

SUPREME COURT OF NIGERIA
23RD FEBRUARY, 2007, SC.74/2002
CORAM:- S. U. ONU, D. MUSDAPHER, S.A. AKINTAN,
W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC

DALEK NIGERIA LTD APPELLANT
AND
OIL MINERAL PRODUCING
AREAS DEVELOPMENT RESPONDENT/
COMMISSION (OMPADEC) CROSS APPELLANT

CONTRACTS - Existence - Proof - Issue of exhibit B being a counter offer is irrelevant - Appellant is to prove assignment of the project in issue to it (H1)

CONTRACTS - Terms - Inference - That appellant's managing director - Served as a member of the monitoring team - Which inspected some projects - Does not justify inference of a contract (H2)

CONTRACTS - Damages - Existence of contract - Where not established - Court of Appeal rightly reversed trial court's award of damages (H3)

EVIDENCE - Weight - Exhibits - Issue of non attachment of evidential weight - To exhibit M - Did not affect the fortune of appellant's case (H4)

CONTRACTS - Damages - Admissions - Where facts are undisputed - As to percentage of fee due - Lower court's award based on mathematical calculation - Is correct (H5)

FACTS

Before the Delta State High Court, Sapele, plaintiff/appellant filed an action against the defendant/respondent. Appellant claimed over N211

million as outstanding debt in respect of professional engineering consultancy fees for 192 projects, another over N18 million for the Omadino project, and claimed interest on those amounts. It is not in dispute that there was a contract between the parties. Respondent maintained that the only project it gave to appellant to supervise was the Omadino Bridge project, for which appellant was entitled to 2% of the total project cost. And that the 192 projects were never given to appellant to supervise. Rather, appellant's Managing Director, one Engineer Uduehi in his personal capacity, was amongst a consortium of engineers under the presidential Monitoring Team that worked on the 192 projects and was paid an honorarium of N120,000 per week.

The trial court looked at exhibits A & B and arrived at a conclusion that because appellant's managing director served as a member of the Presidential Monitoring Team, a contract in respect of the 192 projects can be inferred. Judgment was given in favour of appellant. Respondent's appeal to the Court of Appeal was upheld in part. The lower court only reversed the trial court's award in respect of the 192 projects and awarded the sum of over N14 million to appellant in respect of the Omadino project. Being dissatisfied, appellant has now appealed to the Supreme Court, while the respondent cross appealed.

ISSUES FOR DETERMINATION

"1. Was the Court of Appeal right to have held that Exhibit "B" was a counter-offer, when the question of whether Exhibit "B" was a counter-offer is a material and fundamental issue of fact and law that was never raised nor canvassed by any of the parties before the Court of Appeal, and, was Exhibit "B" really a counter-offer of Exhibit "A".

2. From the totality of the evidence adduced before the trial court and the findings and conclusion of the learned trial judge, was the Court of Appeal right to have rejected the appellant's total claim in the sum of N229,304,760.26k.

(3) Whether the Court of Appeal was right to have refused to attach any weight to Exhibit "M", having found that the Respondent was duly "given the opportunity to cross examine on the documents", and that "he also had the opportunity if he so wished to call further

evidence in rebuttal of Exhibit “M”, thus the principal (sic) of fair hearing was maintained. Exhibit “M” was therefore properly admitted.”

HELD (Unanimously dismissing the appeal and cross appeal per **MUSDAPHER JSC**, Onnoghén JSC expressing different view on issue 1)

CONTRACTS - Existence - Proof

1. In other words, the award of N229,304,706.26 could not be justified on the grounds of any contract founded on Exhibits A and B. Assuming for one moment that Exhibits A and B formed a valid contract, it is clear from their terms that there must be an assignment of a particular project to the appellant. The appellant proved no particular assignment except the Omadino project. I am accordingly of the firm view that the issue of whether Exhibit B was a counter offer to Exhibit A or not, is not important or relevant, when the appellant has failed to show that it had been specifically assigned to any project. In appointing the appellant in general terms, Exhibit A stated that the appellant’s professional fees for any assigned project would be 2% of the total cost of such project. At the time Exhibit A was made no project of the respondent much less of the 192 project assessed and inspected by the Presidential Monitoring Team was contemplated. The 192 project cannot in any way be referable to Exhibit A. Nor did Exhibit A list any project assigned to the appellant. In respect of the Omadino Road Project, the respondent specifically by a letter dated 10/2/1997 assigned the project to the appellant. Under the circumstances whether Exhibit B is a counter offer to Exhibit A is not important or relevant. The crucial issue is whether the appellant has proved the assignment of the 192 projects. I accordingly resolve issue one against the appellant. (p. 715 H)

CONTRACTS - Terms - Inference

2. In Exhibit “B” the letter of acceptance, the appellant undertook to provide services as engineering and management consultancy and technical services and advice not in a team but as a sole consultant. The respondent always maintained, that the only engineering consultancy “as-

signed” to the appellant was the Omadino project which was awarded on the 10/2/1997.

In my view Engineer Uduehi was co-opted into the team in his own personal capacity and not as agent of the appellant.

B There is clearly no dispute whatever, that the appellant did not plead that Engineer Uduehi who signed Exhibits C, D and E as co-opted member acted or operated as an agent of the appellant. It is also clear that the inspection of the 192 projects carried out by the team of which the
C appellant is claiming the sum of N211,157,560.00 were for completed projects not for new projects.

In my view, the 192 project were not “assigned” to the appellant, the projects were merely inspected by a team comprising of Engineer D. B. Uduehi, who was specifically co-opted as a member of the team in his
D personal capacity and was remunerated for his services equally along with the other members of the team.

I accordingly agree with the decision of the court below that under the undoubted facts of this case, a contract for the 192 projects
E cannot be inferred as the trial court did. Based on the undoubted facts, there was not contract for the 192 projects which involved the appellant. (p. 717 H/ 718 D/H)

F ***Damages - Existence of contract***

3. The fundamental issue is that, the appellant has failed to establish any assignment to it as per exhibits “A” and “B”. I am satisfied, based on the facts, that the appellant was assigned the Omadino project only. So from the totality of the evidence adduced before the trial court and the findings
G and the conclusions of the learned trial judge, the Court of Appeal was right to have rejected the appellant’s claim in the sum of N215,157,260 since the finding of the existence of the contract by the learned trial judge was perverse and not supported by any credible evidence. I accordingly
H resolve issue 2 against the appellant. (p. 719 B/D)

EVIDENCE - Weight - Exhibits

4. I have resolved this issue also against the appellant, since the non

attachment of any evidential weight on Exhibit “M” did not in any way affect the fortunes of the case of the appellant. Issue 3 is resolved against the appellant.

In the result the appeal of the appellant is rejected by me since all the issues formulated are resolved against the appellant. (p. 720 B) B

CONTRACTS - Damages - Admissions

5. The cross-appellant is not disputing the Omadino project and that the cross-respondent was entitled to 2% of the total cost of the project. C

It is also not disputed that N4 million naira was paid as part payment. The simple question in this matter is what was the total cost of the Omadino project and what was 2% of the cost? 2% of the cost was N18,147,224.26k. If N4 million is deducted, the balance due to the cross-respondent would be N14,147,224.26k. In my view, the Court of Appeal acted rightly when it awarded the sum. Based on the undisputed facts, I find no merit in the cross-appeal, I dismiss it. (p. 721 A) D

NOTABLE POINTS OF INTEREST

E

AKINTAN JSC

1. Contract of supervision - What appellant ought to prove

The appellant, a firm of Consulting Engineers, claimed that it was engaged by the respondent to supervise about 192 projects being executed by the respondent. But apart from one project specifically named in one of the written documents, the appellant was to supervise other projects specifically referred to it. No other project was later specifically referred to the appellant for supervision. It is therefore clear that from the terms of the written contract between the parties that the appellant need to produce evidence that the respondent specifically requested it to supervise any of the 192 projects before it could claim under the contract. (p. 722 A) F

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ONNOGHEN JSC

2. Pleadings - Issue of counter offer was not raised by the parties

It is very important to note that it is settled law that in an action based on

pleadings issues are joined by the parties in their pleadings. It is also settled law that evidence on facts not pleaded ground to no issue. The existence or non-existence of fact is said to be in issue if the existence or non-existence of that fact is asserted by a party in his pleading and denied by the other party specifically, positively and unequivocally.

Going through the pleadings of the parties, it is very clear that parties never joined issues on whether exhibit B was a counter offer or not neither has the learned senior counsel for the respondent/cross appellant in the respondent's brief referred this Court to any paragraph of the Statement of Defence where such a vital fact was pleaded in reaction to the pleadings of the appellant in relation to exhibits A and B. It is settled law that issues are formulated from the grounds of appeal which in turn are founded on the ratio decidendi or reason for decision of the court in the judgment appealed against. In the instant case it is obvious that since no issues were joined by the parties as regard the issue of counter offer, the trial judge never mentioned it in his judgment and as such the appellant before the lower court had no complaint in any ground of appeal against a non-existent decision. In the circumstance it follows therefore, that issue II before the lower court cannot be read to include the question as to whether or not exhibit B constitutes a counter offer as contended by learned Senior Advocate in the respondent's/cross appellant's brief of argument. (p. 728 A/G)

3. Lower court wrongfully raised an issue suo motu

It is settled law that one of the functions of pleadings is to avoid taking the other party by surprise. It is therefore clear that the lower court was in error in suo motu raising the issue of exhibit B being a counter offer contrary to the pleadings of the parties, the grounds of appeal and the issues formulated therefrom for the determination of the appeal. It is settled law that where a court raises an issue suo motu it must afford the parties or their counsel the opportunity of addressing the court on the issue so raised so as to ensure that the rules of fair hearing are adhered to for the purpose of doing justice to the parties. In the instant case, the lower court did not give the parties the opportunity to address it on the

issue and I hold the view that it thereby committed a serious error.

I do not consider it necessary to determine the secondary issue as to whether in fact exhibit B is a counter offer because it would amount to an exercise in futility particularly as no relevant basis exists for that determination since the issue did not arise for determination before the lower court as earlier found and held by me in this judgment. The resolution of the main issue has turned the sub-issue into an academic question which the court will not entertain. (p. 730 A)

4. No implied contracts where the words are clear

I hold the considered view that the terms of the contract in exhibit A are very clear and it is impossible to read into them an assignment of the said 192 projects for which the disputed claim is made. Learned counsel for the appellant has argued forcefully that the co-option of the Managing Director of the appellant into the membership of the Federal Government Presidential Monitoring Team and his participation therein including the issuing of the joint reports, exhibits C, D, E & F constitute the required assignment as envisaged in exhibit A and therefore the respondent is liable to pay. I must confess that the argument is beautiful but it is not supported by the facts of the case. In the first place exhibit A was entered into between the respondent and the appellant as distinct from PW1, the Managing Director of the appellant who was the person specifically co-opted into the said Presidential Monitoring Team in which he acted in that capacity and was given his dues just like any other member of the team. That apart, the fact that the Omadino project was specifically assigned to the appellant confirms the view that it was the intention of the parties as evidenced in exhibit A that every project(s) which the respondent desired the services of the appellant has (have) to be specifically assigned to the appellant so as to create a binding contract between the parties. There can be no implied contract in this case where the words of exhibit A are very clear and unambiguous. (p. 733 F)

OGBUAGU JSC

5. Clear agreement is binding

The wordings of Exhibit “A”, are clear and unambiguous. It is now settled that where the words of a contract agreement or document are clear, the operative words in it should be given their simple and ordinary” grammatical meaning. See the case of Union Bank of Nigeria Ltd v. Sax (Nig) Ltd & 2 Ors (1994) 9 SCX JI. If parties enter into an agreement, they are bound by its terms. One or the court cannot legally or properly, read into the agreement, the terms on which the parties have not agreed.
(p. 739 H)

REPRESENTATION

Chief Mike Ozekhome with him Richard Lifu for the Appellant/Cross Respondent.
Ben Anachebe, with A. A. Akpamgbo and Emmanuel Okoro for Respondent/Cross Appellant.

E CASES REFERRED TO

Lewis and Peat Ltd vs. Akhimien (1979) 1 All NLR (pt. 1) 460
Ezomo vs. Oyakhire (1985) 1 NWLR (pt. 2) 195
Ekwealor vs. Obasi (1990) 2 NWLR (pt. 131) 231 at 251
Nwogo vs Njoku (1990) 3 NWLR (pt. 140) 570
Oba Oyediran of Igbanla v. H.R.H. Oba Alebiousu II & Ors (1992) 6 NWLR (pt. 249) 250 at 539: (1992) 7 SCNJ. 167
Danniya v. Jomoh (1994) 3 NWLR (Pt. 334) 609
Bank of Nig. Plc & Anor. V. Sparkling Breweries Ltd &. Anor. (2000) 15 NWLR (Pt. 689) 200 at 211
Orient Bank (Nig) Plc vs. Bilante International [1997] 8 NWLR (Pt 515) P. 37
Hyde vs. Wrench [1840] Beav 334
Council of Yaba College of Technology V Niger Lee Contractors Limited [1989] 1 NWLR (Pt. 95) 99 At 107
Bioku Investment Property Co. Ltd V. Light Machine Industry Nigeria Ltd [1986] 5 NWLR (Pt. 39) 42

Jackson v. Turquand [1869] L.R. 4 H.L. 305

Jones V. Daniel [1804] 2 Ch. 332

U.B.A. V. Tejumola & Sons Ltd [1988] 2 NWLR (Pt. 79) 662 At 700

Kuti vs Balogun (1978) 1 S.C 53

B

LEAD JUDGMENT BY MUSDAPHER JSC

In the High Court of Justice of Delta State of Nigeria, holden at Sapele and in suit No. S/78/98 the plaintiff by its Writ of Summons claimed against the defendant the following:

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“(a) N211,157,536.00 being outstanding debt in respect of professional fees for engineering and management consultancy services for 192 projects, the first assignment

(b) N18,147,224.26k being unpaid professional engineering and management consultancy services for the Omadino project and access roads.

D

(c) Interest to date with effect from 20th March, 1997 on the N211,157,536.00 being outstanding debt for the first assignment.

(d) Interest with effect from 5th October, 1997 on N18,147,224.26k being fees for Omadino project and access roads, the second assignment.”

E

By its pleadings, the plaintiff averred that it is a registered limited liability company comprising of a consortium of engineers, land surveys architects and computer experts. By a letter of 12/4/1996, the defendant engaged the plaintiff to provide general engineering consultancy and technical services, general management consultancy and other relevant professional services and assignments. By a letter of acceptance dated the 15/4/1996, the plaintiff accepted the offer and immediately commenced professional services. The fees for any assigned project was fixed at the rate of 2% of the total cost of the project. Similarly, by a letter dated 10th February, 1997, the defendant appointed the plaintiff as engineering consultant for engineering and consultancy services in respect of Omadino Bridge project at 2% of the estimated cost of the cost and also on the following terms of payment:

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(i) 30% advance payment.

(ii) 40% on submission of Draft Report.

(iii) 30% on submission of a Final Report.

The plaintiff further averred that it rendered professional services in respect of 192 projects in Edo, Ondo, Delta and Rivers States and that its 2% fee for the totalled cost of all projects was N229,304,760.26. The plaintiff averred that by several letters and personal calls it demanded the defendant to pay the fees to no avail, hence the plaintiff took this action.

The defendant admitted employing the plaintiff on the Omadino Bridge project only and even at that, the plaintiff was paid N4 million, leaving a balance unpaid of only N8 million. On the question of the 192 projects, the defendant denied employing the plaintiff and averred no job was awarded to the plaintiff. The defendant further claimed that work on the 192 project was carried out by the Presidential Monitoring Team of which one Mr. Uduehi the Managing Director of the plaintiff was co-opted [in his personal capacity] into the Presidential Monitoring Team. The said Mr. Uduehi was accommodated at Hotel Presidential free, he was given allowances like all other members of the Presidential Monitoring Team and at the end of the exercise he was paid an honorarium of N120,000.00 per week. It was also averred that the data with which the Presidential Monitoring Team performed its job was provided by the technical staff of the defendant and not the professional or engineering skill or expertise of the plaintiff. The defendant denied being liable to the plaintiff in the sum of N211,157,536.00 or any sum at all for the 192 projects. The defendant admitted owing only 8 million being the balance unpaid on Omadino project.

The trial commenced on 14/1/1999 with the evidence of the Managing Director of the plaintiff. In his evidence he tendered Exhibits A and B letters dated 12/4/1996 and 15/4/1996 respectively being letters of offer and acceptance of consultancy services offered to the defendant by plaintiff. Exhibits C, D and E, three volumes of the Report of the 192 projects inspected by Presidential Monitoring Team. Exhibit F is the assessment and evaluation of the Omadino project. The Managing Director of the plaintiff was the only witness who testified for the plaintiff. He also tendered other documents

For the defence W.1 and D.W. 2 testified in line with the Statement of Defence. Thus denying the claims of the plaintiff. After the address of counsel in his judgment delivered 11/10/1999, the learned trial judge found for the plaintiff and entered judgment in its favour in the total sum of N229,304,760.26 on the two assignments but dismissed the claims for interests. B

Aggrieved by the said judgment, the defendant appealed to the Court of Appeal. After its consideration of the issues as canvassed in the briefs, the Court of Appeal in its judgment delivered the 10/12/2001, allowed the appeal of the defendant but granted the plaintiff the sum of N14,147,224.26 being the amount unpaid on the Omadino project and dismissed the claim on the 192 projects. Both parties appear to be unhappy with the judgment and have now appealed and cross-appealed. I shall first deal with the appeal and later the cross-appeal. D

APPEAL

The plaintiff hereinafter referred to as the appellant filed a Notice of Appeal against the decision of the Court of Appeal. In his brief for the appellant, the learned counsel has identified, formulated and submitted three issues arising for the determination of the appeal. The issues read:- E

“1. Was the Court of Appeal right to have held that Exhibit “B” was a counter-offer, when the question of whether Exhibit “B” was a counter-offer is a material and fundamental issue of fact and law that was never raised nor canvassed by any of the parties before the Court of Appeal, and, was Exhibit “B” really a counter-offer of Exhibit “A”. F

2. From the totality of the evidence adduced before the trial court and the findings and conclusion of the learned trial judge, was the Court of Appeal right to have rejected the appellant’s total claim in the sum of N229,304,760.26k. G

(3) Whether the Court of Appeal was right to have refused to attach any weight to Exhibit “M”, having found that the Respondent was duly “given the opportunity to cross examine on the documents”, H and that “he also had the opportunity if he so wished to call further evidence in rebuttal of Exhibit “M”, thus the principal (sic) of fair hearing was maintained. Exhibit “M” was therefore properly admitted.”

The learned counsel for the respondent on the other hand has identified and submitted the following 3 issues as arising for the determination of the appeal :-

B “i. Did the Court of Appeal go outside the issues submitted to it for adjudication when it held that Exhibit B amounted to counter offer and was it right in so holding?

C ii. From the totality of evidence oral and documentary, was the Court of Appeal right in setting aside the award of N211,157,536 in favour of the Appellant on the ground that the 192 projects were not awarded to it.

iii. Was the Court of Appeal right in attaching no weight to Exhibit M in consequence of the finding that 192 projects were not awarded to the Appellant?”

D The issues formulated are not dissimilar in meaning, I shall, however, in this judgment discuss the appeal on the basis of the issues as submitted by the appellant.

ISSUE ONE

E This deals with the holding by the Court of Appeal that Exhibit B was a counter-offer. It is submitted that whether Exhibit B was a counter-offer or not it was not an issue joined by the parties for the determination of the appeal before the Court of Appeal. It is further argued that through F out the pleadings of either party the question whether Exhibit B was a counter offer was never raised. It is further argued that there was no dispute whatever, the parties have created a valid contract between themselves, what the Court of Appeal did with reference to Exhibit B was to introduce a new issue not canvassed by either party, thereby occasioning G miscarriage of justice on the appellant who had no opportunity of responding to the question.

H It is further argued that Exhibit “B” was infact not a counter offer of Exhibit “A”. It is said to be “a clear categorical and unambiguous” acceptance of the terms contained in Exhibit A.

It is further added that Exhibit A was not exhaustive and was predicated on the appellant’s “proposals and application for appointment as engineering and management consultants. It is submitted that

Exhibits A and B constitute proper offer and acceptance which created a valid contract between the parties. In Exhibit “B” the appellant did not make a counter offer, but it merely high lighted the points of agreement during negotiations. Learned Counsel referred to the cases of ORIENT BANK (NIG) PLC VS. BILANTE INTERNATIONAL [1997] 8 NWLR B (Pt 515) P. 37. MAJOR-GENERAL GEORGE INNIH (RTD) & OTHERS VS. FERADO AGRO AND CONSORTIUM LTD [1990] 5 NWLR (Pt 152) 604.

The learned counsel for the respondent on the other hand argued that the Court of Appeal clearly dealt with the issue as raised by the appellant in his issues for determination [Respondent herein], to wit.

“Whether by virtue of exhibits A, B, C, D, E, F and G, the respondent [appellant herein] was entitled to the judgment in the sum of N229,304,706.26.” It was while examining the exhibits that the Court of Appeal came to the conclusion that Exhibit B was a counter-offer to Exhibit A and thus there was no contract for which the respondent herein was liable to the appellant for the total sum of N229,304,706.26. In arriving at his decision, the trial judge held that the offer in Exhibit A was accepted in Exhibit B. In its consideration of the exhibits the Court of Appeal came to the conclusion that Exhibit B was a counter offer and not an acceptance of the offer in Exhibit “A”. It is further argued, that the issue did not relate to a finding of facts based on the testimony of witnesses but merely on the interpretation of the documentary evidence put in by the appellant to prove the existence of a contract to entitle him to damages for its breach. It is thus submitted that the Court of Appeal did not go outside the issues which the parties have submitted for the determination of the appeal. It is further argued that Exhibit B was challenged as incapable of founding the judgment of the trial court.

On the secondary issue whether infact Exhibit B was a counter offer to Exhibit A, the learned counsel for the respondent submitted that (a) An acceptance of offer must correspond to the terms of the offer vide HYDE VS. WRENCH [1840] BEAV 334. (b) A counter offer is when the offeree attempts to accept the offer on new terms not contained in the offer.

Learned counsel referred to the case of COUNCIL OF YABA COLLEGE OF TECHNOLOGY VS. NIGER LEE CONTRACTORS LTD [1989] 1 NWLR (Pt 95) 99, ORIENT BANK (NIG.) PLC VS. BILANTE INT'L LTD [1997] 8 NWLR (Pt 515) 37, UBA LTD VS. TEJUMOLA & SONS LTD [1988] 2 NWLR (Pt 79) 662 AT 700.

It is again added that on looking at Exhibits A and B, it becomes clear that that Exhibit B was indeed a counter offer.

Now, in its judgment the Court of Appeal held at page 408 of the record thus:-

"In his judgment the learned trial judge found that Exhibit B was received by the appellant. He also held at page 94 of the record of appeal that Exhibits "A" and "B" constitute offer and acceptance which is a binding contract and the terms of the contract created by Exhibits A and B include the contract sum, payment terms and conditions of the contract. He also found that the projects were never in doubt in the Exhibits and actions creating and constituting the contract. Although he stated later in the judgment at page 95 that the assigned projects as shown in Exhibit "M" were not specifically named in Exhibit "A" but held that the combined effects of Exhibits A, B, C, D, E, F and M and their annexure eloquently confirm and link the work assigned and performed by the plaintiff MD/Chairman and agent as shown in Exhibits M, C, D, E as the actual projects that were eventually assigned to the plaintiff under the contract created by Exhibit "A" and "B". (sic)

The reasoning and conclusion of the learned trial judge is a little bit complicated but I will try to untangle the cobwebs. I do not agree with the statement that 'Exhibits A and B constitute offer and acceptance which is a binding contract. Although Exhibit "A" is an offer, Exhibit "B" does not constitute an unqualified acceptance of the offer in Exhibit "A". The position of the law on acceptance is very clear. The intention to accept an offer must be conclusive if it is to constitute a valid acceptance. COUNCIL OF YABA COLLEGE OF TECHNOLOGY v NIGERLEC CONTRACTORS LIMITED [1989] 1 NWLR (Pt. 95) 99 at 107; BIOKU INVESTMENT PROPERTY CO. LTD v. LIGHT MACHINE INDUSTRY NIGERIA LTD [1986] 5 NWLR (Pt. 39) 42. Where in an

attempt to accept an offer, the offeree varies the terms of the offer or, as in the instant case, introduces an entirely new term, it is not an acceptance and cannot result in a contract crystallizing. See: ORIENT BANK NIG. PLC v BILANTE INT'L LTD [1997] 8 NWLR (Pt. 515) 37; JACKSON v. TURQUAND [1869] L.R. 4 H.L. 305; JONES v. DANIEL [1804] B 2 Ch. 332. As Nnaemeka-Agu J.S.C. put it in U.B.A. v. TEJUMOLA & SONS LTD [1988] 2 NWLR (Pt. 79) 662 at 700:-

"It is a Counter-offer which is not only an acceptance of the offer but amounts to a rejection of the original offer, with the result that even if that original offer is subsequently accepted, its acceptance does not result in a contract between the parties - HYDE v. WRENCH [1840] 3 Beav. 334."

I find Exhibit "B" to be a Counter-offer and I so hold."

The Court of Appeal further in its judgment while discussing whether the appellant was entitled to the claim under the exhibits tendered and whether a contract had been entered had this to say at page 412:-

"xxxxxxxxxx a proper evaluation of the evidence especially exhibit C would have made the learned trial judge to conclude P.W 1 was co opted into the Presidential Monitoring Team because of his special qualification as an engineer and not on account of his being an agent of the respondent [appellant herein] and neither were the over 2000 projects of the commission which were at different stages of completion assigned to the respondent [appellant herein]. If the projects were assigned to the respondent [appellant herein] there would have been no need for the committee to recommend at page X of exhibit C to the Commission to engage the services of experienced and independent/consultants to critically measure assess and evaluate the work already done, xxxxxxxxxxxxxx and this is exactly the work the respondent [appellant herein] did when the Omadino Road Project was assigned to it."

In other words, the award of N229,304,706.26 could not be justified on the grounds of any contract founded on Exhibits A and B. Assuming for one moment that Exhibits A and B formed a valid contract, it is clear from their terms that there must be an assign-

ment of a particular project to the appellant. The appellant proved no particular assignment except the Omadino project. I am accordingly of the firm view that the issue of whether Exhibit B was a counter offer to Exhibit A or not, is not important or relevant, when the appellant has failed to show that it had been specifically assigned to any project. In appointing the appellant in general terms, Exhibit A stated that the appellant's professional fees for any assigned project would be 2% of the total cost of such project. At the time Exhibit A was made no project of the respondent much less of the 192 project assessed and inspected by the Presidential Monitoring Team was contemplated. The 192 project cannot in any way be referable to Exhibit A. Nor did Exhibit A list any project assigned to the appellant. In respect of the Omadino Road Project, the respondent specifically by a letter dated 10/2/1997 assigned the project to the appellant. Under the circumstances whether Exhibit B is a counter offer to Exhibit A is not important or relevant. The crucial issue is whether the appellant has proved the assignment of the 192 projects. I accordingly resolve issue one against the appellant.

ISSUE 2

Now, this issue is concerned with whether the Court of Appeal was right in rejecting the claims of the appellant when it claimed the sum of N211,157,536 in relation to the 192 projects. The trial court held that the disputed 192 projects were linked to Exhibits "A" and "B" and therefore formed contract voluntarily entered into by the parties. In his judgment, the learned trial judge held at page 98:-

"The Chairman/Managing Director of the plaintiff company served in the Presidential Monitoring Team as I have found in this judgment not as Engineer D. B. Uduehi but as agent in a representative capacity of the plaintiff company of which he is the Managing Director, his company having duly assigned the projects under the provisions of Exhibit "A" sub - section C."

Thus the trial court found the acceptance of P.W 1, Engineer Uduehi to serve in the Presidential Monitoring Team, was the "assignment" of the projects to be inspected in the terms of Exhibit A offered to the appel-

lant. And that Engineer Uduehi did not serve in the committee in his personal capacity, but as agent of the appellant.

The Court of Appeal in its judgment at page 412 of the record stated:-

“I hold the view that the learned trial judge was wrong when he said that the assigned projects even though not specifically named in Exhibit “A” are those shown in Exhibit “M”. Exhibit “M” was made by the respondent. No where did the appellant [respondent herein] agree to the projects which the respondent [appellant herein] said it was handling on behalf of the appellant [respondent herein]. Even in the so called acceptance of offer which the learned trial judge held Exhibit B to be the projects were not enumerated. P.W 1 under cross examination agreed that he signed Exhibits C, D and E as co-opted member of the team. He also agreed that Exhibits C, D and E are joint reports of all the members of the team. Even if P.W. 1 maintained that he operated on behalf of the company [the appellant herein] when he joined the Presidential Monitoring Team to inspect, identify and assess the OMPADEC projects which led the respondent [appellant herein] writing demand letters dated 25/5/96, 10/10/96, 20/3/97, 16/6/97, 15/10/97 and 2/5/98 which are tendered as exhibits J, M, G, K, I and H respectively, a proper evaluation of the evidence especially exhibit C would have made the learned trial judge to conclude that P.W. 1 was co-opted into the Presidential Monitoring Team because of his special qualifications as an engineer and not on account of his being an agent of the respondent [appellant herein], xxxxxxxx”

Now, there is no dispute whatever, that the appellant was appointed as a company of engineering and consultancy services to render such technical services to the respondent for a consideration of 2% of the total cost of any assigned project as per Exhibit A. This letter was written to the appellant and was a follow up by an earlier letter by the appellant company soliciting for engagement. In the purported letter of acceptance Exhibit “B”, the appellant accepted the fees for any “assigned commission’s project or projects.” The question is; are the 192 projects inspected by the Presidential Monitoring Team in which Engineer Uduehi was co-opted, “assigned projects” to be inspected by the appellant. **In**

Exhibit “B” the letter of acceptance, the appellant undertook to provide services as engineering and management consultancy and technical services and advice not in a team but as a sole consultant. The respondent always maintained, that the only engineering consultancy “assigned” to the appellant was the Omadino project which was awarded on the 10/2/1997.

In my view Engineer Uduehi was co-opted into the team in his own personal capacity and not as agent of the appellant. Exhibit C sets out the composition of the monitoring team and it said this about Engineer Uduehi :-

“To strengthen the professional membership of the Team considering the engineering content of the assessment, the Team co-opted a Civil Engineer, Engineer D. B. Uduehi, a one time permanent secretary/Director General in the defunct Bendel State and also a one time Chairman of the Nigerian Society of Engineers.”

There is clearly no dispute whatever, that the appellant did not plead that Engineer Uduehi who signed Exhibits C, D and E as co-opted member acted or operated as an agent of the appellant. It is also clear that the inspection of the 192 projects carried out by the team of which the appellant is claiming the sum of N211,157,560.00 were for completed projects not for new projects.

In my view, the 192 project were not “assigned” to the appellant, the projects were merely inspected by a team comprising of Engineer D. B. Uduehi, who was specifically co-opted as a member of the team in his personal capacity and was remunerated for his services equally along with the other members of the team. The appellant is a separate legal entity from Engineer Uduehi. Exhibits A and B never referred to Engineer Uduehi as an individual but only to the appellant while Exhibits C, D and E only referred to Engineer Uduehi as an individual in his personal capacity and not the appellant as a corporate personality.

Indeed Engineer Uduehi signed Exhibits C, D and E in his personal capacity and not as agent or representative of the appellant. **I accordingly agree with the decision of the court below that under the un-**

doubted facts of this case, a contract for the 192 projects cannot be inferred as the trial court did. Based on the undoubted facts, there was not contract for the 192 projects which involved the appellant.

Having so found, I do not think it will serve any useful purpose for me to consider all the arguments of counsel for the appellant stretching from page 12-31 of the appellant's brief. **The fundamental issue is that, the appellant has failed to establish any assignment to it as per exhibits "A" and "B". I am satisfied, based on the facts, that the appellant was assigned the Omadino project only.** The co-option of Engineer Uduehi in the Presidential Team for the assessment of completed projects did not in any way involve the appellant. Engineer Uduehi was nominated and co-opted into the team in his personal capacity. The "assignment to projects" as contemplated in Exhibits "A" and "B" did not include assignment to the team who submitted joint reports in Exhibit C, D and E. It is noteworthy that Engineer Uduehi who was involved in the 192 projects was at the end of the day paid for his services like all the other members of the team. **So from the totality of the evidence adduced before the trial court and the findings and the conclusions of the learned trial judge, the Court of Appeal was right to have rejected the appellant's claim in the sum of N215,157,260 since the finding of the existence of the contract by the learned trial judge was perverse and not supported by any credible evidence. I accordingly resolve issue 2 against the appellant.**

ISSUE 3

This is concerned with the refusal of the Court of Appeal to attach any weight to Exhibit 'M'.

Now, Exhibit "M" was tendered and admitted in evidence after the close of the case of the appellant as the plaintiff. It is similar to Exhibit 9, it contained a notice of demand of payment of fees of the 192 projects. The learned trial judge in his judgment said:- [see page 123 of the record]:

"Even if Exhibit "M" is expunged, there exists Exhibit "G" and the oral evidence of demand for payment which, in my view, are enough to satisfy the burden of proof in civil matters based on the balance of probabilities."

Thus the learned trial judge found other sufficient evidence both oral and documentary showing that the appellant gave the notice of its demand for it fees. Accordingly if the Court of Appeal held that it will attach no weight to Exhibit “M”, such a statement would not occasion any miscarriage of justice. Apart from that, while dealing with issue 2 above, I have extensively discussed the issue of the non-involvement of the appellant with the services rendered by the Presidential Team which co-opted Engineer Uduehi in his personal capacity. **I have resolved this issue also against the appellant, since the non attachment of any evidential weight on Exhibit “M” did not in any way affect the fortunes of the case of the appellant. Issue 3 is resolved against the appellant.**

In the result the appeal of the appellant is rejected by me since all the issues formulated are resolved against the appellant.

The Cross - appeal

One issue has been formulated and submitted by the respondent/cross-appellant [hereinafter referred to as the cross-appellant and the appellant/cross respondent, the cross respondent]. The issue is:-

“Was the Court of Appeal right to have awarded the plaintiff/respondent the sum of N141,147,224.26 in the face of Exhibit “L”

It is submitted by the learned counsel for the cross-appellant that by paragraph 8 of the Statement of Claim, the cross respondent claimed N215,157,536.00 for engineering and management services rendered. Also in paragraph 13, it claimed N211,157,536.00 being fees for the 1st first assignment and N18,147,224.26k for the Omadino project, thus totaling N229,304.760.26k. It is further submitted that the cross-appellant claimed to have paid N4 million as part payment of the Omadino project and this was admitted by the cross-respondent. It is further submitted that what was owed in the Omadino project was only N8,982,199.52k. These conflicts were not resolved by the trial court or the Court of Appeal and yet the Court of Appeal awarded N14,147.224.26k to the cross-respondent on the Omadino project.

Now, I have no doubt and it is not disputed that there were two claims by the cross-respondent, claim No. 1 on the 192 projects and

claim No. 2 on the Omadino project. **The cross-appellant is not disputing the Omadino project and that the cross-respondent was entitled to 2% of the total cost of the project.**

It is also not disputed that N4 million naira was paid as part payment. The simple question in this matter is what was the total cost of the Omadino project and what was 2% of the cost? 2% of the cost was N18,147,224.26k. If N4 million is deducted, the balance due to the cross-respondent would be N14,147,224.26k. In my view, the Court of Appeal acted rightly when it awarded the sum. Based on the undisputed facts, I find no merit in the cross-appeal, I dismiss it.

In the end both the appeal and the cross appeal are dismissed by me, I make no order as to costs.

Appeal and cross-appeal are both dismissed.

ONUJSC

The main thrust of this appeal is the interpretation of the written contract between the parties hereto. The Appellant, a firm of consulting Engineers, claimed that it engaged the Respondent to supervise 192 projects being executed by the respondent. However, for one particular project named in one of the written documents, the respondent was to supervise other projects specifically referred to it. As transpired, no other project was later referred to it for supervision. Thus, for the Appellant to evoke the existence of the evidence of any written contract of supervision other than the 192 projects it had to produce same before claiming under the contract and this he failed to do.

Having had the opportunity to read in draft the leading judgment of my learned brother Dahiru Musdapher, JSC I entirely agree with him that the appeal and cross - appeal fail. They are both accordingly dismissed with similar orders inclusive of those as to costs.

AKINTAN JSC

The main question raised in this appeal boils down to the interpretation of the written contract between the parties. The appellant, a firm of Consulting Engineers, claimed that it was engaged by the respondent to supervise about 192 projects being executed by the respondent. But apart from one project specifically named in one of the written documents, the appellant was to supervise other projects specifically referred to it. No other project was later specifically referred to the appellant for supervision. It is therefore clear that from the terms of the written contract between the parties that the appellant need to produce evidence that the respondent specifically requested it to supervise any of the 192 projects before it could claim under the contract.

I had the privilege of reading the draft of the lead judgment written by my learned brother, Musdapher, JSC. The facts of the case are well set out therein and all the issues raised in the appeal are fully discussed. I entirely agree with his reasoning and conclusions as set out in the said lead judgment and I hereby adopt them. For the reasons I have given above and the fuller reasons given in the lead judgment, I also dismiss the appeal and the cross-appeal and I make similar consequential orders, including that on costs, as are made in the lead judgment.

F

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Benin City in appeal No. CA/B/179/2000 delivered on 10th December 2001 in which it allowed the appeal of the respondent except on the issue of the legal personality of the appellant and set aside the decision of the Delta State High Court holden at Sapele in suit No. S/78/98 delivered on 11th October, 1999 in respect of award of N211,157,536 made in favour of the appellant.

In paragraph 22 of the statement of claim, the appellant, as plaintiff claimed the following reliefs against the respondent/cross appellant:

“22. Thereupon the plaintiff claims against the defendants as fol-

lows:-

(i) *The total outstanding sum of two hundred and twenty-nine million, three hundred and four thousand, seven hundred and sixty naira, twenty six kobo (N229,304,760.26k) made up of:*

(a) *Two hundred and seven million, one hundred and fifty seven thousand, five hundred and thirty six naira only (N211,157,536.00) being the outstanding balance of the 1996 professional fees for engineering and management consultancy services in respect of 192 projects.*

(b) *Eighteen million, one hundred and forty-seven thousand, two hundred and twenty-four naira, twenty six kobo (N18,147,224.20k) being the unpaid 1997 professional fees in respect of Engineering Consultancy Services for Omadino Project.*

(ii) *Interest thereon at the ruling rate of interest to date with effect from:-*

(a) *20th March, 1997 on the two hundred and eleven million, one hundred and fifty-seven thousand, five hundred and thirty-six naira only (N211,157,536.00) being the outstanding debt for the first assignment.*

(b) *16th October, 1997, on the eighteen million, one hundred and twenty-four naira, twenty six kobo (N18,147,224.26k) being fee for the Omadino Project, the second assignment."*

The appellant's case as can be gathered from the pleadings and evidence is that the respondent/cross appellant by a letter dated 12th April 1996 engaged the services of the appellant who is a consortium of engineers, Land Surveyors, Architects and Computer experts to provide consultancy services for General Engineering Consultancy and Technical advice and General Management Consultancy and any other relevant professional assignment, which offer the appellant accepted vide a letter dated 15th April, 1996. By another letter dated 10th February, 1997 the respondent awarded it consultancy services on Omadino Bridge Project at 2% on the following terms:

- (a) 30% advance payment;
- (b) 40% on submission of draft, and,
- (c) 30% on submission of final report.

Appellant further contends that it rendered professional services

in respect of 192 projects in Edo, Ondo, Delta and Rivers States and that its 2% for each of the two projects totaled N229,304.26, which it demanded payment by letters and personal calls to no avail.

On the other hand, the case of the respondent/cross appellant is that the 192 projects for which the appellant claims N211,157,536.00 was not awarded to the appellant as the project was the work of the Presidential Monitoring Team of which the appellant was never a member but Mr. Uduehi, appellant's Managing Director was later co-opted into the Team, accommodated at Hotel Presidential free, given allowance and was, like all other members of the team, paid an honorarium of N120,000.00 at the end of the exercise; that the data with which the Presidential Monitoring Team performed its task was provided by the technical staff of the respondent/cross appellant and not the engineering skill of the appellant. The respondent/cross appellant denied owing the sum N211,157,536.00 but admitted owing N8 million after paying N4 million on account of the bridge project which was duly awarded to the appellant.

The letter of offer dated 12/4/96 was tendered, admitted and marked as exhibit "A" while the letter of acceptance dated 15/4/96 was admitted and marked as exhibit "B", Exhibits "C", "D" and "E" are the three volumes of the report of the 192 projects inspected by the Presidential Monitoring Team while exhibit "F" is the Assessment and Evaluation of Omadino Projects. Exhibits "G", "H", "I" and "M" are the letters of demand by the appellant. The documents were tendered by the appellant.

At the conclusion of trial, the learned trial judge entered judgment in favour of the appellant to the tune of N229,304,760.26 on the 11th day of October, 1999 and dismissed the claim for interest.

The respondent/cross appellant was dissatisfied with that judgment and consequently appealed to the Court of Appeal which allowed the appeal in the terms earlier stated in this judgment resulting in the instant appeal to this Court. The cross, appeal is on the award of N14,147,224.26 made by the Court of Appeal in favour of the appellant in respect of the claim relating to the Omadino Project.

In the appellant's brief of argument filed on 16/5/02 and adopted

in argument of the appeal, the following are the issues identified by learned counsel for the appellant CHIEF MIKE OZEKHOME for the determination of the appeal:

“2.01 Was the Court of Appeal right to have held that Exhibit “B” was a counter offer when the question of whether Exhibit “B” was a counter-offer is a material and fundamental issue of fact and law that was never raised nor canvassed by any of the parties before the Court of Appeals (sic). B

2.02. Was Exhibit “B” really a counter-offer to Exhibit “A”? C

2.03. From the totality of the evidence adduced before the trial court and the findings and conclusions of the learned trial judge, was the Court of Appeal right to have rejected the appellant’s total claim in the sum of N229,304,760.26? D

2.04. Whether the Court of Appeal was right to have refused to attach any weight to Exhibit “M”, having found that the respondent was duly “given the opportunity to cross-examine on the documents,” and that “he also had the opportunity if he so wished to call further evidence in rebuttal of Exhibit “M”, thus the principal (sic) of fair hearing was maintained. Exhibit “M” was therefore properly admitted.” E

On the other hand in the Respondent’s Brief filed by C. O. AKPAMGBO, Esq., SAN on 10/6/02 (now late), the following issues are identified for determination:- F

“(i) Did the Court of Appeal go outside the issues submitted to it for adjudication when it-held that Exhibit “B” amounted to a counter offer and was it right in so holding. G

(ii) From the totality of evidence oral and documentary, was the Court of Appeal right in setting aside the award of N211,157,536 in favour of the appellant on the ground that the 192 projects were not awarded to it? H

(iii) Was the Court of Appeal right in attaching no weight to Exhibit “M” In consequence of the finding that the 192 projects were not awarded to the appellant?”

In respect of the cross appeal, learned Senior Advocate submitted a single issue for determination in the Cross Appellant’s brief filed on 8/4/

02. The issue is as follows:-

“(i) Was the Court of Appeal right to have awarded the Plaintiff/Respondent the sum of N14,147,224.26 in the face of exhibit “L”.”

The main issue in the determination of the appeal lies in the resolution of appellant’s issue No.1 because the validity of the award of N211,157,536.00 for, professional fees for engineering and Management Consultancy services depends on the existence of the alleged contract for consultancy services in respect of ‘the 192 projects. The resolution of issue No. 1 is therefore the main plank in this judgment.

In arguing issue No. 1, learned counsel for the appellant submitted that the question of whether or not Exhibit “B” was a counter-offer was never an issue before the lower court particularly as the issues for determination before that court are as formulated by learned counsel for the appellant before the court, which were then reproduced by learned counsel for the present appellant. Learned counsel then cited and relied on *Lewis and Peat Ltd vs. Akhimien* (1979) 1 All NLR (pt. 1) 460; *Ezomo vs. Oyakhire* (1985) 1 NWLR (pt. 2) 195; *Ekwealor vs. Obasi* (1990) 2 NWLR (pt. 131) 231 at 251 and *Nwogo vs Njoku* (1990) 3 NWLR (pt. 140) 570 in submitting that issues are joined when one party asserts and the other party denies.

Learned counsel then submitted that there is nowhere in the Statement of Claim and Defence where the issue was raised that exhibit “B” constituted a counter-offer to exhibit “A” but that the issue joined by the parties was whether exhibit “B” in conjunction with exhibits “C”, “D”, “E”, “F” and “M” could be said to have created a valid contract arising from the offer made by the respondent in exhibit “A”, that the lower court, raised the issue of exhibit “B” being a counter-offer without giving the appellant the opportunity of addressing it on it contrary to laid down principles of law as stated in the cases of *Kuti vs Balogun* (1978) 1 S.C 53; *Olusanya vs Olusanya* (1983) 1 S.C NLR 134; *Hayaki vs Dogara* (1993) 8 NWLR (pt. 313) 586; *Ojo-Osagie vs Adonri* (1994) 6 NWLR (pt. 349) 131.

Learned counsel then proceeded to argue that exhibit “B” in fact is not a counter-offer and that the lower court was in error in holding that

it is, relying on *Orient Bank (Nig) Plc vs Bilante International* (1997) 8 NWLR (pt. 515) 37; *Major General George Innih (RTD) & ors vs Ferado Agro and Consortium Ltd* (1990) 5 NWLR (pt. 152) 604. Learned counsel therefore urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent submitted that the holding by the lower court that exhibit “B” constitutes a counter-offer arose from the court’s consideration of issue No. (II) before it to wit:

“(ii) *Was the trial judge right to hold that the respondent by virtue of Exhibits A, B, C, D, E, F and G was entitled to the sum of N229,304,760.26 in respect of the 192 projects.*”

Learned counsel then submitted that the gravamen of that issue was the propriety of the learned trial judge entering judgment to the plaintiff by placing reliance on the said exhibits A-G and that evaluation of those exhibits cannot support the judgment and award of the sum of N229,304,760.26; that the trial judge arrived at the award by holding that the offer in exhibit “A” was accepted by the present appellant in exhibit “B” which made it necessary for the lower court to determine whether the holding is supported by the said exhibits; that the exercise embarked upon by the lower court in resolving the issue centred only on the construction of documentary evidence tendered before the court, and that the exercise does not touch on the credibility of witnesses who testified before the trial court neither did it involve the setting aside of a finding of fact by that court, relying on *Abisi vs Ekwealor* (1993) 6 NWLR (pt. 302) 643; *Adeyemi II vs Atanda* (1995) 5 NWLR (pt. 397) 512 at 529; *Olujinle vs Adegbo* (1988) 2 NWLR (pt. 75) 238; *U.T.B. vs Awanzigama Ent. Ltd* (1994) 6 NWLR (pt. 348) 81.

Arguing further, learned counsel submitted that the respondent need not specifically raise the point that exhibit “B” constituted a counter offer before the lower court could pronounce to that effect, particularly as the exhibit was challenged as being incapable of supporting the judgment of the trial court.

On the question as to whether exhibit “B” was indeed a counter offer learned Senior Advocate submitted that it is in that exhibit B con-

tains material qualification or addition to the terms of the offer contained in exhibit “A” and therefore amounts, in law, to a rejection of the offer as can be ascertained by a community reading of exhibits “A” and “B”.

B It is very important to note that it is settled law that in an action based on pleadings issues are joined by the parties in their pleadings. It is also settled law that evidence on facts not pleaded ground to no issue. The existence or non-existence of fact is said to be in issue if the existence or non-existence of that fact is asserted by a party in his pleading and denied by the other party specifically, positively and unequivocally - C see *Lewis & Peat vs Akhimien* (1976) 1 All NLR 460; *Atolagbe vs Shorum* (1985) NWLR (pt. 2) 360 at 367.

Going through the pleadings of the parties, it is very clear that parties never joined issues on whether exhibit B was a counter offer or D not neither has the learned senior counsel for the respondent/cross appellant in the respondent’s brief referred this Court to any paragraph of the Statement of Defence where such a vital fact was pleaded in reaction to the pleadings of the appellant in relation to exhibits A and B. In fact, E during oral arguments in court I specifically asked learned counsel for the respondent/cross appellant BEN ANACHEBE Esq. whether the facts constituting the defence of counter offer was pleaded and he answered in the negative. It therefore means that no issue was joined by the parties F on exhibit B being a counter offer neither did the trial judge pronounce on same. I have carefully gone through the grounds of appeal from which the issues before the lower court were formulated and have seen no ground of appeal relating to exhibit B being 3 counter offer neither is there any specific issue raised before the lower court on whether exhibit G B is a counter offer. It is settled law that issues are formulated from the grounds of appeal which in turn are founded on the ratio decidendi or reason for decision of the court in the judgment appealed against. In the instant case it is obvious that since no issues were joined by the parties as H regard the issue of counter offer, the trial judge never mentioned it in his judgment and as such the appellant before the lower court had no complaint in any ground of appeal against a non-existent decision. In the circumstance it follows therefore, that issue II before the lower court

cannot be read to include the question as to whether or not exhibit B constitutes a counter offer as contended by learned Senior Advocate in the respondent's/cross appellant's brief of argument.

There is the argument that the lower court in considering the said issue II was evaluating documentary evidence which it has the power to B not only do, but also to draw inferences therefrom and as such its conclusion in respect of exhibit B is valid. With the greatest respect to the Senior Advocate I do not agree that in the instant case the lower court can do that having regard to the state of the pleadings of the parties and the purpose for which exhibit B was tendered and admitted in the trial C court. The relevant paragraphs of the Statement of Claim are paragraphs 3 and 4 which averred thus:

"3. The plaintiff was engaged by a letter dated April 12th, 1996 under the hand of professor E. A. Opia, Sole Administrator (OMPADEC) D to provide the following services:-

(a) General Engineering Consultancy and Technical advice.

(b) General Management Consultancy; and

(c) Any other relevant professional assignment. E

4. The plaintiff by letter dated 15th April, 1996, accepted the offer and commenced professional services immediately at the fixed rate of 2% of project cost of any assigned commission's project or projects in accordance with the functions listed in the letter of offer. The plaintiff shall F rely on the said letter and its contents for its full effects during proceedings."

What is the reaction of the respondent to the above paragraphs? In paragraphs 3 & 4 of the Statement of Defence, the following is pleaded: G
"3. The defendants admit the letter of April 12th, 1996, which in particular states as follows:-

"Specifically it shall be 2% of any assigned commission's project or projects. Your appointment shall be a month to month basis and could be determined by the Sole Administrator at anytime." H

4. The Defendant did not receive the Plaintiff's letter of 15th April, 1996 referred to in paragraph 4 of the Statement of Claim and pleads that as at 24 . 5 . 96 the 1st Defendant....."

It is settled law that one of the functions of pleadings is to avoid taking the other party by surprise. It is therefore clear that the lower court was in error in suo motu raising the issue of exhibit B being a counter offer contrary to the pleadings of the parties, the grounds of appeal and the issues formulated therefrom for the determination of the appeal. It is settled law that where a court raises an issue suo motu it must afford the parties or their counsel the opportunity of addressing the court on the issue so raised so as to ensure that the rules of fair hearing are adhered to for the purpose of doing justice to the parties. In the instant case, the lower court did not give the parties the opportunity to address it on the issue and I hold the view that it thereby committed a serious error.

I do not consider it necessary to determine the secondary issue as to whether in fact exhibit B is a counter offer because it would amount to an exercise in futility particularly as no relevant basis exists for that determination since the issue did not arise for determination before the lower court as earlier found and held by me in this judgment. The resolution of the main issue has turned the sub-issue into an academic question which the court will not entertain.

The next and equally very important issue is whether the lower court was right in rejecting the appellant's total claim in the sum of N229,304,760.26. This issue calls for examination of the relevant documents to ascertain the existence of a contract(s) between the parties to ground the claim of the appellant.

In arguing issue 2, learned counsel for the appellant referred the court to the contents of exhibit B and submitted that the projects i.e. the 192 projects had been assigned to the appellant by the respondent in accordance with exhibit A which together with exhibit B constitutes the contract between the parties, that there were in fact two contracts involved in the transaction between the parties, namely the 192 projects covered by exhibits A, B, C, D, E, F and M while the second concerns the Omadino bridge and access road projects; that appellant's professional fees at 2% in respect of the 192 projects amounts to N215,157,536.00 out of which appellant said it was paid N4 million as

part payment leaving a balance of N211,157,536.00 while the amount due and payable to the appellant in respect of the second contract is N18,147,224.26. Learned counsel further submitted that the payment of N120,000.00 by the respondent to the appellant represented a mere out of pocket expenses in accordance with the terms and conditions of the B contract between the parties.

Learned counsel finally urged the court to resolve the issue in favour of the appellant.

On his part, learned senior counsel for the respondent submitted C that the inspection, assessment and evaluation of the 192 projects of the respondent scattered all over the oil producing States was undertaken by the Presidential Monitoring Team constituted by the Federal Government and that the Managing Director of the appellant, Engr. D. B. Udechi - not D the appellant - was later co-opted into the team for which he was paid an honorarium like any other member of that team; that the 192 projects were not specifically related to exhibits A & B particularly as exhibit A offers appointment to the appellant in general terms; that the terms carry E no remuneration in default of a future specific assignment of projects; that contrary to the 192 projects, the Omadino bridge project was specifically assigned to the appellant in terms of exhibit A; that the lower court was right in setting aside the award of N211,157,536 representing F 2% of the contract sum in respect of the 192 projects and urged the court to resolve the issue against the appellant.

There is no doubt that exhibit A dated 12/4/96 offered an appointment to the appellant and specifically states as follows:-

“Following your proposals and application for appointment as G engineering and management consultants to the commission and subsequent interview with the commission, we wish to formally appoint your firm DALEX NIGERIA LIMITED, (Consortium of Engineers, Architects, Computer Experts) as Engineering and Management Consultants H to the commission.

Your functions will include:

- (a) General Engineering Consultancy and Technical advice.*
- (b) General Management Consultancy and*

(c) *Any other relevant professional assignment.*

Your professional fees for your services shall be in accordance with the Federal Government approval scale of fees for consultants in the construction industry and as negotiated - specifically, it shall be 2% of any assigned commission's project or projects.

Your appointment shall be on a month to month basis and could be determined by the Sole Administrator.....”

On the other hand, exhibit B dated 15th April, 1996 states as follows, inter alia. “

“Acceptance of Appointment As Engineering and Management Consultants.

We refer with thanks to your letter dated 12th April 1996 appointing us Engineering and Management Consultants to your commission to provide general Engineering and Management Consultancy and Technical services and advice. In consideration of the anticipated volume and magnitude of the Commission's projects, we write to accept your offer of 2.0% of any assigned assigned Commission's Project or Projects costs.

In compliance with your urgent desire for our professional services we have today, 15th April, 1996, commenced work at your Port Harcourt headquarters office.

As discussed and provided for in the Federal Government approved “Professional Scale of Fees for Consultants in the Construction Industry” the 2.0% fee is exclusive of reimbursable claims additionally payable to the professional consultant in accordance with the provisions of clauses 32.0 and 32.2 of the Federal approved scale of fees. For the avoidance of doubt, reimbursable items include “Transportation, Accommodation, Printing, Computer Rentals, Office Equipment and other incidentals” and is “limited to 1.0% of the consultants cost of works.”

We thank you again for your patronage of our consortium and assure you of satisfactory professional services at all times.....”

From the tone and tenor of exhibit B it is very clear that it is demanding 1.0% in addition to the 2.0% of the project or projects costs as offered in exhibit A. In any event, since no issue was joined by the parties on the issue as to whether, exhibit B constitutes a counter offer

thereby amounting in law to a rejection of the offer in exhibit A, and I have earlier held in this judgment that the lower court erred in pronouncing the said exhibit B a counter offer in the circumstance exhibit B constitutes an acceptance of the offer contained in exhibit A. It therefore follows that both documents, exhibits A and B constitute the contract binding the parties to this action. B

I now proceed to determine the sub-issue as to whether exhibit A assigned the 192 projects in issue to the appellant so as to entitle the appellant to the sum claimed and awarded by the learned trial judge. C

It is not in doubt that exhibit A clearly offered appointment to the appellant in general terms without mentioning specific projects to which the offer relates. It however contains the remuneration to be paid per assigned project(s). To the extent that the project(s) to be paid for by the respondent would have to be assigned and none was so assigned in exhibit A, the said exhibit A is futuristic in nature and operation. It means whenever the respondent desired appellant to handle any project(s) on its behalf, the specific project(s) would be formally assigned to the appellant for that purpose and it is only in that context that specific contracts within the general contract contained in exhibit A can be operational and binding between the parties. That was specifically done in respect of the Omadino Bridge and Road project which was specifically assigned to the appellant vide a letter of the respondent dated 10th February, 1997. D E F

In respect of the 192 projects, there is no document assigning them to the appellant so as to constitute a contract enforceable by performance. I hold the considered view that the terms of the contract in exhibit A are very clear and it is impossible to read into them an assignment of the said 192 projects for which the disputed claim is made. Learned counsel for the appellant has argued forcefully that the co-option of the Managing Director of the appellant into the membership of the Federal Government Presidential Monitoring Team and his participation therein including the issuing of the joint reports, exhibits C, D, E & F constitute the required assignment as envisaged in exhibit A and therefore the respondent is liable to pay. I must confess that the argument is beautiful but it is not supported by the facts of the case. In the first place exhibit A was G H

entered into between the respondent and the appellant as distinct from PW1, the Managing Director of the appellant who was the person specifically co-opted into the said Presidential Monitoring Team in which he acted in that capacity and was given his dues just like any other member of the team. That apart, the fact that the Omadino project was specifically assigned to the appellant confirms the view that it was the intention of the parties as evidenced in exhibit A that every project(s) which the respondent desired the services of the appellant has (have) to be specifically assigned to the appellant so as to create a binding contract between the parties. There can be no implied contract in this case where the words of exhibit A are very clear and unambiguous.

To hold that the 192 projects worked on by the Monitoring Team were assigned to the appellant and for which it is entitled to the claim would expose the respondent to the danger of having to pay again for them in view of the recommendations of the Presidential Monitoring Team at page x of exhibit C which recommended that the respondent engages the services of experienced and independent engineers/consultants to critically measure, assess and evaluate the work already done on each project it had assessed with a view to determining which project it should continue and what each contractor was reasonably entitled to. It is very clear and I hereby hold that if the 192 projects were assigned to the appellant and the appellant duly carried out the assignment necessitating the payment of the sum claimed, there would have been no need at all for the above recommendation by the team which incidentally included the Managing Director of the appellant. I will not say more on this except that the appellant's claim in respect of the 192 projects leaves much to be desired and contain more than meets the eye.

It is however very clear from the above exposition that there being no existing valid contract between the parties in respect of 192 projects for which the claim was made, the lower court was perfectly in order when it set that award by the learned trial judge aside.

In conclusion I hold the view that the appeal is devoid of any merit and is consequently dismissed by me. Subject to my views on the issue No. 1 on counter offer, I agree with the lead judgment of my learned

brother MUSDAPHER, JSC that the appeal and cross appeal be dismissed and abide by the consequential orders contained in the said lead judgment including the order as to costs.

Appeal and cross appeal dismissed.

B

OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Benin Division (hereinafter called “the court below”) delivered on 10th December, 2001 setting aside, the award of the sum of N211,157,536.00 in favour of the Appellant whilst affirming the award of N14,147,224.26 to the Appellant being he unpaid amount on the Omadino Project. It dismissed the claim on the 192 projects. Dissatisfied with the said judgment, both parties, have appealed to this Court. The main appeal, is by the Appellant while the Respondent, is the Cross-Appellant in respect of the award to the Appellant of N14,147,224.26.

I have had the advantage of reading before now, the lead Judgment of my learned brother, Musdapher, JSC who has, with respect, admirably, set out the claims, the facts of the case and the issues formulated by the parties. I entirely agree with the reasoning and the conclusion that both the main appeal and the cross-appeal, are unmeritorious and stand dismissed. But for purposes of emphasis, I will make my own contribution.

I note that the Appellant, claims that it rendered professional services in respect of 192 (one hundred and ninety two) projects in Edo, Ondo, Delta and Rivers States and that the fee of two per cent (2%) for any assigned project, has amounted/totaled to the sum of N229,304,760.26 for all the projects.

On its part, the Respondent admitted that it employed the Appellant only for the Omadino Bridge sad Road Project and that it paid the sum of four (N4) million to the Appellant leaving a balance of the sum of Eight (8) million unpaid. The Respondent therefore, denied employing the Appellant for any other job and categorically, maintained that no job was ever awarded by it to the Appellant in respect of the 192 projects. As

a matter of fact, the Respondent narrated or averred how the work on the 192 projects, were carried out by the Presidential Monitoring Team. It claimed that the Managing Director of the Appellant (one Engr. D. B. Uduehi) was even co-opted in his personal capacity, into, the said Team B by the Respondent who in fact, provided hotel accommodation for him Mr. Uduehi at its own expense, and paid him like other members of the Team, allowances. More importantly, that at the end of the jobs by the said Team, the Respondent maintains/maintained, that it paid Mr. Uduehi, C the sum of N120,000.00 (one hundred and twenty thousand naira) as an honorarium. The Respondent further maintained that the Data used by the Team for the joss, was provided by its technical staff. It therefore, denied liability of the sum of N211,157,536.00 or any other sum whatsoever, in respect of the one hundred and ninety two (192) projects.

D The Appellant has formulated four (4) issues for determination, namely-

2.01 *Was the Court of Appeal right to have held that Exhibit B was a counter-offer when the question of whether Exhibit 3 was a counter-offer is a material and fundamental issue of fact and law that was never raised nor canvassed by any of the parties before the court of Appeals, (sic)*

2.02 *Was Exhibit M really a counter-offer to Exhibit A ?*
F 2.03 *From the totality of the evidence adduced before the trial court and the findings and conclusions of the learned trial judge, was the Court of Appeal right to have rejected the Appellant's total claim in the sum of N229,307,760.26?.*

2.04 *Whether the Court of Appeal was right to have refused to attach any weight to Exhibit M, having found that the Respondent was duly "given the opportunity to cross-examine on the documents", and that "he also had the opportunity if he so wished to call further evidence in rebuttal of Exhibit M, thus the principal (sic) (meaning principle) of H fair hearing was maintained. Exhibit M was therefore properly admitted".*

I am of the respectful view, that issues 2.01 and 2.02, are substantially, the same and can be treated or dealt with together. The Re-

spondent on its part, has formulated three (3) issues for determination, namely; -

i) Did the Court of Appeal go outside the issues submitted to it for adjudication when it held that Exhibit B amounted to a counter offer and was it right in so doing? B

ii) From the totality of evidence oral and documentary, was the Court of Appeal right in setting aside the award of N211,157,536.00 in favour of the Appellant on the ground that the 192 projects were not awarded to it. C

iii) Was the Court of Appeal right in attaching no weight to Exhibit M in consequence of the finding that the 192 projects were not awarded to the Appellant.”

I note that all the issues of both parties, are substantially the same or similar although differently couched. I note that on 28th November, 2006 when this appeal came up for hearing, the learned leading Counsel for the Respondent - Anachebe, Esq., withdrew their objection raised at page 5 of their Brief as regards issues 1 and 2 of the Appellant. The court, therefore, struck out the said objection. D E

Now, it seems to me that the issue in real controversy, is as to the propriety of the trial court's evaluation of the documentary evidence in respect of Exhibits A to G. As to whether Exhibit B is/was a counter-offer, in my respectful view, it is of no moment having regard to the issue F as to whether the Appellant, was either assigned the 192 Projects by the Respondent. Period! I say so because both in the pleadings of the parties - particularly that of the Respondent, the evidence in the trial court, the judgment of the trial court, the issues formulated by the parties in. the court below and the respective Briefs of Argument in the court below, I G find no where, where this issue of Exhibit B being a counter-offer, was ever raised or dealt with by the trial court. Just as parties are bound by their pleadings, both a trial court and an Appellate Court, are not justified, to go outside the pleadings and the case presented by the parties. It is the settled law, that where a court raises a matter suo motu, the parties or H their counsel, must be given the opportunity to be heard on such an issue. Failure by the court to hear the parties or their counsel, will amount

to a denial of fair hearing. There are too many authorities in this regard. See *Odiase v. Agho* (1972) 1 ANLR (pt. 1) 170 *Ugo v Obiekwe & Anor* (1989) 1 NWLR (pt. 99) 566; (1989) 2 SCNJ. 95; *Kotoye v. C.B.N. & 71 Ors.* (1989) 1 NWLR (P.98) 419; (1989) 2 SCNJ. 31 and recently, *Abbas B v. Solomon* (2001) 15 NWLR (pt. 735) 144 at 170; (2001) FWLR (pt.67) 847; *Osasonu v. Oba Ajayi & Ors.* (2004) 4 NWLR (pt 394) 527; (2004) 5 SCNJ. 82 and *Mrs. Evangeline Fombo v. Rivers State Housing & Property Development Authority* (2001) 5 SCNJ. 213 (citing three other cases therein) just to mention but a few.

As a matter of fact, I maintain that whether or not Exhibit B, is a counteroffer to Exhibit A, is otiose and irrelevant, again, because, the Appellant failed woefully, to prove, establish or show that the Respondent has specifically assigned to it, any other project other than the Omadino Bridge and Road Project to talk of being assigned 192 projects which assertion or claim by the Appellant, is with respect, a hoax and not honestly made. It is a fraudulent claim to say the least. Surely and certainly, the 192 projects, were not and cannot, in any way by any stretch of imagination, be related or referable to Exhibit A which did not list any project assigned to the Appellant. For the avoidance of any doubt, in offering appointment to the Appellant in terms of (a), (b), and (c) in Exhibit A, the following inter alia appear:

“..... your professional fees for your services shall be in accordance with the Federal Government approved scale of fees for consultants in the construction industry and as negotiated – specifically, it shall be 2% of any assigned ‘ commission’s project or project”

[the underlining mine]

It talks about any assigned project or projects and not “to be later assigned” and did not expressly, state any project it was going to assign to the Appellant -i.e. of any assignment in the future. It was the Respondent, who would make the assignment and I note that Exhibit “B”, did not enumerate any such future project or projects to be assigned to the Appellant. In the evidence of the Appellant, no where, was it ever shown or stated, that any specific act of assignment of project by the Respondent was made to the Appellant except the Omadino Bridge and Road

Project. In fact, in paragraph 1 of Exhibit B the following appear, inter alia:

“..... *In consideration of the anticipated volume and magnitude of the Commission’s projection.....*”

In other words, the Appellant accepted the offer in anticipation of B more projects to be assigned to it. In paragraph three, thereof, the Appellant, wrote or stated thus, “*for The avoidance of doubt.*” It then, demanded some “reimbursable items” fixed at 1.0%. Honestly, I don’t blame the court below for treating Exhibit B as a counter-offer. However I have C stated why it does not arise. Surely and this is settled, a qualified acceptance of an offer, cannot give rise to a binding agreement between the parties. *See the cases of Messrs. Sulaiman & Bros v. Hans Meher of Hamburg (1957) 4 FSC 60; Odunsi v. Boulos (1959) 4 FSC 234. Hyde v. Wrench (1840) 3 Beav 334 and Hart v. Mills (1846) 15 L.J. Ex 200* D

I need not “flog” this matter. But it is on record and as found as a fact by the court below, that Engr. Uduehi on his admission, signed Exhibits C, D and E as a co-opted member in his personal capacity and never acted as an Agent of the Appellant in the Presidential Monitoring E Team. This Engr. Uduehi admitted that Exhibits C, D and E are joint reports of all the members of the Team. He was co-opted into the team, because of his special qualifications as an Engineer and not as any Agent of the Appellant. Can the Appellant honestly say or assert, that the 192 F Projects inspected by that said Team in which Engr. Uduehi was co-opted as a member, were projects assigned to it to be supervised by the Appellant? I believe not. Engr. Uduehi was paid N 120,000.00 per week as an honourarium like the other members of the Team. Significantly, he G did not pass the money, to the Appellant as its Agent after the exercise. It therefore, sounded very funny and ridiculous to me when it is submitted in the Appellant’s Brief, “that the payment of N 120,000.00 by the Respondent to the Appellant represented a mere out of pocket expenses in H accordance with the terms and conditions of the contract between the parties. I or one may ask. Which contract? For sure Exhibit A did not say anything about payment of any expenses to the Appellant.

The wordings of Exhibit “A”, are clear and unambiguous. It is

now settled that where the words of a contract agreement or document are clear, the operative words in it should be given their simple and ordinary” grammatical meaning. See the case of Union Bank of Nigeria Ltd v. Sax (Nig) Ltd & 2 Ors (1994) 9 SCX JI. If parties enter into an agreement, they are bound by its terms. One or the court cannot legally or properly, read into the agreement, the terms on which the parties have not agreed. See the cases of Evbuomwan & 3 Ors v. Elema & 2 Ors (1994) 7 - 8 SCNJ. (Pt. II) 243: Olalove (Mrs.) v. Balogun (Madam) (1990)5 NWLR (pt. 148)20: (1990) 7 SCNJ. 205: Mrs. Layade v. Panalpina Transport Nig. Ltd (1996) 7 SCNJ. I at 14 - 15 and Olatunde v. Obafemi Awolowo University (1998) 5 NWLR (Pt. 549)178 at 191. 144: (1998) 4 SCNJ. 59 at 74 – 75.

If I must touch on issue 3 (iii) of the Appellant and the Respondent as regards Exhibit M which is one of the letters of demand, it was admitted in evidence as an exhibit. Does the admission of an exhibit, mean that the trial court must attach any weight to it willy nilly? I or one may ask. I think not. It is settled law that it is the relevance of a document and not the weight to be attached to it that is paramount. In other words the position of the law is that admissibility is one thing while the probative value that may be placed thereon is another. Relevance and admissibility of a document are separate matters in contradiction from the weight to be attached to it. See the case of Okonji & 2 Ors v. Njokanma & 2 ors (1998) 12 SCNJ. 259 at 273 - 275. I note that Exhibit M was made by the Appellant and not the Respondent. In the face of this fact, what is its relevance to the clear contents of Exhibit A? I or one may ask since relevance and admissibility of a document or evidence, is different from the weight to be attached to it. See also the cases of Oba Oyediran of Igbalanla v. H.R.H. Oba Alebiousu II & Ors (1992) 6 NWLR (pt. 249) 250 at 539: (1992) 7 SCNJ. 167; Danniya v. Jomoh (1994) 3 NWLR (Pt. 334) 609 and perhaps. Union Bank of Nig. Plc & Anor. V. Sparkling Breweries Ltd &. Anor. (2000) 15 NWLR (Pt. 689) 200 at 211 cited and relied on in the Respondent’s Brief. There is no doubt in my mind that the refusal of the court below to attach any weight to Exhibit M was as a result of its finding that the 192 projects, were not assigned to the Appel-

lant by the Respondent. I therefore, hold that on the decided authorities and in the circumstances of the said finding of the court below, it was right and justified, in refusing to attach any weight to Exhibit M.

Finally, ever if Exhibit M was not considered by the court below it has in no way in my respectful view led to any miscarriage of justice. As a mere letter of demand, made by the Appellant itself, its consideration or attachment of any weight by the court below, could not have in any way or manner, affected the misfortune or fortune of the Appellant who wants to reap, where it did not sow so to speak.

As to the Cross-Appeal, with respect, it lacks substance. This is because, the court below, was right in awarding the sum of N14,147,224.26 in its favour. It is a matter of simple arithmetic or calculation. The undisputed fact, is that 2% of the cost of the Omadino Bridge and Road Project, is/was N18,147,224.26. If N4 million already paid, is deducted from this amount, the balance would be N14,147.224.26 which was what the court below awarded.

In the final result or analysis, both the main and the cross-appeals, lack substance or merit. I too dismiss the both of them. I also award no cost.

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