

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 2009. SC. 247/2002
CORAM:- D. MUSDAPHER, G. A. OGUNTADE,
I. F. OGBUAGU, P. O. ADEREMI,
M. S. MUNTAKA-COOMASSIE, JJSC

ALLOYSIUS AKPAJI APPELLANT
AND
FRANCIS UDEMBA RESPONDENT

PRACTICE & PROCEDURE - Filing fees - Failure to pay - Effect - It does not raise issue of jurisdiction - It is a mere irregularity which when not taken timeously or when acquiesced in - Becomes incapable of affecting the proceedings in any way (H1)

COURT PROCESSES - Claims - On which filing fees are not paid - Proper order to make - If the default is that of the plaintiff & there is no appropriate remedial action - Or application to regularize the anomaly - The claim should be struck out (H2)

PRACTICE & PROCEDURE - Filing fees - Under assessment - Liability for - A litigant or his counsel is not to be held liable - For the failure of the registrar to correctly or properly assess filing fees (H3)

PLEADINGS - Counter claim - Reply - Failure to file - Legal effect - Contrary to the statement of the Court of Appeal - Failure to file a reply is not deemed to be an admission of the counter claim (H4)

APPEALS - Concurrent findings - Attitude of Supreme Court - Where such findings are borne out by evidence on record - They will not be disturbed by the court (H5)

FACTS

The plaintiff/appellant sued the defendant/respondent claiming a certain sum of money purported to be the balance on an interest free loan granted to the respondent by the appellant. The respondent had counter claimed. At the end of trial, the trial court dismissed the appellant's claim and entered judgment for the respon-

dent in respect of the counter claim.

However, the registrar had inadvertently failed to assess the counter claim independently of the statement of defence in which it was contained, thereby leading the respondent to pay only the filing fees for statement of defence without that of the counter claim. Aggrieved by the judgment of the trial court, the appellant appealed to the Court of Appeal challenging the jurisdiction of the trial court to hear the counter claim on the foregoing basis. That court dismissed the appeal and ordered that the appropriate fees be paid by the respondent. Dissatisfied, the appellant has further appealed to the Supreme Court .

ISSUES FOR DETERMINATION

“3.1 Whether or not it was proper in view of S.16 Court of Appeal Act for the lower court to retroactively order the Respondent to pay filing fees on his counter-claim in this appeal.

3.2 Whether the Court of Appeal was right in affirming the findings of fact made by the trial High Court dismissing the Appellant’s claim and awarding judgment to the Respondent on his counter-claim.”

HELD (Dismissing the appeal per **OGBUAGU JSC**, Aderemi JSC dissenting)

Filing fees - Failure to pay - Effect

1. It is now firmly settled that even the failure to pay, does not raise issue of jurisdiction and that the failure to fulfill the provisions of the High Court Rules in that regard, is a mere irregularity which when not taken timeously or when acquiesced in, becomes, incapable of affecting the proceedings in any way.

The usual remedy, it is also settled, is an order by the lower court, that the appropriate fees or any short fall, be paid. It has nothing to do with jurisdiction of the lower court to entertain the counter-claim. (pp. 271 G/272 B)

Claims - On which filing fees are not paid

2. In the case Of Onwugbufor & 2 ors, V. Okoye & 3 ors. (1996) 1 NWLR (Pt.424) 252 @, 291 - 292; (1996) 1 SCNJ. 1 @, 36 cited by the parties in their respective Brief, (it is also reported in (1996) 34 LRCN 1), although it was held that payment of filing fees, is a condi-

tion precedent necessary to the exercise of jurisdiction, this Court - per Iguh, JSC, stated inter alia:

“If the default in payment is that of the plaintiff, the claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the court and should be struck out in the absence of an appropriate remedial action or application to regularize such anomaly.....”

So, it can be seen that there is a rider so to speak.
(p. 273 A)

Filing fees - Under assessment - Liability for

3. Surely and certainly, the error or inadvertence of the said Registrar, cannot, in my respectful and firm view, be said to be that of the Respondent. The Registrar saw and assessed the Statement of Defence. If he must read the entirety of the Statement of Defence before assessing it (and I doubt it) and he failed correctly or properly to do so, his error or omission, cannot be ascribed to be that of the Respondent and/or his learned counsel. I therefore, hold, that the non-payment in full of the appropriate fees, was a mere irregularity and did not vitiate the proceedings and it has nothing to do, with the jurisdiction of the trial court. At worst, it is voidable not void. As can even be seen, it is not the failure to pay an assessed filing fees, but non-payment of the appropriate or requisite fees - (i.e. inadequate fees). If the Registrar/Registry under-assessed - i.e. not assessing correctly, can it be said, by any stretch of imagination, that the fault to assess adequately, is that of a litigant or a lawyer or the Respondent? I think not. (p. 274 D/F)

Counter claim - Reply - Failure to file - Legal effect

4. I had in this Judgment, noted as did the court below, that the Appellant, never filed any defence or reply to the counter-claim (even on his admission), it was “irregularly” filed. I am aware however, and this is also settled, that where a plaintiff fails to or neglects to file a defence or a Reply to a counter-claim, it is of no moment and it is not fatal to the claim. This is because, if the Plaintiff succeeds in his claim, the counter-claim is useless. It is not that the plaintiff, is deemed to admit the counter-claim as stated at page 166 of the Records by the court below. It is only so, where it relates to the failure of the defen-

dant, to file a Statement of Defence. In that case, all material facts alleged in the Statement of Defence, are put in issue. (p. 275 D)

Concurrent findings - Attitude of Supreme Court

5. As regards issue 3 of the Appellant, the court below at page 166 of the Records, stated inter alia, as follows:

“..... the learned trial Judge of the lower court made painstaking review of the evidence led before him and made in depth findings of fact which findings are unimpeachable. I cannot fault the findings. I am of the view that the findings of fact made by the Judge are in accordance with the evidence before him which he believed. The conduct of the Appellant in this case must be deprecated. There is no merit in this appeal which must be dismissed”.

I agree and I will add that the Appellant, by his greed, ingratitude, bad faith and dishonesty, has now broken and truncated the age long friendship between him and the Respondent - his mentor and benefactor. It is a pity!

The attitude of this Court in respect of findings of facts by the two lower courts, is no longer in doubt. It is firmly settled that it will not disturb or interfere with the said concurrent findings of fact/facts. (p. 276 A)

NOTABLE POINTS OF INTEREST

ADEREMI JSC (DISSENTING)

1. *Payment of filing fee is condition precedent to validity of court processes*

I will like to say that payment of a prescribed filing fee is a pre - condition to the validity of any process filed in the court. In a counter - claim, the defendant who has filed it is in the same position as a plaintiff, indeed, he is the plaintiff vis - a- vis that counter - claim. (p. 281 G)

2. *S. 16 of Court of Appeal Act presupposes regularity of court processes*

The court below had in closing its judgment invoked the provisions of Section 16 of the Court of Appeal Act Cap 75 Laws of the Federation of Nigeria and ordered the defendant/respondent to pay the prescribed filing fee for the counter-claim.

In exercising its power solely in dispensing justice, the above provisions envisages a situation in which everything about the process before the court right from the inception of the case is regular, it is not afflicted by any vice, no condition precedent to the validity of the process filed has been left unattended to. (p. 283 B/H)

B

3. A litigant must see to it that all righteousness is fulfilled

The respondent has further argued that the non-payment of the filing fee was not his fault as it was not his duty to assess the process. My quick reply is that it is he who is seeking a redress from the court that must see to it that all righteousness is fulfilled. His ignorance of the law pertaining to the payment of the filing fee, even if he relies on that cannot avail him. The saying is quite sacrosanct. "IGNORANCE OF THE LAW WHICH EVERYBODY IS SUPPOSED TO KNOW DOES NOT AFFORD EXCUSE" - the Latin Maxim is IGNORANTIA JURISQUOD QUISQUE SCIRE TENETUR NON EXCUSAT" (p. 285 F)

C

D

REPRESENTATION

No appearance for the Appellant (although served).

E

I. M. Ugwuanyi, Esqr., for the Respondent, with him, Joseph Ugwuka, Esqr.

CASES REFERRED TO

A.C.B. Ltd. v. Henshaw (1990) 1 NWLR (Pt.129) 646 @ 650 C.A.

F

Sonuea v. Anadein (1967) NMLR 77 @ 79

Ezemo v. Oyakhire (1985) 1 NWLR (Pt.2) 195 (a). 202-203

Noibi v. Fikolata & anor. (1987) 1 NWLR (Pt.52) 619 @ 632

Alhaji Saude v. Alhaji Abdullahi (1989) 4 NWLR (Pt.116) 387

G

Dike v. Okorie (1990) 5 NWLR (Pt.161) 418 @ 428-429

Hassan Said v. Nigerian Automobile Co. Ltd. (1956) 1 FSC 107

Enang v. Adu (1981) 11 - 12 S.C. 25 @ 39

Eigbajale v. Oke & 6 ors. (1996) 5 SCNJ. 49 @, 64

Onwugbufo & 2 ors, V. Okoye & 3 ors. (1996) 1 NWLR (Pt.424) H 252 @, 291 - 292

Dabup v. Kolo (1993) 9 NWLR (Pt.317) 254 @ 270, 281; (1993) 12 SCNJ 1

Akeredolu v. Akinremi (1989) 3 NWLR (Pt.108) 164 (a), 172

Obot v. Central Bank of Nigeria (1993) 8 NWLR (Pt.310) 140

STATUTE REFERRED TO

Court of Appeal Act, s.16

B

LEAD JUDGMENT BY OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Enugu Division (hereinafter called “the court below”) delivered on 25th April, 2002 affirming the decision of the trial court delivered on 28th June, 1999 - per Nguta, J. (as he then was) dismissing the Plaintiff/Appellant’s claim and granting the counter-claim of the Defendant/Respondent.

Dissatisfied with the said decision, the Appellant, has appealed to this Court on six (6) Grounds of Appeal. Briefs were filed and exchanged. The Appellant formulated four (4) Issues for determination which read as follows:

“1. *Whether the Lower Court and the Trial High Court has (sic) Jurisdiction to hear and enter Judgment on a Counterclaim when the condition precedent to the filing of a valid claim being payment of prescribed fees was wanting and whether by section 16 Court of Appeal Act the Court of Appeal is empowered to validate the said Judgement retrospectively or retroactively by an order to pay the said filing fees on the claim 3 years ex post the Trial Court Judgment (sic) thereon.*

2. *Whether ‘a special order of the Court’ on a process on which no fee has been paid, virtue (sic) of order 6 Rule 5 of the High Court Rules of Anambra State 1988 Applicable in Ebonyi State and by section 16 Court of Appeal Act, exempted and can avail a party who though made aware of irregularity, defended his steps and where no evidence on record of any mistake on the part of Court officials.*

3. *Whether upon a proper direction on the evidence and on the evaluation of credible evidence adduced, the Defendant/Respondent was entitled to Judgment on his Counterclaim (albeit a nullity) on the mere failure (or mistake) of filing a Defence to same by the Plaintiff and in spite of controverting evidence in proof of said Counterclaim as opposed to Plaintiff/Appellant who led credible evidence on his claims”.*

(the underlining mine)

On his part, the Respondent formulated two (2) issues for determination, namely,

“3.1 Whether or not it was proper in view of S.16 Court of Appeal Act for the lower court to retroactively order the Respondent to pay filing fees on his counter-claim in this appeal. This issue arose from grounds 1,2,3 & 4 of the appellant’s grounds of appeal.” ^B

3.2 Whether the Court of Appeal was right in affirming the findings of fact made by the trial High Court dismissing the Appellant’s claim and awarding judgment to f/ie Respondent on his counter-claim. This issue arose from grounds 5 & 6 of the appellant’s grounds of appeal.” ^C

In my respectful view, the issues of the Respondent, appear to me, apt for the determination of the appeal. The facts of the case, appear to me not necessary to be set out by me having regard to issues 1 and 2 of the Appellant and issue 3.1 of the Respondent. However, having regard to issue 3 of the Appellant and issue 3.2 of the Respondent, I will, even briefly state the facts. The parties were good or bosom friends. Both of them, entered into a written Agreement titled a “LOAN agreement”. It is Exh. ”A” prepared by a lawyer and it is a free loan without interest. For the avoidance of doubt; the terms of the Agreement, are as follows: ^E

“NOW THIS AGREEMENT WITNESS that:

1. The Borrower hereby acknowledges the receipt of the sum of 441,484,535 (One million, four hundred and eighty four thousand, five hundred and thirty five Naira) from the lender. ^F

2. The said sum is to enable the Borrower meet the cost of repairs of the aforementioned vehicles.

3. The Borrower shall repay the loan in monthly installments depending on the proceeds accruing from the Commercial use of the Vehicles,

4. On payment, the lender shall issue a receipt to the Borrower acknowledging receipt of sum and the latter shall be deducted from the outstanding sum. ^H

5. The parties shall meet every three months to review the operation of this agreement.

6. Any dispute arising from this agreement shall be referred to arbitration comprising of four men to be nominated by the parties”.

The Respondent, by two instalmental payments which were receipted for by the Appellant, (Exhibit “B” and “C”), made a total refund of N1,074,805 (One million, hundred and seventy four thousand eight hundred and five naira) leaving a balance of N411,730.00 (Four hundred and eleven thousand seven hundred and thirty naira}.

B The Appellant was appointed as a Manager at his instance, in respect of two Mercedes Lorries owned by the Respondent who was a businessman. The Appellant, was authorised by the Respondent, to employ drivers and conductors for the two vehicles and the service of the vehicles and was to render account to the Respondent. The Appellant, was to invest the proceeds from the two vehicles. When in C 1996, the Respondent demanded from the Appellant, an account of the proceeds, the Appellant claimed that there was no credit balance and that in fact, he had spent his own money on repairs of the vehicles which he put at N1,484,535.00. It was at the instance of the D Appellant, that Exhibit “A” ,was made. When the Appellant thereafter rendered an account amounting to N550,000.00, the Respondent ,told him to deduct the balance of N411,730 .00 and to pay over to him, the sum of N138,270.00 and also issue him with a E receipt in respect thereof. The Appellant did not comply. When the Respondent, insisted on the said balance of N138,270.00 and the receipt in respect of N411,730.00, the Appellant sued him under the Undefended List. The Respondent, filed a Notice of Intention to Defend the suit. The trial court later, transferred the suit, to the general F cause list for hearing. Pleadings were filed and exchanged. The Respondent in his Statement of Defence, counter-claimed. I note that the Appellant, did not file a defence or Reply to the counter-claim.

At the trial, the Appellant testified and did not call a witness. G The Respondent testified and called two witnesses. After the addresses of learned counsel for the parties, the learned trial Judge, in a well considered Judgment, dismissed the Appellant’s claim and entered Judgment for the Respondent in respect of the counter-claim. The Appellant appealed to the court below which also dismissed the appeal and affirmed the Judgment of the trial court. It also, pursuant to H Section 16 of its Rules, ordered that appropriate fees for the counter-claim, be paid, hence the instant appeal.

When this appeal came up for hearing on 18th November, 2008, the Appellant and his learned counsel were absent although

served. The learned counsel for the Respondent - Ugwuanyi, Esqr., adopted their Brief and urged the Court, to dismiss the appeal. Pursuant to Order 6 Rule (6) of the Rules of this Court, the Appellant's appeal, was deemed to have been argued. Judgment was therefore, reserved till today.

In dealing with the merits of this appeal, I note in respect of Issues 1 and 2 of the Appellant and issue 3.1 of the Respondent, that during the pendency of the appeal in the court below, the Respondent, filed an application dated 26th March, 2001, for an order directing the Respondent to pay the filing fees for the counter-affidavit which according to him, was inadvertently omitted in the correct or appropriate assessment by the Registrar of the trial court. In paragraphs 10, 11, 12 and 13 of the supporting affidavit, he swore that the omission for the proper or correct assessment, was not his but that of the Registry/Registrar. That he only became aware of the incorrect assessment, when the appeal in the court below, came up. I note that what was assessed by the Registry and paid for, is N37,00 (thirty-seven naira) and this amount, was for the said Statement of Defence containing the Counter-claims in paragraph 13 thereof. The fault for not adverting his mind to the counter-claims, was surely and certainly, that of the Registrar or Registry and not that of the Respondent. The Appellant filed a counter-affidavit. The court below at page 165 of the Records, found as a fact that,

"the record shows that the fees assessed by the Registry were paid fully".

On 6th June, 2001, the Respondent, filed another motion asking for the same relief as in the previous application and having paid the sum of N540.00 (five hundred and forty naira) which he described as the correct fees, sought leave of the court below, to file the receipt in respect thereof and a deeming order.

I have no doubt that these motions, were panicky actions. See pages 121 and 144 of the Records. In my respectful view, they were most unnecessary. I say so because, ***it is now firmly settled that even the failure to pay, does not raise issue of jurisdiction and that the failure to fulfill the provisions of the High Court Rules in that regard, is a mere irregularity which when not taken timeously or when acquiesced in, becomes, incapable of affecting the proceedings in any way.*** See the case of A.C.B. Ltd. v.

Henshaw (1990) 1 NWLR (Pt.129) 646 @ 650 C.A. citing the cases of Sonuea v. Anadein (1967) NMLR 77 @ 79; Ezemo v. Oyakhire (1985) 1 NWLR (Pt.2) 195 (a). 202-203; Noibi v. Fikolata & anor. (1987) 1 NWLR (Pt.52) 619 @ 632 (it is also reported in (1987) 3 SCNJ. 14) and Alhaji Saude v. Alhaji Abdullahi (1989) 4 NWLR (Pt.116) 387 (a), 405 - 406 (it is also reported in (1989) 7 SCNJ. 216)

The usual remedy, it is also settled, is an order by the lower court, that the appropriate fees or any short fall, be paid. It has nothing to do with jurisdiction of the lower court to entertain the counter-claim. Indeed, Oguntade, JCA (as he then was) in ACB v. Henshaw (supra) at page 651, stated inter alia, as follows:

“..... even if the defendant/respondent had not paid the requisite court fees, this was a matter to be settled before the lower court. The usual remedy being an order by the lower court that the appropriate fees or any short fall be paid. It certainly has nothing to do with jurisdiction of the lower court to entertain the counter-claim”.

In the case Of Lawal & anor. V. Odejimi & anor. (1963) WNLR 23; (1963) ANLR 569 @ 570 - per Charles J. where inadequate fees were paid for a writ of summons, the trial court, allowed the plaintiff, time to pay the balance of the fees. See also the case of The State v. Sunday Ugbor & ors. (1979) 1 MSLR 521 (at 523 - per Ukattah, J. (as he then was) citing Lawal & anor. V. Odejimi (supra),

I am aware and this is also settled that a document or process of court, is deemed duly filed, when a paper or the document or process is brought to the Registry, and is assessed and paid for, that such a document, etc, can be said to be filed in law, except where there is a dispensation under the Rules of court that the document etc, can be filed without payment. Of course, this will be a question of fact if fees are paid in respect of a document brought to the court. See the case of Dike v. Okorie (1990) 5 NWLR (Pt.161) 418 @ 428-429 C.A. citing the case of Government of Imo State v. Orisakwe FCA/109/82 of 2/7/85. It was also held that a document is deemed to have been properly filed in court, when same is deposited in a court's office with the proper court officer assigned with the responsibility. See the case of Mohammed v. Musawa (1985) 3 NWLR (Pt.II) 89.

In the case Of Onwugbufor & 2 ors, V. Okoye & 3 ors. (1996) 1 NWLR (Pt.424) 252 @, 291 - 292; (1996) 1 SCNJ. 1 @, 36 cited by the parties in their respective Brief, (it is also reported in (1996) 34 LRCN 1), although it was held that payment of filing fees, is a condition precedent necessary to the exercise of jurisdiction, this Court - per Iguh, JSC, stated inter alia: B

"If the default in payment is that of the plaintiff, the claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the court and should be struck out in the absence of an appropriate remedial action or application to regularize such anomaly.....". C

[the underlining by the Respondent and mine]

So, it can be seen that there is a rider so to speak. The appropriate remedial action, was the said order by the court below D even without the said motions of the Respondent afore-stated. But in any case, not only did the Respondent, apply for leave of the court below, to pay the appropriate fees, it exhibited, the receipt of the payment. Afterwards, as stated by Charles, J. in Lawal v. Odejimi (supra), the object of the provisions of payment of filing fees in the said Rules of the High Court, is to protect the public revenue. The material averments in the said paragraphs 7 to 13 of the affidavit of the Respondent in support of his said motion, were merely stated by the Appellant in his counter-affidavit, to be an after-thought and false. F Can paragraph 8 thereof which the Respondent swore as follows:

"That the said Court Registrar informed me, and I verily believed him that the total court fees was the sum of N37. 00 (thirty seven naira) which was contained in the Statement of Defence".

be said to be false? I or one may ask. G

I have noted earlier in this Judgment, that the Respondent's Statement of Defence containing the counter-claim at pages 12 to 14 of the Records, was assessed at N37.00 (thirty seven naira) and this was paid for by the Respondent. The Respondent in paragraphs 10, 11, 12 and 13 of the said affidavit, swore as follows: H

"10. That at the time of handing in the said Statement of Defence and Counter Claim, I had in my possession enough money to pay any sum of money to be assessed as Court fees thereof".

11. That the default in assessment and the resultant nonpayment

of a specific court fee for counter claim is not my fault

12. *That I was not aware that the Counter Claim was not assessed for payment at the time of assessment.*

13. *That I became aware that my Counter Claim was omitted in the assessment of Court fees by the Registrar of the Court below only when this matter came of an appeal (sic)"*

These averments, are clear and unambiguous. The said Registrar, has not controverted paragraphs 11 - 13 of the said affidavit. At page 4 of the Appellant's Brief before "issues for Determination", it is stated inter alia, that,

"..... and in spite of evidence on record of Defendant being aware of the irregularity of his counter claim and yet defending his steps..... "

See also his issue 2.

Surely and certainly, the error or inadvertence of the said Registrar, cannot, in my respectful and firm view, be said to be that of the Respondent. The Registrar saw and assessed the Statement of Defence. If he must read the entirety of the Statement of Defence before assessing it (and I doubt it) and he failed correctly or properly to do so, his error or omission, cannot be ascribed to be that of the Respondent and/or his learned counsel. With profound humility, it will be unfair and unjust in the instant appeal, to state by anybody including this Court, that ignorance of the law is no excuse. The Records, show that the Respondent who took the document to the Registry for assessment and payment, is only a Business-man. There is no evidence, that he is a lawyer or one who knows the business or procedure in the court's Registry as regards assessment of court processes brought before it. ***I therefore, hold, that the non-payment in full of the appropriate fees, was a mere irregularity and did not vitiate the proceedings and it has nothing to do, with the jurisdiction of the trial court. At worst, it is voidable not void. As can even been seen, it is not the failure to pay an assessed filing fees, but non-payment of the appropriate or requisite fees - (i.e. inadequate fees). If the Registrar/Registry under-assessed - i.e. not assessing correctly, can it be said, by any stretch of imagination, that the fault to assess adequately, is that of a litigant or a lawyer or the Respondent? I think not.***

Before I am done with the said issues, I note that the issue of nonpayment of the filing fees, was never raised in the trial court. This fact, is conceded by the Appellant. However, since it touches on jurisdiction and therefore, can be raised at any stage, I say no more about the raising of the said issue for the first time in the court below notwithstanding of the decision of this Court in the case of Alhaji Ndayako Etsu Nupe (Chairman Niger State Council Of Chiefs) Jikantoro & 6 ors, v. Alhaji Dantoro & 6 ors, (2004) 13 NWLR (Pt.889) 189: (2004) 5 SCNJ. 152 @, 196; (2004) 5 S.C. (Pt.II) 1 @ 20 to the effect also that rules on payment of requisite court fees, are rules of natural justice and that objection thereof, ought appropriately to have been taken, at the stage of trial and not at the appellate level. This referred to Order 3 Rule 4 of the Niger State High Court Rules which requires that particulars of claim shall not be amended except by leave of court as well as rules of natural justice.

I had in this Judgment, noted as did the court below, that the Appellant, never filed any defence or reply to the counter-claim (even on his admission), it was “irregularly” filed. I am aware however, and this is also settled, that where a plaintiff fails to or neglects to file a defence or a Reply to a counter-claim, it is of no moment and it is not fatal to the claim. This is because, if the Plaintiff succeeds in his claim, the counter-claim is useless. See the case of *Dabup v. Kolo* (1993) 9 NWLR (Pt.317) 254 @ 270, 281; (1993) 12 SCNJ.1. ***It is not that the plaintiff, is deemed to admit the counter-claim as stated at page 166 of the Records by the court below. It is only so, where it relates to the failure of the defendant, to file a Statement of Defence. In that case, all material facts alleged in the Statement of Defence, are put in issue.*** See the case of *Akeredolu v. Akinremi* (1989) 3 NWLR (Pt.108) 164 (a), 172; (1989) 5 SCNJ. 71 - per Kawu JSC, referred to in the case of *Obot v. Central Bank of Nigeria* (1993) 8 NWLR (Pt.310) 140 @ 162; (1993) 9 SCNJ. (Pt.II) 268. See also T.A. Aguda paragraph 109 page 101 - 102 Practice and Procedure in Civil Actions in the High Court of Nigeria.

However, or in any case, can it be fairly or justly said from the Records, that the Appellant's case remained unchallenged, in the absence of the counter-claim? With respect, I think not. The Respondent, filed a Statement of Defence and testified in support of the

defence and called witnesses to controvert the Appellant's Claim. The trial court, thoroughly, evaluated the evidence of the parties before coming to a decision dismissing the Appellant's case.

As regards issue 3 of the Appellant, the court below at page 166 of the Records, stated inter alia, as follows:

B *"..... the learned trial Judge of the lower court made painstaking review of the evidence led before him and made in depth findings of fact which findings are unimpeachable. I cannot fault the findings. I am of the view that the findings of fact*
 C *made by the Judge are in accordance with the evidence before him which he believed. The conduct of the Appellant in this case must be deprecated. There is no merit in this appeal which must be dismissed".*

D *I agree and I will add that the Appellant, by his greed, ingratitude, bad faith and dishonesty, has now broken and truncated the age long friendship between him and the Respondent - his mentor and benefactor. It is a pity!*

The attitude of this Court in respect of findings of facts by the two lower courts, is no longer in doubt. It is firmly settled
 E *that it will not disturb or interfere with the said concurrent findings of fact/facts.* See the cases of Onwugbufo & ors. v. Okoye & ors. (supra) citing the cases of Hassan Said v. Nigerian Automobile Co. Ltd. (1956) 1 FSC 107 and Alhaji A.W. Akibu v. Joseph Opalye (1974) 11 S.C. 1.89. See also the cases of Enang v. Adu (1981) 11
 F - 12 S.C. 25 @ 39 and Eigbajale v. Oke & 6 ors. (1996) 5 SCNJ. 49 @, 64 and too many others.

It is from the foregoing, that I unhesitatingly, dismiss this appeal which with respect, is bereft of any merit or substance. I hereby
 G and accordingly, affirm the decision of the court below.

Costs follow the event. The Respondent is awarded N50,000.00 (Fifty Thousand Naira) costs payable to him by the Appellant. I wish I could have awarded more.

H

MUSDAPHER JSC

I have read before now, the judgment of my Lord Ogbuagu, JSC just delivered. For the same reasons canvassed in the aforesaid judgment which I respectfully adopt as mine, I too find the appeal

unmeritorious and I dismiss it. I affirm the judgments of the two courts below. I abide by order of costs as contained in the lead judgment.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Ogbuagu JSC. I agree with his reasoning and conclusion. I would also dismiss the appeal and subscribe to the order on costs.

ADEREMI JSC (DISSENTING)

This is an appeal against the judgment of the Court of Appeal (Enugu Division) hereinafter referred to as the court below. The judgment was delivered on the 25th of April 2002. The court below had dismissed the appeal against the judgment of the trial court (High Court of Justice, holden at Abakaliki) in suit No. AB/28/98: ALLOYSIUS AKPAJI VS. FRANCIS UDEMBA delivered on the 28th of June 1999 in which the trial court held that the plaintiff/appellant failed to prove that the defendant/respondent was indebted to him and the trial court proceeded to uphold the counter-claim of the defendant.

Briefly put the facts of the case are follows: it is common ground that the plaintiff/appellant advanced an interest -free loan of N1,484,535.00 to the defendant/respondent. The plaintiff/appellant's case is that the defendant/respondent made a partial refund of the debt to him in two lots i.e. the sum of N472, 805 (Four Hundred and Seventy Two Thousand, Eight Hundred and Five Naira) on the 6th of June, 1996 and N600, 000.00 (Six Hundred Thousand Naira) on the 8th of December, 1996. The plaintiff/appellant issued two receipts to the defendant/respondent for the two different sums paid by him. The two receipts for the two different sums of money paid were tendered and admitted in evidence as Exhibits B and C respectively. Suffice it to say that the Agreement evidencing the loan had been tendered as Exhibit A. When the defendant/respondent failed to pay the balance of the interest - free loan amounting to N411, 730.00 (Four Hundred and Eleven Thousand, Seven Hundred and Thirty naira) he took out a writ of summon claiming the said balance

from the defendant/respondent in the trial court. The plaintiff thereafter filed a statement of claim. In reacting to the plaintiffs process, the defendant/respondent filed a statement of defence and a counter-claim wherein he averred that the said two sums of money were proceeds from the management of his vehicles and the sale of one of his vehicles respectively and that the two sums were handed over to the plaintiff to off - set part of the debt. He (defendant) further averred in his pleadings that he had granted the management of his two commercial vehicles to the plaintiff/appellant, who, as further averred by the defendant, tendered a credit balance of N550,000.00 after the payment of the afore-said two sums of money receipted for the plaintiff/appellant. In setting up a counter - claim, the defendant/respondent averred that with the fresh credit of N550,000.00 inuring in his favour through the plaintiff by deducting the outstanding balance of N411,730.00 earlier debited to him by the plaintiff/appellant, the sum of N138,270.00 would then be outstanding in his favour from the plaintiff/appellant. He (defendant/respondent) counter - claimed from the plaintiff/appellant the sum of N138,270.00 and an order of the court compelling the plaintiff/appellant to issue to him (defendant) a receipt for the sum of N411,730.00 deducted from N550.000.00 credited to him. Suffice it to say that the defendant/respondent did not pay the requisite filing fees for the said counter claim.

Evidence was called by both parties and as I have said, the trial court held that the plaintiff failed to prove his case and consequently dismissed the claim therein. The counter-claim was however granted. Dissatisfied with the judgment of the trial court, the plaintiff appealed to the court below which after hearing the arguments on the appeal, dismissed the appeal, in so doing, the court below reasoned:

"The amount of the alleged loan is not in dispute. I call it an alleged loan because it was not a loan in the ordinary sense of the word. I had remarked earlier that the nature of the amount involved in the loan makes one wonder whether it was a simple loan transaction in the ordinarily sense of the word. The truth is that it was not an amount to be used in amortising the amount spent in repairing the two Mercedes Benz lorries of the respondent for which the appellant was appointed a manager to ensure that his money was dully re-

funded to him. Be that as it may, under the loan agreement (Exhibit A) the respondent acknowledged his indebtedness to the appellant in the sum of N1,484,535.00.

*As per Exhibits B and C the respondent had refunded a total of N1,072,805.00 leaving a balance of N411,730.00. The appellant rendered a 3rd account of N550,000.00 which completely amor- B
tised the loan leaving a balance of N138,270.00 in favour of the respondent. It was this last account that sparked off the controversy between these two age-old friends. From the agreement which the parties had observed, the appellant ought to deduct his balance of C
N411, 730.00 from the N550,000.00 and pay over to the respondent the excess of N138,270.00. This the appellant refused to do but instead sued the respondent to court for the N411,730.00 The respondent counter-claimed for N138,270.00. At the close of the plead- D
ings, the position was that the appellant filed no defence or reply to the counter-claim where a plaintiff fails to or neglects to file a defence or a reply to a counter - claim, he is deemed to admit the counter-claim..... There is no merit in this appeal which must be dismissed. I dismiss the appeal. I order the respondent to pay to the lower court the necessary fee for filing a counter - claim. E
I affirm the orders made by the lower court."*

Again, dissatisfied with the judgment of the court below delivered in the 25th of April 2002, the plaintiff/appellant further appealed to this court raising three issues for determination. They are as fol- F
lows:

*"(1) Whether the Lower Court and the trial court has (sic) Jurisdiction to hear and enter Judgment on a counter claim when the condition precedent to the filing of a valid claim being payment of prescribed fees was wanting and whether by Section 16 of the G
Court of Appeal Act the Court of Appeal is empowered to validate the said Judgment retrospectively or retroactively by an order to pay the said filing fees on the claim 3 years, ex-post the trial court judgment therein.*

*(2) Whether a special order of the Court in a process in which H
no fee has been paid, (sic) virtue of Order 6 Rule 5 of the High Court Rules of Anambra State 1988 applicable to Ebonyi State and by Section 16 of the Court of Appeal Act, exempted and can avail a party who though made aware of irregularity, defended his steps and*

where no evidence on sic record of any mistake on the part of Court officials.

(3) *Whether upon a proper direction on the evidence and on the evaluation of credible evidence adduced, the Defendant/Respondent was entitled to Judgment on his Counter claim (albeit a nullity) on the mere failure (or , mistake) of filing a defence to same by the plaintiff and in spite of controverting evidence in proof of the said counter - claim as opposed to plaintiff/appellant who led credible evidence on his claim ”.*

The respondent, on his part, identified two issues for determination, which is set out in his brief, are as follows:

“(1) Whether or not it was proper in view of Section 16 Court of Appeal Act for the lower court to retroactively order the respondent to pay filing fees on his counter claim in this Appeal

(2) Whether the Court of Appeal was right in affirming the findings of fact made by the trial High Court dismissing the Appellant’s claim and awarding judgment to the Respondent in his counter claim ”.

When this appeal came before us on the 18th of November 2008 for argument, parties were absent and it was only Mr. Ugwuanyi, learned counsel for the respondent that appeared. Since all briefs had been filed, exercising the powers of this court under the Rules of court, we took the appeal as having been argued while Mr. Ugwuanyi adopted and relied on his client’s brief filed on 26th March 2003 and urged us to dismiss the appeal.

I have carefully read the three issues formulated by the appellant and the two issues raised by the respondent for determination by this court. Both parties are in agreement as to the following facts: that the sum of N1,484,535.00 (One Million, Four Hundred and Eighty - Four Thousand, Five Hundred and thirty -five Naira) was initially owed by the defendant/respondent to the plaintiff/appellant, that in two different occasions, the defendant/respondent paid back the sums of N472, 805.00 (Four Hundred and Seventy-two Thousand, Eight Hundred and five naira) and N600, 000.00 (Six Hundred Thousand naira) respectively to the plaintiff/appellant. They both also agreed that the plaintiff/appellant issued two receipts to the defendant/respondent acknowledging the receipt of the aforesaid two sums of money i.e. N472, 805.00 and N600, 000.00 respectively. The area of disagreement between them is that; while the plaintiff/

appellant is contending that the outstanding balance for which he took out a writ against the defendant is N411,730.00 (Four Hundred and Eleven Thousand, Seven Hundred and Thirty Naira), the defendant/respondent on the other hand is contending that in addition to the two sums of money paid to the plaintiff and for which he was given two receipts, he also paid to the plaintiff/appellant the sum of N550,000.00 (Five Hundred and Fifty thousand Naira) for which no receipt was issued to him. His further position is that if the sum of N411,730.00 outstanding after the initial two payments by him is deducted from the sum of N550,000.00 that would leave to his (defendant) credit the sum of N138,270.00 (One Hundred and Thirty - Eight thousand. Two Hundred and Seventy naira) for which he counter - claimed, he also prayed for an order of court compelling the plaintiff/appellant to issue him receipt acknowledging the payment of N411,730.00 which is the basis of the plaintiff's claim. The plaintiff/appellant has argued strenuously in his brief of argument that failure to pay the filing fee for the counter - claim is fatal and that the trial court lacked the jurisdiction to entertain it, he placed reliance on the decision of this court in (1) ONWUGBUFOR VS OKOYE (1996) NWLR (PT.424) 252 and (2) OHENE MOORE VS AKASSEH 2 WACA 43. The defendant/respondent argued to the contrary maintaining that there was a valid counter-claim before the trial court and that non-compliance with the provision of the law as to payment of filing fees makes the counter-claim voidable for irregularity and not void as, according to him, the object of the rules dictating payment of filing fees is to protect the public revenue and that the irregularity would be removed by the payment of the prescribed fee which the court below eventually ordered in the exercise of its powers under Section 16 of the Court of Appeal Act, he relied on the decision in ALIRATU LAWAL & ORS VS E. S. ODEJIMI & AN (1963 ALL NLR 569 at 570, 572.

I will like to say that payment of a prescribed filing fee is a pre - condition to the validity of any process filed in the court. In a counter - claim, the defendant who has filed it is in the same position as a plaintiff, indeed, he is the plaintiff vis - a - vis that counter - claim. My view as to the payment of prescribed filing fee is reinforced by the decisions in ONWUGBUFOR & ORS VS OKOYE & ORS (1996) 1 NWLR (Pt.424) 252 and OKOLO & AN VS. UBN Ltd. (2004) 3

B *“It is the responsibility of the plaintiff inter alia to pay the requisite fees in respect of each and every relief claimed as prescribed by the rules to enable the court’s judicial functions to commence. A court shall not entertain a relief claimed without payment of the prescribed*
C *requisite fees unless such fees have been waived or remitted by the court or such are payable by any Government Ministry or non- Ministerial Government Department or Local Government pursuant to the provisions of the said High court Rules of Anambra State. If the default in payment is that of the plaintiff, the claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the court and should be struck- out in the absence of an appropriate remedial action or application to regularize such anomaly.*

D *In the present case, no payment whatsoever was made by the appellants in respect of their new claim for forfeiture. Payment of the prescribed fees being a condition precedent to the filing of a valid claim before the court, it seems to me clear that the claim for forfeiture in the present suit is incompetent, improperly before the court and sought to be struck out. In the circumstance, it becomes entirely*
E *idle and academic to examine the various reasons given by both courts below in refusing the appellant’s claim for forfeiture which must be and is hereby struck out.”*

F *Again in OKOLO & AN VS. UBN LTD. (2004) 3 NWLR (PT.859) 87, this court in following its decision in ONWUGBUFOR (Supra) said per Tobi JSC at page 109*

G *“in the light of the above, I have not the slightest difficulty in accepting the invitation of Chief Akpofure to strike out the new reliefs Nos 21E and D and I hereby accordingly strike them out.*

H *But the all-important question to ask is whether the counter-claimant paid the filing fee for the counter-claim he filed? The answer to this question can only be found in page 167 of the record where Ubaezonu who read the lead judgment reasoned and ordered:*

“I dismiss the appeal. I order the respondent to pay to the lower court the necessary fee for filing a counter-claim.”

(Underlining mine for emphasis)

By this order it admits of no argument that the official necessary fee for the counter-claim was never paid and the counter- claim, for reason of non-payment of the fee, ought to have been struck

out. It should not have been entertained. The process filed by the defendant was not captioned "STATEMENT OF DEFENCE and COUNTER-CLAIM." It is deliberately misleading.

From the two decisions I have referred to supra non-payment of prescribed filing fee is not a technicality rather, it is a fundamental vice that goes to the root of process, it makes it invalid. The court below had in closing its judgment invoked the provisions of Section 16 of the Court of Appeal Act Cap 75 Laws of the Federation of Nigeria and ordered the defendant/respondent to pay the prescribed filing fee for the counter-claim. The defendant had tried to justify the order made by the court below by arguing that not only is the non-payment of the prescribed filing fee a mere irregularity, the fault or the mistake in not so paying the filing fee is that of the Registry of the trial court which failed to assess the counter-claim and indicate the amount in the process presented for filing by the defendant/respondent. Section 16 of the Court of Appeal Act Cap 75, Laws of the Federation of Nigeria 1990 provides:

"The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear in whole or in part or may emit it to the court below for the purpose of such re-hearing of may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court or, in the case of an appeal from the court below in that court's appellate jurisdiction order the case to be re-heard by a court of competent jurisdiction."

In exercising its power solely in dispensing justice, the above provisions envisages a situation in which everything about the process before the court right from the inception of the case is regular, it is not afflicted by any vice, no condition precedent to the validity of

the process filed has been left unattended to. The vice in the present process the counter-claim- is one that goes to the root of the validity of the process-filed failure to pay the filing fees deprives the trial judge the jurisdiction to entertain the process. Provisions in Section 16 afore-said do not cover this situation. In the case of OHENE MOORE VS AKESSEH TAYEE 2 WACA 43, a plaintiff had brought an action for damages for trespass, on his land and for unlawfully arresting the plaintiffs men. The Native Tribunal had entered judgment for the defendant. The provincial Commissioner of the Western Province in Gold Coast reversed the judgment of the Native Tribunal. On a further appeal to the West African Court of Appeal, the appellate court reversed the judgment of the Provincial Commissioner of the Western Province. The rules regulating appeals from the Paramount Chiefs Tribunal (Native Tribunal) were contained in the Native Administration Ordinance called Native Administration Ordinance Chapter III of the Laws of the Gold Coast Colony, 1928 Section 77 (1) and (2) thereof. An application was made to the Native Tribunal Court for leave to appeal and the Native Tribunal granted conditional leave to appeal. The order so made by the Native Tribunal Court (the court of first instance) did not comply with the provisions of Section 77 (2) of the statute which provides:

“Leave to appeal from a Paramount Chief’s Tribunal shall not be granted unless and until the appellant shall either had paid the costs in such Tribunal or shall have deposited therein or in the court to which the appeal is being taken a sum of money sufficient to satisfy such costs.”

The condition for payment of money was never complied with. It is clear that the statutory condition upon which alone leave to appeal could be given was not fulfilled. When the appeal came before the Provincial Commissioner the point of non-compliance with the statutory condition was taken up and the Provincial Commissioner regarded the objection as mere technicality and so ordered that costs incurred by the respondent in the court of first instance should be paid at once to his court; that order was immediately carried out. The Provincial Commissioner then proceeded to allow the appeal. On appeal to the Court of Appeal, by majority decision, it was held that the Provincial Commissioner had no jurisdiction to make any order at all because no appeal was properly before him. On a

final appeal to the Privy Council, Lord Atkin delivering the opinion of the Judicial Committee opined at page 45 thus:

“But the objection lies in limine, in that the Provincial Commissioner had no jurisdiction at all; and therefore the reference to these powers unfortunately is irrelevant to the question of the provincial Commissioner being able to give relief. It is quite true that their Lordships, as every other court, attempt to do substantial justices and to avoid technicalities; but their Lordships, like any other court, are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other court to have jurisdiction.”

True it is that all courts must strive to do substantial justice in all cases before them; they must jettison technicalities and not allow same to stand in their way to dispensing justice. Section 16 of the Court of Appeal Act supra and Section 22 of the Supreme Court Act Cap 424 Laws of the Federation of Nigeria 1990 empower the two appellant courts respectively to strive to do substantial justice in all the matters before them. But if the statute says that there shall be no jurisdiction to entertain a claim or a counter-claim, as in the instant case, until the filing fee is first paid until that event-the payment of filing fee occurred, the trial court would have no jurisdiction to entertain it. Every court is bound by the statute and its provisions cannot be circumvented under the thin guise of desire to do justice. The condition precedent must not only be fulfilled it must be seen to be properly fulfilled. That is the righteousness of the matter. The respondent has further argued that the non-payment of the filing fee was not his fault as it was not his duty to assess the process. My quick reply is that it is he who is seeking a redress from the court that must see to it that all righteousness is fulfilled. His ignorance of the law pertaining to the payment of the filing fee, even if he relies on that cannot avail him. The saying is quite sacrosanct. “IGNORANCE OF THE LAW WHICH EVERYBODY IS SUPPOSED TO KNOW DOES NOT AFFORD EXCUSE”- the Latin Maxim is IGNORANTIA JURISQUOD QUIQUE SCIRE TENETUR NON EXCUSAT”

For all I have been saying, issues Nos. 1, 2, and 3 in the appellant’s brief of argument are hereby resolved in his favour. Issues Nos 1 and 2 in the brief of the respondent are hereby resolved

against him.

In the final result this appeal is adjudged by me to be meritorious. It is accordingly allowed. The judgments of the two courts below together with the costs awarded are hereby set aside. Judgment is hereby entered in favour of the plaintiff/appellant against the defendant/respondent in the sum of N411,730.00 (Four hundred and Eleven Thousand, Seven hundred and Thirty naira) only. I also assess costs in favour of the plaintiff/appellant but against the defendant/respondent in the sum of N50,000.00 (fifty Thousand naira) only.

MUNTAKA-COOMASSIE JSC

I have had a preview of the lead judgment of my learned Lord, Ikechi Ogbuagu JSC which has just been delivered. I agree entirely with his reasoning and conclusion that this appeal before us deserves to be dismissed as it has no merits, I have nothing more useful to add. For the reasons adumbrated in the lead judgment I too hold that the appeal is lacking in merits and I dismiss same. I endorse the order as to costs made by my learned brother, Ogbuagu, JSC.

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