

**SUPREME COURT OF NIGERIA**  
5TH JUNE, 2009. SC. 209/1999  
**CORAM:- N. TOBI, G. A. OGUNTADE, I. F. OGBUAGU,**  
**I. T. MUHAMMAD, J. O. OGEBE JJSC**

1. ARISONS TRADING &  
ENGINEERING COMPANY LTD. .... APPELLANT  
AND

1. THE MILITARY GOVERNOR  
OF OGUN STATE

2. COMMISSIONER FOR WORKS ..... RESPONDENTS  
& TRANSPORTS OGUN STATE

3. ATTORNEY-GENERAL OF OGUN STATE

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COURTS - Appeal courts - Omissions by trial court - Power to correct - Court of Appeal is in as good a position as trial court to do or refrain from doing - What trial court has erroneously done or refrained from (H1)

DAMAGES - Special damages - Recovery - Requirements - They must be specifically pleaded and strictly proved by plaintiff - It is not a matter of hypothetical exercise (H2)

CONTRACTS - Construction - Redundant machinery - As basis for damages - It requires evidence of facts such as inquiries for their hire - Depreciation & maintenance - Appellant failed to prove any of these facts (H3)

PLEADINGS - Statement of defence - General traverse - Purpose of - It serves to salvage such a situation - Where a pleader may inadvertently fail to deny a fact - Thereby admitting what he did not intend to (H4)

PLEADINGS - Statement of defence - General traverse - Effect - It has the same effect as specific denial - That is to put plaintiff to proof of the allegation in that paragraph (H5)

PLEADINGS - Averments - General traverse - Construction - The

practice is to give it effect along with the whole tenor of other averments - It is not the practice to consider each paragraph of statement of defence in isolation (H6)

JUSTICE - Miscarriage - Improper evaluation of evidence - Need to arrest - It will perpetuate injustice in our judicial processes - If appellate court does not interfere therein (H7)

APPEALS - Respondent's notice - Resort to - Propriety - It is validly raised as applicant is not asking for reversal - Of findings of fact made against him (H8)

### **FACTS**

The plaintiff/appellant sued the defendants/respondents for breach of contract before the High Court of Ogun State. Appellant claimed for payment of damages under sundry heads of claim like outstanding payments, loss of anticipated profit and interest on judgment debt. There was evidence that the contract was intermittently suspended by respondents prior to the final termination thereof. By reason of those suspensions, appellant also included two heads of claim for damages comprising charges on plants and machinery for the idle periods and expenses on staff maintenance and salaries. Having found respondents liable for breach of the contract, the learned trial judge awarded damages as claimed but refused the damages on the two heads of claim in respect of the suspension periods.

Aggrieved, appellant appealed to the Court of Appeal on the refusal of the two heads of claim. Also dissatisfied, respondents cross appealed. But they later abandoned the cross appeal and filed a respondent's notice contending that the refusal of the two heads of claim by the trial court be affirmed on other grounds than that relied on by trial court. Court of Appeal eventually dismissed the appeal and affirmed the refusal of the two heads of claim on the ground that they were not proved as special damages should be. This is an appeal against the judgment of the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*i. "Whether or not ownership and source of the equipment and machineries (sic) used for the contract in this suit was an issue contested by parties to this case.*

*ii. Whether or not the appellant was not denied fair hearing when the court held that the respondents denied the case of the appellant.*

*iii. Whether from the totality of the evidence before the court, the appellant did not establish that the appellant's equipment were kept on site while the contract was suspended which would have enabled the appellant to be entitled to judgment in the sum of N23,853,200.00 claimed as damages for loss of income on her equipment and machineries (sic) that lay idle when the contract was twice suspended.*

*iv. Whether the learned justices of the Court of Appeal can embark on the review of evidence of the parties given at the trial court to the extent of deciding issues which border on the credibility of the witnesses.*

*v. Whether or not the Respondents' Notice filed by the respondents in the lower court was appropriate in the circumstances of this case."*

**HELD** (Unanimously dismissing the appeal per **MUHAMMAD JSC**)  
**Appeal courts - Omissions by trial court - Power to correct**

1. The court below, in considering the submissions of learned counsel for the respective parties (page 403 of the record), analyzed in details the above claim in relation to the evidence led in relation thereof and came up with the conclusions as contained in the above quoted excerpt from its judgment. I can hardly fault that exercise by the court below. In any event, where there is a failure, a commission or omission by a trial court in relation to an act which the trial ought to do or refrain from doing, the court below is in as good a position as the trial court to do or refrain from doing that act. (p. 1500 E)

**Special damages - Recovery - Requirements**

2. I am in complete agreement with the court below. Not only must special damages be specifically pleaded they must be strictly proved by the plaintiff. They are those pecuniary losses actually suffered up to the date of the trial, such as loss of earnings. The requirement of the law in relation to such damages is that it must be pleaded and proved. It is not a matter of hypothetical exercise nor can it be left to conjecture. (p. 1501 F/G)

***Redundant machinery - As basis for damages***

3. If the appellant was to realize anything from the special damages claimed, it should have gone further to lead evidence on those who made inquiries to hire each item of the equipment/machinery. It should have also led evidence in proof of loss of interest from the capital which lay idle, depreciation and maintenance. Further, there was no evidence of how old or new the machinery or equipment were and whether they could really endure work for the 1248 days claimed. Thus, the appellant failed to prove any facts on which the special damages could be estimated. Issues 1 and 3 must fail and are hereby resolved against the appellant. (p. 1501 H)

***Statement of defence - General traverse - Purpose of***

4. The two paragraphs above from the defendants' statement of defence are what are regarded as 'general traverse' in the law of pleadings. A 'traverse' simpliciter, is a categorical denial in the statement of defence of any fact alleged in the statement of claim. In a traverse, the defendant may deny or refuse to admit the allegation. It is also a general rule, conversely, that a fact not denied is taken to be admitted. Of course, a pleader may by inadvertence fail or omit to deny a fact thereby admit what he should not have admitted. It is in order to salvage such a situation that almost every statement of defence contains what is known as the "GENERAL TRAVERSE". (p. 1505 B)

***Statement of defence - General traverse - Effect***

5. In 1976, the Supreme Court held that the denial of a particular paragraph in the statement of claim by means of the general traverse had the same effect as a specific denial of it and that this effect was solely to put the plaintiff to proof of the allegation in that paragraph. In a much later case, this court, in *LEMEZIE V. ONUAGULUCHI* (1995) 12 SCNJ, 120, re-stated the position as expounded earlier that a general traverse contained in the statement of defence has been recognized as convenient and permissible. It is a traverse and its effect is that it casts on the plaintiff the burden of proving the allegation denied. (pp. 1505 E/G)

***PLEADINGS - Averments - General traverse - Construction***

6. I am in complete agreement with the court below in that decision.

It has for long been the practice that such general traverse in a statement of defence is always given effect along with the whole tenor of the other averments in the other paragraphs of the statement of defence. Thus, it is not the practice to consider each paragraph of the statement of defence in isolation but in conjunction with other paragraphs so that the issues joined in the pleadings can be properly ascertained. I accordingly resolve issue No. 2 in favour of the respondents. (p. 1508 A/C) B

***Improper evaluation of evidence - Need to arrest*** C

7. If an appeal court does not interfere to arrest an apparent miscarriage of justice occasioned by non-evaluation or improper evaluation by a trial court, that will perpetuate injustice in our judicial processes and it is the society that will bear the brunt. In my view, the court below did the right thing. I have no hesitation in dismissing this issue as unmeritorious. (p. 1509 G) D

***APPEALS - Respondent's notice - Resort to - Propriety***

8. A Respondent's Notice as provided by Order 3 Rule 14 (2) of the Court of Appeal Rules is not and does not represent a Notice of Appeal. This is because a respondent's notice does not contemplate a situation where the applicant will be entitled to ask for a complete reversal in his favour of findings of fact made against him on certain issues contested in the case, though he may have succeeded on other issues. The respondents' notice filed in this appeal arose from the appeal on hand. I have perused the grounds upon which the respondents' Notice was predicated. The respondents' notice in this matter, in my view, was validly raised. I resolve issue No. 5 in favour of the respondents. (p. 1510 A/E) F  
G

***NOTABLE POINTS OF INTEREST***

***TOBI JSC***

***1. Special damages may be proved without document***

It is trite law that where a party claims special damages, the burden is on him to prove the special damages to the last kobo. He has to do this by leading credible evidence; most of the time by documents. There are however instances where special damages could be proved without documents. (p. 1512 G) H

**OGUNTADE JSC**

*2. Claim for staff salaries is unjustified*

The payment of staff salaries and hire of equipment to execute the contract would necessarily merge in the overall value of the contract awarded to the appellant. There is no case made that the respondents awarded a contract to the appellant for hire of staff or equipment. If the contract with the appellant was breached, the damages that could have fallen within the contemplation of the parties at the time the contract was made is the loss of profit earned by the appellant by the improper termination of the contract. I do not see how the claim for hire of staff, equipment etc. could be justified in a case of breach of a construction contract. (p. 1514 G)

**OGBUAGU JSC**

*3. Damages for breach - The law is against double compensation*

It is now firmly settled that in a claim for damages for breach of contract, the court is concerned only with damages which are natural and probable consequences of the breach or damages within the contemplation of the parties at the time of the contract. However, in such a claim, the court, must be careful, not to compensate a party twice for the same wrong. By the law against double compensation, a party who has been fully compensated under one head of damages for a particular injury, cannot, be awarded damages in respect of the same injury under another head as appears to be the intention of the Appellant. (p. 1519 F)

*4. Respondent's notice affirms reasoning of the judge*

A Respondent's Notice it is settled, postulates that the approach of the learned trial Judge to the case, was correct, but that his conclusions, had adversely affected the Respondent who thereby, contends that by the same reasoning of the learned trial Judge, he should have received, such as for example, a greater award. (p. 1521 B)

**REPRESENTATIONS**

I. L. Alabi Esq., with him: Simon Onu Esq. for the appellant.  
Mr. A. Osibanjo [Attorney General, Ogun State], with him: Mr. D. Dipeolu [S.C. Ogun State Ministry of Justice] for the respondents.

**CASES REFERRED TO**

- FALIYE V. OTAPO (1995) 3 NWLR (381) 1 at page 12
- ADONRI V. OSAGIE (1994) SCNJ (pt.11) 192 at 194
- UGOCHUKWU V.COOPERATIVE BANK (1996) 7 SCNJ 22 at page 35 B
- ADELEKE V. AKINOLUGBADE (1987) 3 NWLR (part 60) 214 at page 216
- C & C Construction Co. Ltd. & anor. v. Okhai (2003) 12 SCNJ. 33 @ 55 C
- Nigeria Industrial Development Bank v. De-Easy Life Electronics & anor. (1999) 4 NWLR (Pt.597) 5@ 23
- Attorney-General, Anambra State & 5 ors. v. Okeke & 4 ors. (2002) 5 SCNJ. 318 @ 333
- Ononulu v. Micho & Co. (1961) ANLR 324 @ 325 D
- Mercantile Bank v. Adalma (1990) 5 NWLR (Pt.153) 747 @ 751 - 752
- Nigerian Arab Bank Ltd. v. Shuaibu (1991) 4 NWLR (Pt.186) 450 @ 456
- Stroms Bruks Aktie Bolag v. Hutchison (1905) A.C. 515 @525 - 526 E
- Ekenwa v. Nkoakara & 2 ors. (1997) 5 SCNJ, 70 @ 90
- The Shell Petroleum Development Co. of Nigeria v. Chief Trebo VII (2005) 4 SCNJ. 39 @ 57
- IYARE V. OMOROGUN (1976) 7-10 SC. 165 F
- LANA V. UNIBADAN (1987) 4 NWRL (pt.64) P. 245
- AFRO-CONT. NIG. LTD V. AYANTUYI (1995) 9 NWLR. (pt. 420) 411
- Ntiti V. Afatsao (1970) 2 ALR. Comm. 148, 150-151
- OSUJI V. ISIOCHA (1989) 3 NWLR (pt. 111) 623 G
- OTARU & SONS LTD. V. IDRIS (1999) 6 NWLR (pt. 606) 330

**LEAD JUDGMENT BY MUHAMMAD JSC**

The version of the appellant herein, as plaintiff at the Ogun State High Court of Justice, holden at Abeokuta (trial court), is that the plaintiff was a limited liability Company carrying on business, inter alia, as Building and Civil Engineering Contractors based in Abeokuta. In 1981, the plaintiff tendered for and was awarded contract by the defendants, who are respondents, herein, for the con-

struction of 25 kilometers road between Obafemi/Owode Local Government Area of Ogun State. The contract sum was N8,000,000.00 (Eight Million Naira). The plaintiff was put into possession of the Owode/Obafemi road site by the defendants and work commenced on the said project. The defendants agreed to pay mobilization fees of N1,600,000.00 (One Million, Six Hundred Thousand Naira). Contrary to the terms of the agreement, the mobilization fees were never paid by the defendants. The plaintiff claimed that it suffered damages due to the failure of the defendants to pay the mobilization fees as it had sought and obtained bridging loan in anticipation of the said fees. Subsequently, the defendants made instalmental payments periodically, towards settling the mobilization fees. A total sum of N1,975,000.00 was paid. The plaintiff signed an agreement with Messrs YURSEL INSAAT ANONIH SIRUETT of TURKEY which made 40% claim of the project thereof. The plaintiff committed large sums of money to mobilize plants, equipment and machinery. The plaintiff also employed several workers (skilled and unskilled) and qualified engineers both locally and from abroad. The plaintiff commenced work on the Owode/Siwun section when in 1982, the company was directed to shift to Siwun/Obafemi section. The plaintiff incurred some losses in the movement of machines, equipment, plants and site office.

Between 1981 and 1983, a total of eight (8) interim certificates were issued. Three were signed by the Consulting Engineers while five were signed by Ogun State Resident Engineer. The value of each certificate was indicated therein.

When the Military took over in 1983, all contracts, including the project, were suspended by the defendants. A special investigation panel was constituted in 1984 to review and investigate all contracts awarded by the Ogun State Government. During the time, work was suspended by the defendants, all the machines and equipment of the plaintiff were idle, that is from January, 1984 to June, 1986, and the plaintiff incurred substantial losses of revenue it would have earned for hiring out the machines and equipment.

In June, 1986, work by the plaintiff again resumed. In August, 1986, dispute again arose in respect of the amount to be paid on work done. The plaintiff had to stop work to clarify the dispute which was clarified in June, 1987. However, the defendants, through a let-

ter dated 30th March, 1988, terminated the contract between them and the plaintiff.

Consequent upon the termination of the Contract between the plaintiff and the defendants, the former took out a Writ of Sum-  
mon from the trial court. In paragraph 48 of its further amended  
statement of claim, the plaintiff prayed for the following reliefs: B

*“48 WHEREOF the plaintiff claim(s) as follows:*

*1 DECLARATION that defendant’s letter No. 363/307 of 30th  
March, 1988 purporting to revoke the contract agreement between  
the plaintiff and the defendants in respect of Owode Road Project is C  
wrongful, improper, null and void.*

*ORDER for payment of damages for breach of contract are as fol-  
lows:*

*(i) Expenses incurred on staff maintenance,  
Salaries- N305,826.00 D*

*(ii) Charges on plants and machineries from January, 1984 to  
June, 1986 and from August, 1986 - June, 1987 at daily rate as  
follows:*

*Bulldozer - N4,000.00*

*2 Motor builders at N2,000.00 each - N4,000.00 Loader - E  
N1,000.00 Tipper - N800.00*

*3 Concrete Mixers at N200 - N600.00 Scrapper - N2,500.00  
Roller - N6,000.00*

*Water Lancer . , , •• - N600.00 F*

*Caber Vibrator - N300.00*

*N19,000.00 Per day*

*Total from January, 1984 to June 1986 and from August, 1986 to  
June, 1987 at N19,000.00 per day N23,853,200.00*

*Outstanding payments on certificate 1/1 N202,797.76 G*

*Interest on outstanding payments at the Rate of 15% from the date  
when certificate 9 became due until judgment.*

*(v) (a) Loss of anticipated profit on N14.8 Million  
N3,700,000.00 .— at 25%*

*ALTERNATIVELY H*

*(b) Loss of anticipated profit on balance of 55% of N8 million  
N1,100,000.00*

*(vi) Interest on judgment debt at the rate of 10% from the  
date of judgment until the date of payment”*

The defendants, except where they made admissions, denied all material allegations contained in the plaintiff's amended statement of claim. After full hearing, the trial court granted the principal claims of the plaintiff. It held that the defendants were in breach and awarded damages against them. The trial court, however, refused the claims on charges for plants and machinery which were idle during the period of suspension.

Both parties were dissatisfied with the trial court's judgment and they appealed to the Court of Appeal Ibadan, (Court below). The defendants/respondents later abandoned their cross appeal but filed a Respondents' Notice contending that the findings of the trial court i.e. the plaintiff/appellant was not entitled to a claim for the idleness of its plants and machinery be affirmed on other grounds contained in its Respondents' notice.

The Court below in its judgment, per Olagunju, JCA, held inter alia:

*"The appeal succeeds in parts, the judgment of the lower court in respect of the claim on equipment is affirmed. Appeal on damages is dismissed"*

The appellant filed its appeal to this court on the refusal of the court below to grant damages in respect of the equipment and machinery for the suspension period within which they were said to be idle.

The appellant filed its brief of argument. The respondents filed their brief of argument. The appellant filed a reply brief in answer to some points raised by the respondents in their brief. Each party adopted and relied on its brief on the hearing date of this appeal.

The appellant formulated five issues for our determination. They are as follows:

- i. *"Whether or not ownership and source of the equipment and machineries (sic) used for the contract in this suit was an issue contested by parties to this case. Grounds 4, 5 and 6*
- ii. *Whether or not the appellant was not denied fair hearing when the court held that the respondents denied the case of the appellant - Ground 3.*
- iii. *Whether from the totality of the evidence before the court, the appellant did not establish that the appellant's equipment were kept on site while the contract was suspended which would have*

*enabled the appellant to be entitled to judgment in the sum of N23,853,200.00 claimed as damages for loss of income on her equipment and machineries (sic) that lay idle when the contract was twice suspended. Grounds 7, 8, 9 and 10.*

*iv. Whether the learned justices of the Court of Appeal can embark on the review of evidence of the parties given at the trial court to the extent of deciding issues which border on the credibility of the witnesses - Ground 1.*

*v. Whether or not the Respondents' Notice filed by the respondents in the lower court was appropriate in the circumstances of this case"*

On page 8 of the respondents' brief of argument, the following three issues were formulated for our consideration:

Issue No 1.

*"Whether the Court of Appeal rightly interfered with the assessment and evaluation of evidence by the trial court?"*

ISSUE NO. 2

*Whether there was credible evidence before the court of Appeal in its re-evaluation and re-assessment of the evidence available before the trial court to show that the plaintiff/appellant was entitled to an award of special damages for idleness of its machinery and equipment?"*

ISSUE NO. 3

*Whether the respondents' Notice filed in this suit was invalid and without merit?"*

Issue one formulated by the learned counsel for the appellant is said to have covered grounds 4,5 and 6 of the grounds of Appeal contained in the Notice of Appeal which is now under consideration. The claim contained in paragraph 48(4) of the statement of claim is on special damages. Sub-paragraph (f) thereof is on charges on the idle plants and the machinery from January 1984 to June, 1986 and from August, 1986 to June, 1987. It is in the sum of N700,000.00 (Seven Hundred Thousand Naira). The arguments put forward by learned counsel for the appellant are that the learned trial judge declined to grant the claim on plants and machinery because according to him, the evidence of PW 4 required corroboration. He also held that PW 1 was a tainted witness. The trial court held further that the appellant had waived its right to claim damages for idleness of its

equipment. Learned counsel submitted further that the issues of requiring corroboration for the evidence of PW 4; that PW1 was a tainted witness and whether the appellant had waived its right to claim damages were all resolved by the court below in favour of the appellant. He argued further that in spite of all these, the court below  
 B failed to follow the logical conclusion following the setting aside of the reasonings of the trial court which is to award the amount the trial court had found the appellant was entitled to. The court below, instead, embarked on other inquiries and investigations as to the ownership and source of the equipment and machinery. Learned counsel  
 C stated that the question relating to ownership and source of the equipment used by the appellant for the project was never an issue contested by the parties either in their pleadings or in evidence at the hearing of the case before the trial court. He submitted that it is trite  
 D that parties are bound by their pleadings. Any contention or submission not based on the issues raised and joined in the pleadings would be incompetent and be disregarded by the court. Learned counsel cited the case of IYARE V. OMOROGUN (1976) 7-10 SC. 165; LANA V. UNIBADAN (1987) 4 NWRL (pt.64) P. 245.

E In his submission on the same issue, which is contained in issue No. 2 of the respondents' issues, the learned counsel for the respondents stated that the general principle of law which is so trite is that not only must special damages be specifically pleaded, they must also  
 F be strictly proved with credible evidence. Without such proof, no special damages can be awarded. Learned counsel cited several authorities which included inter alia OSUJI V. ISIOCHA (1989) 3 NWLR (Pt. 111) 627; ALHAJI OTARU & SONS LTD. V. IDRIS (1999) 6 NWLR (Pt.606) 330. Learned counsel submitted further that the Court  
 G of Appeal in view of the discrepancies it found in the evidence before the trial court had little choice but to hold that the appellant had not made out its claim for damages for non-use or idleness of its machinery and equipment. He submitted further that the appellant had not put credible evidence before the trial court to entitle it to the damages for hire.  
 H

In the reply brief filed on behalf of the appellant, learned counsel for the appellant submitted that issue No.2 formulated by the respondents was not distilled from grounds 5, 6, 7, 8, 9 and 10 as claimed by the respondents. The issue has no legs to stand on. It is

incompetent and liable to be struck out. In an alternative submission, the learned counsel for the appellant stated that if the issue is found to evolve from grounds 5, 6, 7, 8, 9 and 10, then the argument canvassed by the respondents are utterly misleading and misdirected. The case cited by the respondents, that is, SOMMER V. FEDERAL HOUSING AUTHORITY (1992)1 NWLR (Pt. 219) 548 at page 562 is completely different from the present case. Learned counsel submitted that the claim for special damages by the appellant on account of the idleness of the machinery was not misplaced at all and that there is no known rule that stipulates that the contractor must be the owner of all machinery or equipment used in the execution of any contract before he/it can claim damages that may arise therefrom. The comparison made by the respondents' counsel between the claim for damages in this appeal and for trespass in land is most inappropriate and misconceived.

I will take-up this issue together with appellant's issue no. [iii] as they are inter-related though covered by different grounds.

Under these issues, but particularly issue No.3, the main bone of contention is the claim for the appellant's loss of income for non-use or idleness of its machinery and equipment during the periods of suspension of the contract (that is from January, 1984 to June, 1986 and from August, 1986 to June, 1987). The total sum claimed was N23,853,200.00.

Two views were expressed by the learned trial judge. In his first view, the learned trial judge found that the plaintiff had not proved the item of claim satisfactorily and he dismissed the claim. In his alternative view, the learned trial judge dismissed the claim on that item as well, in spite of all speculations.

The discussion by the court below on these issues is interesting. It is fairly lengthy but I found it pertinent to reproduce it herein below as follows:

*"On the equipment claimed to be at the contract site at the material time the learned counsel juxtaposed the list of the equipment of claim in sub-paragraph 28(a) of the statement of claim with the list of the equipment on page 10 of Exhibit 'A' which, for the purpose of clarity range as hereunder:*

*X. The list in sub-paragraph 28(a):*

*[a] One Fieligun Motor Scrapper*

- [b] *One Bulldozer D7G*
- [c] *Two Motor Graders (one Caterpillar and one Fiat Allis),*
- [d] *One Payloader*
- [e] *One Roller*
- [f] *One Bitumen Sprayer*
- B [g] *Two Water Tankers*
- [h] *5 Tipper Lorries*
- [i] *3 Concrete Mixers*
- [j] *Pocker Vibrator*
- C Y. Page 10 of the Agreement, Exhibit 'A': (prices excluded)
- "1 No. 619 Scrapper
- 2 No. D8 Bulldozer
- 1 No. D8 Bulldozer
- 2 No. 10/12 Ton Roller
- D 8 No. Ycu.y Tipper
- 1 No. 30 Trailer
- 1 No. 2,000 gallons water Tanker
- 10 No. Concrete Mixer
- 4 No. Vibrating Machines
- E 1 No. 12F Grader."

To ease an understanding of the analysis that follows let me reiterate that list Y' above comprises number of equipment and machinery declared by the appellant as owned or possessed by her when the Agreement for execution of the project was being signed by the parties. Thus to all intents and purposes the equipment and machinery in that list are the property which the appellant declared under the contract as belonging to her and in effect an integral part of the contract as far as claim under the contract for loss of their use is concerned.

The learned counsel highlighted the discrepancies between five of the ten items on each of the lists. Items (d) and (f) of list 'X' (i.e. sub-paragraph 28(a) of the statement of claim), one Payloader and one bitumen sprayer, are addition to the equipment in list 'Y', i. e. the equipment listed in the Agreement. Items (c) and (g) of list 'X', two Motor Graders and two Water Tankers, show increase of the equipment by one each over the number enumerated in list 'Y' while Fieligun Motor Scrapper', the first item on list 'X', is different from the equipment described as '619 Scrapper', the first item on list 'Y'.

*These three items together with the two items noted earlier must represent new equipment acquired by the appellant after signing the contract.*

*On the discrepancies, no explanation were offered in respect of three item, a Water Tanker by which the number claimed to be owned by the appellant in list 'Y' was increased by one, and a B payloader and a Bitumen sprayer which are not among the equipment in list 'Y'. The 4PW's explanation that two other equipment, a Michigan scrapper and a Motor Grader, were supplied by the appellant's Turkish foreign partner is debunked by learned counsel C for the respondents who in the Respondents' Brief of Argument contended that a comparison of Exhibit V with Exhibit 'N' shows that the Turkish foreign company with which the appellant claimed to be in partnership is a sham.*

*That leads to the second question posed by learned counsel D for the respondents whether, as claimed by her, the appellant in fact, had a foreign partner who contributed equipment and machinery for the execution of the project.*

*Exhibit V is a letter written by the appellant to the respondents' Tenders Board on 10/4/81 informing the board that the appellant and our Business Associate, Sager and Woener of Munic Germany and Kano, Nigeria are very much privileged to have this opportunity of tendering for the above project". Exhibit 'N' is an agreement executed on 18/5/81 between Stone Construction Company Nigeria Ltd., and Yuksel infaat and Anonim Sirketi, a company registered in Turkey, to form another company to be known as 'Stone - Yaksel Construction Company Nigeria Ltd. F*

*The 4PW, deposed, at pages 122-123 of the record, that the appellant was in partnership with a company called Messrs Yuksel G Infaat Brisnim Sinket and Turkey, and he produced as evidence of the partnership an agreement, Exhibit 'N', to which he deposed that he was a signatory adding 'the company gave the plaintiff additional equipments' (sic). There is obviously no nexus between the appellant, Arosos Trading and Engineering Co. Ltd., incorporated on 12/ H 2/80 as per Exhibit 'D', and Yuksel Infaat and Anonim Sirketi of Turkey' which with Stone Construction Company Nigeria Ltd. were to incorporate at an undisclosed date in future another company, Stone - Yuksel Construction Nigeria Ltd., as per the terms stipulated in clause*

*1 of the Agreement, Exhibit 'N'.*

*A close study of Exhibit 'N' shows that it is not a partnership agreement between the appellant and any of the two parties to that agreement. Thus the 4PW's story about teaming up with a foreign company to execute the contract with the respondents is an illusion which the appellant, Exhibit 'N' as evidence of the partnership to which the appellant is a stranger. Indeed the fact that the Stone Construction Company Nigeria Ltd, on behalf of which the 4PW signed the agreement, Exhibit 'N', is not shown by evidence to have any business connection with the appellant, a limited liability company with its separate identity denoted in law by Exhibit 'D', her Certificate of Incorporation, underscores a total lack of any nexus between either of the two parties to that agreement and the appellant.*

*If as it has been clearly demonstrated the appellant has no connection with the agreement in Exhibit 'N' and if that agreement to which the appellant's purported partner -Yüksel Insaat Anonim Sirketi company of Turkey- is a party is for the formation of a new company by a different name with no link whatsoever with the appellant(sic)the evidence of the 4PW about the appellant's Turkish foreign partner is a load of hogwash that tears apart at the seams the story of that witness about the participation of any foreign partner in executing the appellant's contract with the respondents. It is a hare-brained humbug spun to enhance the appellant's business ego. Equally nonsensical is 'the tale' in Exhibit 'P', a letter dated 3/4/88, by the appellant's foreign partner threatening hell and brimstone for her share of profit in the contract. This is, to say the least, (sic) a pedestrian business ploy steeped in 'street smarts'.*

*That brings me to the inscrutable aspect of foreign participation in the appellant's business. In Exhibit 'V' the appellant wrote to the respondents' Tenders Board that herself and Sager and Woener of Munic Germany and Kano Nigeria' were tendering jointly for the contract with the respondents. But no word was breathed or anything heard afterwards about the enigmatic business associate' who without any ado was superseded by an equally mysterious Turkish foreign partner that resurfaced through an abstruse correspondence, Exhibit 'P', to demand for a business bonanza'. Indeed, the appellant must have a penchant for foreign - partnership make- believe. It is monstrous!*

*In any case, that gives the lie to the claim of a foreign partner contributing any equipment to the stock of machinery at the disposal of the respondents. It, however, leaves unaccounted for when and how the appellant acquired the Motor Scrapper' by the statement of claim as to a Water Tanker, a Payloader and a Bitumen Sprayer about which the appellant gives no explanations of when and how they were acquired since they are not among the equipment declared at page 10 of Exhibit 'A' to be the stock of the appellant's machinery at the time of signing the contract.*

*The five pieces of machinery about which there are no explanations on when and how the appellant acquired them form half of the machinery for which the appellant is claiming damages from the respondents for loss of profit for their non-use. Learned counsel for the respondents submitted that because of failure to prove that the appellant acquired those machinery in fact, he is not entitled to claim for profit for their loss of use. Sommer V. Federal Housing Authority, supra, on which the learned counsel relied is supportive of his submission with which I am in complete agreement"* (Underlining supplied for emphasis).

It is clear from the above in-depth analysis by the court below that:

[i] the plaintiff/appellant laid claim of ownership/possession of the equipment/machinery in list 'Y' when the agreement for execution of the project was being signed.

[ii] there were discrepancies between the items contained by the two lists as portrayed by paragraph 28(a) of the statement of claim and the list on page 10 of the agreement that is Exhibit 'A'.

[iii] there was no partnership between the appellant and any foreign partner.

[iv] there was no foreign partner that contributed any equipment to the stock of machinery at the disposal of the appellant for the execution of her contract with the respondents.

[v] the appellant could not give explanation on some equipment and machinery as to when and how they were acquired as they did not form part of the appellant's stock declared at page 10 of Exhibit 'A'.

Now, a perusal at paragraph 28 of the further amended statement of claim reveals that there were elements of ownership/possession

sion of the equipment and machinery listed thereunder. It stated as follows:

*“28 During the time work was suspended by the defendants, all the machines and equipment of the plaintiff were idle and the plaintiff incurred losses of revenue it would have earned for hiring out the machines and equipment.*

*(a) At the material time, including the time work was suspended, the plaintiff had on site inter alia the following machines and equipment:*

*[i] One Fieligun Motor scapper*

*[ii] One Bulldozer D7G*

*[iii] Two Motor Graders (one Caterpillar and fiat Allis)*

*[iv] One pay loader*

*[v] One Roller*

*[vi] One Bitumen Sprayer*

*[vii] Two water Tankers*

*[viii] Five Tipper Lorries*

*[ix] Three Concrete Mixers*

*[x] pocker Vibrator.*

*[b] The plaintiff suffered substantial loss due to the idleness of the machineries from (i) January, 1984 to June, 1986 and (ii) from August, 1986 to June, 1987.” (Underlining supplied for emphasis).*

***The court below, in considering the submissions of learned counsel for the respective parties (page 403 of the record), analyzed in details the above claim in relation to the evidence led in relation thereof and came up with the conclusions as contained in the above quoted excerpt from its judgment. I can hardly fault that exercise by the court below. In any event, where there is a failure, a commission or omission by a trial court in relation to an act which the trial ought to do or refrain from doing, the court below is in as good a position as the trial court to do or refrain from doing that act. See: AFRO-CONT. NIG. LTD V. AYANTUYI (1995) 9 NWLR. (pt. 420) 411; FALIYE V. OTAPO (1995) 3 NWLR (381) 1 at page 12.***

On the remaining equipment and machinery, it is the finding of the court below that there was no proof to entitle the appellant on the special damages claimed. The court below observed:

*“The nature of the appellant’s claim as special damages which*

*must, as a rule, be proved strictly makes the submissions of the learned counsel on this point to be compelling. Particularly apposite on the exposition of the principles on special damages are Messrs Dumez Nig. Ltd. V. P. N. Ogboli. (1972) 1 All NLR (pt. 1) 241, 249-250; Odulaja V. Haddad, (1973) 11 S.C 357, 362; West African Examination Council V. Koroye, (1977) 2 S.C 45, 54; Basil V. Fajebe, (1990) 6 NWRL (pt. 155) 172, 179-180; Ajikwo V. Ansaldo Nig. Ltd. (1991) 2 NWLR. (pt. 173) 359, 373; Aku Nmechu Transport Service Ltd. V. Atoloye, (1993) 6 NWLR. (pt. 293) 233, 257; Guara Securities & Finances Ltd. V. I. T. C. Ltd. (1999) 2 NWLR. (pt. 589) 29, 48-49; and Acme Builders Ltd. V. Kaduna State Water Board, (1999) 2 NWLR. (pt. 590) 288, 305-306 and 309.*

*On the premise of the principles regulating the award of special damages as expounded by those authorities the reproduction by rote of the list of the machinery by the 1PW and 4PW bereft of proper identification of each equipment falls far short of what is required to prove special damages. It is trite that special damages must be proved positively from facts which satisfy the court of their truth but not by repeating on oath undigested averments in the statement of claim that are lubricated by various guess-work to tend them semblance of factual authenticity: see Niti V. Afatsao (1970) 2 ALR. Comm. 148, 150-151. The evidence by the appellant has failed to establish the company's possession or ownership of the other five equipment."*

***I am in complete agreement with the court below. Not only must special damages be specifically pleaded they must be strictly proved by the plaintiff.*** (See: OSUJI V. ISIOCHA (1989) 3 NWLR (pt. 111) 623; OTARU & SONS LTD. V. IDRIS (1999) 6 NWLR (pt. 606) 330; ATTORNEY GENERAL OYO STATE V. FAIRLAKES HOTEL No. 2 (Supra). ***They are those pecuniary losses actually suffered up to the date of the trial, such as loss of earnings. The requirement of the law in relation to such damages is that it must be pleaded and proved. It is not a matter of hypothetical exercise nor can it be left to conjecture. If the appellant was to realize anything from the special damages claimed, it should have gone further to lead evidence on those who made inquiries to hire each item of the equipment/ machinery. It should have also led evidence in proof of loss of interest from the capital which lay idle, depreciation and main-***

***tenance. Further, there was no evidence of how old or new the machinery or equipment were and whether they could really endure work for the 1248 days claimed. Thus, the appellant failed to prove any facts on which the special damages could be estimated. Issues 1 and 3 must fail and are hereby resolved against the appellant.***

On the appellant's second issue, that is, denial of fair hearing, learned counsel for the appellant submitted that in paragraph 28, 28(a), 28(b), 28(c) and claim 2(ii) of the statement of claim, the appellant highlighted the machines and equipment and made a claim of what it lost during the suspension of the contract. The defence did not join any issue on this but made a general traverse by denying it. It is settled law, he argued, that general traverse is insufficient denial of specific allegations but only constitutes admission. The trial court took it upon itself to wade through the records of proceedings and found an answer to the appellant's issue on this point. Learned counsel faulted the court below's application of the principle which allows a defective brief to be heard on the merit to be used to make a case for a party and that approach by the lower court had led to a great injustice to the appellant as the appellant had no opportunity to address the answers or case which the court made for the respondents. Learned counsel submitted further that where a respondent failed to respond to an issue raised by the appellant in its brief, the respondent is deemed to have admitted that issue. Some of the respondents in the appeal did not file respondents' brief even though records show that allegations were made against them and they were served with hearing notices. All these, according to the learned counsel for the appellant occasioned injustice and the appellant were denied fair hearing. Learned counsel cited and relied on the cases of ADONRIV. OSAGIE (1994) SCNJ (pt.11) 192 at 194; OJE V. BABALOLA (1991) SCNJ 110.

The submission of learned counsel for the respondents is that the learned counsel for the appellant was misconceived of the issue of non-joinder of issues between the appellant and the respondents on the issue of idleness of appellant's machinery and equipment. Learned counsel for the respondents pointed out that appellant's learned counsel referred to certain paragraphs -6.04, 6.05 and 6.06 in the brief he filed at the lower court and also at page 12 of his brief,

paragraph 5.03 where he stated the findings of the lower court in respect of this issue. Respondents' learned counsel argued that the issue not pleaded as stated by the court below was on waiver. He argued further that the defendants indeed joined issues with the appellant on damages for idleness or non-use of the machinery and equipment. He urged this court to discountenance this issue. B

The allegation posed by appellant's issue No. 2 is on denial of fair hearing to the appellant in the sense that the appellant was not afforded an opportunity to answer the case, which appellant said was made by the court below for the respondents that a court must accommodate a deflative or inelegant brief of argument by a party which must not be allowed to operate any hindrance to an appeal being heard on the merits. C

I think, a convenient point of starting the consideration of this issue is to have recourse to the pleadings, the evidence and the findings of the trial court. The plaintiff pleaded in paragraph 28 of his further amended statement of claim as follows: D

*"28 During the time work was suspended by the defendants, all the machines and equipment of the plaintiff were idle and the plaintiff incurred losses of revenue it would have earned for hiring out the machines and equipment. E*

*[a] At the material time, including the time work was suspended, the plaintiff had on site inter alia the following machines and equipment:*

*[i] One Fieligun Motor scapper*

*[ii] One Buldozer D7G*

*[iii] Two Motor Graders (one Caterpillar and fiat Allis)*

*[iv] One pay loader*

*[v] One Roller*

*[vi] One Bitumen Sprayer*

*[vii] Two water Tankers*

*[viii] Five Tipper Lorries*

*[ix] Three Concrete Mixers*

*[x] pocker Vibrator.*

*(b) The plaintiff suffered substantial loss due to the idleness of the machinery from (i) January, 1984 to June, 1986 and (ii) from August, 1986 to June, 1987."* H

Equipment Rental Rates Per Day

1 Michigan motor Scapper N2,500.00

2	Buldozer	N4,000,000	
3	Motor Graders (N2,000x2)		N4, 000.00
4	Pay Loaders	N1, 000.00	
5	Roller	600.00	
6	Bitumen Sprayer	800.00	
B 7	Water Tankers (600x2)		N1, 200.00
8	Tipper Lorries (N800 x 5)		N4,000.00
9	Concrete mixers (N200 x 3)		600.00
10	Pocker Vibrator	300.00	
C Total			N19,000.00

(c) *After making allowances for overhead, repairs and maintenance of irregular booking etc, the plaintiff lost an estimated N700,000.00 (Seven Hundred Thousand Naira) for idleness of machineries during the suspension of work for which the defendants were responsible."*

D Claim 2(ii) of the further Amended statement of claim states as follows:

*"2. ORDER for payment of damages for breach of contract are as follows:*

*[i] Expenses incurred on staff maintenance N305,826.00*

E *[ii] Charges on plants and machineries (sic) from January, 1984 to June, 1986 and from August, 1986 to June, 1987 at daily rate are as follows:*

*Buldozer N4,000.00*

F *2 Motor Bulders at N2,000.00 each N4,000.00*

*Loader N2,000.00*

*Tipper 800.00*

*3 Concrete Mixers at N200 600.00*

*Scraper N2,500.00*

G *Roller N5,000.00*

*Water Lancer 600.00*

*Caber Vibrator 300.00*

*N19,800.00 P.D*

H *Total from January, 1984 to June, 1986 and from August, 1986 to June, 1987 at N19,600 per day — N23,853,200.00"*

In their joint statement of defence, the 1st, 2nd and 3rd defendants averred as follows:

*"SAVE AND EXCEPT as are hereinafter expressly admitted, the defendants deny each and every allegation of fact contained in*

*the plaintiff's statement of claim as if each were set out seriatim and specifically denied:*

2. *The defendants deny paragraphs .....28 ..... of the plaintiff's statement of claim and put the plaintiff to the strictest proof thereof.*”

***The two paragraphs above from the defendants' statement of defence are what are regarded as 'general traverse' in the law of pleadings. A 'traverse' simpliciter, is a categorical denial in the statement of defence of any fact alleged in the statement of claim. In a traverse, the defendant may deny or refuse to admit the allegation. It is also a general rule, conversely, that a fact not denied is taken to be admitted. Of course, a pleader may by inadvertence fail or omit to deny a fact thereby admit what he should not have admitted. It is in order to salvage such a situation that almost every statement of defence contains what is known as the "GENERAL TRAVERSE".*** B C D  
It is set out as the opening paragraph of the statement of defence but may also come at the end as follows:

*“Save as hereunder/hereinbefore (as the case may be) expressly admitted, the defendant denies each and every allegation of fact contained in the statement of claim as though same were herein set out and TRAVERSED SERIATIM”.* E

***In 1976, the Supreme Court held that the denial of a particular paragraph in the statement of claim by means of the general traverse had the same effect as a specific denial of it and that this effect was solely to put the plaintiff to proof of the allegation in that paragraph. See: A.C.E JIMONA LTD. V. NIGERIAN ELECTRICAL CONTRACTING CO. LTD. (1976) 1 All NLR 122. In the case of ATTAH AND ANOR V. NNACHO & ORS. (1965) NMLR 28, which was decided earlier than Jimona's case (Supra), the same court laid it that by common practice, a general traverse has always been accepted and when employed it puts the opponent to proof of the fact therein stated or alleged. In a much later case, this court, in LEMEZIE V. ONUAGULUCHI (1995) 12 SCNJ, 120, re-stated the position as expounded earlier that a general traverse contained in the statement of defence has been recognized as convenient and permissible. It is a traverse and its effect is that it casts on the plaintiff the burden of proving*** F G H

**the obligation denied.** It was further held that the general traverse and the whole tenor of the other averments were sufficient traverse. The trial judge made finding on the idleness of appellant's equipment and machinery during the time work was suspended. This is what he stated:

B *"The issue that is to be determined is the equipment and their numbers on the site during this period in view of the disparity in the list of equipment as given in evidence by the PW4 and those in Exhibit 'A'. This is necessary having regard to the cross examination of the PW4 that he removed or hired out some of the equipment during this period. There is no doubt that there must be some equipment on site to be able to perform to specification but the evidence is not that all the equipments as listed by the PW4 must be on site to be able to perform according to specifications. It must be remembered*  
 C *that the burden is on the plaintiffs to prove this facts and the claim being that of a special damage must be specifically proved. I am in doubt as to the equipment being on site.*

*This right to claim for these equipment matured from January, 1984 to June, 1986 and from August, 1986 to June, 1987. After*  
 E *this, the plaintiffs continued to deal with the defendants giving an impression that he was not going to insist on this right to claim for the idleness of the equipment. I am of the view that if the contract had not been terminated, the plaintiffs would have not sued to claim for this item of damages. It is therefore, my view that the plaintiffs, in the*  
 F *circumstance, have waved their right to sue to claim for the idleness of the equipment. See: African Petroleum Ltd. V. Owodunni, supra.*

*From the above, the plaintiffs have not proved this item of claim satisfactorily. It fails and it must be dismissed. It is accordingly*  
 G *dismissed."*

He also held later in his alternative view on the same issue as follows:

*"In case I am wrong in my conclusion, I shall go further to consider the case on the assumption that the items on the site having been satisfactorily proved .....*  
 H *However, in view of my finding that the evidence that the equipment were on site is not satisfactory, this item of claim must be dismissed. It is accordingly dismissed."*

I think a finding of fact by a court of law is that result or inference arrived by a judge after a careful collation, study and synthesising of

the facts and evidence or otherwise in support of such facts as pleaded by the parties. The learned trial judge in this case could not have come to the conclusion he reached if the pleading or evidence was faulty or unsatisfactory. What the court below did, and rightly in my view, is to expatiate on the circumstances where a general traverse is amplified by other cognate averments in the statement of defence. B  
The court below stated:

*“Applying the principle expounded above to the pleadings by the parties, although paragraph 2 of the respondents’ statement of defence is a general traverse of the averments in paragraph 28 of the appellant’s statement of claim and would, if it stands alone, amount to non-denial of the allegations in paragraph 28 of the statement of claim and, in consequence, amounts to admission of the averments therein, nevertheless, subparagraph 26(a) is an amplification of the general traverse in paragraph 2 of the statement of defence; it reads D in part thus:*

*“neither is it”, a reference to the plaintiff, entitled to any charges on plants and machineries (sic) having not maintained any on the contract site during the period of suspension.”*

*The denial in that passage is strengthened by the general tenor of paragraphs 22, 23(c) and 26 of the statement of defence complaining about the appellant’s lack of equipment and workers to cope with the work and predicates the conclusion that the appellant was in dire shortage of equipment during the subsistence of contract to be able to spare any on the contract site during the period of suspension. It is complemented by paragraph 11 thereof which shows that inability to mobilize equipment and machinery for the execution of the contract had beset the appellant from the beginning of the contract. Those four paragraphs (22, 23, (c), 26 and 11 of the statement of defence reinforced the purport\*check of sub-paragraph 26(a) reproduced in part above. Collectively or severally they expand the general denial in paragraph 2 of the statement of defence of the averments in paragraph 28 of the statement of claim.* E F G

*Consequently, I am satisfied that notwithstanding the general denial of paragraph 28 of the statement of claim by paragraph 2 of the statement of defence (sic) there other areas of the statement defence where the defence of respondents has been clearly stated and amplified to bring the parties to issue. I am further satisfied that on H*

*the state of the pleadings of the parties the respondents did join issue with the appellant on paragraph 28 of the statement of claim within the meaning of the words 'joining issue'".*

***I am in complete agreement with the court below in that decision. It has for long been the practice that such general traverse in a statement of defence is always given effect along with the whole tenor of the other averments in the other paragraphs of the statement of defence. Thus, it is not the practice to consider each paragraph of the statement of defence in isolation but in conjunction with other paragraphs so that the issues joined in the pleadings can be properly ascertained.*** (See: UGOCHUKWU V. COOPERATIVE BANK (1996) 7 SCNJ 22 at page 35; PAN ASIAN AFRICAN CO. LTD. V. NICC NIG. LTD (1982) 9 SC 11. ***I accordingly resolve issue No. 2 in favour of the respondents.***

Learned counsel for the appellant made his submission on the 4th issue for determination as follows: that it is most inappropriate for the court below to go into the assessment of the credibility of the witnesses called by the appellant, review them on its own and came into the conclusion that they are not credible and they cannot be believed. Whether a witness is to be believed or not goes to the credibility of the witness and it is only the trial court that saw and heard the witness that can do so and not the Court of Appeal.

Learned counsel for the respondents submitted that the Court of Appeal painstakingly went through the evidence available before the trial court including documentary evidence and found out discrepancies between the list of machinery the appellant cited and the items it was claiming damages for their idleness. It also found from available documentary evidence that the appellant had no foreign partner and thus, none contributed any equipment to the stock of machinery at the disposal of the appellant. The reason for the re-evaluation of the evidence placed before the trial court is better stated by the court below when it said:

*"But before I examine the question let me interject for the purpose of clarification that the inquiry projected by the issues canvassed involves probing and, if necessary, interfering with the findings of fact by the court below; an exercise in which the discretion of this court is not unfettered. The general principle is that ordinarily an*

appellate court will not interfere with the decision of the trial court where so much turns on the credibility or reliability of the witnesses on the rationale that ascription of probative value to such evidence is the primary function of the trial court which saw, heard and assessed the witnesses: See: *AKINLOYE V. EYIYOLA*, (1968) NMLR. 92, 95; *AWOYALE V. OGUNBIYI* (1986) 1 All NLR. (part 1) 371, 377; and *AGBABIKA V. SAIBU*, (1988) 7 SCNJ. 305, 318. The court will also not do so for the sheer fancy of substituting its view for the view of the trial court where that court has properly evaluated the evidence and made findings of facts: See: *OBODO V. OGBA*, (1987) 1 All NLR. (part 1) p. 157, 162-163; and *OGBECHIE V. ONOCHIE* (1988) 1 NWLR. (part 70) 370, 378.

But an appellate court will disturb the findings of fact by the trial court where such findings are shown to be unreasonable or perverse and not a result of proper exercise of judicial discretion. It will similarly interfere with the decision of the lower court where there is ample evidence and the court failed to evaluate it and make correct findings on the issue as in such a case the appellate court is in a good position as the trial court to make the proper findings: See: *SHELL BPPETROLEUMCO. NIG. LTD. V. PERE COLE*, (1978) 3 S.C 183, 194; *ISOKAWA MOTORS NIG. LTD. V. AWONIYI* (1999) 1 NWLR.. (part 587) 423, 435. An appellate court will also interfere where the findings do not flow from the evidence on which such findings are based: See: *ADEMOLAJU V. ADENIPEKUN*, (1999) 1 NWLR. (part 587) 440, 455. I am satisfied that within the parameters set by the principles here adumbrated it is proper and permissible for this court to evaluate the evidence before the lower court with a view to seeing where justice of this case lies."

That of course, is the correct principle of the law where it is found that the trial court has failed in its primary role in evaluating the evidence placed before it by the parties. ***If an appeal court does not interfere to arrest an apparent miscarriage of justice occasioned by non-evaluation or improper evaluation by a trial court, that will perpetuate injustice in our judicial processes and it is the society that will bear the brunt. In my view, the court below did the right thing. I have no hesitation in dismissing this issue as unmeritorious.***

Issue No. 5 is on Respondents' Notice filed by the respondents

praying that the decision of the court below appealed against by the appellant be affirmed on the grounds other than those relied on by the court below.

Let me first and foremost draw attention that ***a Respondent's Notice as provided by Order 3 Rule 14(2) of the Court of Appeal Rules is not and does not represent a Notice of Appeal. This is because a respondent's notice does not contemplate a situation where the applicant will be entitled to ask for a complete reversal in his favour of findings of fact made against him on certain issues contested in the case, though he may have succeeded on other issues. The respondents' notice filed in this appeal arose from the appeal on hand. I have perused the grounds upon which the respondents' Notice was predicated.***

I have carefully perused, compared and contrasted with the reliefs claimed in the appeal and I am contented that the respondents were neither asking for a complete reversal of the findings of fact made against them nor did they ask for anything that would have fundamentally altered the case. See: ADELEKE V. AKINOLUGBADE (1987) 3 NWLR (part 60) 214 at page 216; ATTORNEY GENERAL OYO STATE V. FAIRLAKES HOTELS (No.2) Supra. ***The respondents' notice in this matter, in my view, was validly raised. I resolve issue No. 5 in favour of the respondents.***

In the final result, this appeal lacks merit and it is hereby dismissed. The respondents are entitled to N50.000.00 costs from the appellant.

### **TOBI JSC**

I have read in draft the judgment of my learned brother, Muhammad, JSC and I agree with him. This appeal is on award of damages in respect of idleness of equipment and machinery of the appellant during the period of inactivity or lull. The appellant is the plaintiff. The respondents are the defendants.

The appellant, a limited liability company, entered into a contract with respondents in 1981 to construct a 25-kilometer road between Obafemi and Owode in Obafemi/Owode Local Government of Ogun State. Further to the agreement, the appellant moved its equipment and machinery to the site of the construction and it was

working until 1983 when the respondents ordered it to suspend work on the site. The appellant stopped working with the equipment from January 1984 to June 1986. Thereafter work resumed again.

From August 1986, dispute arose again in respect of the amount to be paid on work done and the appellant had to stop working to clarify the dispute. The dispute was clarified in June 1987 and the respondents agreed to be paying the amount agreed to on the Certification of Completion of Work issued at the particular time after which work resumed again, but the respondents soon after this, purportedly terminated the contract by their letter of 30th March, 1988.

On 3rd March 1988, the respondents finally by its letter of 3rd March, 1988 terminated the contract and went on to award the contract to another company. Consequently the appellant filed a Writ of Summons claiming reliefs stated in paragraph 48 of the Further Amended Statement of Claim.

The trial court in its judgment granted the principal claims of the appellant. It held that the respondents were in breach of the contract and awarded damages against them. The trial court however refused the claim on equipment and machinery which were idle during the period of the suspension of the work.

The trial court based its reason for the refusal of the claim on the ground that the evidence of PW1 on equipment and machinery needed corroboration. The learned trial Judge also reasoned that the appellant had waived its right to claim for the equipment.

Both parties, being dissatisfied with the judgment, appealed to the Court of Appeal. The respondents later abandoned their appeal but filed a Respondent's Notice.

The Court of Appeal overturned the decision of the High Court, by holding that the evidence of PW.1 needed no corroboration. The court also held that the appellant had not waived its right to claim for equipment and machinery.

The appellant has therefore filed this appeal to this court on the refusal of the Court of Appeal to grant the claim for equipment and machinery after the court had disagreed with the reasoning of the trial court for refusing the claims.

The appellant formulated five issues for determination. The crux of the case of the appellant is that the appellant is entitled to the damages in respect of the idleness of the equipment and machinery

on site while the contract was suspended by the respondents. The respondents case is that they are not liable to pay damages on the equipment and machinery during the period of idleness.

B It is a principle of law that an appellate court will not interfere with the findings of a trial Judge as a matter of routine or by way of parading appellate power. On the contrary, an appellate court can only interfere with the findings of a trial Judge where is that while the trial Judge watches the demeanour of the witness, an appellate court has not such an opportunity. It has to look at the cold Records before C the trial Judge and come to a decision. And so when the findings of fact are not traced or traceable to the Record, an appellate court will be correct to substitute its own findings based on the Record.

The Court of Appeal refused to grant the claim for equipment and machinery. The Court enquired into the identity and source of D the equipment and machinery, and rightly in my view, came to the following conclusion at page 417 of the Record:

*"However that may be I have come to the conclusion that on the evidence before the trial court purged of any slur on the appellant's witnesses and with no benefit of any gratuitous defence to the respondents the appellant was not entitled to judgment on her claim for loss of income on her equipment and machinery purported to be idle during the suspension of her contract with the respondents in circumstances where she failed miserably to prove that she acquired E or possessed the equipment and machinery. And what with the testimony of her star-witness, the company's financial kingpin at that, about the inventory of the company's stock of equipment and machinery which sounded the death-knell to the appellant's pretensions to entrepreneurial grandeur and stripped the claim of any vestige of F G credibility."*

I am not in a position to fault the above as it is based or predicated on the Record before this court.

H It is trite law that where a party claims special damages, the burden is on him to prove the special damages to the last kobo. He has to do this by leading credible evidence; most of the time by documents. There are however instances where special damages could be proved without documents.

I think I can stop here. I also dismiss the appeal. I award the respondents N50,000.00 costs.

### OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Muhammad JSC. I agree with him in the conclusion that this appeal has no merit. The case made by the appellant, who was the plaintiff at the trial Court was that it was awarded a contract for the construction of a 25 kilometre road in 1981 by the Respondents. The appellant claimed that the said contract was wrongfully terminated in 1988. It pleaded its claim in paragraph 48 of its further amended statement of claim thus:

*"48 WHEREOF the plaintiff claim(s) as follows:*

*1. DECLARATION that defendant's letter Nol. 363/307 of 30th March, 1988 purporting to revoke the contract agreement between the plaintiff and the defendants in respect of Owode Road Project is wrongful, improper, null and void.*

*2. ORDER for payment of damages for breach of contract are as follows:*

*i) Expenses incurred on staff maintenance, Salaries - N305,826,00*

*ii) Charges on plants and machineries From January, 1984 to June, 1986 and from August 1986, 1987 at daily rate as follows:*  
*Bulldozer - N4,000.00*

*2 Motor Builders @ N2,000.00 each - N4,000.00 Loader - N1,000.00  
 Tipper - N 800.00*

*3 Concrete Mixers @ N200 - N600.00 Scraper - N2,500,00  
 Roller - N6,000.00 Water Lancer - N600.00 Caber Vibrator - N300.00  
 N19,000.00 per day*

*Total from January, 1984 to June 1986 and from August, 1986 to June, 1987 @ N19,000.00 per day N23,853,200.00*

*iii) Outstanding payments on certificate 1/1 - N202,797.76*

*iv) Interest on outstanding payments at the Rate of 15% from the date when certificate 9 became due until judgment.*

*v) (a) Loss of anticipated profit on N14.8m - N3,700,000.00  
 @25%, ALTERNATIVELY*

*(b) Loss of anticipated profit on balance of 55% of N8 million - N1,100,000.00*

*vi) Interest on judgment debt at the rate of 10% From the date of judgment until the date of payment".*

The appellant's claim for breach of contract was granted by

the Court below but the claim for special damages for keeping appellant's equipment idle was refused. Dissatisfied, the appellant has brought a final appeal before this Court. The appellant formulated the following issues for determination.

B (i) *whether or not ownership and source of the equipment and machineries (sic) used for the contract in this suit was an issue contested by parties to this case. Grounds 4, 5 and 6*

C (ii) *Whether or not the appellant was not denied fair hearing When the court held that the respondents denied the case of the appellant – Ground 3.*

D (iii) *Whether from the totality of the evidence before the court the appellant did not establish that the appellant's equipment were kept on site while the contract was suspended which would have enabled the appellant to be entitled to judgment in the sum of N23,853,200.00 claimed as damages for loss of income on her equipment and machineries (sic) that lay idle when the contract was twice suspended. Grounds 7, 8, 9 and 10.*

E (iv) *Whether the learned Justices of the Court of Appeal can embark on the review of evidence of the parties given at the trial court to the extent of deciding issues which border on the credibility of the witnesses - Ground 1.*

F (v) *Whether or not the Respondents' Notice filed by the Respondents in the lower Court was appropriate in the circumstances of this case"*

The contention of the appellant in the main is that it should have been awarded special damages for the loss it incurred in payment of staff salaries and for charges on plants for January 1984 to June, 1986 and August 1986 - June 1987.

G I am of the view that the payment of staff salaries and hire of equipment to execute the contract would necessarily merge in the overall value of the contract awarded to the appellant. There is no case made that the respondents awarded a contract to the appellant for hire of staff or equipment. If the contract with the appellant was H breached, the damages that could have fallen within the contemplation of the parties at the time the contract was made is the loss of profit earned by the appellant by the improper termination of the contract. I do not see how the claim for hire of staff, equipment etc. could be justified in a case of breach of a construction contract. Pre-

sumably, it would have been in the contemplation of parties that equipment would be used to execute the contract but that could not form a distinct head of claim in the circumstances. Whatever loss the appellant suffered under such heads fell to be considered under the head of claim for its overall loss of profits on the contract.

I would also dismiss this appeal as unmeritorious. I subscribe to the order on costs made in the lead judgment. B

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### **OGBUAGU JSC**

This is an appeal only against the Judgment of the majority of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on 23rd June, 1999, further dismissing the claim of the appellant for damages for the idleness of its equipment and machinery which the Appellant had claimed in the trial High Court of Ogun State sitting at Abeokuta and presided over by - Delano, C.J. and whose Judgment was delivered on 28th July, 1994. I note that the trial court found in favour of the Appellant in its main or principal claim for breach of contract by the Respondents, but refused and dismissed the claim for the item which is the subject-matter of the appeal. I also note that both parties being dissatisfied with the Judgment, appealed and cross-appealed respectively to the court below. The Respondents however, withdrew/abandoned their own cross-appeal and relied on their Respondents’ Notice filed on 14th May, 1996, urging the court below to affirm the finding and decision of the trial court in respect of the said subject-matter of this appeal on other ground or grounds. The court below granted leave to the Respondents to so file the said Notice. See page 360 of the Records. C D E F

Dissatisfied with the said decision of the court below, the Appellant, has further appealed to this Court on (10) ten grounds of appeal. It has formulated (5) five issues for determination while the Respondents, have formulated (3) three issues for determination. G

When this appeal came up for hearing on 10th February, 2009, the leading learned counsel for the Appellant, adopted their main and Reply Briefs. He urged the Court to allow the appeal. The leading learned counsel for the Respondents, adopted their Brief and urged the Court, to dismiss the appeal. Thereafter, Judgment was reserved till to-day. H

In my respectful view, the main or principal claim for breach of contract having succeeded, this appeal is a narrow one as it concerns only or mainly, an award of damages in respect of a head of the Appellant's Claims claiming damages for the idleness of equipment and machinery at the trial court. In other words, this appeal is on the narrow compass of whether or not, the court below was right in refusing to award damages in respect of the said equipments and machineries.

At pages 307 - 308 of the Records, the learned trial Chief Judge stated inter alia, as follows:

*"The issue that is to be determined is the equipments and their numbers on the site during this period in view of the disparity in the list of equipments as given in evidence by the PW1 and those in exhibit A. This is necessary having regard to the cross examination of the PW4 that he removed or hired out some of the equipments during this period. There is no doubt that there must be some equipments on site to be able to perform to specification but the evidence is not that all the equipments as listed by the PW4 must be on site to be able to perform according to specifications. It must be remembered that the burden is on the plaintiffs to prove this facts and the claim being that of a special damage must be specifically proved. I am in doubt as to the equipment being on site.*

*This right to claim for these equipments matured from January 1984 to June 1986 and from August 1986 to June 1987. After this, the plaintiffs continued to deal with the defendants giving an impression that he (sic) was not going to insist on this right to claim for the idleness of the equipments. I am of the view that if the contract had been terminated, the plaintiffs would not have sued to claim for this item of damages. It is therefore my view that the plaintiffs, in the circumstances, have waived their right to sue to claim for the idleness of the equipments. See African Petroleum Ltd. v. Owodunni, (supra).*

*From above, the plaintiffs have not proved this item of claim satisfactorily. It fails and it must be dismissed. It is accordingly dismissed".*

His Lordship, then at pages 308 to 310 of the Records, in my respectful view, thoroughly, considered the claim in the alternative (as he was enjoined to do on decided authorities) stating that assum-

ing he was wrong in his decision or conclusion. See the cases of Adeyemi & ors. v. Bamidele & ors. (1968) 1 All NLR 31 @ 38 - 39; Kayece (Nig.) Ltd. v. Prompt Shipping Corporation Ltd. (1986) 2 NWLR (Pt.23) 458 C.A.; Tsokwa Oil Marketing Co. Nig. Ltd. v. Bank of the North Ltd. (2002) 5 SCNJ. 176 @ 205 and C & C Construction Co. Ltd. & anor. v. Okhai (2003) 12 SCNJ. 33 @ 55 citing the case of English Exporters (London) Ltd. v. Ayade (1973) NSCC 123 @ 126 - per Coker, JSC and some other cases therein, just to mention but a few, as to the duty of a trial court to always assess damages which he could have awarded to a plaintiff, even where he finds the defendant not liable. B C

His Lordship thereafter, found as a fact and stated at page 310 thereof inter alia, as follows:

“..... However, in view of my finding that the evidence that the equipment were on site is not satisfactory, this item of claim must be dismissed. It is accordingly dismissed” D

It is now firmly settled that where there is evidence to support the conclusion of a trial Judge in dismissing a claim of a plaintiff, as in the instant case leading to this appeal, an Appellate Court, will not interfere. See the case of Lion Building Ltd. v. Shodipe (1976) 12 S.C. 135. This is also the case in respect of findings of fact by a trial court who saw and heard the witnesses testify. There are too many decided authorities in this regard. But see the cases of Agwunedo & ors. v. Onwumere (1994) 1 NWLR (Pt.321) 375; (1994) 1 SCNJ. 106; Nwoke & ors. v. Okere & ors. (1994) 5 NWLR (Pt.343) 159; (1994) 5 SCNJ. 102; Chief Oro & ors. v. Fatade & ors. (1995) 5 NWLR (Pt.396) 385; (1995) 5 SCNJ. 10 and Nigeria Industrial Development Bank v. De-Easy Life Electronics & anor. (1999) 4 NWLR (Pt.597) 8 @ 23 C.A. citing Akinloye v. Eyiola (1968) NMLR 92 just to mention but a few. Thus, the findings of fact or facts is/are the exclusive business of a trial court. See the case of Alhaji Usman v. Garke (2003) 7 SCNJ. 38 @ 50-51. E F G

I note that the court below - per Olagunju, JCA (of blessed memory) at pages 402 to 403 of the Records, also dealt with the issue of the attitude of an Appellate court as to when and why it can interfere or not to interfere in respect of findings of fact and where the decision of a trial court, is based on the credibility or unreliability of the witnesses. At pages 409 to 410 thereof, it dealt with the law on H

onus of proof of special damages by a claimant. After a very impressive review and evaluation in my respectful but firm view of the evidence before the trial court and submissions of both learned counsel for the parties, at pages 411 - 412 thereof, it found as a fact and held inter alia, as follows:

B “ *Whichever way one looks at the matter - either from the angle that the appellant’s claim cannot stand on the evidence, oral and documentary, adduced by her or from the focus of the stunning but clinching testimony of the IPW I will resolve In favour of the respondents issue Two in the appellant’s Brief of Argument. That is to say, on the evidence before the trial court free of any probative stigma against the evidence of the IPW and 4PW and of the benefit of any special defence by the respondents, the appellant did not prove that she possessed the equipment and machinery which she claimed were*  
C *at the contract site during the period of suspension.....”.*  
D

It continued inter alia, as follows at page 412 thereof:

“..... *Having resolved issue one that the appellant failed to prove as a fact the existence of the equipment and machinery for the loss of income upon which she is claiming damages the foundation*  
E *for issue Two has collapsed. Therefore, the short answer to issue Two is that it has been eliminated by the negative answer to issue One and must per force, be resolved in favour of the respondents. That is to say, determining the question of idleness of equipment and machinery that are not shown to belong to the appellant is sterile or, at best,*  
F *academic and the issue must be resolved against the claimant for damages who has no shadow of title, ownership or possessory, to the property”.*

It concluded at pages 417 to 418 thereof inter alia, as follows:

G “..... *I have come to the conclusion that on the evidence before the trial court purged of any slur on the appellant’s witnesses and with no benefit of any gratuitous defence to the respondents the appellant was not entitled to judgment on her claim for loss of income on her equipment and machinery purported to be idle during*  
H *the suspension of her contract with the respondents in circumstances where she failed miserably to prove that she acquired or possessed the equipment and machinery. And what with the testimony of her star-witness, the company’s financial kingpin at that about the inventory of the company’s stock of equipment and machinery which*

*sounded the death-knell to the appellant's pretensions to entrepreneurial grandeur and stripped the claim of any verge of credibility.*

*Therefore, I am satisfied that notwithstanding the errors by the court below as regards competence of the 1PW and 4PW as witnesses and the wrong application of the doctrine of waiver the court came to the right decision by dismissing the appellant's head of claim for loss of income from her equipment and machinery rendered idle during the period of suspension of her contract with the respondent. The appeal succeeds in part. The judgment of the lower court in respect of the claim on equipment is affirmed*

*Appeal on damages is dismissed.....”.*

I agree. All the above, are borne out from the Records. I note that Mukhtar, JCA (as he/she then was), concurred with the said Judgment while Onalaja, JCA dissented. I note that the court below, painstakingly, dealt with the issue which led to the lengthy and in my respectful view, well considered Judgment of that court which at the end, commended the learned counsel for the parties for their industry in a matter so simple and narrow as in the instant appeal. Afterwards, an appeal is by way of a re-hearing in respect of all issues raised in respect of the case including what damages ought to be awarded. See the cases of *Sabru Motors Ltd. v. Rajab Enterprises Nig. Ltd. (2002) 4 SCNJ. 370 @ 382* - per Ogwuegbu JSC; *Maersk Line & anor. v. Addide Investment Ltd. & anor. (2002) 4 SCNJ. 435 @ 472* - per Ayoola, JSC and *Attorney-General, Anambra State & 5 ors. v. Okeke & 4 ors. (2002) 5 SCNJ. 318 @ 333* just to mention but a few.

It is now firmly settled that in a claim for damages for breach of contract, the court is concerned only with damages which are natural and probable consequences of the breach or damages within the contemplation of the parties at the time of the contract. See the case of *Mobil Oil Nig. Ltd. v. Akinfosile (1969) (1) NMLR227*. However, in such a claim, the court, must be careful, not to compensate a party twice for the same wrong. By the law against double compensation, a party who has been fully compensated under one head of damages for a particular injury, cannot, be awarded damages in respect of the same injury under another head as appears to be the intention of the Appellant. See the cases of *Ononulu v. Micho & Co. (1961) ANLR 324 @ 328*; *Mercantile Bank v. Adalma (1990) 5 NWLR*

(Pt.153) 747@ 751 - 752; Nigerian Arab Bank Ltd. v. Shuaibu (1991) 4 NWLR (Pt.186) 450@ 456; Imo Concord Hotel Ltd. v. Hon. Justice K.O. Anya (1992) 2 NWLR (Pt.234) 210 and Artra Industries Nig. Ltd. v. The Nigerian Bank for Commerce & Industry (1998) 4 NWLR (Pt.546) 357; (1998) 3SCNJ. 97 @ 130 just to mention but

B a few.

It need be stressed as it is also settled that strict proof, is mandatory in proof of special damages. This is why in the determination of the claim for special damages on a party's pleadings alone, may not be prudent. It must be backed by concrete evidence in court. See the cases of Adimorah v. Ajufor & ors. (1988) 3 NWLR (Pt.80) 1; (1988) 6 SCNJ. 18 referred to in the case of Calabar East Co-operative Thrift Credit Society Ltd. & 3 ors. v. Etim E Ikot (1999) 14 NWLR (Pt.638) 225; (1999) 12 SCNJ. 321 @ 331 - 332. Special damages have been defined as damages of the type as the law will not infer from the nature of the act, they do not flow in the ordinary course; they are exceptional in their character and therefore, they must be claimed specially and proved strictly. See the cases of Stroms Bruks Aktie Bolag v. Hutchison (1905) A.C. 515@ 525 - 526 - per Lord Machnaghten; Incar Nig. Ltd. & anor. v. Mrs. M.R. Adegboye (1985) NWLR (Pt.8) 453@ 454; Ekenwa v. Nkpakara & 2 ors. (1997) 5 SCNJ. 70 @ 90; Badimus & anor. v. Abegunde (1999) NWLR (Pt.627) 493 @ 502; (1999) 7 SCNJ. 96 and The Shell Petroleum Development Co. of Nigeria v. Chief Trebo VII (2005) 4 SCNJ. 39@ 57; (2005) 3-4 S.C. 137.

Before concluding this Judgment, I will touch briefly on Issue No. (v) of the Appellant and Issue No. 3 of the Respondent which are the same. I note that the Appellant in attacking the validity or appropriateness of the Respondent's said Notice, stated in paragraphs 8.02 to 8.07 of their Brief, that the trial court had not made (spelt as 'make') any findings on the grounds relied on in the said Respondent's Notice. That the said grounds are in the nature of grounds of appeal. That there is a difference between variation of a judgment vide a Respondent's Notice and a cross-appeal. That the Respondent's Notice is invalid as it did not comply with Order 3 Rule 14 of the Court of Appeal Rules 1981 as amended. That the grounds stated in the said Notice, are not for purposes of relying on grounds other than those relied upon by the trial court, but to reverse the findings made

by the trial court which can only be done by a Cross-Appeal.

The Respondents on their part, submit that their Notice, firstly, arises from the appeal filed by the Appellant and which formed their Issue No. 2. Secondly, that they are not asking for a complete reversal of the finding on the issue that the Appellant is not entitled to the claim for damages for idleness of the equipments and machinery. That they urged that the court below, affirm that the Appellant is not entitled to the said claim because of other reasons. B

Now, a Respondent's Notice it is settled, postulates that the approach of the learned trial Judge to the case, was correct, but that his conclusions, had adversely affected the Respondent who thereby, contends that by the same reasoning of the learned trial Judge, he should have received, such as for example, a greater award. See the case of *Alhaji Sunmonu & ors. v. Ashrote (1975) (1) NMLR 116 @ 23*. C

On the other hand, if a plaintiff wants a complete reversal of the decision of the lower court, he files a cross-appeal. In other words, a party seeking to set aside a finding in a judgment which is crucial and fundamental to a case, can only do so, through a substantive Cross-appeal and not an application to affirm or vary the judgment on other grounds. See the cases of *Lagos City Council v. Ajayi (1970) 1 ANLR 291 @ 294 - 297*; *Oba Adeyinka Oyekan v. B.P. Nig. Ltd. (1972) 1 ANLR 45 @ 47-48*; *African Continental Seaways Ltd. v. Nigerian Dredging Roads & General Works Ltd. (1977) 5 S.C. 235*; *Eliochin (Nig.) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47 S.C. (1986) 1 S.C. 99 @ 130*; *(1986) 1 All NLR (Pt.1) 1 @ 11* (spelt in the Appellant's Brief as Egochin); *Oguma Associated Companies (Nig.) Ltd. v. International Bank for West Africa Ltd.* (not fully cited in the Appellant's Brief) *(1988) 1 NWLR (Pt. 73) 655, 658*; (also reported in *(1988) 3 SCNJ. 13*); *FRA Williams v. Daily Times of Nig. Ltd. (1990) 1 NWLR (Pt.124) 1 @ 20, 21 - 23, 25, 28, 35-36, 39, 41, 48 & 49. (1990) 1 SCNJ. 1* and *Chief Briggs & 12 ors. v. Chief Bob-Manuel & 6 ors. (2003) 1 SCNJ. 218 @ 226-227* just to mention but a few. In other words, a Cross-Appeal arises, where two parties to a judgment, are dissatisfied with it and each accordingly appeals. Each appeal, is separate and is an independent complaint by the parties even though both appeals, are heard together. See the case of *Chief Kalu Igwe & 2 ors. v. Chief Okuwa Kalu & 2 ors. (2002) 7 SCNJ. 336 @ 348 -* D E F G H

per Ogwuegbu, JSC.

Mukhtar, JCA (as he/she then was) in her concurring Judgment at page 419 of the Records, dealt with the said Respondent's Notice. He/she stated/noted that the Notice, coupled with issue No.2 of the Appellant, would entail the consideration of the overall evidence adduced as had been done in the lead Judgment. At page 421 to 422 thereof, His Lordship stated inter alia, as follows:

"When one reads carefully *the various evidence adduced by the parties on the number of equipments on the site*, one is inclined to uphold the notice of intention to contend that judgment should be affirmed on the grounds stated in the notice,

Order 3 Rule 14 of the Court of Appeal Rules makes provisions for two forms of *contending a decision and the provision the Respondents have come under is the second one undersub Rule 2, which states:-*

(2) *A Respondent who desires to contend on the appeal that the decision of the court below should be affirmed on grounds other than those relied upon by that Court must give notice to that effect specifying the grounds of that contention.*

The Respondent's have done so, and I am satisfied, that *the notice is quite valid, for it has merit and substance. It must be emphasised here that what the Respondents have sought here is affirmation not variation. I find the words of Kolawole J.C.A. (as he then was) in the case of Adeleye v. Awotoye 1990 7 NWLR part 162 page 337 (it is at pages 344-346) on the purport of the Respondent's notice of intention to affirm a decision on grounds other than those relied upon by a lower Court, quite illuminating. They read:-*

*"The Respondents' NOTICE that the decision of the Court below should be affirmed on grounds other than those relied upon by the Court below must, in my view, have arisen from the appeal filed. A Respondent's Notice does not contemplate a situation where the Applicants will be entitled to ask for a complete reversal in their favour of the findings of facts made against them on certain issues contented in the case, even though the Applicants succeeded on a number of other issues.*

*I am of the firm view that Order 3 Rule 14(2) of the Court of Appeal Rules does not apply where a finding of the Court below which is crucial and fundamental to the case is sought to be set aside".*

*“I think the notice in the present case arose from the appeal filed, and the Respondents have not asked for any reversal or setting aside. It is also instructive to note here that leave of this Court was obtained in respect of the notice on 18/3/97”.*

*[the underlining mine]*

I completely agree because, I cannot fault the above. I am also satisfied that the Respondents’ said Notice, is valid and meritorious. I therefore, answer issue (v) of the Appellant in the Affirmative/Positive, while my answer to issue 3 of the Respondent, is rendered in the Negative. See also the case of Attorney-General of Oyo State & anor. v. Fair Lakes Hotel Ltd. (No.2) (1989) 5 NWLR (Pt....) 255 @ 293 - 294; (1989) 12 SCNJ.1 - per Belgore, JSC (as he then was) cited and relied on in the Respondents Brief.

In concluding this Judgment, I note that there are concurring findings of fact and Judgment of the said narrow issue in this appeal by the two lower courts. The attitude of this Court in this regard, has been stated and re-stated in a number of decided authorities - i.e. it will not disturb or interfere. See the cases of Ume v. Okonkwo & anor. (1996) 12 SCNJ. 404 @ 413 citing several other cases therein and Ogbu v. Wokoma (2005) 14 NWLR (Pt. 944) 118; (2005) 7 SCNJ. 299; (2005) 7 S.C. (Pt.II) 123 @ 136 Just to mention but a few.

It is from the foregoing and the more detailed lead Judgment of my learned brother, Muhammad, JSC just delivered, that I too, find no merit in this appeal that fails. I too dismiss it. I abide by the consequential order in respect of costs.

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### **OGEBE JSC**

I read in advance the lead Judgment of my learned brother Muhammad JSC just delivered and I agree with his reasoning and conclusion. I also see no merit in this appeal and dismiss it with costs as assessed in the lead Judgment.