

SUPREME COURT OF NIGERIA
15TH FEBRUARY, 2008 SC. 270/2002
CORAM:- N. TOBI, W. S. N. ONNOGHEN, I. F. OGBUAGU,
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH, JJSC

1. UNITY BANK PLC.

(Substituted for Bank of the
North Ltd.)

..... APPELLANTS

2. MR. B. B. ODUNOWO (Receiver)

AND

MR. EDWARD BOUARI

..... RESPONDENT

(For himself and on behalf
of Bouari Family)

ACTIONS - Family property - A member of the family can sue to protect it - If authority of the family was not secured - The family is not bound by the result - Save by reason of estoppel (H1)

APPEALS - Notice of appeal - Amendment - Can be at any time with leave of court - And once filed within the extended period - The notice of appeal is valid (H2)

APPEALS - Addresses - Fair hearing - Is not denied - Where lower court refused to hear an address - On a notice that was rightly struck out - For being incompetent (H3)

APPEALS - Issues - Abandonment - Where an issue is at variance with the ground of appeal - On which it is based - Both issue and ground will be struck out as incompetent (H4)

APPEALS - Issues - Reformulation of by court - Can be done - For purpose of accuracy - And proper determination of an appeal (H5)

APPEALS - Issues - Definition - Re-framing of issues by lower court - Is proper in this case - As it related the said issues to arguments before it (H6)

APPEALS - Briefs - Reply brief - Failure to file by a respondent is immaterial - But admission is deemed thereby - Yet an appellant must succeed or fail on his own brief (H7)

COMPANY LAW - Membership - Findings - Born out from the records - That defendants failed to prove their assertion - That plaintiff and his brothers were directors/shareholders - At time of mortgage by a limited liability company - Will not be faulted by Supreme Court (H8)

PLEADINGS - Reply - Purpose and function - Include to answer new issues raised in the defence - Filing a reply to merely join issues - Is not permissible (H9)

JUDGMENTS - Interference - Appeals - Not every error or mistake in a judgment - Will result in allowing an appeal - Prejudice or miscarriage of justice - Must be shown (H10)

MORTGAGES - Appeals - Findings - Mortgage - Where declared ultra vires the power of attorney - Trial court ought not dismiss the other claims (H11)

APPEALS - Briefs - Repetitions - Some issues and arguments in appellants' briefs - Are repetitions - Which do not improve unacceptable argument (H12)

FACTS

Before the High Court Ibadan, plaintiff/respondent filed an action against the defendants/appellants. Respondent claimed inter alia, declaration that the purported mortgage of their family property, No. 80 Lebanon Street and No. 30 Oba Adebimpe Street, Gbagi, Ibadan, is unlawful, void and of no effect. Appellants claimed that the disputed property was mortgaged to the 1st appellant to secure the account of Trans Atlantic Co. Ltd., in which the Bouari family has interest as directors. Respondent contended that the property belongs to their family and that no member of the family had authority to mortgage it to 1st appellant. The appellants who may have proved

that respondent and his brothers were at one time directors of the debtor company, failed to prove that they were directors at the time the mortgage was executed. Trial court seemed to misconstrue respondent's case, as it granted only one out of the six reliefs claimed.

Respondent appealed to the Court of Appeal while appellants cross appealed. Respondent was granted leave to amend his notice of appeal and file additional grounds of appeal in spite of appellants' preliminary objection, which was struck out. The Court of Appeal allowed the appeal granting the other five reliefs refused by the trial court. The cross appeal was dismissed. Still aggrieved, appellants have further appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per **OGBUAGU JSC**)
ACTIONS - Family property

1. Again and this is settled, a member of the family, can sue, to protect or defend the interest of the property of the family in respect of any property. If he has not the authority of the family to bring the action, the family, would or will of course, not be bound by the result, unless for some reasons, the family is/was estopped from denying that the action was binding. (p. 923 H)

Notice of appeal - Amendment

2. As a matter of fact, an amended notice of appeal, is certainly not a new notice of appeal. This is because and this is also firmly settled that an amendment, relates back to the date in which the document, was originally filed just like an Amended Statement of Claim. In other words, it is retrospective.

More importantly, Order 3 Rule 16 of the Court of Appeal Rules, 1981 (As Amended) and which was applicable at the time the appeal was heard by the court below, and also referred to in the respondent's Brief, provides as follows:

"A notice of appeal or respondent's notice may be amended by or with leave of the court at any time."

(the underlining mine)

The above provision, is very clear and unambiguous and therefore, need no interpretation. In other words, there is no time limit within which to do so. So, there is no question of the said amended

notice of appeal, being a nullity. I therefore, resolve this issue against the appellants and in favour of the respondent. In other words, the said amended notice of appeal, was/is valid and there was/is an order of the court below duly extending the time to so file it out of time which was accordingly so filed within the said extended time.

B (p. 924 H)

APPEALS - Addresses - Fair hearing

3. What is more, in my respectful view, it was certainly not necessary to hear an address, as it clearly did not arise. At page 197 of the Records, the court below - per Akintan, JCA., (as he then was), struck out the notice of Preliminary Objection for being incompetent on the ground that it was not brought at least three (3) clear days before the date fixed for the hearing of the appeal. The court below relied on Order 3 Rule 15(1) of the Rules of that court. It was right to do so. I note that there is no appeal against the said decision of the court below and it is therefore, binding on the appellants as it subsists.

(p. 925 H)

E ***APPEALS - Issues - Abandonment***

4. As it stands, there is no valid ground of appeal which this issue 2 is related to or formulated from and the said issue, being at variance with the said Ground 2 of the Grounds of Appeal, is deemed in law, as having been abandoned as rightly submitted in the respondent's Brief. I therefore, discountenance the said issue and the result, is that both the issue and the Ground of Appeal on which it is based, being incompetent, are accordingly struck out. (p. 926 D)

G ***APPEALS - Issues - Reformulation of by court***

5. It is now firmly settled that a court, can and is entitled to re-formulate issue or issues formulated by a party or parties or counsel in order to give it precision and clarity. It is now firmly settled that the purpose of reframing issue or issues, is to lead to a more judicious and proper determination of an appeal. In other words, the purpose, is to narrow the issue or issues in controversy in the interest of accuracy, clarity and brevity. (p. 927D/F)

Re-framing of issues by lower court

6. It need be stressed and this is also settled that as long as the issue or issues re-framed, is/are anchored on the ground or Grounds of Appeal, the opposite party, cannot complain.

In my respectful view, the said issue formulated by the court below, were/are germane to the issues in controversy. The learned counsel for the respondent in their Brief, has stated that *"It will be seen that the issues formulated for determination had no relevance to the Grounds of Appeal filed by the appellants in the court below"*. I agree with him, that the issues distilled by the court below, fitted into the two Grounds of Appeal in the cross appeal of the appellants. I also agree with him that before giving its final decision, the court below, related the said issues so distilled by it, to the arguments before it.

This must be so because, it is now firmly established, that an appeal, is decided upon the issues formulated for determination. In other words, when an issue or issues for determination are formulated, the Ground of Appeal upon which it or they are based, are extinguished so to say and are replaced by the said issue or issues so raised and no longer on the grounds.

In other words, a Ground of Appeal, must have an issue to cover it and argument is proffered to cover the issue. Any Ground of Appeal not having any argument proffered on the issue distilled therefrom, is deemed abandoned and such an issue, is or ought to be struck out with the Ground of Appeal. Afterwards and this is also settled, an issue, is a point that has arisen in the pleadings of the parties which forms the basis of the dispute or litigation which requires resolution by a trial court. (pp. 927H/928 C)

APPEALS - Briefs - Reply brief

7. In a line of decided authorities, it has been held that the failure of a respondent to file a Reply Brief, is immaterial. This is because, an appellant, will succeed on the strength of his case. But a respondent, will be deemed to have admitted the truth of everything stated in the appellant's Brief in so far as such is borne out by the Records. In other words, it is not automatic. An appellant, must succeed or fail on his own Brief. (p. 930 A)

COMPANY LAW - Membership - Findings

8. In conclusion I hold that in view of the above considerations the findings of the learned trial Judge about the plaintiff and his brothers being directors of the Trans Atlantic Coy. Ltd., at the time of the mortgage transaction and the conclusions or decisions based, thereon are perverse and this court should necessarily interfere. It is the defence assertion that the plaintiff and his brothers were directors/shareholders of Trans Atlantic Co. Ltd., at the time of the mortgage transaction and it is the duty of the defence to prove it through a document like Exhibit D3 from Registration of Companies. It was not enough to prove that the plaintiff and/or his brothers were at one time or the other directors of the company. They have to prove that they were directors of the Company at the time of the mortgage transaction in Exhibit D6 (sic) p.6 and D1. This they failed to do. The result is that I resolve this issue in favour of the plaintiff/ appellant". (the underlining mine)

I am unable to fault the above findings of fact and holdings because they are borne out from the Records. I agree with the submission in his Brief that the learned trial Judge's finding on the issue of directorship of Trans Atlantic Co. Ltd., and consequent upon which the learned trial Judge, refused claim No.4 of the plaintiff/respondent and came to the conclusion that it would be a travesty of justice to grant that claim/relief, when Trans Atlantic Co. Ltd., was owing about N7 Million (Seven Million Naira), was exactly, what the court below held to be perverse. I also agree with the respondent in his Brief that it will be wrong and in fact with respect, a gross misconception, to assert as the appellants have done in Ground 6 of the Grounds of Appeal and in this instant issue, that the court below, did not make a finding on their said complaint when I have demonstrated in this judgment, that it did. (p. 931 A)

PLEADINGS - Reply - Purpose and function

9. The proper function of a reply, is to raise in answer to the defence, any matter which must be specifically pleaded, which make the defence not maintainable or which otherwise might take the defence by surprise or which raise issue of fact not arising out of the defence.

In other words and this is also settled, that a Reply, is used by a plaintiff, to answer new issues raised in the Statement of Defence such as in cases of confession and avoidance. It is therefore, not necessary to file a Reply if its only purpose, is to deny the allegations of fact made in the Statement of Defence because of the principle of joinder of issues. Where no counter-claim is filed, a Reply, is generally unnecessary if it is also to deny allegations in the Statement of Defence. After the completion of pleadings, issue is or issues are said to be joined and the case is ready for hearing. Such a joinder of an issue, operates as a denial of every allegation of fact in the pleadings upon which the issue has been joined. In fact, it is also settled that if no Reply is filed, all material facts alleged in the Statement of Defence, are put in issue. A Reply to merely join issues, is therefore, not permissible. (p. 932 H)

D

APPEALS - Judgments - Interference

10. It is now settled as rightly submitted in the respondent's Brief that, it is not every mistake or error in a Judgment, that will result in an appeal being allowed. An appellate court will only interfere when the error is substantial in that it has occasioned a miscarriage of justice.

E

The appellants, as rightly stated by the respondent in the Brief, have not shown to this court, how the said statement of the court below, have made any difference or would have been different in the circumstances of this appeal. They have not also shown what prejudice or miscarriage of justice they have suffered or has been occasioned to them. Being an academic exercise, I ignore and discountenance the said issue. (p. 936 C/F)

G

APPEALS - Findings - Mortgage

11. In other words, the trial court, having declared the said mortgage between Lutfallah Bouari and the 1st appellant - Exhibit P6, to be ultra vires the Power of Attorney - Exhibit P3 of 5th November, 1962 as unlawful, the trial court, ought not to have dismissed the other said claims of the respondent. Period! I agree. (p. 937 D)

H

APPEALS - Briefs - Repetitions

12. I observe that some of the arguments of the appellants in their Brief, are with respect, repetitions just as the court below found in its judgment, some of the issues and arguments in the Brief filed by the appellants in that court. Even in their Reply Brief, some of the arguments therein are repetitions. In the case of Calabar East Co-operative Thrift Credit Society Ltd. v. Etim E. Ikot (1999) 14 NWLR (Pt.638); (1999) 12 SCNJ 321 at 339, this court - per Achike, JSC., (of blessed memory), stated that repetitions, do not improve an earlier arid, weak and completely unacceptable argument. (p. 937 E)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. What is not pleaded goes to no issue

D I have gone through the pleadings and I do not see where the so-called open fraud involving N7 Million was pleaded. It is trite law that parties are bound by their pleadings and what is not pleaded will go to no issue. Pleadings provide the foundation of the case of the parties and anything outside the pleadings are to no avail. (p. 941 F)

2. Pleadings - Reply when necessary

In the law of pleadings, a Reply is only necessary where the pleadings (the Statement of Claim and the Statement of Defence) have joined issues. A Reply is necessary where a Statement of Defence raises a fresh issue which was not anticipated by the Statement of Claim. Where a Statement of Defence raises an issue which is already averred to in the Statement of Claim, a Reply is otiose and that is the point learned counsel for the respondent has made in the respondent's Brief, and I agree with him. (p. 942 B)

REPRESENTATION

Oluwole Aluko, for the Appellants.
Kolawole Esan, for the Respondent.

CASES REFERRED TO

Coker v. Oguntola & Ors. (1985) 1 ANLR (Pt. 1) 278
Sogunle & Ors. v. Akerele & Ors. (1967) NMLR 58 at 60

- Animashaun v. Osuma & Ors. (1972) 4 S.C. 200 at 214
Ugwu v. Agbo (1977) 10 S.C. 27, 40; (1977) 10 S.C.
Alhaji Gegele v. Alhaji Layinka & 6 Ors. (1993) 3 SCNJ 39
Grace Amanambu v. Okafor (1966) 1 All NLR 205
Rotimi v. McGregor (1974) 11 S.C. 133 at 152
Madam Salami & Ors. v. Oke (1987) 9-11 S.C. 43 (not 45) at 67 B
Katto v. Central Bank of Nigeria (1999) 5 S.C. (Pt.II) 21 (1999) 5
SCNJ 1 at 21
Ajakaiye & Anor. v. Adediji & Anor (1990) 7 NWLR (Pt. 161) 192
Akinsanya v. Longman (1996) 3 NWLR (Pt.436) 303 C
Ibrahim v. Mohammed (1996) 3 NWLR (Pt.437) 453
Diel & Ors v. Iwuno & Ors. (1996) 4 NWLR (Pt 445) 622
Ogun v. Asemah (2002)4 NWLR (Pt.256) 208

STATUTE & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1999, ss. 22, 36(1)
Court of Appeal Rules, 1981, O. 3 r. 15 (1), 16
Court of Appeal (Amendment) Rules, 1984, O. 6 r. 3 (a), 10

LEAD JUDGMENT BY OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on 9th May, 2002 allowing the appeal of the respondent and dismissing the cross-appeal of the appellants in respect of certain findings of the trial court. F

Dissatisfied with the said decision, the appellants, have appealed to this court on eleven (11) Grounds of Appeal. Without their particulars, they read as follows:

“1. The Court of Appeal erred in law by allowing the appeal of the respondent when the Court of Appeal had been deprived of its jurisdiction to entertain the appeal of the respondent by the invalid and incompetent amended notice of appeal of the respondent which was filed out of time without an order of the Court of Appeal extending the time to file it out of time. H

2. The Court of Appeal erred in law by not resolving the issue of its jurisdiction to entertain the appeal that was raised by the application of the appellants of February 13th, 2002 for leave for

further address on the issue of jurisdiction and Notice of Preliminary Objection of March 26th, 2002 challenging the competence of the Court of Appeal to grant extension of time to the respondent to regularize the invalid amended notice of appeal as the application for leave for further address on the issue of jurisdiction was never taken
B before the delivery of judgment.

3. The Court of Appeal erred in law by dismissing the cross-appeal of the appellants without consideration and finding on the issues of law that were raised therein that the donee of the Power of the Attorney or his personal representative ought to have been joined
C in the action in which the respondent challenged the competence of the donee of the Power of Attorney to execute the deeds of legal mortgage by virtue of the Power of Attorney.

4. The Court of Appeal erred in law by dismissing the cross-appeal of the appellants without consideration and finding on the issues of law that were raised therein that the donee of the Power of Attorney had been held out by the donor of the Power of Attorney as having the authority of the donor to execute the deeds of the legal mortgage and the respondent never joined issue with the appellants
D on this point of law.
E

5. The Court of Appeal erred in law by not making finding on the issue that the amended notice of appeal of the respondent is invalid and incompetent under Order 6 Rule 3(a) Court of Appeal (Amendment) Rules, 1984 on the ground that all the issues that are
F involved in all the Grounds of Appeal did not feature in the pleading of the respondent and they were not canvassed at the court below.

6. The Court of Appeal erred in law by not considering and
G making finding on the issue that was raised by the appellants in the appeal that it will be an open fraud and injustice to allow the 1st appellant to loose (sic) N7 Million as shown by Exhibit D2 and the respondent and his company to escape with N7 Million.

7. The Court of Appeal erred in law when it held as follows:
H “..... In conclusion I hold that in view of the above consideration the findings of the learned trial Judge about the plaintiff and his brothers being directors of the Trans Atlantic Co. Ltd., at the time of the mortgage transaction and the conclusion or decision based thereon

are perverse and this court should necessarily interfere. It is the defence assertion that the plaintiff and his brothers were directors/shareholders of Trans Atlantic Co. Ltd., at the time of the mortgage transaction and it is the duty of the defence to prove it through a document like Exhibit D3 from Registrar of companies. It was not enough to prove that the plaintiff/and or his brothers were at one time or the other directors of the company. They have to prove that they were directors of the company at the time of the mortgage transaction in Exhibits P6 and D1. This they failed to do. The result is that I resolve this issue in favour of the plaintiff/appellant”.

8. The Court of Appeal erred in law when it held as follows:
“..... There is no indication of when he became the director or when he acquired his shares. There is also no other member of the Bouari family as one of the directors. It was therefore wrong for the learned trial Judge to proceed on the assumption that because of William Bouari’s directorship all male children of Lutfallah Bouari, were directors. Furthermore, there is no indication of when William Bouari became a director. Was he a director as at the time the property in dispute was mortgaged? There was no evidence in that respect and the onus was on the defence to establish that at the time Exhibits D6 and D1 were executed William Bouari, was one of the directors”.

9. The Court of Appeal erred in law by holding that there was no evidence of any transaction between the Trans Atlantic Co. Ltd., and the 1st appellant when the statement of account Exhibit D2 shows that Trans Atlantic Co. Ltd., is indebted to the 1st appellant in the sum of N7 Million.

10. The Court of Appeal erred in law when it held as follows:
“..... There is ample evidence in support of this finding and conclusion and the point needs no further discussion. The finding is also consistence (sic) with the customary law of Ibadan where the property is situated or the law in Lebanon as testified to by the plaintiff. And it is settled law that until a person who owns a landed property dies his children cannot dispose of the property without his authority or consent. And any purported sale, pledge or mortgage of a property by a person who is not owner will be caught by the principle of nemo dat Qua (sic) non habet and such transaction will be null and

void”.

11. The Court of Appeal erred in law when it held as follows:

“.....It is my conclusion therefore that in 1963 and 1968 when the mortgage transaction (sic) were made the owner of the properties in dispute was still alive and in the absence of any authority to do so in the Power of Attorney Exhibit P3 or any other authority, Emile Bouari, either acting alone or in conjunction with other children of the Lutfallah Bouari had not the power to mortgage the property in dispute”.

The claims of the respondent as appears at paragraph 38 of his Statement of Claim at pages 36 and 37 of the Records, read as follows:

“(i) Declaration that the purported mortgage of the plaintiff’s family property known and described as No. 80, Lebanon Street, and No. 30, Oba Adebimpe Street, Gbagi, Ibadan if any is unlawful, illegal, null and void and of no effect.

(ii) Declaration that the said plaintiff’s family property known and described as No. 80, Lebanon Street, and No.30, Oba Adebimpe Street, Gbagi, Ibadan can not be mortgaged or charged for indebtedness or liability of any individual or institution without the knowledge and consent of members of the family.

(iii) Declaration that the purported mortgage of the property known as 80, Lebanon Street, and or 30, Oba Adebimpe Street, Gbagi, Ibadan or any part thereof is *ultra vires*, the Power of Attorney dated 5th November, 1962 and registered as 56/56/564 and is therefore unlawful, wrongful, ineffectual, null and void.

(iv) An order directing the 1st defendant/ respondent to release the title deed of the said plaintiff’s family property known as No.80, Lebanon Street, and No.30, Oba Adebimpe Street, Gbagi, Ibadan or any other document relating thereto, to the plaintiff forthwith.

(v) Declaration that the defendants can not dispose of the plaintiff’s family property known as No.80, Lebanon Street, and No.30, Oba Adebimpe Street, Gbagi, Ibadan without complying with the provisions of the Land Use Act, 1978 and the Auctioneers Laws of Oyo State.

(vi) Injunction restraining the defendants by themselves their

agents, servants and or privies otherwise howsoever from selling or disposing of, the plaintiffs family property known as No.80, Lebanon Street, and or No.30, Oba Adebimpe Street, Gbagi, Ibadan or in anyway interfering with the plaintiff's family or their agents possession thereof."

The appellants who were the defendants filed a Statement of Defence which appears at pages 40 and 41 of the Records. After hearing evidence and addresses of learned counsel for the parties, the learned trial Judge - Arasi, J., in a considered judgment delivered on 3rd October, 1997, dismissed all the claims/reliefs of the respondent except relief No (i). His Lordship, concluded thus:

"In the result, and for all the reasons earlier stated by me, it is my judgment that the plaintiff partially succeeds in his claim against the defendants. I hereby make the following orders:

(a) Declaration that the purported mortgage of the property known as 80, Lebanon Street. Gbagi,

Ibadan or any part thereof is ultra vires the Power of Attorney dated 5th November, 1962 and registered as 56/56/564 and is accordingly unlawful.

(b) All the other legs of the plaintiff's claim are hereby dismissed."

As stated earlier in this judgment, the appeal by the respondent to the court below, was successful, while the cross-appeal of the appellants, was dismissed. The appellants have formulated eight (8) issues for determination which have been adopted by the respondent. They read as follows:

"(1) Whether the amended notice of appeal of the respondent dated June 1st, 2000 and filed in court on November 1st, 2000 against the decision of the Ibadan High Court of October 3rd, 1997 was valid in the absence of an order of the court extending time to file it out of time.

(2) Whether having regard to the provision of Section 36(1) of the 1999 Constitution relating to fair hearing, the Court of Appeal was right by not allowing the appellants' counsel to address the court on the application of the appellants for leave for further address on the issue of the jurisdiction of the court to entertain the appeal of the respondent in view of the incompetent and

invalid amended notice of appeal of the respondent.

(3) *Whether the Court of Appeal was right by dismissing the cross-appeal summarily and without making finding on the issues of law that were raised in the appellants' cross-appeal and expatiated in the Brief of Argument that the donee of the Power of Attorney has been held out and his action ratified and that his personal representative ought to have been joined in the action to impeach the Power of Attorney.*

(4) *Whether the Court of Appeal was right by not making finding on the issue of the invalid of the amended notice of appeal of the respondent that was raised by the appellants in their Brief of Argument on the ground that all the issues contained therein did not feature in the pleading of the respondent and were not canvassed at the court below and leave of the court was not obtained to canvass them.*

(5) *Can the judgment of the Court of Appeal stand having regard to the failure of the Court of Appeal to make finding on the issue that was raised in the appellants' Brief of Argument that it will be an open fraud to allow the respondent and his company to escape with N7 Million as shown in Exhibit D2 and in respect of which issue was never joined by the respondent.*

(6) *Whether the court can adjudicate on the issue that is not raised in the pleading and if the answer is in the negative whether the decision of the Court of Appeal that there is no evidence that the respondent and his brothers are directors of the Trans Atlantic Co. Ltd at the time of the mortgage transaction is not perverse having regard to the fact that the issue did not arise for the consideration of the court on the state of the pleadings.*

(7) *Whether the Court of Appeal was right by holding that there is no evidence of any transaction between the 1st appellant and Trans Atlantic Co. Ltd., even with the statement of account Exhibit D2 that shows that the Trans Atlantic Co. Ltd., is indebted to the 1st appellant to the tune of over N7 Million.*

(8) *Whether there is credible evidence on the record in support of the Lebanese Customary Law of succession and if the answer is in the negative whether the decision of the Court of Appeal that there is evidence in support of Lebanese Customary Law of succession is not perverse having regard to the fact that issue was never joined in the*

pleading that Emile Bouari, had been held out and his action in executing the deeds of legal mortgage ratified."

On 20th November, 2007, when this appeal came up for hearing, Aluko, Esq., - learned counsel for the appellants, moved their motion for substitution of the 1st appellant with Unity Bank PLC., which was duly granted by the court. He adopted their Brief filed on 26th September, 2002 and referred to the Reply Brief of the appellants filed on 29th July, 2004 in respect of the Objection of the respondent on the issue of jurisdiction. He also adopted the same. He referred to pages 13-16 in relation to issue 6 and cited and relied on Nos. 3 and 5 cases in their list of authorities -i.e. R.E.A.N. Ltd, v. Aswani Textile Ltd. (1991) 2 NWLR (Pt. 176) 639 at 673 and Ifayanneyin v. Omomowo (1992) 5 NWLR (Pt.239) 30 at 37. He also referred to issue 2 at pages 6 to 8 of their Brief of Argument and cited and relied on their case of No.9 on the list of authorities - i.e. Alabi v. Amoo (2003) 7 S.C. 154 at 164. He finally urged the court, to allow the appeal.

Esan, Esqr., - learned counsel for the respondent, referred to the respondent's Brief filed on 28th June, 2004 and the respondent's objection to the appellants' Reply on issue of jurisdiction filed on 12th April, 2005. He adopted the two Briefs and informed the court that on 7th June, 2004, they filed the proceedings of the court below which he said was missing. He urged the court to dismiss the appeal. Thereafter, judgment was reserved till to-day.

I will not bother myself, going into the "respondent's objection to the appellants' Reply on the issue of jurisdiction and the raised for the first time". This is because, in my respectful view, going into the same, will amount to an exercise in futility as it has, with respect, no relevance to the real issue in controversy in the case leading to the instant appeal. For example, the issue of the capacity in which the respondent sued, was not an issue in the two lower courts and being raised for the first time in this court without the leave of the court, renders it incompetent. Again, there is no Ground of Appeal in respect thereof. I agree with the respondent in the submission that this court, sits on appeal in respect of decisions or pronouncements of the court below and will therefore, not entertain any question in which there was no decision or pronouncement by the court below. **Again**

and this is settled, a member of the family, can sue, to protect or defend the interest of the property of the family in respect of any property. See Coker v. Oguntola & Ors. (1985) 1 ANLR (Pt. 1) 278. ***If he has not the authority of the family to bring the action, the family, would or will of course, not be bound by the result, unless for some reasons, the family is/was estopped from denying that the action was binding.*** See Sogunle & Ors. v. Akerele & Ors. (1967) NMLR 58 at 60, Animashaun v. Osuma & Ors. (1972) 4 S.C. 200 at 214; (1972) 4 S.C. (Reprint) 180, Ugwu v. Agbo (1977) 10 S.C. 27, 40; (1977) 10 S.C. (Reprint) 18 and AlhaJi Gegele v. Alhaji Layinka & 6 Ors. (1993) 3 SCNJ 39. My conclusion therefore, is that the said objection is grossly irrelevant and it is accordingly, dismissed.

I will now deal with the said issues of the appellants adopted by the respondent.

ISSUE (I)

With respect, this issue is completely misconceived. As rightly submitted by the respondent in his Brief, I note at page 148 of the records, that the court below, granted to the defendant/respondent all his three prayers which included an extension of time within which to file an amended notice of appeal. In the additional records filed in this court on 7th June, 2004, the following appear at page 4 thereof, inter alia:

“Court: Order as prayed. Prayers a, b, c and d are granted. Time is hereby extended by 14 days from today to file all the processes prayed for in this application.....”

The above order, was made on 26th October, 2000, in respect of the said application that was filed on 1st June, 2000. I also note that the said application, was not opposed by the learned counsel for the respondents/appellants - Aluko, Esq., who asked for and was awarded N2,000.00 (Two Thousand Naira) costs. The said amended notice of appeal, was filed on 1st November, 2000 within the fourteen (14) days period so granted.

As a matter of fact, an amended notice of appeal, is certainly not a new notice of appeal. This is because and this is also firmly settled that an amendment, relates back to the date in which the document, was originally filed just like an Amended

Statement of Claim. In other words, it is retrospective. (See the cases of *Grace Amanambu v. Okafor* (1966) 1 All NLR 205, *Rotimi v. McGregor* (1974) 11 S.C. 133 at 152; (1974) 11 S.C. (Reprint) 102 - per Coker, JSC., *Madam Salami & Ors. v. Oke* (1987) 9-11 S.C. 43 (not 45) at 67; (1987) 9-10 SCNJ 27, *Katto v. Central Bank of Nigeria* (1999) 5 S.C. (Pt.II) 21 (1999) 5 SCNJ 1 at 21; (1999) 6 NWLR (Pt. 607) 370, *Ajakaiye & Anor. v. Adedeji & Anor* (1990) 7 NWLR (Pt. 161) 192 at 207 CA., also cited and relied on in the respondent's Brief are the English cases of *Sneade v. Wotherton Barytes and Leading Mining Co.* (1904) 1 KB 295 at 297 and *Warner v. Sampson & Anor.* (1959) 1 QB 297.

More importantly, Order 3 Rule 16 of the Court of Appeal Rules, 1981 (As Amended) and which was applicable at the time the appeal was heard by the court below, and also referred to in the respondent's Brief, provides as follows:

"A notice of appeal or respondent's notice may be amended by or with leave of the court at any time."

(the underlining mine)

The above provision, is very clear and unambiguous and therefore, need no interpretation. In other words, there is no time limit within which to do so. So, there is no question of the said amended notice of appeal, being a nullity. I therefore, resolve this issue against the appellants and in favour of the respondent. In other words, the said amended notice of appeal, was/is valid and there was/is an order of the court below duly extending the time to so file it out of time which was accordingly so filed within the said extended time. Again, having regard to the provisions of the said Order 3 Rule 16 of the said Rules, the issue, I repeat with respect, is absolutely and completely misconceived and most irrelevant.

ISSUE (2)

This issue which is said to be relevant to Ground 2 of the Grounds of Appeal, is totally, at variance with the said ground which I have earlier in this judgment, reproduced. The Ground of Appeal, complains that "the Court of Appeal erred in law by not resolving the issue of its jurisdiction to entertain the appeal.....". ***What is more, in my respectful view, it was certainly not necessary to hear an ad-***

dress, as it clearly did not arise. At page 197 of the Records, the court below - per Akintan, JCA., (as he then was), struck out the notice of Preliminary Objection for being incompetent on the ground that it was not brought at least three (3) clear days before the date fixed for the hearing of the appeal. The court below relied on Order 3 Rule 15(1) of the Rules of that court. It was right to do so. See recently/ the case of Tiza & Anor. v. Begha (2005) 5 S.C (Pt.II) 1; (2005) 5 SCNJ 168 at 178 citing the case of Nsirim v. Nsirim (1990) 5 S.C. (Pt.II) 94; (1990) 3 NWLR (Pt.138) 295; (1990) 5 SCNJ 174 and two other cases therein. **I note that there is no appeal against the said decision of the court below and it is therefore, binding on the appellants as it subsists.** See the cases of Ejiwhomo v. Edet-Eter Mandillas Ltd. (1986) 9 S.C. 41 at 47 and recently, Dabo v. Alhadi Abdullahi (2005) 2 S. C. (Pt. 1) 75 at 91; (2005) 7 NWLR (Pt. 923) 181; (2005) 2 SCNJ 76 at 95.

As it stands, there is no valid ground of appeal which this issue 2 is related to or formulated from and the said issue, being at variance with the said Ground 2 of the Grounds of Appeal, is deemed in law, as having been abandoned as rightly submitted in the respondent's Brief citing and relying on the cases of Fasoro & Anor. v. Beyioku & Ors. (1988) 2 NWLR (Pt.76) 263 at 270 - 271 (it is also reported in (1988) 4 SCNJ 23), and Attorney-General. Bendel State & 2 Ors. v. Aideyan (1989) 9 S.C. 127; (1989) 4 NWLR (Pt.118) 646 at 665 (it is also reported in (1989) 9 SCNJ 80). See also the cases of Captain Amadi v. NNPC (2000) 6 S.C. (Pt.1) 66; (2000) 10 NWLR (Pt.674) 76; (2000) 6 SCNJ 1; (2000) FWLR (Pt. 9) 1527 and (2000) WRN 47 and Adelusola & 4 Ors. v. Akinde & 3 Ors. (2004) 5 S.C. (Pt.II) 71; (2004) 12 NWLR (Pt.887) 295 at 311; (2004) 5 SCNJ 235 at 246/ Falola v. Union Bank of Nigeria Plc. (2005) 2 S.C (Pt. II) 62; (2005) 2 SCNJ 209 and Archbishop Jatau v. Alhadi Ahmed & 4 Ors. (2003) 1 S.C. (Pt.II) 118; (2003) 1 SCNJ 382 at 388, just to mention but a few. **I therefore, discountenance the said issue and the result, is that both the issue and the Ground of Appeal on which it is based, being incompetent, are accordingly struck out.**

ISSUE (3)

In my respectful view, it is unfair to say that the court below, dismissed the cross-appeal of the appellants, summarily. I note that at pages 143 of the Records, what appears therein, is an appeal against part of the trial court's judgment - i.e.

"PART OF THE DECISION COMPLAINED OF:

The portion of the judgment that the validity of the Power of Attorney can be determined without the presence of donor and donees (sic) (meaning donee)" ^B

As a matter of fact, the court below, considered the Grounds of Appeal - six (6) by the respondents and two (2) by the appellant and the issues formulated by the parties and formulated or reformulated its own issues for determination. It formulated three (3) issues for determination and at page 203 thereof stated inter alia, as follows: ^C

"The arguments contained in the appellant's other issues and the respondents' issues can conveniently be subsumed in these three issues." ^D

Of course, ***it is now firmly settled that a court, can and is entitled to re-formulate issue or issues formulated by a party or parties or counsel in order to give it precision and clarity.*** ^E See the cases of Okoro v. The State (1988) 12 S.C. 191; (1988) 12 S.C (Pt.II) 83; (1988) 12 SCNJ 191 Latunde & Anor. v. Bello Lajinfin (1989) 5 S.C 67; (1989) 5 SCNJ 59, Awojugbagbe Light Industries Ltd. v. P.N. Chinukwe & Anor. (1995) 4 NWLR (Pt.390) 379; (1995) 4 SCNJ 162, Ogunbiyi v. Ishola (1996) 6 NWLR (Pt 452) 12 at 24; (1996) 5 SCNJ 143 and Lebile v. The Registered Trustees of Cherubim & Seraphim Church of Zion of Nigeria Uqbobla & 3 Ors. (2003) 1 S.C. (Pt. I) 25; (2003) 1 SCNJ 463. ***It is now firmly settled that the purpose of reframing issue or issues, is to lead to a more judicious and proper determination of an appeal. In other words, the purpose, is to narrow the issue or issues in controversy in the interest of accuracy, clarity and brevity.*** ^F See the case of Musa Sha (Jnr.) & Anor. v. Da Rap Kwan & 4 Ors. (2000) 5 S.C. 178; (2000) 5 SCNJ 101. ^G

It need be stressed and this is also settled that as long as the issue or issues re-framed, is/are anchored on the ground or Grounds of Appeal, the opposite party, cannot complain. ^H

See Ogbuanyinya & Ors. v. Okudo & Ors. (No.2) (1990) 7 S.C. (Pt.1) 66; (1990) 4 NWLR (Pt.146) 551; (1990) 7 SCNJ 29 and Bankole & Ors. v. Pelu & Ors. (1991) 11-12 S.C. 116; (1991) 8 NWLR (Pt.211) 523; (1991) 11 SCNJ 108. In Musa Shar's case (supra), Uwaifo, JSC., (as he then was) stated that it would be a misconception to argue that a court, cannot, suo motu re-formulate an issue arising from a Ground of Appeal if the interest of justice demands this. That a court, must have the authority to do that when the Grounds of Appeal and argument canvassed, permit such a re-formulation if the issue formulated by the appellant or respondent, appears awkward or not well framed. See the observation or comment of this court in the case of Akpan v. The State (1992) 6 NWLR (Pt.248) 439 at 466; (1992) 7 SCNJ 22.

In my respectful view, the said issue formulated by the court below, were/are germane to the issues in controversy. The learned counsel for the respondent in their Brief, has stated that "It will be seen that the issues formulated for determination had no relevance to the Grounds of Appeal filed by the appellants in the court below". I agree with him, that the issues distilled by the court below, fitted into the two Grounds of Appeal in the cross appeal of the appellants. I also agree with him that before giving its final decision, the court below, related the said issues so distilled by it, to the arguments before it.

This must be so because, it is now firmly established, that an appeal, is decided upon the issues formulated for determination. In other words, when an issue or issues for determination are formulated, the Ground of Appeal upon which it or they are based, are extinguished so to say and are replaced by the said issue or issues so raised and no longer on the grounds. See the cases of Sanusi v. Ayoola (1992) 9 NWLR (Pt.265) 275; (1992) 11-12 SCNJ 1423 and Saliba v. Yassin (2002) 2 S.C (Pt.1) 15; (2002) 2 SCNJ 14 at 24 - per Katsina-Alu, JSC.

In other words, a Ground of Appeal, must have an issue to cover it and argument is proffered to cover the issue. Any Ground of Appeal not having any argument proffered on the issue distilled therefrom, is deemed abandoned and such an

issue, is or ought to be struck out with the Ground of Appeal. See the cases of *Akinsanya v. Longman* (1996) 3 NWLR (Pt.436) 303, *Ibrahim v. Mohammed* (1996) 3 NWLR (Pt.437) 453, *Dieli & Ors v. Iwuno & Ors.* (1996) 4 NWLR (Pt 445) 622 and *Ogun v. Asemah* (2002)4 NWLR (Pt.256) 208. **Afterwards and this is also settled, an issue, is a point that has arisen in the pleadings of the parties which forms the basis of the dispute or litigation which requires resolution by a trial court.** See the cases of *Metal Construction (W.A.) Ltd. v. Milgliore & Ors.* (vice versa) (1990) 2 S.C 33; (1990) 1NWLR (Pt. 126) 299; (1990) 2 SCNJ 20, *Egbe v. Alhaji & 2 Ors.* (1990) 3 S.C. (Pt. 1) 63; (1990) 1 NWLR (Pt.128) 546; (1990) 3 SCNJ 41 and *Ishola v. Ajiboye* (1998) 1 NWLR (Pt. 532) 71.

From page 203 to the first paragraph of page 205 of the Records, the court below - per Tabai, JCA., (as he then was), reviewed the said three issues and from the second paragraph of page 205 up to page 208 thereof, His Lordship, considered all the said three issues and in conclusion, allowed the appeal and set aside the said judgment of the trial court. The cross-appeal was also dismissed. I see nothing wrong with the said decisions. Since I have found and held that the court below, never dismissed the cross-appeal summarily but on painfully, considering the said issues formulated by it, this issue 3, in my respectful view, is completely misconceived and I accordingly discountenance it.

ISSUE (4)

This issue in my respectful view, is in substance, the same with or similar to issue 1 already dealt with by me in this judgment although differently couched. I therefore, ignore it together with all the arguments proffered in respect thereof and strike it out as being of no moment. I have, while considering issue 1, held that the amended notice of appeal, is not invalid and I cannot declare to be so as again urged by the appellants in their Brief.

ISSUE 5

The appellants complain in their Brief that,

“the respondent, did not file a Reply Brief to join issue with the appellant on the issue that was raised in the appellants’ Brief at the court below that it will be an open fraud and injustice to allow the 1st

appellant to loose (sic) (lose) N7 Million and the respondent and his Company to escape with N7 Million and under Order 6 Rule 10 of the Court of Appeal (Amendment) Rules, 1984 the respondent is deemed to have conceded to the point”.

In a line of decided authorities, it has been held that the failure of a respondent to file a Reply Brief, is immaterial. This is because, an appellant, will succeed on the strength of his case. But a respondent, will be deemed to have admitted the truth of everything stated in the appellant’s Brief in so far as such is borne out by the Records. In other words, it is not automatic. An appellant, must succeed or fail on his own Brief.
 See the cases of John Holt Venture Ltd, v. Oputa (1996) 9 NWLR (Pt.470) 101 CA.; Onyejekwe v. The Nigeria Police Council (1996) 7 NWLR (Pt.463) 704 CA, Waziri v. Waziri (1998) 1 NWLR (Pt.533) 322 CA. and UBA Plc, v. Ajileye (1999) 13 NWLR (Pt.633) 116 C.A., Just to mention but a few.

However, the appellants submit in their Brief that the court below, ought to have dismissed the appeal summarily because according to them, issue of fraud, cannot be glossed over. I have stated earlier in this judgment that the court below, formulated three issues for determination and decided on each of them. At page 7/206 of the Records, the following appear, inter alia:

“.....There is no indication of when he became the director or when he acquired his shares. There is also no other member of the Bouari family as one of the directors. It was therefore wrong for the learned trial Judge to proceed on the assumption that because of William Bouari’s directorship, all male children of Lutfallah Bouari, were directors. Furthermore, there is no indication of when William Bouari became a director. Was he a director as of the time the property in dispute was mortgaged? There was no evidence in that respect and the onus was on the Defence to establish that at the time Exhibit D6 (sic) (p6) and PI were executed William Bouari was one of the directors .”

(the underlining mine)

At page 8/207, the court below, stated inter alia, as follows:

“There was no evidence as himself and his brothers were any such directors at the time of any transaction between the Trans Atlan-

tic Co. Ltd., and the 1st defendant. Here the learned trial Judge purported to rely on evidence that never came from the plaintiff to destroy his case. There was even no evidence of any transaction between the Trans Atlantic Co. Ltd., and the 1st defendant.

In conclusion I hold that in view of the above considerations the findings of the learned trial Judge about the plaintiff and his brothers being directors of the Trans Atlantic Coy. Ltd., at the time of the mortgage transaction and the conclusions or decisions based, thereon are perverse and this court should necessarily interfere. It is the defence assertion that the plaintiff and his brothers were directors/shareholders of Trans Atlantic Co. Ltd., at the time of the mortgage transaction and it is the duty of the defence to prove it through a document like Exhibit D3 from Registration of Companies. It was not enough to prove that the plaintiff and/or his brothers were at one time or the other directors of the company. They have to prove that they were directors of the Company at the time of the mortgage transaction in Exhibit D6 (sic) p.6 and D1. This they failed to do. The result is that I resolve this issue in favour of the plaintiff/ appellants (the underlining mine)

I am unable to fault the above findings of fact and holdings because they are borne out from the Records. I agree with the submission in his Brief that the learned trial Judge's finding on the issue of directorship of Trans Atlantic Co. Ltd., and consequent upon which the learned trial Judge, refused claim No.4 of the plaintiff/respondent and came to the conclusion that it would be a travesty of justice to grant that claim/relief, when Trans Atlantic Co. Ltd., was owing about N7 Million (Seven Million Naira), was exactly, what the court below held to be perverse. I also agree with the respondent in his Brief that it will be wrong and in fact with respect, a gross misconception, to assert as the appellants have done in Ground 6 of the Grounds of Appeal and in this instant issue, that the court below, did not make a finding on their said complaint when I have demonstrated in this judgment, that it did.

ISSUE (6)

This issue, is a surprise package to me so to speak. Firstly, the appellants at page 14 of their Brief, stated inter alia, as follows:

“At page 40 of the record lines 4, 5, 6 and page 41 line 17 of the record the appellant (sic) made it an issue that Edward Bouari, Lutfallah Bouari, Emile Bouari and William Bouari are members of the board of directors of the Trans Atlantic Co. Ltd., and that Trans Atlantic Co. Ltd., is indebted to the first defendant. It was further stated at page 40 line 6 that members of the Bouari family are the shareholders in the Trans Atlantic Co. Ltd., and the property of Lutfallah Bouari was mortgaged to secure the account of the Trans Atlantic Co. Ltd.”
(the underlining mine)

It is then submitted that the respondent, did not file a Reply to the Statement of Defence to join issue with the appellants in respect thereof. I have reproduced the claims of the respondent in this judgment and claims (i), (ii) and (iii), are quite clear and relevant. What is more, the pleadings of the respondent in paragraphs 24, 25 and 29 at page 35 of the Records, read as follows:

“24. None of the members of Bouari family had knowledge of any mortgage between Bank of the North Ltd, in respect of plaintiff’s said family property or any part thereof by Emile Bouari or anybody.

25. The plaintiff’s late father Mr. Lutfallah Bouari, did not keep any account with Bank of the North Limited.

29. The plaintiff will contend that the Power of Attorney donated to Emile Bouari did not authorize him or any person to pledge any of the properties for his indebtedness or that of any other person or institution and that the consent of other members of Bouari family was neither sought nor got for any mortgage.”

I note that the appellants, never filed any counter-claim in which case, the respondent, should have filed a defence. From the above pleadings, I wonder what other “Reply”, the appellants, expected the respondent to file which will amount to any other joining of issues. If anything, in my respectful view, it is in fact the appellants, who had joined issues in respect of the above said pleadings of the respondent. This is why I stated that this issue, is a surprise to me. It is now firmly settled as rightly submitted in the respondent’s Brief, that **the proper function of a reply, is to raise in answer to the defence,**

any matter which must be specifically pleaded, which make the defence not maintainable or which otherwise might take the defence by surprise or which raise issue of fact not arising out of the defence. The case of *Akeredolu & Ors. v. Akinremi & Ors.* (1989) 5 S.C. 102; (1989) 3 NWLR (Pt.108) 164 at 172 (it is also reported in (1989) 5 SCNJ 71) is cited in support and relied on. B

In other words and this is also settled, that a Reply, is used by a plaintiff, to answer new issues raised in the Statement of Defence such as in cases of confession and avoidance. It is therefore, not necessary to file a Reply if its only purpose, is to deny the allegations of fact made in the Statement of Defence because of the principle of joinder of issues. Where no counter-claim is filed, a Reply, is generally unnecessary if it is also to deny allegations in the Statement of Defence. After the completion of pleadings, issue is or issues are said to be joined and the case is ready for hearing. Such a joinder of an issue, operates as a denial of every allegation of fact in the pleadings upon which the issue has been joined. (See also *Principles of Practice & Procedure in Civil Actions in the High Courts in Nigeria* by T. Akinola Aguda paragraph 110; paragraph 18.06 of High Court and Supreme Court and the cases of *Dabup v. Kola* (1993) 9 NWLR (Pt.317) 254 at 270, 281; (1993) 12 SCNJ 1; *Umenyi v. Ezeobi* (1990) 3 NWLR (Pt.140) 621 CA, *Obot v. Central Bank of Nigeria* (1993) 8 NWLR (Pt.310) 140 at 162; (1993) 9 SCNJ (Pt. 11) 268). ***In fact, it is also settled that if no Reply is filed, all material facts alleged in the Statement of Defence, are put in issue. A Reply to merely join issues, is therefore, not permissible.*** C

From the above principles, learned counsel for the appellants, D
can now perhaps, see and appreciate that he was standing with respect, on quick sand when he submitted that,

“On the state of the pleadings of the parties the issue that the respondent and the members of his family are not directors of the Trans Atlantic Co. Ltd., at the time of the mortgage transaction did not arise for the consideration of the court because the issue was not raised in the pleading.....” E

and also when it was submitted that -

“Furthermore the respondent did not raise the issue in his plead-

ing that at the time of the mortgage transaction the respondent and members of his family are not the directors of the company that enjoyed the overdraft facility.”

I am sure that either the learned counsel, did not advert his mind to the above pleadings in the said paragraphs 24, 25 and 29 or that he deliberately, wanted to draw wool into the “eyes” of the court. It is unfortunate. It is even noted by me that the respondent, led evidence in support of the said averments in the said paragraphs 24, 25 and 29 of the Statement of Claim. See page 68 line 23 to 30 where he swore as follows:

“.....My father never mortgaged any of his properties to the Bank of the North. I know Trans Atlantic Company Limited. My father was not a director of that Company, my father was also not a share holder of that company. I never knew that our family property at 80, Lebanon Street, and 30, Oba Adebimpe Road, had been mortgaged to the defendant until our family tenants saw the auction notice placed on the walls which they removed and brought to us.....”

(the underlining mine)

The court below, was therefore, justified, when it held that it was the duty of the appellants, to prove that the plaintiff/ respondent and/or his brothers, were directors of the Company at the time of the mortgage transaction in Exhibits P6 and the lease in DI, but that they failed to so prove.

Again, the said contention of the appellants at page 14 paragraph 3 of their Brief, that the issue of directorship of the said Company at the time of the mortgage transaction, did not arise for consideration of the trial court because, according to them, the issue was not raised in the pleading or canvassed at the court below but that it emerged as a fresh issue in the Ground of Appeal of the respondent even without leave of the Court of Appeal obtained to canvass it at the hearing of the appeal, to say the least and with respect, is bogus and baseless.

At page 129 of the Records - last paragraph, the learned trial Judge, stated *inter alia*, as follows:

“I therefore find as a fact and so hold that Emile Bouari, Edward Bouari and William Bouari, as members of the Board of Trans

Atlantic Company Ltd.. were aware or were deemed to be aware that the properties of Lutfallah Bouari, had been mortgaged to the 1st defendant.....”

As rightly submitted in the respondent’s Brief under paragraph G4, it was the above findings, that gave rise to the respondents’ ground 2 of their notice of appeal in the court below and it will therefore, not be correct and I will add that it will be misleading, with respect, when the appellants, asserted as shown by me in this judgment, that the issue, emerged as a fresh issue in the ground of appeal of the respondent. This is why, there is the utmost need, for all learned counsel, to cross-check the records of proceedings thoroughly, before making unsubstantiated or baseless assertions in the Briefs they file in this court.

I will end this issue by agreeing with the respondent in his Brief that the case of Oladipo v. Bank of the North Ltd. (2001) 1 NWLR D (Pt.694) 225 at 266, which the appellants assert, bind the respondent in that the judgment is against the sub-lease of the respondent, is totally irrelevant to the instant case before the court below sitting in its appellate jurisdiction. The said issue with respect, is a non-issue in that it was not only raised in the pleadings of the plaintiff/respondent, but it was also dealt with and a finding of fact was made by the trial court and on appeal, the court below, set aside the said finding. Indeed, Exhibit P6, is/was on the face of it, a straight deal or transaction between Emile Bouari and the 1st appellant. Emile Bouari, purported therein, to act on behalf of Lutfallah Bouari. It has no reference whatsoever to Trans Atlantic Co. Ltd., as to make directorship of the Company an issue in the circumstances as rightly submitted in the respondent’s Brief. I agree with the respondent that Exhibit P6, was not expressed to be executed in respect of a loan facility granted to Trans Atlantic Co. Ltd., at all. This was why the court below, stated at page 207 of the Records already reproduced by me in this judgment that -

“There was even no evidence of any transaction between the Trans Atlantic Co. Ltd., and the 1st defendant”.

In any case, I note that the two lower courts, decided that Exhibit P3 under which Emile Bouari, purported to enter into the mortgage transaction, did not confer such powers on him. Being concurrent

findings of fact, this court, cannot interfere or disturb the said finding.
ISSUE (7)

My answer straight away, is in the Negative having regard to Exhibit D2 which is the statement of account that shows that the Trans Atlantic Co. Ltd., is/was indebted to the 1st appellant to the tune of over Seven Million (N7 Million) Naira. I or one may then ask, so what? How did the slip or error, assist or enhance the appeal of the appellants? In my respectful view, I agree with the respondent in his Brief that the issue, is purely academic and this court, never engages itself in academic exercise. ***It is now settled as rightly submitted in the respondent's Brief that, it is not every mistake or error in a Judgment, that will result in an appeal being allowed. An appellate court will only interfere when the error is substantial in that it has occasioned a miscarriage of justice.*** See the cases of Chief Oje & Anor. v. Chief Babalola & 2 Ors. (1991) 5 S.C. 128; (1991) 4 NWLR (Pt.185) 267 at 282 (it is also reported in (1991) 5 SCNJ 110; - per Nnaemeka-Agu, JSC, Oladele & 2 Ors. v. Oba Aromolaran II & 3 Ors. (1996) 6 NWLR (Pt.453) 180 at 234 (it is also reported in (1996) 6 SCNJ 1) and Alli & Anor. v. Chief Alesinloye (not Aleshinloye) & 8 Ors. (2000) 4 S.C. (Pt.I) 111; (2006) 6 NWLR (Pt.660) 177 at 213 (it is also reported in (2000) 4 SCNJ 264) - per Iguh, JSC., all cited and relied on by the respondent. See also the cases of Ukejianya v. Uchendu (1950) 13 WACA 45, Onajobi v. Olanipekun (1985) 4 S.C. (Pt.2) 156 at 163, Amoroti v. Agbeke (1991) 6 SCNJ 54 and Ike v. Ugboaja (1993) 6 NWLR (Pt.301) 539 at 556.

The appellants, as rightly stated by the respondent in the Brief, have not shown to this court, how the said statement of the court below, have made any difference or would have been different in the circumstances of this appeal. They have not also shown what prejudice or miscarriage of justice they have suffered or has been occasioned to them. Being an academic exercise, I ignore and discountenance the said issue.
ISSUE (8)

The real crux or pertinent issue in this case in my respectful view, is Exhibit P6. I note that the appellants, did not indicate or state

in their Brief, on what ground of the Grounds of Appeal, this issue was distilled or formulated. I take it to relate to ground 10 of the Grounds of Appeal. However, the important question, is whether the said Power of Attorney, conferred any power or authority on the donor or any other member of the respondent's family to enter into the purported mortgage transaction. In the first place, I have reproduced in this judgment, the declaration made by the learned trial Judge in his said judgment at page 135 of the Records. The court below at page 209 thereof, stated inter alia as follows:

"On the effect of this declaration it is my view that the validity or otherwise of the mortgage transaction is the key issue in this trial. Having resolved that issue in favour of the plaintiff all other reliefs should necessarily be granted."

(the underlining mine)

In other words, the trial court, having declared the said mortgage between Lutfallah Bouari and the 1st appellant - Exhibit P6, to be ultra vires the Power of Attorney - Exhibit P3 of 5th November, 1962 as unlawful, the trial court, ought not to have dismissed the other said claims of the respondent. Period! I agree. I observe that some of the arguments of the appellants in their Brief, are with respect, repetitions just as the court below found in its judgment, some of the issues and arguments in the Brief filed by the appellants in that court. Even in their Reply Brief, some of the arguments therein are repetitions. In the case of Calabar East Co-operative Thrift Credit Society Ltd. v. Etim E. Ikot (1999) 14 NWLR (Pt.638); (1999) 12 SCNJ 321 at 339, this court - per Achike, JSC., (of blessed memory), stated that repetitions, do not improve an earlier arid, weak and completely unacceptable argument.

My reading of the said Briefs of the appellants, have been tedious and energy sapping. The good news, however, is that I am bound to consider every Brief of the parties even if in-elegant or badly written. See the cases of *Chinweze & 2 Ors. v. Veronica Mar & Anor.* (1999) 1 NWLR (Pt.93) 254 at 265; (1999) 1 SCNJ 148. *Obiora v. Osele* (1989) 1 S.C. (Pt. II) 60; (1989) 1 NWLR (Pt.97) 278; (1989) 1 SCNJ 213 and *Tukur v. Government of Taraba State* (1997) 6 NWLR (PT.510) 549 at 569; (1997) 6 SCNJ 81, citing some other cases

therein.

In conclusion, I find no merit in this appeal and I accordingly, dismiss it. I hereby affirm the judgment of the court below. Costs follow the event. Costs of N10,000.00 (Ten Thousand Naira), are awarded in favour of the respondent payable to him by the appellants.

TOBI JSC

I have read in draft the judgment of my learned brother, Ogbuagu, JSC., and I agree with him that the appeal should be dismissed. The respondent was the plaintiff in the High Court. The appellants were the defendants. The dispute is in respect of property situate at No.30, Oba Adebimpe Street and 80, Lebanon Street, Ibadan. The case of the appellants is that the property of Lutfallah Bouari was mortgaged to the 1st appellant to secure the account of Trans Atlantic Co. Ltd., in which Bouari family has interest as directors. The case of the respondent is that the property is the family property of the respondent's family and that no member of the family had the authority to mortgage it to the 1st appellant.

The respondent sued, asking for six reliefs: four declaratory, one injunctive and one for an order directing the 1st appellant to release the property. The learned trial Judge granted the third leg of the appellants' claim and dismissed all others. Arasi, J., ordered at page 135 of the Record:

"In the result, and for all the reasons earlier stated by me, it is my judgment that the plaintiff partially succeeds in his claim against the defendants. I hereby make the following orders:

"(a) Declaration that the purported mortgage of the property known as 80, Lebanon Street, Gbagi, Ibadan or any part thereof is ultra vires the Power of Attorney dated 5th November, 1962 and registered as 56/56/564 and is accordingly unlawful.

(b) All the other legs of the plaintiff's claim are hereby dismissed."

The respondent appealed to the Court of Appeal. He sought leave to amend the notice of appeal and file additional grounds of appeal. According to the appellants, there was no order of the court

extending time to file the amended notice of appeal. Appellants cross-appealed. Both parties filed and adopted their Briefs. On 13th February, 2002. the appellants filed an application for leave for further address on the issue of jurisdiction of the court to entertain the appeal on the ground that the amended notice of appeal of the respondent was a nullity as it was filed out of time without leave of court. B The Court of Appeal, according to the appellants, struck out the Notice of Preliminary Objection and adjourned the case for judgment. The Court of Appeal dismissed the cross-appeal of the appellants and allowed the appeal of the respondent. Tabai. JCA., (as he then was), C in his judgment, concluded at page 209 of the Record:

"In conclusion, I allow the appeal. The judgment of the learned trial Judge dismissing the 1st, 2nd, 4th, 5th and 6th claims, is hereby set aside. In its place I enter judgment for the plaintiff/appellant in terms of the reliefs claimed in paragraph 32 of the Statement of Claim. D The cross-appeal is dismissed."

Dissatisfied, the appellants have come to the Supreme Court. Briefs were filed and duly exchanged. The appellants also filed a Reply Brief. The appellants formulated eight issues for determination. The respondent has adopted the issues. I ask: why eight issues in a simple and straightforward matter such as this? Appeals are not won on the quantity of issues. Appeals are won on the quality of issues formulated. E

Did the Court of Appeal grant the application for extension of time to file the amended notice of appeal? Did the respondent file the amended notice of appeal without an order of extension of time to do so? Appellants answered the questions in the negative. Respondent answered the questions positively. Who is correct? It is clear from page 4 of the additional record that the Court of Appeal granted G the respondent extension of time to file the amended notice of appeal. The order reads:

"Order as prayed. Prayers a, b, c and d are granted. Time is extended by 14 days from today to file all the processes prayed for in the application." H

And so, the appellants are wrong and the respondent is right.

The first issue I want to take is whether the Court of Appeal was right in striking out the Preliminary Objection on the notice of

appeal. The Preliminary Objection was to the effect that the Court of Appeal had no jurisdiction to grant extension of time for the appellants within which to file the amended notice of appeal. The appellants relied on five grounds. The Court of Appeal struck out the objection on the ground that it was not brought at least three clear days before the date fixed for the hearing of the appeal as required under Order 3 Rule 15(1) of the Court of Appeal Rules. The appeal was adjourned for judgment to 7th May, 2002.

I do not think the Preliminary Objection was well taken. Although the Court of Appeal did not go into the merits of the objection, it is my view that the objection had no merit. The notice of appeal is on an amended notice, which relates or dates back to the original date of the notice. It is therefore not a nullity. Accordingly, issue No.2 on fair hearing does not arise. Fair hearing is a potent and vibrant provision in the Constitution which is readily available to a party only in clear cases of denial. The constitutional power cannot be instigated against a party in the litigation in a beggarly way as in this case. Constitutional provisions are never begged to apply to cases. They apply as a matter of constitutionality or constitutionalism. They either apply or not. There cannot be a hybrid or ad hoc situation. The fair hearing provision in the Constitution, is an aggressive one; not a cowardly one. The objection fails and is therefore struck out. Learned counsel for the appellants argued that the Court of Appeal was wrong in dismissing the cross-appeal summarily without making finding on the issues of law that were raised in the appellants' cross-appeal and expatiated in their Brief of Argument. While I concede that a cross-appeal is an independent appeal, having a life of its own in the appellate process, it could have some affinity with the main appeal as they criss-cross. There are instances where a decision of the main appeal affects and in fact disposes of the crux or fulcrum of the cross-appeal. In such situations, it will be merely repetitive and will not serve any useful purpose for an appellate court to go over the arguments raised by the cross-appellant in his Brief. In such situations, and in order to avoid repetition and superfluity, an appellate court has the option to dismiss a cross-appeal summarily in the way the Court of Appeal did in this appeal. I do not see anything wrong procedurally in what the Court of Appeal did.

An appellate court is not under a regimental duty to take all the issues canvassed by the parties in the appeal. As a matter of procedure, the Court of Appeal can formulate issues for determination; and as long as the issues articulate and cover the grounds of appeal, this court will not censure the Court of Appeal. In the appeal before the Court of Appeal, that court did not go along with the many issues formulated by the parties. The court formulated the following three issues for determination: -

“1. Whether the learned trial Judge having ignored Exhibit D3 on the ground that it was not pleaded, was right in making use of the Attachment to the said exhibit in his judgment.

2. Whether Emile Bouari either acting alone or in conjunction with other children of Lutfallah Bouari, had the authority to mortgage the property of their father in his life time.

3. Whether the learned trial Judge was right to declare the mortgage deeds ultra vires the Power of Attorney dated 5th November, 1962 and registered as 56/56/564 and if so the effect if any on the other reliefs claimed.”

The Court of Appeal resolved the appeal in the light of the above three issues. I am in grave difficulty to fault the court.

Learned counsel for the appellants urged this court to invoke its Section 22 power and make a finding that the Court of Appeal should have made on the issue of open fraud involving N7 Million. I will obey him to some extent by invoking Section 22 of the Supreme Court. But I will not obey him full hog. I want to take the contrary position and it is that the issue of open fraud is not available to the appellants. I have gone through the pleadings and I do not see where the so-called open fraud involving N7 Million was pleaded. It is trite law that parties are bound by their pleadings and what is not pleaded will go to no issue. Pleadings provide the foundation of the case of the parties and anything outside the pleadings are to no avail.

Learned counsel for the appellants tried to fault the finding of the Court of Appeal that there was no evidence that the respondent and his brothers were directors of the Trans Atlantic Co. Ltd., at the time of the transaction between the Trans Atlantic Co. Ltd., and the 1st appellant. He pointed out that the appellants made it an issue that Edward Bouari, Lutfallah Bouari, Emile Bouari and William

Bouari, are members of the Board of Directors of the Trans Atlantic Co. Ltd., and that Trans Atlantic Co. Ltd., is indebted to the 1st defendant. It is one thing for a party to make an issue and it is quite another for the party to prove the issue by evidence. This procedural dichotomy is material and important. The Court of Appeal was understandably concerned with the latter; not with the former and so I ask why the furore?

In the law of pleadings, a Reply is only necessary where the pleadings (the Statement of Claim and the Statement of Defence) have joined issues. A Reply is necessary where a Statement of Defence raises a fresh issue which was not anticipated by the Statement of Claim. Where a Statement of Defence raises an issue which is already averred to in the Statement of Claim, a Reply is otiose and that is the point learned counsel for the respondent has made in the respondent's Brief, and I agree with him.

I think I can stop here. The appeal is dismissed. I award N10,000.00 costs in favour of the respondent.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, holden at Ibadan in appeal No.CA/I/159/98, delivered on the 9th day of May, 2002 in which the court allowed the appeal of the present respondent, then appellant against the judgment of the High Court of Oyo State holden at Ibadan in Suit No.1/128/92 delivered on the 3rd day of October, 1997.

On the 5th day of February, 1992, the respondent took out a Writ of Summons against the appellants for himself and on behalf of Bouari family claiming the following reliefs:-

“(i) Declaration that the purported mortgage of the plaintiff's family property known and described as No.80, Lebanon Street, and No. 30, Oba Adebimpe Street, Gbagi. Ibadan if any is unlawful, illegal, null and void and of no effect.

“(ii) Declaration that the said plaintiff's family property known and described as No.80, Lebanon Street, and No.30, Oba Adebimpe Street, Gbagi. Ibadan cannot be mortgaged or charged for indebtedness or liability of any individual or institution without the knowl-

edge and consent of members of the family.

(iii) Declaration that the purported mortgage of the 20 property known as 80, Lebanon Street, and or 30, Oba Adebimpe Street. Gbagi, Ibadan or any part thereof is ultra vires the Power of Attorney dated 5th November, 1962 and registered as 56/56/564, and is therefore unlawful, wrongful, ineffectual, null and void. B

(iv) An order directing the 1st defendant to release the title deed of the said plaintiff's family properly known as No.80. Lebanon Street and No.30, Oba Adebimpe Street, Gbagi, Ibadan or any other document relating thereto, to the plaintiff forthwith. C

(v) Declaration that the defendants cannot dispose of the plaintiff's family property known as No.80, Lebanon Street, and No. 30, Oba Adebimpe Street, Gbagi, Ibadan without complying with the provisions of the Land Use Act, 1978 and the Auctioneers Laws of Oyo State. D

(vi) Injunction restraining the defendants by themselves their agents, servants and or privies otherwise howsoever from selling or disposing of, the plaintiff's family property known as No.80, Lebanon Street and or No.30, Oba Adebimpe Street. Gbagi. Ibadan or in anyway interfering with the plaintiff's family or their agents' possession thereof." E

The property in dispute originally belonged to Lutfallah Bouari, a Lebanese by birth who settled in Nigeria sometime in 1923. He had four (4) children namely Emile, who was the eldest son; Edward who is the respondent in the appeal, William and Mrs. Odette Hereiki. Prior to his death in 1986, Lutfallah Bouari, appointed Emile, as his attorney to whom he donated powers, Exhibit P3 in November, 1962 by virtue of which powers Emile, kept all the title deeds and other documents relating to their father's properties. There is nothing to show that during his life time Lutfallah Bouari kept any money with the 1st appellant as his banker neither was he indebted to the 1st appellant in any way. F G

On the 20th day of March, 1963, Emile, executed a legal mortgage Exhibit P6 in respect of the property in issue in favour of the 1st appellant to secure a loan transaction between the parties. There is no evidence that the other three (3) children of Lutfallah Bouari, knew of the mortgage transaction until sometime in 1992 H

when tenants of the respondent's family residing in the properties saw auction notices Exhibit P5 fixed on some of the buildings on the land. A search at the Land Registry disclosed the existence of Exhibit P6 which bore a signature not belonging to Lutfallah Bouari, but Emile.

B On the other hand, it is the case of the appellants that Edward, the present respondent; Lutfallah, Emile and William are members of the Board of Directors of Trans Atlantic Co. Ltd., and that Trans Atlantic Co. Ltd., is indebted to the 1st appellant as a result of which
C the property in issue was mortgaged to the 1st appellant to secure the account of Trans Atlantic Co. Ltd., in which the Bouari family is alleged to have interests as directors. The indebtedness of the said Trans Atlantic Co. Ltd., at the time of the institution of the action is said to have stood at over N7,000,000.00 (Seven Million Naira).

D At the conclusion of the trial, the trial court held as follows:-

"In the result, and for the reasons earlier stated by me, it is my judgment that the plaintiff partially succeeds in his claim against the defendants. I hereby make the following orders:-

E *"(a) Declaration that the purported mortgage of the property known as No.80, Lebanon Street, Gbagi, Ibadan or any part thereof is ultra vires the Power of Attorney dated 5th November, 1962 and registered as 56/567 564 and accordingly unlawful;*

F *(b) All the other legs of the plaintiff's claims are hereby dismissed."*

The reason for refusing the other claims of the plaintiff appears to be grounded on the thinking of the trial court that it would be inequitable to allow the plaintiff and his family to lay claim to the property as family property since the same was mortgaged to the 1st
G appellant to secure the account of Trans Atlantic Co. Ltd., as the respondent and other members of his family are alleged to be directors.

As stated earlier in this judgment, the respondent was dissatisfied with the above judgment and appealed to the Court of Appeal
H which set same aside and entered judgment in favour of the respondent herein. The instant appeal is against that judgment.

The issues for determination, as formulated by learned counsel for the appellants, some of which are incongruous, have been

exhaustively treated in the leading judgment of my learned brother, Ogbuagu, JSC., a copy of which I had the privilege of previewing. I agree with the reasoning and conclusion of my learned brother. Ogbuagu, JSC., that the appeal is without merit and should be dismissed.

I only wish to comment on the issue as to whether or not, Exhibit P6, the Mortgage Deed which was executed on the 20th day of May, 1963 can be said to have been executed for and on behalf of Trans Atlantic Co. Ltd., the alleged debtor to the 1st appellant and whether there is any facts in support of the finding by the trial court that the respondent and other members of the Bouari family are members of the Board of Directors of the said Trans Atlantic Co. Ltd., on whose behalf the alleged mortgage was executed. It should be noted that at page 129 of the record, the trial Judge found as follows:-

“I therefore find as a fact and I so hold that Emile Bouari, Edward Bouari and William Bouari, as members of the Board of Trans Atlantic Company Limited were aware or deemed to be aware that the properties of Lutfallah Bouari, had been mortgaged to the defendant.....”

The above finding was set aside by the lower court on the ground that it was perverse and I am of the view that the lower court is right in so holding. On the face of Exhibit P6 it was a document directly between Emile Bouari, who purported to act on behalf of Lutfallah Bouari and the 1st appellant. Exhibit P6 makes no reference to Trans Atlantic Co. Ltd., as being the beneficiary which would have raised the issue of the directorship of that company for consideration. In short the said Exhibit P6 was not expressed to be executed in respect of any loan transaction between the 1st appellant and Trans Atlantic Co. Ltd., neither does the said Exhibit P6 mention Trans Atlantic Co. Ltd., in anyway.

The question then is if Exhibit P6 did not mention Trans Atlantic Co. Ltd., but involves a transaction directly between Emile Bouari and the 1st appellant, when did the respondent and the other members of the Bouari family as found by the trial Judge, become the members of the Board of Directors of the said company and when did that company become a customer of the 1st appellant.

From the evidence on record, there is no link between the respondent and other members of the Bouari family except Emile on the one part and the 1st appellant and, Trans Atlantic Co. Ltd., on the other part so as to make the property of Bouari family liable to be mortgaged to secure to debt of Trans Atlantic Co. Ltd. In any event, the trial court have held, unequivocally that Exhibit P3 - the Power of Attorney, under which Emile Bouari purported to enter into the mortgage, Exhibit P6, did not confer such powers on Emile Bouari. In the circumstance, I cannot but agree with the lower court, as stated at pages 206 - 207 of the record that;

".....There is no indication of when he became the director or when he acquired shares. There is also no other member of the Bouari as one of the directors. It was therefore wrong for the learned trial Judge to proceed on the assumption that because of William Bouari's directorship, all male children of Lutfallah Bouari were directors. Furthermore, there is no indication of when William Bouari, became a director. Was he a director as at the time the property in dispute was mortgaged?....."

There was even no evidence of any transaction between the Trans Atlantic Co. Ltd; and the 1st defendant. In conclusion I hold that in view of the above considerations, the findings of the learned trial Judge about the plaintiff and his brothers being directors of the Trans Atlantic Co. Ltd., at the time of the mortgage transaction and the conclusions or decisions based thereon are perverse and this court should necessarily interfere....."

It is settled law that evaluation of evidence and ascription of probative value thereto belong to the province of the trial court that heard the witnesses and observed their demeanour and that appellate court do not make a practice of interfering with the finding of facts made by the trial court by substituting their own findings for those of the trial court except under certain special circumstances which include a situation where the finding of facts is demonstrated to be perverse, as in the instant case on appeal before the lower court.

It is my considered view that the substance of the appeal is on the findings of facts which have been resolved against the appellants. In conclusion I hereby dismiss the appeal and abide by the conse-

quential orders made by my learned brother, Ogbuagu, JSC., in the leading judgment including the order as to costs.

MUHAMMAD JSC

My learned brother, Ogbuagu, JSC., permitted me to B
read in draft form the judgment just delivered by him. He has pains-
takingly treated all the issues raised in the appeal. I am contented
with his reasoning and I adopt the conclusions he arrived at. I too,
dismiss the appeal for lacking any merit. I endorse the order of costs C
granted by my learned brother.

CHUKWUMA-ENEH JSC

I have read before now the judgment of my learned brother, D
Ogbuagu, JSC., with which I agree. I also find no merit in the appeal
and it is accordingly dismissed with costs as contained in the leading
judgment.

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