

SUPREME COURT OF NIGERIA
19TH DECEMBER, 2008. SC. 298/2002
CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,
M. MOHAMMED, F. F. TABAI,
C. M. CHUKWUMA-ENEH, JJSC

DUMEZ NIGERIA LIMITED APPELLANT
AND

1. PETER NWAKHOBIA

2. SOLOMON BAKO

3. GODWIN NGEDE

4. PAULINUS DIKE RESPONDENTS

(For themselves and on behalf
of the Dumez Nigeria Limited Ex-
Security Workers whose
Appointments were terminated
between 1989 and December, 1994)

ACTIONS - Reliefs - Declaratory reliefs - Proof - Declarations of right cannot be made on admission - Or in default of pleading by defendant - Or even in reliance on evidence of defendant witnesses - Plaintiff must prove his claim by his own evidence (H1)

ORDERS OF COURT - Dismissal order - Propriety of - Where a plaintiff fails to satisfy the court - As to his entitlement to declaratory relief sought on his own evidence - It is the duty of the court to dismiss the case of the plaintiff (H2)

ACTIONS - Declaratory reliefs - Proof - Court below correctly found that burden of proof - In an action for declaratory relief is entirely on plaintiff - It was therefore wrong to have relied on the evidence of defendant in its judgment (H3)

EVIDENCE - Evaluation - Role of appellate court - Where evaluation of evidence is a matter of inference - To be drawn from established facts on record - Appellate court is in as good a position as trial court - But Court of Appeal was wrong in reversing the trial court here - In view of the facts on record (H4)

ACTIONS - Relief not claimed - Power of court to grant - Limits - A court is bound to limit itself to the claim before it - It may only go outside the terms of such claim - In making incidental orders flowing naturally from the claim - (H5)

APPEALS - Findings - By trial court - Interference by appellate court - Appellate court may only interfere with findings of fact by trial court - Where such findings are perverse - Or not supported by the facts relied upon - Which is not the case herein (H6)

FACTS

The plaintiffs/respondents had sued the defendant/appellant in a representative capacity. The claims of the respondents were for a declaration and a mandatory injunction to compel the appellant to pay to the plaintiffs accumulated overtime payment and medical allowance arrears. It was common ground that though the respondents were all ex-workers of the appellant, they had left appellants employment at different times and for different reasons.

At the end of hearing the learned trial judge held that the respondents had failed to prove their case and accordingly dismissed their claims. Aggrieved, respondents appealed to the Court of Appeal which set aside the judgement of the trial court and instead made an order that the respondents were entitled to the payment. It made another order remitting the case back to the trial court for further proceedings to ascertain the quantum of the entitlements of each respondent. Dissatisfied, the appellant has brought this appeal against the judgement of the Court of Appeal.

ISSUE FOR DETERMINATION

"Whether the Court below was right in setting aside the findings of facts on the evidence before the trial Court and the dismissal of the Respondents' entire action for failing to prove the same".

HELD (Unanimously allowing the appeal per **MOHAMMED JSC**)
Declarations of right cannot be made on admission

1. The law on the requirements of the Plaintiff to plead and prove his claims for declaratory reliefs on the evidence called by him without

relying on the evidence called by the Defendant is indeed well settled. The burden of proof on the Plaintiff in establishing declaratory reliefs to the satisfaction of the Court is quite heavy in the sense that such declaratory reliefs are not granted even on admission by the Defendant where the Plaintiff fails to establish his entitlement to the declaration by his own evidence. In other-words declarations of right as sought by the Plaintiffs/Respondents in their first relief against the Defendant/Appellant in the present case, cannot be made on admission or in default of pleading by the Defendant not to talk of reliance on the evidence of the Defendant witnesses. See *Wallersteiner v. Moir* (1974) 3 All E.R. 217 at 251 where Buckley, L. J. said:

“It has always been my experience, and I believe it to be a practice of long standing, that the Court does not make declarations of right either on admission or in default of pleading but only if the Court was satisfied by evidence.” (p. 3692 B)

Dismissal order - Propriety of

2. With due respect to the Court below, its stand on the position of the case of the Respondents is not correct. If indeed the Plaintiffs who claimed declaratory reliefs at the trial Court could not satisfy that Court to their entitlements to the relief, sought on their own evidence, the duty of the trial Court was to dismiss their case and not to give them another opportunity to prove their case in the absence of any grounds for granting them such relief. (p. 3695 C)

Declaratory reliefs - Proof

3. The Court below made a correct finding on the position of the law regarding the burden of proof on the Plaintiffs/Respondents at page 161 of the record where the Court remarked quite correctly thus -

“Also, although the power of the Court to make a declaratory judgment is discretionary the discretion should be exercised with due care and caution and judicially xxx It is however, a rule of the exercise of the discretion that it is not granted as a matter of course or because there is no defence to the action or simply because the claim is admitted by the other party. The Plaintiff must still by evidence establish his claim to the right xxx.

In spite of this correct statement of the law, the Court below turned

round to blame the trial Court for refusing to grant the declaratory reliefs to the Plaintiffs/Respondents relying heavily on the evidence of DW2 and DW3 thereby shifting the burden of proving the declaratory relief sought by the Plaintiffs/Respondents to the Defendant/Appellant. (pp. 3695 E/3696 A)

B

EVIDENCE - Evaluation - Role of appellate court

4. The law is trite that evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which saw, heard and assessed the witnesses. Although where the issue in controversy between the parties is simply a matter of inference to be drawn from established facts on record, not resting on the credibility of witnesses as a result of their demeanour in court or impression of them by trial court, an appellate court is in as good a position as trial court to evaluate evidence on record. The present case does not call for such intervention by the court below which apparently also found that Respondents did not prove their case before the trial court. On the evidence on record adduced by the Respondents as Plaintiffs, the Court of Appeal was clearly in error in reversing the decision of the trial court dismissing the Respondent's action particularly in relation to their claim for declaration of right in relief one. (pp. 3696G/3697 E)

E

Relief not claimed - Power of court to grant - Limits

5. With these clear reliefs sought before the Court below, it was a serious error on its part to take refuge or hide behind Section 16 of the Court of Appeal Act to plunge into the arena of combat between the parties on the side of the Respondents to make far reaching orders which were not placed before the trial Court or the lower Court itself. Since the Court below on the evidence on record could not non-suit or enter judgment for the Respondents, the proper order that should have made would have been to dismiss the Respondents' appeal.

G

H It is both fundamental and an elementary principle in the determination of actions before a Court or tribunal, that the adjudicating body is bound to limit itself to the claim before it. A Court may indeed make incidental orders which flow naturally from the relief

claimed. However, a Court has no power and is not under any circumstances entitled to award a relief not claimed by the party in the Writ of Summons and Statement of Claim. (p. 3699 G)

APPEALS - Findings - By trial court - Interference

6. The circumstances in which the Court of Appeal is entitled to interfere with and reverse the findings of fact of the Court of trial are well settled. A Court of Appeal will only interfere with a finding of fact of the Court of trial when it is clear that the finding is perverse, and not flowing from the facts relied upon, or is not a proper exercise of the Court's judicial discretion. Where also there is ample evidence and the trial Court has failed to evaluate it and make proper findings, the Court of Appeal is entitled to evaluate such evidence and make the findings which the Court of trial ought to have made except where the matter rests on credibility of witnesses. It is quite clear that in the case at hand, none of the circumstances outlined above justifying interference by the Court of Appeal was raised by the Respondents as Appellants in that Court to support its setting aside of the judgment of the trial Court. (pp. 3700 F/3701 A)

REPRESENTATION

Jibo Ibrahim for the Appellants.
Chief Francis Afeigbe for the Respondents

CASES REFERRED TO

Osewale v. Ezeiheshie (1991) 1 N.W.L.R. (Pt. 170) 699
Narindex Trust Limited & 1 or v. Nigeria Intercontinental Merchant Bank Ltd (2001) 4 S.C.N.J. 208 at 211 and 220
Onehiokobia v. Momodu Ajanya & Ors. (1998) 5 S.C.N.J. 95 at 104
Anthony O. Fyama Edebiri v. Doleyi Osawe Edebiri & Anor. (1997) 4 S.C.N.J. 177 at 190
Nwoke & Ors. v. Okere & Ors. (1994) 17 L.R.C.N. 123 at 142
Akinola v. Fatoyinbo Oluwo & Ors. (1962) All N.L.R. 244
Akintoye v. Eyiola (1968) N.M.L.R. 92
Woluchem v. Gudi (1981) 5 S.C. 291
Amadi v. Nwosu (1992) 5 N.W.L.R. (Pt. 241) 273

Okorie Echi & Ors v. Joseph Nnamani & Ors. (2000) 5 S.C.N.J. 155 at 157 and 164

Egonu v. Egonu (1978) 11 - 12 S.C. III

Obionna v. Olomu (1978) 3 S.C. I

Elumeze v. Elumeze (1969) 1 All N.L.R. 311

B Chief Registrar v. Vamos Navigation Ltd. (1979) 1 S.C. 33.

STATUTE REFERRED TO

Court of Appeal Act, s.16

C

LEAD JUDGMENT BY MOHAMMED JSC

On 19th June, 2002, the Court of Appeal, Abuja Division by a unanimous decision set aside the judgment of the trial High Court of Justice of Kogi State sitting at Ajaokuta delivered on 22nd June, 2000, D dismissing the Plaintiffs claims against the Defendant. The present appeal is therefore by the Defendant against that judgment of the Court of Appeal.

The case was initiated by the Plaintiffs by an ex-parte application filed on 10th August, 1995 where the Plaintiffs sought for and E obtained leave of the Court to sue the Defendant in a representative action. Subsequently, the Plaintiffs brought their action in that capacity claiming in their paragraph 18 of the amended statement of claim, the following reliefs -

F *"WHEREOF the Plaintiffs jointly and severally claim against the Defendant as follows -*

1. *An order of this Honourable Court that the Plaintiffs who were ex-security workers at different stages between January 1989 and December, 1994 are entitled the short payment arising from the*
G *overtime and medical arrears paid to their colleagues on 28th March, 1995 for the period of service between January 1989 to December 1995.*

2. *An order of this Court compelling/directing the Defendant to pay the Plaintiffs their respective Short payment inform of over-*
H *time and medical arrears as stated in the list containing the names of the Plaintiffs."*

The case was heard on pleadings which were subjected to several amendments and further amendments by the parties. In the

course of the hearing, only the 1st Plaintiff gave evidence in support of the diverse claims of the Plaintiffs to their arrears of overtime and medical arrears. The Defendant on its part called three witnesses who testified in its defence. At the end of the hearing, the learned trial Judge Rekiya Okpanachi J, made specific findings on the evidence on record and came to the conclusion that the Plaintiffs have failed to prove their claims and consequently dismissed the entire action against the Defendant. Aggrieved by this order of dismissal of their claims, the Plaintiffs then appealed to the Abuja Division of the Court of Appeal which after allowing the appeal, granted relief one to the Plaintiffs and remitted their second relief to the trial Court with liberty to the Plaintiffs to apply to that Court for further proceedings for the purposes of taking of account between parties to ascertain the respective claims of the Plaintiffs and the ultimate payment of the same to them. The Defendant, which was the employer of the Plaintiffs was not happy with the judgment of the Court of Appeal, has now appealed to this Court raising four issues from the grounds of appeal for determination. The issues are -

“1. Whether the learned Justices of the Court of Appeal were right to have remitted the case to the trial Court for relief No. 2 to be tried by further proceedings and for the Plaintiffs to apply to the trial Court to take account between the parties when that relief or claim was not the subject of appeal before it.

2. Whether on the evidence at the trial, the Court of Appeal was right in reversing the order of dismissal by the High Court of Relief No. 1 and held that the Plaintiffs are entitled to short payment arising from the overtime and medical arrears approved under the National Joint Industrial Council Agreement for Building Construction Workers in 1989.

3. Is the claim of arrears of overtime the common interest and the common grievance between the Plaintiffs, who joined the Defendant’s company at different times and left the employment of the Defendant’s company at different times and for different reasons?

4. Could the Court of Appeal Justices discountenance the issue of Demurrer properly argued before it and struck out the argument of the Respondent because there is no Cross-Appeal?”

In the brief of argument filed by the Plaintiffs who are now the Respondents in this Court, similar four issues as identified in the Appellant's brief of argument though differently framed, were also raised in the Respondents' brief.

The facts of this case summarily stated are that the Plaintiffs
B now Respondents are former employees of Dumez Construction Com-
pany. They were employed and served the Company at different
periods and who also left the services of the Company at different
periods and for different reasons between January, 1989 and De-
C cember 1994. During this period, there was a protest from the Secu-
rity staff of the Appellant over short payment in form of overtime
and medical arrears. Ultimately, the management of the Appellant
agreed with the workers union to pay the security workers then in
the service of the company, the overtime arrears covering the period
D between January, 1989 and December, 1994. That payment was
made on 28th March, 1995. On seeing this development, the Plain-
tiffs/Respondents as former security workers of the Appellant who
were no longer in the service of the Company and who felt that they
were also entitled to the package of arrears of overtime and medical
E arrears paid, forwarded their claims in a letter containing their names
and various claims of each of them to the Appellant. Although the
Workers' Union supported the claims of the Respondents, the Appel-
lant was not inclined to accede to the demand of the Respondents
F which gave rise to the action at the trial Court resulting in the present
appeal.

Coming back to the issues for determination in this appeal, the
main issue in my view, is *whether the Court below was right in setting
aside the findings of facts on the evidence before the trial Court and*
G *the dismissal of the Respondents' entire action for failing to prove the*
same. Learned Counsel to the Appellant in his argument in support
of this issue which is the second issue in the Appellants brief, referred
to the relevant paragraphs of the Amended Statement of claim, par-
ticularly paragraphs 4, 5, 5(a), 5(d), 5(e) and 18(2) and argued that
H the evidence of the 1st Plaintiff who was the only witness who testi-
fied for the Plaintiffs, was not enough to prove the case of the Re-
spondents as required by law. He referred to the evidence of the 1st
Plaintiff under cross-examination where the witness stated that he

did not know the number of hours of overtime he and the 20th Plaintiff, Mohammed Ndakwo put up during the period covering their claims and observed that the Plaintiffs claim for declaration in the 1st relief, could not have been proved by such evidence because declaratory reliefs are not granted even on admission by the Defendant but on proof to the satisfaction of the trial Court by the Plaintiffs. The case of *Osewale v. Ezeiheshie* (1991) 1 N.W.L.R. (Pt. 170) 699, was relied upon in support of this submission. Learned Counsel observed that if as the Court below held in its judgment that it was obligatory on the part of the Plaintiffs/Respondents to show by their own evidence that they were entitled to the declaration sought, it was quite clear that Plaintiffs/Respondents have failed to prove their case justifying the order of dismissal made by the trial Court. That relying on the cases of *Narindex Trust Limited & 1 or v. Nigeria Intercontinental Merchant Bank Ltd* (2001) 4 S.C.N.J. 208 at 211 and 220, *Onehiokobia v. Momodu Ajanya & Ors.* (1998) 5 S.C.N.J. 95 at 104 and *Anthony O. Fyama Edebiri v. Doleyi Osawe Edebiri & Anor.* (1997) 4 S.C.N.J. 177 at 190, the Plaintiffs/Respondents having failed to plead the figures of the amount each of them was claiming and support same by evidence, the trial Court was right in dismissing their claim. Concluding, learned Counsel argued that the Court below acted in error in setting aside that decision which he urged this Court to restore in allowing this appeal.

Learned Counsel to the Respondents however, does not agree with the argument that the Respondents have failed to prove their case. He maintained that the evidence of the 1st Plaintiff taken along with the evidence of DW1, DW2 and DW3, has clearly established the fact that the Plaintiffs/Respondents worked for the Defendant/Appellant within the period of January, 1989 to December, 1994. Also established, according to the learned Counsel, was the fact that the Plaintiffs/Respondents' colleagues who were still in the service of the Appellant, were duly paid their arrears of overtime and medical arrears covering the same period being claimed by the Respondents. Learned Counsel referred to the cases of *Nwoke & Ors. v. Okere & Ors.* (1994) 17 L.R.C.N. 123 at 142 and *Akinola v. Fatoyinbo Oluwo & Ors.* (1962) All N.L.R. 244, on the powers of the appellate Court to interfere with the decision or discretion of the trial Court where

that Court took into cognizance wrong principles of law or immaterial facts in exercising its discretion and insisted that the power to set aside or interfere with the decision of the trial Court on relief No. 1, was rightly exercised by the Court below, warranting no justification for this Court to interfere.

The law on the requirements of the Plaintiff to plead and prove his claims for declaratory reliefs on the evidence called by him without relying on the evidence called by the Defendant is indeed well settled. The burden of proof on the Plaintiff in establishing declaratory reliefs to the satisfaction of the Court is quite heavy in the sense that such declaratory reliefs are not granted even on admission by the Defendant where the Plaintiff fails to establish his entitlement to the declaration by his own evidence. In other-words declarations of right as sought by the Plaintiffs/Respondents in their first relief against the Defendant/Appellant in the present case, cannot be made on admission or in default of pleading by the Defendant not to talk of reliance on the evidence of the Defendant witnesses. See Wallersteiner v. Moir (1974) 3 All E.R. 217 at 251 where Buckley, L. J. said:

“It has always been my experience, and I believe it to be a practice of long standing, that the Court does not make declarations of right either on admission or in default of pleading but only if the Court was satisfied by evidence.”

See also Metzger v. Department of Health and Social Security (1977) 3 All E.R. 444 at 451. This statement of the law was adopted by this Court in Vincent I. Bello v. Magnus Eweka (1981) 1 S.C. 101 and also applied in Motunwase v. Sorungbe (1988) 5 N.W.L.R. (Pt. 92) 90 at 102.

Having regard to the position of the law, in the resolution of this issue, one has to look into the relative evaluation of the evidence of the Plaintiffs/Respondents on record in support of their first relief for the declaration of their rights to the entitlement of the payment of arrears of overtime and medical arrears as seen and acted upon by the two Courts below. The learned trial Judge after scrutinizing the evidence before it particularly that of the 1st Plaintiff being the only witness who testified in support of the Plaintiffs’ claim, made far reach-

ing findings regarding the quality of the evidence. The relevant part of the judgment of the trial Court at pages 107 to 108 reads -

“In any case what is the sum of the Plaintiffs claim. The Court as seen from above has suo motu asked this question before. The Plaintiffs’ evidence confirmed paragraph 5d and 5e of the statement of claim that they were employed at different times and left the company at different modes and at different times, so their claims cannot be the same. The 1st Plaintiff has a bud in his own eyes and throughout his evidence he was unable to remove that bud. He does not know the number of hours of overtime he had worked. He does not know the dates he was absent from duty in 1993 nor the number of public holidays in 1992 and 1993. This fact was necessary since he had said that they were working 12 hours daily throughout (sic) 1999 minus the public holidays and others. It is therefore not surprising that he was unable to remove the bud in another persons eyes. He knows Mohammed Ndakwo one of the Plaintiffs, but he does not know how many hours overtime he had worked. Now if the claim in that of hours overtime can the Plaintiff succeed without knowing in the first instance the number of hours of overtime they are claiming? It is pertinent to refer to the summary of the Plaintiffs claim in paragraph 18(2) of the statement of claim.

The issue about the list of the Plaintiffs has been settled above. They are the Plaintiffs in exhibit 3. Exhibit 3 does not indicate particulars of any short payment arising out of overtime or medical arrears. Neither does Exhibit 5 which purports to be another list of Plaintiffs. Exhibit 5 merely states the number of months worked and the respective short payments. But the Plaintiffs claim is premised on arrears of hourly overtime and or medical earnings and not arrears of monthly Wages. From the facts available there is no doubt that the quantum of hourly overtime is definitely a determining yardstick. This of course requires strict proof. Not just any strict proof though, but strict proof that would be such qualitative proof as would lend itself to the quantitative assessment of the quantum of overtime xxx Before me there is no Such proof. I find the Plaintiffs’ claim to be fully in obedience to the force of the ocean waves as it wrestles to find solace on the variables exhibited by exhibit 9, exhibit 2, exhibit 4 and exhibit 5 xxx On the whole, as seen from the above, the burden of

uncertainty which formed a clog in the wheel which could have shifted the burden of proof blotted the merit of the Plaintiffs' case. Accordingly, I find no merit in the Plaintiffs case and it is accordingly hereby dismissed."

I have decided to quote extensively from the judgment of the learned trial Judge in order to bring out quite clearly the extent of her consideration of the case of the Respondents as Plaintiffs in relation to their declaratory reliefs right from their statement of claim which suffered several amendments, the evidence of the only witness who testified in support of the Plaintiffs/Respondents' case and the documentary evidence put in by the Plaintiffs/Respondents in support of their case, before coming to the conclusion not to exercise her discretion in their favour. This was done rightly in accordance with the law on the subject of requirement of proof in support of claims for declaration of rights without probing or considering the evidence of DW1, DW2 and DW3 called by the Defendant/Appellant. The question is whether the Court below rightly exercised its powers under the law in setting aside that decision.

The Court of Appeal in the lead judgment held at page 153 of the record as follows: -

"I am however satisfied that Plaintiffs have established not only through PW1 but also through PW2 and DW3 and exhibits 4, 6, 8 and 9 that the bone of contention in this case between all the Plaintiffs and the Defendant is the claim to arrears of overtime pay between 1989 and 1994 which the Defendant paid to their colleagues still serving Whether as jointly with medical arrears but which was denied to Plaintiffs/Appellants because they have left the service of Defendant by December 1994 when Defendant agreed to pay the same. That in my respectful view, is the common interest, the common grievance and the payment of such arrears if paid according to the period of service by each Plaintiff with the Defendant would be beneficial to all of them."

Turning to the findings of the trial Court regarding the quality of the evidence adduced by the Plaintiffs/Respondents in support of their claims, the Court below seemed to have the same view with the trial Court which it accused of failing to give the Plaintiffs/Respondents the opportunity of coming back to the trial Court to prove their

case. This observation no doubt is predicated upon the alternative plea of the Respondents' Counsel at the Court below for an order of non-suit in case their appeal against the dismissal of their action failed. The relevant part of this judgment at pages 159 - 160 of the record reads -

"If the learned trial judge found that the failure of Plaintiffs to tabulate their claim to Overtime arrears in Exhibit 5 in months instead of tabulating the claim in hours which is the basis of calculation, they ought to have not denied them a permanent relief by the dismissal of the action of the Plaintiffs but should have given Plaintiffs the opportunity of coming back to court to ventilate their claim in another suit." B C

With due respect to the Court below, its stand on the position of the case of the Respondents is not correct. If indeed the Plaintiffs who claimed declaratory reliefs at the trial Court could not satisfy that Court to their entitlements to the relief, sought on their own evidence, the duty of the trial Court was to dismiss their case and not to give them another opportunity to prove their case in the absence of any grounds for granting them such relief. In any case the Court below made a correct finding on the position of the law regarding the burden of proof on the Plaintiffs/Respondents at page 161 of the record where the Court remarked quite correctly thus - D E

"Also, although the power of the Court to make a declaratory judgment is discretionary the discretion should be exercised with due care and caution and judicially xxx It is however, a rule of the exercise of the discretion that it is not granted as a matter of course or because there is no defence to the action or simply because the claim is admitted by the other party. The Plaintiff must still by evidence establish his claim to the right xxx In this case it does not matter that the Defendant withdrew at the hearing of the trial proceedings, his preliminary objection under paragraph 1 (a) of the Amended Statement of Defence on the ground that the claim is not for a particular sum of money xxx Nor does it matter that the lower Court ruled that the Statement of Defence is defective. *It Was Still obligatory on the Plaintiffs to show by evidence that they are entitled to the declaration."* F G H

Inspite of this correct statement of the law, the Court below turned round to blame the trial Court for refusing to grant the declaratory reliefs to the Plaintiffs/Respondents relying heavily on the evidence of DW2 and DW3 thereby shifting the burden of proving the declaratory relief sought by the Plaintiffs/Respondents to the Defendant/Appellant. The relevant part of the judgment of the Court below after quoting extensively the evidence of DW2 and DW3 came to the conclusion at page 163 thus -

“it strikes me that if the Defendant had been minded to answer the points of substance in the allegations of fact in the pleadings of Plaintiffs, the Defendant was in a position to indicate in the statement of Defence, the figures or sums to which Plaintiffs were entitled. The Defendant has been and is in possession of necessary records. The failure of the Defendant to answer the points of substance and its evasiveness, constitute admission in law of the claim of the Plaintiffs so hold.”

It is quite clear from the above findings of the Court below that the Court had virtually shifted the burden of proving the case of Plaintiffs/Respondents to the Defendant/Appellant completely overlooking its earlier findings on the state of the law that such declaratory reliefs sought by the Plaintiffs/Respondents in their action, are not granted on admission but on strict proof of entitlement to such reliefs on the evidence called by the Plaintiffs/Respondents themselves. In any case the evidence of DW2 and DW3 quoted and relied upon by the Court below as admission in support of the Plaintiffs/Respondents' case, deals specifically with the payment of their salaries and not their claims for overtime arrears. The overtime arrears referred to in the evidence of DW3 is the one paid to the security staff of the Appellant who were still in its service and this payment was made on 28th March, 1995 when the Respondents were no longer in the service of the Appellant.

The law is trite that evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a Court of trial which saw, heard and assessed the witnesses. See *Akintoye v. Eyiola* (1968) N.M.L.R. 92; *Woluchem v. Gudi* (1981) 5 S.C. 291 and *Amadi v. Nwosu* (1992) 5 N.W.L.R. (Pt. 241) 273. ***Although where the issue in contro-***

versy between the parties is simply a matter of inference to be drawn from established facts on record, not resting on the credibility of witnesses as a result of their demeanour in Court or impression of them by trial Court, an appellate Court is in as good a position as trial Court to evaluate evidence on record. See Okafor v. Idigo III (1984) 1 S.C.N.L.R. 481, **the present case does not call for such intervention by the Court below which apparently also found that Respondents did not prove their case before the trial Court.** Taking into consideration of the nature of the Respondents' claim for arrears of overtime over a period of time and the evidence of the only witness who gave evidence in support of the claim who testified that he could not say the number of hours of overtime he had put up which would serve as the basis of calculating the amount he was claiming not to talk of the number of hours of overtime each and everyone of the remaining Plaintiffs who were employed at different time and also left the services of the company at different times was claiming, was certainly very far from discharging the burden of proof of establishing the claim. **On the evidence on record adduced by the Respondents as Plaintiffs, the Court of Appeal was clearly in error in reversing the decision of the trial Court dismissing the Respondent's action particularly in relation to their claim for declaration of right in relief one.**

The appeal having succeeded on the resolution of the main issue No. 2 in the Appellant's brief of argument as well as in the Respondents' brief, the dismissal of the Respondents' claim in their relief number 2 as was rightly done by the trial Court is obvious on the evidence on record as even the Court below seemed to have agreed that the relief was not established by the Respondents. Unfortunately, the Court below instead of affirming the dismissal of the claim after clearly making a specific finding that it had not been proved, decided to make another case for the Respondents by granting them reliefs which now form the subject of first issue for determination which I shall now proceed to resolve.

This first issue is whether the Court of Appeal was right to have remitted the case to the trial Court with liberty for the Respondents as Plaintiffs to apply to that Court in further proceedings for the pur-

pose of obtaining an order of that Court for taking of an account between the parties after allowing the appeal as regards relief (1) of the claim of the Plaintiffs/Respondents. Learned Counsel to the Appellant after referring to the claims of the Respondents in the Writ of Summons and the Amended Statement of Claim, observed that the claim placed before the trial Court does not include the taking of Accounts between the parties. As for the burden of proof the law placed upon the Respondents to prove their case, learned Counsel cited the cases of *Okorie Echi & Ors v. Joseph Nnamani & Ors.* (2000) 5 S.C.N.J. 155 at 157 and 164 and *Spasco Vehicle and Plant Hire Co. Ltd. v. Alrairie Nigeria Ltd.* (1995) 9 S.C.N.J 288 at 290 and submitted that the burden is on the Respondents. With regard to the case of the parties before the Court below, learned Counsel pointed out that from the four grounds of appeal filed by the Respondents who were the Appellants at that Court, the issue of taking of accounts between the parties was not raised by any of the parties to warrant the exercise of the powers of the lower Court under Section 16 of the Court of Appeal Act.

For the Respondents however, it was contended by their learned Counsel that their problem at the trial Court was that they did not have the requisite data and the means of accurately stating the amounts of entitlement of each of them who had worked for the Appellant; that since DW2 and DW3 who were Computer Analyst and Accountant respectively with the Appellant were in possession of the data and means of accurately stating the amount of entitlement of each of the Respondents but refused to state them in the statement of defence, the action of the Appellant constitutes an admission in law of the claim of the Respondents on the authority of *Ogbeide v. Obeanu* (1998) 62 L.R.C.N. 4880 at 4895; that on the strength of this admission, the Court below in its urge to do substantial justice in the case before it, rightly used its powers under Section 16 of the Court of Appeal Act in remitting the case back to the trial Court in consequential orders flowing from the claim of the Respondents having regard to the decision in *Ajomale v. Yaduat* (1991) 5 S.C.N.J 172 at 176. At the expense of repetition and for the purpose of clarity regarding the claim of the Respondents in their relief No. 2 which I have earlier quoted in this judgment and which is the subject of this issue for

determination, I reproduce this particular relief as contained in paragraph 18(2) of the Further Amended Statement of Claim as follows -

“18. WHERE OF the Plaintiffs jointly and severally claim against the Defendant as follows -

1. xxxxxxxxxxxxxxxx

2. An order of this Court compelling/directing the Defendant^B to pay the Plaintiffs their respective short payment in form of over-time and medical arrears as stated in the list containing the names of the Plaintiffs.”

The list containing the names of the Plaintiffs as found by the^C learned trial Judge does not contain the number of hours of over-time put up by each of the Respondents covering the period of their claim from January 1989 to December 1994 to provide the basis of calculating the entitlement of each of them. On that basis the trial Court was right in regarding the relief claimed as not proved. This^D finding was affirmed by the Court below which rebuked the trial Court of refusing to give the Respondents another chance of proving their case. The relief clearly does not contain anything relating to the taking of account between the parties to determine the amount due to each of the Respondents.^E

On coming to the Court of Appeal on appeal against the dismissal of their entire action against the Appellant by the trial Court, in their brief of argument at page 131 of the record, what the Respondents sought from the Court of Appeal in concluding their arguments^F on the issues arising from their grounds of appeal is as follows

“This Court will be urged to allow the appeal and Set aside the order of dismissal which was wrongly made. The Court of Appeal should thereafter either non-suit parties or the Court of Appeal on its own evaluate the evidence on record and enter judgment for the Plaintiffs/Appellants.”^G

With these clear reliefs sought before the Court below, it was a serious error on its part to take refuge or hide behind Section 16 of the Court of Appeal Act to plunge into the arena of combat between the parties on the side of the Respondents to make far reaching orders which were not placed before the trial Court or the lower Court itself. Since the Court below on the evidence on record could not non-suit or enter judgment^H

for the Respondents, the proper order that should have made would have been to dismiss the Respondents' appeal.

It is both fundamental and an elementary principle in the determination of actions before a Court or tribunal, that the adjudicating body is bound to limit itself to the claim before it.

- A Court may indeed make incidental orders which flow naturally from the relief claimed. However, a Court has no power and is not under any circumstances entitled to award a relief not claimed by the party in the Writ of Summons and Statement of Claim.*** See *Egonu v. Egonu* (1978) 11 - 12 S.C. Ill; *Obionna v. Olomu* (1978) 3 S.C. I; *Elumeze v. Elumeze* (1969) 1 All N.L.R. 311; *Chief Registrar v. Vamos Navigation Ltd.* (1979) 1 S.C. 33. Judgments are based on the issues tried and decided and the right of the parties determined on the claim before the Court - See *Solana v. Olusanya* (1975) 6 S.C. 55. Where trial is conducted by pleadings, the judgment thereon must be based on issues joined between the parties - See *Metal Construction (W.A.) Ltd. v. Migliore* (1976) 6-9 S.C. 163.

- In the instant case, the judgment of the trial Court was clearly based on the pleadings, issues joined between the parties and the evidence before the Court. The dismissal of the Respondents' action was therefore quite in order. There is no justification whatsoever, in my view, for the Court below to have interfered with that judgment.

- The circumstances in which the Court of Appeal is entitled to interfere with and reverse the findings of fact of the Court of trial are well settled. A Court of Appeal will only interfere with a finding of fact of the Court of trial when it is clear that the finding is perverse, and not flowing from the facts relied upon, or is not a proper exercise of the Court's judicial discretion.*** See *Onowan & Anor. v. Iserhein* (1976) 1 N.M.L.R. 263. ***Where also there is ample evidence and the trial Court has failed to evaluate it and make proper findings, the Court of Appeal is entitled to evaluate such evidence and make the findings which the Court of trial ought to have made except where the matter rests on credibility of witnesses.*** See *Shell-BP Petroleum Development Co. of Nigeria Ltd. v. His Highness Pere Cole & Ors.* (1978) 3 S.C 188. However, there must be before

the Court, a ground of appeal raising the issue directly or on which the determination of the issue depends. See Chief Frank Ebba v. Chief Warie Ogodo & Anor. (1984) 4 S.C. at 99. ***It is quite clear that in the case at hand, none of the circumstances outlined above justifying interference by the Court of Appeal was raised by the Respondents as Appellants in that Court to support its setting aside of the judgment of the trial Court.*** B

Thus, the appeal having succeeded on issues one and two which are predicated on the two reliefs originally sought by the Respondents in their action at the trial Court, there is hardly any need for me to look into the remaining two issues namely, issues three and four as to whether the Respondents have common interest or grievance in their action or that whether the Court below was right in striking out the argument of the Appellant in its brief of argument as Respondent at the Court below relating to the decision of the trial Court that the statement of defence was defective. This is because the issues are grounded on the two reliefs sought at the trial Court the dismissal of which I have earlier affirmed in the resolution of issues one and two in this judgment. In other-words issues three and four are no longer alive. In any case the Respondents common interest in their joint action against the Appellant stops at a point where all of them are ex-security workers of the Appellant. With regard to the separate and various claims of each of them having joined and left the services of the Appellant Company at different times and for different reasons, in order for each of them to succeed in his claim, he must plead and prove that claim by evidence. This is so because whether each and everyone of the Respondents was entitled to his own claim including even those who were dismissed from service like the 1st Plaintiff/Respondent who admitted that he was dismissed, is quite another question altogether that may require a determination specifically. Therefore the Respondents as Plaintiffs having failed to establish their various claims for overtime and medical arrears, their joint action was rightly dismissed by the trial Court. In this respect the Court below had no justification whatsoever in disturbing the judgment of the trial Court. H

In the result this appeal succeeds and the same is hereby allowed. The judgment of the Court below now on appeal is hereby

set aside. In place of that judgment, the judgment of the trial Court dismissing the Respondents' action shall be and is hereby restored and affirmed.

There shall be no order on costs.

B

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother Mahmud Mohammed JSC. I totally agree with his reasoning and conclusion.

For the reasons he has given I also allow the appeal and set aside the judgment of the court below. I also make no order as to costs.

D

MUKHTAR JSC

I have had the opportunity of reading in advance, the lead judgment delivered by my learned brother, Mohammed JSC. I am in complete agreement that the appeal has merit, and ought to be allowed. I also allow it and abide by the consequential orders made in the lead judgment.

F

TABAI JSC

I was privileged to read, in advance, the lead judgment of my learned brother Mohammed JSC and I agree that the appeal be allowed. I have taken a careful look at the judgment of the trial court and I am satisfied that the findings are supported by the evidence on record. There was therefore no basis for the interference by the Court of Appeal. I shall allow the appeal. The consequence is that the judgment of the Court of Appeal dated the 19th of June 2002 be and is hereby set aside. And the judgment of the trial court of the 22nd of June 2000 be and is hereby restored.

I adopt the order on costs contained in the lead judgment.

CHUKWUMA-ENEH JSC

This appeal has emanated from the decision of the Court of Appeal, Abuja Division which unanimously has set aside the decision of the Kogi State High Court holden at Ajaokuta given on 22/6/2000 dismissing the plaintiffs' (Respondents) claim in its entirety.

The Defendant (Appellant in this Court) aggrieved by the decision has by a Notice of Appeal filed on 12/7/2000 appealed to this court on four grounds of appeal. It has distilled from the grounds of Appeal in its brief of argument filed on 8/4/2005 four issues for determination to wit.

"1. Whether the learned justices of the Court of Appeal were right to have remitted the case to the trial Court for relief No.2 to be tried by further proceedings and for the plaintiffs to apply to the trial Court to take account between the parties when that relief or claim was not the subject of appeal before it."

2. Whether on the evidence at the trial, the Court of Appeal was right in reversing the order of dismissal by the High Court of Relief No.1 and held that the Plaintiffs are entitled to short payment arising from the overtime and Medical arrears approved under the National Joint Industrial Council Agreement for Building Construction workers in 1989."

3. Is the claim of arrears of overtime the common interest and the common grievance between the Plaintiffs, who joined the Defendant's company at different times and left the employment of the Defendant's company at different times and for different reasons?"

4. Could the Court of Appeal Justices discountenance the issue of Demurrer properly argued before it and struck out the argument of the Respondent because there is no Cross-Appeal?"

The Respondents (plaintiffs in the trial Court) have filed their joint brief of argument on 19/5/2003 and in it have as well distilled 4 issues for determination, which are substantially similar in content to the issues raised by the appellant.

I have had the privilege of reading before now the lead judgment of my learned brother Mohammed, JSC and I agree with him that the appeal is meritorious and should be allowed.

However for purposes of a short contribution I have adopted

his statements of the facts of this case. I have decided, however, in order to situate my reasoning in this case clearly to set out in further expatiation of the issues in controversy the reliefs claimed by the Respondents (Plaintiffs) in the trial Court to wit:

B *“WHEREOF the Plaintiffs jointly and severally claim Against the Defendant as follows -*

C *1. An order of this Honourable Court that the Plaintiffs who were ex-security workers at different stages between January 1989 and December, 1994 are entitled to the short payment arising from the overtime and medical arrears paid to their colleagues on 28th March, 1995 for the period of service between January 1989 to December 1995.*

D *2. An order of this Court compelling/directing the Defendant to pay the Plaintiffs their respective short payment inform of overtime and medical arrears as stated in the list containing the names of the Plaintiffs.”*

I am particularly of the opinion that this appeal succeeds on issue one of the Appellant. And I go on to expound on my reasoning for that conclusion.

E The Plaintiffs’ claim in the main is for arrears of overtime over the period between January 1989 to December 1995. The 1st Plaintiff floundered in his evidence as found by the trial court at P. 107 of the Record which reads:

F *“The Plaintiffs’ evidence confirmed paragraph 5d and 5e of the Statement of Claim that they were employed at different times and left the Company at different modes and at different times. So their claims cannot be the same..... He does not know the member of hours of overtime he had worked. He does not know the dates he was absent from duty in 1993 nor the number of public holidays in 1992 and 1993.....”*

H I have to underscore the point already expounded in the lead judgment that it is settled that the plaintiff has the onus of proof on him to show that in a declaratory action as the instant one he is entitled as per his claim; in this regard he has to succeed on the strength of his own case and not on the weakness of the defence case and where he defaults in discharging this onus his claim is subject to the dismissed. See: KODILINYE V. UBANEFO ODU (1935) 2 WACA

336, ADENLE V. OYEGBADE (1967) NMLR 136.

In the light of the foregoing general principle of declaratory actions and the attitude of the Court to the same the Court below rightly observed that as per the Record as follows:

“Also, although the power of the Court to make a declaratory judgment is discretionary the discretion should be exercised with due care and caution and judicially..... It is however, a rule of the exercise of the discretion that it is not granted as a matter of course or because there is no defence to the action or simply because the claim is admitted by the other party. The Plaintiff must still by evidence establish his claim to the right”

I couldn't agree more. This is a correct statement of the law on the point. It is surprising that having so ably set out the law it has made the grave mistake of coming to the conclusion as at paragraph 159-160 of Record as follows:

“If the learned trial judge found that the failure of plaintiffs to tabulate their claim to overtime arrears in Exhibit 5 in months instead of tabulating the claim in hours which is the basis of calculation, they ought to have not denied them a permanent relief by the dismissal of the action of the Plaintiffs but should have given plaintiffs the opportunity of coming back to court to ventilate their claim in another suit.”

It is patently a grave error to come to this conclusion. It is a grave error of finding as it has side stepped the 1st Plaintiffs testimony and the findings of the trial court on the same to the effect the 1st plaintiff in his testimony does not know the number of hours of overtime he worked nor the dates he has been absent from work nor the number of public holidays in 1992 and 1993 as these facts are necessary in order to arrive at a proper computation of the number of days he has been at work and even then of the other Plaintiffs.

There is clear disparity between the evidence of the 1st Plaintiffs testimony and the pleading, meaning that they have failed to discharge the onus of proof on them. Their claim must fail in the circumstances.

I must however observe that in the immediate above findings of the lower Court it appears to suggest that the suit is wrongly constituted and it has gone ahead to contemplate the principles in

enuciated in SMURTHWAITE & ORS. V. HANNAY (1894) ac 494 as approved and applied in the case of AMACHREE V. NEWINGTON (4 WACA 97) (Reprint) postulating that the instant plaintiffs suit should have been non suited as was the case in NEWINGTON' S CASE. The Smurthwaite's case is to the effect that the joinder of several causes of
B action by the Plaintiffs who claimed to have shipped cargo in a general ship under similar bills of lading could not join in one action because each of them had a distinct and separate cause of action. The Plaintiff in the cited case was non-suited.

C There can be no doubt that each of the Plaintiffs here have distinct and separate claims. The principle has no application here as the Plaintiffs' claim here is hinged on a claim for a declaration and having failed to discharge the heavy burden on them their claim must be dismissed.

D For this short comment I agree with the judgment of my learned brother Mohammed, JSC that this appeal is meritorious and should be allowed. I too allow it and abide by the orders in the lead judgment.

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G

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