finding to that effect, and left it at that in making the order sought, there would have been no need for this appeal, at least not on these grounds. The respondent argued that the trial court only pronounced on the nullity of the contract of sale following the finding that the appellants have no interest

in the generator. But that is not an accurate summation of the issues at stake in this appeal. In making his findings, the learned trial Judge held as follows

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“The first question which calls for consideration is this: *Who owns the 500 KVA Skoda generator?*” The answer to this is clear as crystal as both the plaintiff himself, exhibit “A”, the representative of the 1st defendant and even the 3rd defendant who spoke for the 2nd defendant company have all agreed that *it belongs to Chief P. O. Omuvwie*”. (Respondent) (Italics mine)

“The second question which calls for consideration is this: *“Did the said Chief P. O. Omuvwie at any time transfer his interest to Union General Trading Co. Ltd. - a limited liability company incorporated by him as asserted by the 2nd & 3rd defendants? ... But Chief P. O. Omuvwie and Union Trading Co. Ltd. are two distinct persons - one being human while the other is corporate. To transfer his personal effect to the said company Chief Omuvwie needs a legal instrument to effect such - and none has been tendered by those who assert that he has made the transfer”*”. (Italics mine)

“The next question is this: *“Could Union General Trading Co. Ltd., have transferred the said generator to either Unokan Motors Ltd. or Unokan Enterprises Ltd.? - The 2nd and 3rd defendants have admitted that the generator belongs to Chief P. O. Omuvwie. This court has also found that there is no evidence of a legal transfer by the said Chief of his interest in the said generator to Union General Trading Company Ltd. So, it is not possible that Union General Trading Co. Ltd. could have transferred the 500 KVA Skoda generator to Unokan Motors a division of Unokan Enterprises. The Latin maxim nemo dat quod non habet (i.e. no one can give out what he does not have) applies.*”

“The next issue I would wish to consider is this: “Was there a valid sales transaction between the 2nd & 3rd defendants on the one hand and the 1st defendant on the other?” In the light of my earlier findings above, the answer is an emphatic No! From the very beginning, Mr. Daniel Ejiro Unokan - the 3rd defendant knew that the generator neither belonged to his late father nor to Unokan Enterprises Ltd. His evidence before me under

cross-examination attests to this. Yet in spite of his said knowledge he swore to the following affidavit:-

*‘That the Skoda generator I am selling to Pamol Nigeria Limited is my bona fide property.* “See paragraph 6 at page 11 of exhibit “D”.

B Earlier in paragraph 5 at page 11 of exhibit “D” he had averred: *“The said Unokan Enterprises is not functioning because letters of administration have not been granted”*. It follows that neither he nor the Unokan Enterprises Ltd., had the competence either to negotiate or to transfer the said generator to the 1st defendant. *In my considered opinion the whole sales transaction between the defendants 8 was and is a nullity.’”*

C The learned trial Judge did not stop there. He went on to hit the nail on the head, and made the order that is the gravamen of this appeal. He stated -

D “V. E. Otomiewo, Esq., counsel for the 2nd and 3rd defendants had submitted that this court is not competent to declare the sales transaction illegal because the plaintiff has not asked for same. Unfortunately I have had no access to the authorities cited by him as he did not leave any for

E me and the High Court library has none of them. I have therefore not had the privilege of reading through the said legal authorities. But will it be *just*, will it be *equitable* to allow such a contract induced by fraud, falsehood and perjury to stand, merely to satisfy the demands of legal technicalities?

F Justice demands that it be set aside as being invalid. Accordingly, the purported contract of sale of the 500KVA SKODA generator made between the 1st defendant on the one hand and the 2nd and 3rd defendants on the other is hereby set aside” (Italics mine)

G **In other words, contrary to what the respondent would have us believe, the learned trial Judge did not only pronounce on the nullity of the contract of sale, but he proceeded to also set aside the said contract of sale, a relief not claimed by the plaintiff who had merely prayed the lower court to enjoin the defendants to return the**

H **said generating set to him failing which to pay him the “current value of the 500KVA Skoda generator assessed at N3,000,000” and “N100,000.00 as general damages for trespass to the generating set or for loss of its use”, The learned trial Judge did grant the first relief**

sought as he ordered “the 1st defendant to return the said generator to the plaintiff, but that is not the issue in this appeal. What the appellants are complaining about is that the plaintiff did not ask for the setting aside of the transaction between the parties, and their standpoint is that in making the said order, the learned trial Judge fell into the twin errors of making out a case for a party, and granting him a relief which he did not ask for. B

The appellants are quite right, a court of law cannot give and should never award a relief that is not sought or pleaded by a party. Courts of law are legal institutions for the adjudication of matters and award of relief or reliefs duly sought by the parties in the litigation process. To put it in simple language, a court should not award a relief not specifically pleaded or sought. See N.B.C.I. v. Standard (Nig.) Eng. Co. Ltd. (2002) 8 NWLR (Pt. 768) 104; Ndulue v. Ibezim (2002) 12 NWLR (Pt. 780) 139; Ogun v. Asernah (2002) 4 NWLR (Pt. 756) 208. See also Ayalogu v. Agu (2002) 3 NWLR (Pt. 753) 168, where this court per Olagunju, JCA stated as follows - D

“In the nature of not uncommon occurrences in the course of judicial proceedings one is not unmindful of the concern by a Judge to prevent an action from being frustrated because of the blunder of a counsel, consideration that might have informed the learned trial Judge’s gratuitous renewal of the writ to prevent it from becoming void with the 2 year life of the writ that had just a few months more to run. *On a moral angle where precepts are at large, that may be a commendable gesture. ...Notwithstanding the lofty and magnanimous gesture of the learned trial Judge, the law as it stands, is not predisposed to beneficent philanthroping of doling out bounties on the basis of need rather than supplication that identifies the need.* On the duty of a suppliant to ask for a relief before it can be granted, particularly apposite is the *dictum of Babalakin, JCA (as he then was) in Ladejobi v. Shodipo (1989) 1 NWLR (Pt. 99) 596 at 610 that the rule is to ask and thou shall be given if you are legally qualified for your request*”. Therefore, on issue two, the bifurcated error that mars the decision of the learned trial Judge is taking the initiative unsolicited to grant the relief, which the *lain beneficiary* did not ask for”. E F G H

**In this case, however indignant the learned trial Judge was at the action of the 3rd appellant in selling what did not belong to him, the point still remained that none of the parties asked him to set aside the contract of sale. It is clear from the pleadings and evidence of the parties in this case, that none of the parties pleaded and/or relied on any of the grounds relating to “fraud, falsehood and perjury” as a ground for any relief. Courts of law do not pursue moral issues outside the precincts of the law - see *NBCI v. Standard (Nig.) Eng. Co. Ltd. (supra)*. A court of law must not grant to a party a relief, which he has not sought or which is more than he has claimed. The fate of every case depends on the pleadings and the evidence in support, and it is not the duty of the court to make up a case for a party. See *Mobar v. Ali* (2002) 1 NWLR (Pt. 747) 95; & *NBCI v. Standard (Nig.) Eng. Co. Ltd. (supra)*. It is not open for a court to raise a point suo motu, no matter how clear it may be, and proceed to resolve it one way or the other without hearing the parties. Where a court does this, it would have breached the parties’ right to fair hearing - see *Ekong v. Udo* (2002) 16 NWLR (Pt. 792) 1. The rationale of the rule which forbids gratuitous award by the court contrary to the rule of practice and pleadings, is to avoid surprises during proceedings and to ensure fair hearing to the parties without showing favour to one or to the other - see *Akinboni v. Akinboni* (2002) 5 NWLR (Pt. 761) 564. Evidently, the learned trial Judge got it all totally wrong and thus erred.**

Now, the appellants also filed a counter-claim, as follows -

(1) The plaintiff hereby pleads all the facts contained in paragraphs 1-11 of the statement of claim above.

(2) The defendants have suffered loss and damages as a result of plaintiff’s interference and the refusal of the 1st defendant to conclude the contract of sale between it and the defendants.

Wherefore the defendants counter-claim as follows: -

(a) General damages of N500,000.00 against the plaintiff and the 1st defendant jointly and severally.

(b) An order of specific performance against the 1st defendant to

conclude the contract of sale by paying over to the defendants the outstanding balance of money due to the defendants from the sale of the generator. This brings us to the appellants' 2nd issue - whether the learned trial Judge was right to have dismissed the counter-claim in the manner he did, he held -

"I am now left with the counter-claim of the 2nd & 3rd defendants. ... It is hardly necessary for me to repeat that the defendants and in particular the 3rd defendant induced the contract between them and the 1st defendant by misrepresentation and perjury. I had declared the said contract invalid and therefore unenforceable. The Latin *maxim ex turpi contractu action non oritur* (A contract founded upon an illegal or immoral consideration cannot be enforced by action) here applies. *In view of the above, this counter-claim against the plaintiff and the 1st defendant is dismissed with N1,000.00 cost in favour of each of the plaintiff and the 1st defendant*" (Italics mine)

It was submitted for the appellants that this is a serious misdirection of facts and a substantial error in law, as no defence was filed to the counter-claim and none of the parties on record canvassed the issue of misrepresentation and/or perjury at the trial; that these issues were raised by the learned trial Judge suo motu, and it is on this solitary issues and/or basis that the appellant's counter-claim was considered and peremptorily dismissed. Citing *Eyibagbe v. Eyibagbe (supra)* & *N.H.D.S. v. Mumuni* (1977) 2 SC 57, it was pointed out that the position of a counter-claim in law is that it is by itself a claim and when it is not defended, the allegations in the counter-claim remains unchallenged and uncontested and in that circumstance such allegations are deemed admitted. Adopting the same arguments canvassed in the 1st issue, and citing *Adeniyi v. Fabiyi* (1992) 5 NWLR (Pt. 242) 489 at 502; *Ezeonwu v. Onyechi* (1996) 3 NWLR (Pt. 438) 520 at 521; *Diyelpwan v. Golok* (Pt 438) 599 at 612, it was further submitted that the learned trial Judge was clearly wrong to have dismissed the appellants' counter-claims on issues not pleaded and/or canvassed by the parties.

The kernel of the respondent's submissions on this issue is as follows -

(1) That where the facts from the pleadings of both parties to an action are intertwined and interwoven as regards the plaintiff's action and the defendant's counter-claim, the success of the plaintiff's case on those facts will decree the failure of the defendant's counter-claim, citing *Dapub v. Kolo* (1993) 9 NWLR (Pt. 317) 254.

(2) That the appellants in this case have not led credible evidence to sustain their counter-claim in spite of the respondent's failure to file a defence, and a plaintiff can lose his case even where the defendant has not appeared to challenge or contradict the evidence tendered by the plaintiff, if such evidence adduced is worthless, citing *Nwogo v. Njoku* (1990) 2 NWLR (Pt. 140) 570; *Omorieg v. Omigie* (1990) 2 NWLR (Pt. 130) 29.

However, the decision of the Supreme Court in *Dapub v. Kolo* (supra), also cited as (1993) 9 NWLR (Pt. 317) 254, is not quite as simple as the respondent put it. In that case, one of the issues considered by the Supreme Court was when the failure of a plaintiff to file a defence to a counter-claim was material, as well as when "not material relevant consideration".

The Supreme Court, per Ogundare, JSC stated the position of the law, thus-

"The law is very clear on the point. There are numerous authorities that say that a counter-claim is in the same position as an action being itself a cross-action and subject to the same rules of pleadings. *Ordinarily therefore, the plaintiff having failed to file a defence to the counter-claim the defendant on moving the trial court would be entitled to judgment and his claim being one for unliquidated damages the trial court would have had after hearing him on the issue of damages to make an award in this case.* However, the defendant did not move the court of trial for judgment but rather proceeded to full-scale trial by adducing evidence and calling witnesses after the close of the case for the plaintiff. There is no doubt that the facts from the pleadings of both parties are intertwined and interwoven as regards plaintiff's action and the defendant's counter-claim. Had the plaintiff succeeded in his claim for damages the counter-claim would have failed since both parties could not at the same time be in exclusive possession of the land in dispute. *In my respectful view, this case would*

*be an exception to that general rule that where a plaintiff fails to file a defence to a counter-claim the defendant is entitled to his counter-claim. Akpata, JSC correctly, in my view, stated the law when in Ogbonna v. A-G Imo State (1992) 1 NWLR (Pt. 220) 647 at 698 he observed as follows:*

*‘Failure of a plaintiff to file a defence to a counter-claim may not be disastrous if he succeeds in his claim. His success may render useless the counter-claim depending on the nature of the counter-claim. However, where he fails in his claim, as in this case, and had filed no defence to the counter-claim, the defendants’ claim in his counter-claim remains uncontroverted. If however, counter-claim is for a declaratory right the defendant will still have to satisfy the court that he is entitled to the declaration sought it was regardless of the failure of the plaintiff to file a defence’*”. (Italics mine)

**Agreed, a counter-claim, as the appellants rightly submitted, is treated as an independent action, the trial or success of which does not depend on the success or failure of the original suit. It is substantially a cross-action and not merely a defence to the plaintiff’s case, and is to be treated for all purposes for which justice requires it to be treated as an action, which is not pivoted on another action. As a general rule, where the plaintiff fails to file a defence to the counter-claim, the trial court would assume that the plaintiff has no defence and enter judgment for the defendant/counter-claimant.**

See Total Nigeria Plc. v. Morkah (2002) 9 NWLR (Pt. 773) 492; Walter v. Skyl (Nig.) Ltd. (2001) 3 NWLR (Pt. 701) 438; Ekwunife v. Ngene (2000) 2 NWLR (Pt. 646) 650. **Nevertheless, the respondent is also right that a counter-claim is a claim, which must also be proved to the satisfaction of the trial court as required by law. The onus of proof, which lies on the plaintiff to prove his claim, is also on the defendant to prove the averments in his counter-claim against the plaintiff, or he will fail in his claim.** See Igbinovia v. Agboifo (2000) 12 NWLR (Pt. 681) 336; Nuba Commercial Farms Ltd. v. NAL Merchant Bank Ltd. (2001) 16 NWLR (Pt. 740) 510. See also Narindex Trust Ltd. v. N.I.M.B. Ltd. (2000) 10 NWLR (Pt. 721) 321, where the Supreme Court per Achike, JSC observed as follows -

“When it is borne in mind that, *stricto sensu*, a counter-claim is an independent claim made by the defendant which can be taken together with the main claim, then it becomes necessary to appreciate that the quantum of proof appropriate to be attained in order to give judgment on a counter-claim in favour of the defendant must be of the type required of the plaintiff every civil claim, i.e. proof based on preponderance of evidence”.

In this case, the learned trial Judge did not address his mind to the above nuances of the law; he merely tarred the counter-claim with the same brush with which he had painted the appellants in the main claim, and dismissed the counter-claim with N1,000.00 costs. His reason was that since the 3rd appellant had “induced the contract between them and the 1st defendant by misrepresentation and perjury”, the said contract was “invalid and therefore unenforceable”, applying “the Latin maxim *ex turpi contractu action non oritur* (A contract founded upon an illegal or immoral consideration cannot be enforced by action)”. But is that fair? To adjudge someone guilty of fraudulent behaviour in a judgment, without hearing him out first?

Obviously not, and this brings us to the last issue for determination, that is whether the learned trial Judge’s consideration of the appellants’ case and counter-claim was fair. The same arguments, more or less, were canvassed in the appellants’ brief for this issue as for the other issues, and in my view there is no need to belabour the point by repeating them.

Suffice it to say, that courts have a duty to administer justice to all manner of people without showing favour to one party or disfavour to the other side, and to this end, a court of law is not to adjudicate or decide on issues not placed or raised before it, see *Oduwole v. Aina* (2001) 17 NWLR (Pt. 741) 1. A court of law, I must add, does not also have the power to grant more than what is claimed in the statement of claim, and what is more, the parties should be heard on any grant of relief not claimed. As I stated earlier in this judgment, a court cannot raise a point *suo motu* and proceed to resolve it one way or the other

without hearing the parties. Where a court does this, it would have breached the parties' right to fair hearing - see *Ekong v. Udo* (supra). And fair hearing is simply an opportunity to be heard in court proceedings or in any situation where justice is required to be established - see *Nuba Commercial Farms Ltd. v. NAL Merchant Bank Ltd.* (supra). B

**Where the right to fair hearing has been breached, as in this case, the entire proceedings are a nullity, and I so hold.** See *Adebayo v. Okonkwo* (2002) 8 NWLR (Pt. 768) 1; *Orugbo v. Nna* (1997) 8 NWLR (Pt. 516) 255.

**The end result of the foregoing is that the appeal succeeds and is allowed. The judgment of Nwulu, J., delivered on the 7th of November, 1997 is hereby set aside. This case is remitted back to the High Court in Sapele for retrial before another Judge.** There will be no order as to costs. C D

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#### MUNTAKA-COOMASSIE JCA

I had the opportunity of reading in draft the judgment prepared by Augie, JCA and delivered today. After considering the issues presented to us I am inclined to hold that the appeal is pregnant with some merits. Same is hereby allowed. I agree with her Lordship that the case be remitted back to the Delta State Chief Judge for reassignment to the High Court in Sapele for rehearing before another Judge other than Nwulu, J. No order as to costs. E F

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#### AMAIZU JCA

I have read in advance the judgment of my learned brother, Augie, JCA. I agree with her reasoning and conclusion that the case should be remitted back to the lower court to be heard by another Judge. G

I make no order as to costs. H

Appeal allowed