

**SUPREME COURT OF NIGERIA**  
17TH JULY, 2009. SC. 212/2002  
**CORAM:- G. A. OGUNTADE, M. MOHAMMED, F. F. TABAI,**  
**J. A. FABIYI, O. O. ADEKEYE, JJSC**

OLALOMI INDUSTRIES LTD ..... APPELLANT  
AND  
NIGERIAN INDUSTRIAL  
DEVELOPMENT BANK LTD ..... RESPONDENT

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**APPEALS** - Fresh points on appeal - Meaning - It means an issue not canvassed and pronounced upon - At the lower court - Like the issue of validity of appointment of project manager - It can only be raised with leave (H1)

**APPEALS** - Grounds - Basis of complaints - Ratio or obiter - Though an appeal is usually against a ratio - The comment on fraud by Court of Appeal - Even if it is obiter - Is so linked with the ratio as to have influenced it (H2)

**PRACTICE & PROCEDURE** - Allegations of fraud - Manner of proving - It must be pleaded and proved beyond reasonable doubt - But it was neither pleaded in this case - Nor was evidence led thereon (H3)

**LAND USE ACT** - Governor's consent - Approval by Lands officer - Sufficiency - Since the person who signed was not the Governor's delegate - The Commissioner for Lands - The approval letter was not in accordance with the Act (H4)

**JUDICIAL PRECEDENTS** - Stare decisis - Bucknor Maclean case - Applicability - It is not evocable in the face of the provision of s. 26 of Land Use Act - Trial judge was right to have nullified Exh 1 (H5)

**EVIDENCE** - Admissibility - Deed of debenture - Without Governor's consent - Debenture charged over floating assets does not create any charge on land - So it does not require Governor's consent for validity - It is therefore admissible without it (H6)

CONTRACTS - Loan agreements - Agreed interest rate - Binding effect - From admissions of PW1 the parties agreed on 14% p.a. interest - Repayable as from January 1985 - Respondent is therefore entitled to charge the agreed interest rate (H7)

JUDGMENTS - Separate days - Separate appeals - Same suit - As none of the appeals was in the form of cross-appeal - And no miscarriage of justice has been shown - The practice is proper in the circumstance (H8)

JUDGMENTS - Terms - Monetary awards - Ascertainment of - Contrary to appellant's contention - The awards as adjusted by Court of Appeal - Is ascertainable (H9)

### ***FACTS***

This is an appeal against two sister judgments of the Court of Appeal. Though the case was one suit at the trial court, the parties had brought independent appeals to the Court of Appeal on different aspects of the judgment of the trial court thereby giving rise to two judgments by the Court of Appeal.

The plaintiff/appellant sued the defendant/respondent claiming damages for loss of production based on full capacity during the tenure of the Project Manager appointed by both parties, from among the staff of the respondent, to manage the affairs of the appellant, pursuant to the terms of the parties' loan agreement. The undisputed facts of the case were that appellant needed fund for importation of its factory machines and equipment, as well as fund for its working capital. It approached the respondent for loans accordingly and obtained two loans. The first was a term loan the collateral for which was the property of appellant at Offa, over which property a deed of mortgage, Exhibit 1 was executed. The second was a working capital loan secured on the floating assets of the appellant, over which a deed of debenture, Exhibit 30 was executed. Appellant sought and obtained a purported consent of the Governor for Exhibit 1 which consent was later found to be invalid under the Land Use Act.

When appellants could not cope with the repayment terms of the Loans due to production problems, the parties decided to ap-

point a project manager, as above, to manage its affairs. Subsequently, due to protests by appellant's chairman the project manager was recalled. Following the recall, appellant sued respondent claiming as above-stated. Respondent counter claimed for the total sum outstanding on the loans and for interests. It also claimed for declaration that it could exercise its power of sale under Exhibit 1. The Learned trial judge dismissed the case of appellant and gave judgment to respondent. It nonetheless held that both Exhibits 1 and 30 were nullities. Aggrieved, both parties appealed to Court of Appeal as above-stated. The court delivered its respective judgments in respect of the appeal on different dates. Appellant's appeal was dismissed. Respondent's appeal was partially allowed as Exhibit 30 was held valid, among other things. Appellant has brought the instant appeal against both judgments of the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*i. Was it right for the Court of Appeal to reverse High Court decision based on credibility of PW 1 and DW 1 who were the only witnesses who gave evidence at the trial High Court?*

*ii Was it proper for the Court of Appeal to rely on statements of accounts tendered by DW 1 at the trial High Court?*

*iii. Was the alleged notice of consent by the Chief Land Officer of Kwara State in his letter for 'Permanent Secretary' attached to Exhibit 1 in compliance with section 22(2) and 45 of the Land Use Act No. 6 of 1978 and the Delegation of Military Governor's Powers Notice Kwara State Legal No. 4 of 1978? (Etc., see p. 2015)*

**HELD** (Unanimously dismissing the appeal per **FABIYI JSC**)

### **Fresh points on appeal - Meaning**

1. I need to say it that a fresh point of law means an issue which was not canvassed at the lower court and pronounced upon thereat. Fresh issue must be basically on point of law and must be raised with the leave of court.

Let me further point it out that fresh point or issue touching on jurisdiction can be raised at any stage of the proceedings; even for the first time on appeal or at the apex court. A question of law, constitution and jurisdiction can be raised at any time in the proceedings with leave appropriately sought and obtained. I cannot trace even remotely where the validity of the appointment of the Project Man-

ager was canvassed by the parties and pronounced upon by the trial court and the court below. The appellant did not seek for leave to raise the fresh point in this court. It cannot be let in through the back door. I do not see how it is saved by section 233 (2) (a) of the Constitution of the Federal Republic of Nigeria 1999. (p. 2013 D/H)

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***APPEALS - Grounds - Basis of complaints - Ratio or obiter***

2. In respect of Ground 1 of the additional grounds of appeal reproduced earlier on by me, learned counsel for the respondent felt that the comment touching on fraud by the court below was just a passing remark which did not go to the root of the judgment. He submitted that an appeal is usually against a ratio and not against an obiter except in cases where the obiter is so clearly linked with the ratio as to be deemed to have radically influenced the latter.

D

In my opinion, even if the above is an obiter (which it is not) it is so clearly linked with the ratio as to be deemed to have radically influenced the later. I feel that the complaint made in ground 1 of the additional grounds of appeal was well taken. The appellant should be allowed to ventilate same. The objection taken in respect of this

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ground is hereby over-ruled. (pp. 2014 B / 2015 B)

***Allegations of fraud - Manner of proving***

3. I must say it unequivocally that fraud must be pleaded with due particulars supplied and evidence led on same. Fraud requires a higher degree of probability in its proof. Allegation of fraud must be proved beyond reasonable doubt. It requires proof in the realm of probability; not fantastic possibility.

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Through out the whole gamut of the proceedings at the trial court, I cannot see where fraud was pleaded; not to talk of giving adequate particulars of same. I cannot trace any evidence touching on fraud. (p. 2014 E)

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***Governor's consent - Approval by Lands officer - Sufficiency***

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4. I must at this point refer to the case of *Union Bank of Nigeria Plc & Anor.v. Ayo Dare & Sons (Nig.) Ltd. (2007) 4-5 S.C. 42*. I note that the decision of the court below in *N.I.D.B v. Olalomi Ind. Ltd. (2002) 5 NWLR (Pt. 761) 532* was cited before this court. This court pronounced that the approval letter was not in accordance with what is

envisaged in section 22 of the Land Use Act. The consent of the Hon. Commissioner for Lands is not manifest on the face of the approval letter. Since the person who signed was not the Governor's delegate, it would be wrong to assume that the signature of the Acting Chief Lands Officer on the letter attached to Exhibit 1 was an act done in a manner substantially regular on the face of it. The signature on the letter reproduced earlier on cannot be seen as being in substantial conformity with the signature of the Governor or his delegate, the Commissioner for Lands and Housing. (p. 2020 E)

***Stare decisis - Bucknor Maclean case - Applicability***

5. The point should be limited to moral turpitude in respect of the appellant's behaviour. It has nothing to do with fraud which if proved, would have nailed the appellant.

In short, I agree that the maxim *ex turpi causa non oritur actio* is not applicable; and, as well, the equitable principle enshrined in *Bucknor Maclean's* case is not evocable in the face of the provision of section 26 of the Land Use Act, 1978. I form the opinion that the learned trial judge was right in declaring Exhibit 1 as null and void. The decision of the court below, to the contrary, is hereby set aside. (p. 2021 G)

***Admissibility - Deed of debenture without Governor's consent***

6. Let me move to Exhibit 30 which, in essence, is a Deed of Debenture freely executed by the appellant creating a charge over its floating assets to secure the working capital loan as a follow up to its acceptance of the offer made to it in Exhibit 28 by the respondent. Exhibit 30 does not create any charge on land. It creates charge over floating assets. It is not made a supplement to Exhibit 1. As such, it does not require the Governor's consent to be valid. To my mind, the court below was on firm ground when it overruled the erroneous view of the trial judge that Exhibit 30 is null and void. The exhibit is clearly admissible and warrants being considered in an appropriate manner as done by the court below. (p. 2022 C)

***Loan agreements - Agreed interest rate - Binding effect***

7. From the admissions made by PW1 as high-lighted above, it is glaring that a fiduciary relationship existed between the parties. The

appellant obtained a term loan in the sum of N1.5 Million with agreed 14% per annum interest with commencement of repayment from January 1985. The learned trial judge entered judgment for the respondent for the stated sum with no interest awarded from January 1985 to 31st May, 2000. In my considered opinion, that stance was not right. The respondent is entitled to charge interest at the agreed rate of 14% per annum. The court below was right in applying the agreed interest rate; when it set aside the judgment of the trial judge in respect of same. The respondent is entitled to judgment on the term loan in the sum of N1.5 Million plus 14% per annum interest from 1/1/85 till judgment on 31/5/2000 and 10% per annum until judgment debt is fully liquidated. I order accordingly. (p. 2023 G)

***JUDGMENTS - Separate days - Separate appeals***

8. On appellant's issue 9, learned counsel submitted that it was wrong for the court below to have delivered the judgments in respect of each party's appeal on different dates and to have awarded costs in respect of each judgment which led to awards of punitive costs.

I note it that it was the appellant who filed the 2nd appeal out of time with the leave of court. It should have filed a cross-appeal to avoid confusion for which a complaint is being raked up. If it had been an appeal by the respondent and a cross-appeal by the appellant, each would have attracted its own separate judgment. The appellant did not say a miscarriage of justice occurred. I cannot pinpoint any miscarriage of justice in the prevailing circumstance. The appellant who did not appeal on costs awarded cannot be heard to raise it in a remote fashion. (p. 2024 F/H)

***JUDGMENTS - Terms - Monetary awards - Ascertainment of***

9. On issue 11, learned counsel for the appellant submitted that the judgment of the court below in respect of monetary award to the respondent was uncertain and not ascertainable. He felt that the appellant was entitled to a final award of N4,461,466.54.

Learned counsel for the respondent submitted that the judgments of the court below on monetary awards were certain and ascertainable. He observed that the appellant's own appeal at the court below was dismissed while respondent's own appeal was allowed.

I have no doubt that the monetary awards with attendant interest rates, as adjusted by the court below, in favour of the respondent is ascertainable. (p. 2025 B)

### **NOTABLE POINTS OF INTEREST**

#### **ADEKEYE JSC**

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##### *1. Ag Chief Land officer was not a sub-delegate*

The learned counsel for the Respondent and the Lower Court are of the opinion that gleaning through the Record that the learned trial judge was in error to have applied the maxim *Delegatus non potest delegare* to the facts of this case. If the learned trial judge had read the body of the letter he would have seen that the Ag Chief Lands Officer only conveyed on behalf of the Permanent Secretary to the Respondent the approval of the Commissioner for the mortgage transaction. This did not make the Ag Chief land Officer or the Permanent Secretary a sub-delegate of the Honourable Commissioner. (p. 2029 A)

##### *2. Appellant cannot now challenge admissibility of Exh 1 & 2*

It is note worthy that all the four Exhibits were tendered before the Trial Court with the consent of the parties. Exhibit 1 is the Deed of Loan and Mortgage Agreement, Exh. 28 is the letter of offer of facility and Exhibit 30 the Deed of Debenture. The Appellant, which did not object to the admissibility of exhibits 1 and 2 before the Trial Court cannot turn around to challenge the admissibility of the documents at the Appellate Court. (p. 2031 A)

##### *3. Evidence - Evaluation involves admissibility and relevancy*

In the evaluation of evidence, the trial Court must have regard to the admissibility of evidence and relevancy of same, credibility of the evidence, conclusiveness of same, the probability of the evidence as between the two parties. It will as an outcome of that exercise apply the law to the sum total of the evidence before arriving at a conclusion one way or the other. The Trial Court applied this test in the circumstance of this case. (p. 2031 C)

**REPRESENTATION**

J. O. Ijaodola for the Appellant

S. Ibiwoye with him T. Okwute and S. Okere (Miss) for the Respondent. A

**B CASES REFERRED TO**

Omoboriowo v. Ajasin (1984) 1 SCNLR 108

Ezukwu v. Ukachukwu (2004) 17 NWLR (Pt 902) 227

Ogba v. Onwuzo (2005) 14 NWLR (Pt. 945) 331 at 344

C Maskale v. Silli (2002) 13 NWLR (Pt. 784) 216 at 226

Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387 at 431

FBN plc v. ACE Ltd. (2006) 1 NWLR (Pt. 962) 438 at 461 -462

Elugbe v. Omokhafa (2004) 18 NWLR (Pt. 905) 319 at 334, 338

Asafa Foods Factory V. Alraine (Nig) Ltd. (2002) 12 NWLR (Pt. 781)

D 353 at 362 and 368.

Ukpong v. Commissioner of Finance (2006) 19 NWLR (Pt. 1013) 187 at 221

Savanah Bank (Nig.) Ltd. v. Ajilo (1989) 1 S.C. (Pt. 11) 90; (1989 1 NWLR (Pt. 97) 305

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**STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, s. 233

Evidence Act, cap 112, L. F. N, 1990, s. 138

Land Instrument Registration Law, ss. 11, 12 & 15

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Land Use Act, 1978, s. 22

**LEAD JUDGMENT BY FABIYI JSC**

G This is an appeal against two decisions of the Court of Appeal, Ilorin Division (court below) delivered on 19th November, 2001 and 10th December, 2001 respectively. In the first appeal, the respondent herein appealed against part of the judgment of A.O. Belgore, J. (as he then was) wherein a part of its counter-claim was granted. In the second appeal, the appellant herein appealed out of time, with H the leave of the court below, against the judgment of the trial court which dismissed its own claim.

The facts that are germane for the determination of this appeal require to be set out at a reasonable length. They are amply captured in the respondent's brief of argument. The appellant is a pri-

vate limited liability company whose object was carpet production at Offa in Kwara State. The respondent is an industrial bank incorporated as a private company by the Federal Government of Nigeria.

The appellant needed fund for importation of its factory machines and equipments and approached the respondent for assistance. Two loans were granted to the appellant by the respondent. The first was a term loan. The collateral for same was the property of the appellant at Offa over which a Deed of Mortgage to wit: Exhibit 1 was executed by the parties. The second loan was a working capital loan which was secured with the floating assets of the appellant over which a Deed of Debenture to wit: Exhibit 30 was also executed by the parties.

The appellant applied to the Government of Kwara State for approval of the mortgage in Exhibit 1 in line with the Land Use Act, 1978. An approval that was communicated to him is incorporated into Exhibit 1 at its last page. The respondent tendered the letter of offer- Exhibit 28, containing the terms and conditions for the working capital loan accepted by the appellant which proceeded to execute Exhibit 30 in favour of the respondent.

The appellant failed to comply with the terms and conditions of the two loans as to repayment. The respondent called for meetings to resolve the appellants' production problems. Both parties resolved to second a staff of the respondent to the appellant as Project Manager in April, 1989 in line with the terms contained in Exhibits 28 and 30. The PW who is the Chairman and Managing Director of the appellant initially cooperated with the Project Manager. However, he later protested against the conduct of the Project Manager who was eventually recalled by the respondent. Before the departure of the Project Manager, production of carpets commenced. Before then, the appellant sought for further loan from the respondent to procure raw materials and take care of staff salary, outstanding NEPA bills and water rate. The respondent granted a sum of N200,000 in the two equal instalments. The Project Manager was recalled in September 1990. He left a handing over note to wit: Exhibit 8. Shortly after the Project Manager left, a sum of N150,000 was paid by the appellant from proceeds of sale left in the appellant's account by the Project Manager. Apart from the sum of N150,000 paid by the appellant, the two loans and interests on both remained unpaid by the

appellant.

The appellant filed a Writ of Summons in an earlier suit which was struck out. The appellant later filed the suit against the respondent which led to the appeals to the court below and subsequently, the appeal before this court. In the stated suit, the appellant claimed  
B from the respondent the total sum of N521,413,740.00 as at April 1992 plus 10% interest per annum until payment of the judgment debt for loss of production based on full capacity during the tenure of the Project Manager. Allegations galore were made by the appellant against the Project Manager. The respondent joined issues with  
C the appellant on all material allegations in the statement of claim. The respondent consequently counter-claimed as follows:-

*"i A sum of N290,931,823.08 being the total sum outstanding against the plaintiff and payable to the defendant on Term Loan  
D and Working Capital loan granted to the plaintiff by the defendant as at the close of business on 31/3/96.*

*ii. Interest on the sum of N290,931,82.08 at the rate of 14% per annum from 1-4-96 to the date of judgment and thereafter at the rate of 10% per annum until the whole judgment debt is fully  
E liquidated.*

*iii. Declaration that the defendant is entitled to exercise her power under the Deed of Loan and Mortgage dated 31/12/83 on the assets of the plaintiff to realise the judgment debt."*

The learned trial Judge garnered evidence adduced by one  
F witness called by each of the parties. He was thereafter addressed by learned counsel on both sides of the divide. In the reserved judgment handed out on 31st May, 2000, the trial judge at page 141 of the record pronounced as follows:-

*"In sum, the Plaintiffs' claim for N521,413,740.00 being an  
G estimated profit fails and the same is accordingly dismissed. The counter-claim was filed on the 25th day of June, 1997 and the same succeeds to the extent of the Plaintiffs admission from that date. The defendant shall have judgment for the sum of N1,500,000.00 and  
H N510,000.00 plus interest at the rate of 10% per annum in respect of the N1,500,000.00 and 14% per annum in respect of the sum of N510,000.00. The interest in the two cases shall run from the 25th day of June, 1997 until the judgment debt is fully liquidated. The defendant also claims a declaration. In view of my pronouncement*

*regarding Exhibits 1 and 30 on which the declaration is anchored, the defendant has failed to prove its entitlement to same. The declaration is hereby dismissed.”*

As stated earlier on in this judgment both sides felt unhappy with the judgment of the learned trial judge. The respondent herein was the first in time to file its appeal against part of the judgment of the trial court. The appellant, later in time, with the leave of the court below, appealed out of time against 'the part concerning damages and reliefs of the appellant'. The appellant did not seek the leave of the court below to cross-appeal and that was not the order granted. The two appeals at the Court below bore the same Appeal No. CA/IL/6/2001. The court below heard the two appeals in one fell swoop on 25-9-01 and reserved judgments; which were eventually delivered on 19/11/01 and 10/12/01 respectively in respect of the 1st and 2nd appeals.

In the first appeal, the parties seriously contested the rates of interests in respect of the two loans and the times they are supposed to run. In respect of the term loan, the court below found as follows at page 241 of the record:-

*“In conclusion I resolve the issue under consideration in favour of the appellant and set aside the judgment of the learned trial judge in respect of the rate of interest on the term loan of N1.5 million and the time it is supposed to run and substitute thereto the rate of interest of 14%-----from 2/1/85 till judgment on 31/5/2000 and thereafter at 10% till judgment debt is liquidated.”*

As for the Working Capital Loan, the court below found that by Exhibit 30, the total facility granted is N2,262,000.00 repayable in 12 equal consecutive quarterly instalments with effect from 1/1/89 with interest rate fixed at 13%. It was found that the sum of N150,000.00 was repaid in respect of this loan. The outstanding amount in respect of the working capital loan is N2,112,600.00 to attract 13% interest rate from 1/1/89 to 31/5/2000 the date of judgment and thereafter at the rate of 10% until same is fully paid.

On the claim in respect of declaration that the defendant is entitled to exercise its power of sale under the deed of Mortgage - Exhibit 1, the court below had a contrary view to that which was expressed by the trial court. In respect of this issue, the court below at the last paragraph of page 245 of the record had this to say:-

*"In conclusion it is clear that having regard to the relevant facts and evidence before the lower court the dismissal of the declaration sought by the appellant is in error and is accordingly set aside. That being the case, issue No. 7 is hereby resolved in favour of the appellant."*

B In the second appeal filed by the appellant herein at the court below, the appeal was dismissed on all grounds. The appellant's claim in the sum of N521,413,740.00 was found to be speculative and lacking any merit.

C The appellant felt unhappy with the two judgments. A Notice of Appeal containing 9 grounds was filed on 22nd January, 2002. By leave of court, four additional grounds of appeal were filed on 12th February, 2002.

D On page 4 of the respondent's brief of argument, a preliminary objection was raised as to the competence of ground 5 contained in the Notice of Appeal as well as additional ground 1 of the grounds of appeal. It is of moment to consider same at this point in time."

Ground 5 with its attendant particulars goes as follows:-

E *"5. The Learned Justice of the Court of Appeal erred in law in holding as valid the appointment of the Project Manager while the agreement only allowed the N.I.D.B to appoint or second one of his (sic) its staff as a General Manager.*

F *Particular of error-in-law.*

*The N.I.D.B was bound by all the mis-deeds of the Project Manager who was N.I.D.B's staff and appointee."*

Ground 1 of the additional grounds of appeal, with its particulars, reads as follows:-

G *"1. The learned Justices of the Court of Appeal erred in law in holding that the appellant's case (Plaintiffs case at the High Court) was tainted with fraud when neither party pleaded fraud nor gave evidence of any fraud.*

*Particulars of error-in-law.*

H *i. Fraud must be expressly pleaded and proved beyond every reasonable doubt under section 138 of the Evidence Act.*

*ii. Neither side pleaded fraud and neither side gave any evidence of fraud. To insist on compliance/obedience of law cannot be fraudulent."*

Arguing the preliminary objection, learned counsel for the respondent observed that the validity or otherwise of the appointment of the Project Manager was not an issue at the trial court and the court below. He submitted that it can only be raised competently upon leave of this court having been sought and granted. He cited *Maskale v. Silli (2002) 13 NWLR (Pt. 784) 216* at 226. He submitted that the ground is incompetent. He felt that issue 7 sounds academic and unrelated to live issues in the appeal. He cited *Asafa Foods Factory V. Alraine (Nig) Ltd. (2002) 12 NWLR (Pt. 781) 353* at 362 and 368. B

In reply, learned counsel for the appellant maintained that Ground 5 is not a fresh point as it permeated right through the proceedings at the two courts below. He maintained that it is also saved by section 233(2) (a) of the Constitution of the Federal Republic of Nigeria, 1999 since 'it involves questions of law alone.' C D

***I need to say it that a fresh point of law means an issue which was not canvassed at the lower court and pronounced upon thereat. See FBN Plc v. ACB Ltd. (2006) 1 NWLR (Pt. 962) 438* at 461 - 462. **Fresh issue must be basically on point of law and must be raised with the leave of court. See Ezukwu v. Ukachukwu (2004) 17 NWLR (Pt 902) 227.**** E

***Let me further point it out that fresh point or issue touching on jurisdiction can be raised at any stage of the proceedings; even for the first time on appeal or at the apex court. See Elugbev. Omokhafe (2004) 18 NWLR (Pt. 905) 319* at 334, 338. **A question of law, constitution and jurisdiction can be raised at any time in the proceedings with leave appropriately sought and obtained. See Ukpong v. Commissioner of Finance (2006) 19 NWLR (Pt. 1013) 187** at 221; *Ogba v. Onwuzo (2005) 14 NWLR (Pt. 945) 331* at 344.** F G

Issue vii decoded from ground 5 of the grounds of appeal goes as follows: - 'was the appointment of the Project Manager valid'? It sounds academic in my considered opinion. I cannot relate it with the real live issues of the appeal. The particular attending the ground is not in tandem with it. These apart, ***I cannot trace even remotely where the validity of the appointment of the Project Manager was canvassed by the parties and pronounced upon by the trial court and the court below. The appellant did not seek for*** H

**leave to raise the fresh point in this court. It cannot be let in through the back door. I do not see how it is saved by section 233 (2) (a) of the Constitution of the Federal Republic of Nigeria 1999.**

B In short, objection to ground 5 is sustained as same is struck out. As well, issue 7 formulated thereon is struck out as it is of no moment.

C **In respect of Ground 1 of the additional grounds of appeal reproduced earlier on by me, learned counsel for the respondent felt that the comment touching on fraud by the court below was just a passing remark which did not go to the root of the judgment. He submitted that an appeal is usually against a ratio and not against an obiter except in cases where the obiter is so clearly linked with the ratio as to be deemed to**  
D **have radically influenced the latter.** The appeal must still essentially be against the ratio. He *cited Saude v. Abdullahi* (1989) 4 NWLR (Pt. 116) 387 at 431. He urged that the ground be struck out.

E In reply, learned counsel for the appellant maintained that the comment touching on fraud by the court below is not a passing remark as it goes to the root of the judgment of the court below. He stressed that a litigant is entitled to insist on legality and it cannot be morally or legally wrong to insist on obedience of the law by an opponent.

F **I must say it unequivocally that fraud must be pleaded with due particulars supplied and evidence led on same. Fraud requires a higher degree of probability in its proof.** Refer to *George v. Dominion Flour Mills Ltd.* (1963) All NLR 70 at 77, *Aina v. Jinadu* (1992) 4 NWLR (Pt. 233) 91 at 106. **Allegation of fraud**  
G **must be proved beyond reasonable doubt. It requires proof in the realm of probability; not fantastic possibility.** See *Nwobodo v. Onoh* (1984) 1 SCNLR 1 at 27-28; *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108. See also section 138 of the Evidence Act Cap. 112, LFN, 1990.

H **Through out the whole gamut of the proceedings at the trial court, I cannot see where fraud was pleaded; not to talk of giving adequate particulars of same. I cannot trace any evidence touching on fraud.** In a subtle manner, the respondent talked about ‘morality’ in the appellant’s behaviour in securing an ‘incho-

ate' consent of the Governor of the State before executing the legal mortgage; benefiting there from, and trying to back out of it. The court below would not 'allow the mortgagee to eat his cake and still have it back'. It maintained that 'the court should resist at all costs the attempt at using it as an engine to further *fraud* or cheating or dishonesty. The banks exist to make profit; they are not father Christmas'.

***In my opinion, even if the above is an obiter (which it is not) it is so clearly linked with the ratio as to be deemed to have radically influenced the later. I feel that the complaint made in ground 1 of the additional grounds of appeal was well taken. The appellant should be allowed to ventilate same. The objection taken in respect of this ground is hereby over-ruled.***

The appellant filed a total of thirteen (13) grounds of appeal. Learned counsel formulated eleven (11) issues for determination. As stated above, issue no. 7 is of no moment. The other issues are reproduced as follows:-

*i. Was it right for the Court of Appeal to reverse High Court decision based on credibility of PW 1 and DW 1 who were the only witnesses who gave evidence at the trial High Court?*

*ii Was it proper for the Court of Appeal to rely on statements of accounts tendered by DW1 at the trial High Court?*

*iii. Was the alleged notice of consent by the Chief Land Officer of Kwara State in his letter for 'Permanent Secretary' attached to Exhibit 1 in compliance with section 22(2) and 45 of the Land Use Act No. 6 of 1978 and the Delegation of Military Governor's Powers Notice Kwara State Legal No. 4 of 1978?*

*iv. Was the Court of Appeal right in not rejecting Exhibits 1, 2, 28 and 30 for non compliance with section 10 of the Land Registration Law and caught by sections 11, 12 and 15 of the same law?*

*v. Was it proper for the Court of Appeal to rely on Exhibit 1 which violated section 22 (1) and (2 ) of the Land Use Act No. 6 of 1978 and which violated section 10 and 15 of the Land Registration Law to grant the respondent's relief 111 for 'declaration that the defendant is entitled to exercise her power under Exhibit 1 to realise the judgment debt?*

*vi. Was the Court of Appeal right in holding that the Project Manager appointed in Exhibit 3 by the respondent in this appeal*

*(N.I.D.B) to be an agent of the appellant?*

vii. -----

viii. *Were the rates of interest on the 2 loans not unconcionable (sic) and inequitable and enforceable?*

ix. *Was it proper for the Court of Appeal to deliver 2 judgments on 2 different dates from a singe judgment of the High Court?*

x. *Was it right of the Court of Appeal to hold that the appellant's case at the trial High Court was tainted with fraud because she (the appellant herein O.I.L) was contending the validity of Exhibits 1 and 30 after she had taken benefits under them?*

xi. *Was the Court of Appeal judgment certain and /or ascertainable and did the court properly determine what was due to either party?*

On behalf of the respondent, nine (9) issues were decoded for determination. They read as follows-

*"1. Whether the Court below was, in the face of the evidence on record, right in allowing the respondent's appeal as related to its counter-claim and in dismissing the appellant's appeal on the dismissal of its claim by the trial court.*

*2. Whether the court below properly made use of the statement of account tendered through the DW at the trial court.*

*3. Whether the approval of the mortgage transaction in Exhibit 1 vide the document so titled and attached to Exhibit 1 as its last page sufficiently complied with section 22 (1) of the Land Use Act 1978 and the mortgage therefore valid as held by the court below.*

*4. Whether receipt of Exhibits 1, 2, 28 and 30 in evidence in any way violated the law (substantive or procedural) and in particular the Land Use Act and the Land Registration Law of Kwara State.*

*5. Whether the Court below was right in allowing the respondent's appeal as related to declaration that it could exercise her power of sale preserved in Exhibit 1 to realise the judgment debt.*

*6. Whether the court below was right when it held the Project Manager appointed vide Exhibit 3 to be agent of the appellant.*

*7. Whether the court below can redraft the contracts of the parties for them so as to interfere with the agreed rates at which interest was payable on the loan facilities.*

*8. Whether in the circumstance, where two different appeals were filed by different parties to one judgment, the court below could*

*be faulted when it delivered two judgments more so when no miscarriage of justice has been occasioned.*

*9. Whether the judgments of the court below could be rightly attached (sic) attacked on alleged ground of uncertainty."*

Issues iii, iv, and x formulated for the due determination of the appeal by the appellant relate to the admission in evidence of Exhibits 1, 2, 28, and 30 by the trial court and probative value given to them by the two courts below. I should point it out that the respondent touched on same in its own issues 3, 4, and 5. It is of moment to consider these issues at this point as they are germane and constitute the pivot of the proper determination of the appeal.

On behalf of the appellant, learned counsel submitted that the trial court properly held that the letter of notice issued by the Chief Lands Officer 'for Permanent Secretary' did not comply with section 22 (2) and 45 of the Land Use Act No. 6 of 1978 and the Delegation of the Military Governor's Notice (Kwara State Legal Notice No. 4 of 1978) which delegated the Military Governor's power to grant certificate of occupancy and to deal with matters connected therewith to the Commissioner for Lands and Housing. He felt that the court below was in grave error in not rejecting Exhibits 1, 2, 28 and 30 for non-compliance with section 10 of the Land Registration Law.

Learned counsel submitted that the respondent's relief 3 for determination, pivoted on Exhibit 1 which is null and void was not sustainable. He asserted that it cannot be fraudulent to insist on legality. He maintained that the fact that the appellant took the two loans does not prevent it from attacking the relevant agreements as being null and void. He observed that neither side pleaded nor gave evidence of any fraud.

Learned counsel for the respondent, on his part, submitted that it was wrong for the trial court to have held that the approval contained in Exhibit 1 was invalid and the mortgage therefore rendered null and void. He observed that the court below felt otherwise after a careful consideration of the approval document.

Learned counsel submitted that Exhibits 28 and 30 are not registrable instruments as defined by the Land Registration Law of Kwara State. He referred to section 2 of same and observed that Exhibit 28, a letter of offer of facility, is not within the scope of documents defined as instrument under the Land Registration Law.

Learned counsel further observed that Exhibit 30 is a Deed of De-benture creating charge over floating assets and that it does not relate to land to qualify as an instrument that requires any consent of the governor or to be registered.

B The letter of approval of mortgage attached to Exhibit 1 is the bone of contention by the parties. It reads as follows:-

“ Ref: No LAN/ARO/IND/549/65  
Ministry of Works Land & Housing & Env.  
Lands Division,  
C PMB 1425,  
Ilorin, Kwara State  
25th July, 1983.

Olalomi Industrial Limited  
P.O. Box 41,

D Offa.

Dear Sir,

APPROVAL OF MORTGAGE OF THE LANDED PROPERTY AT  
OFFA COVERED BY STATUTORY RIGHT OF OCCUPANCY NO.  
4379 TO THE NIGERIAN INDUSTRIAL DEVELOPMENT BANK  
E LIMITED LAGOS.

I am directed to refer to your application of 21st July, 1983 and to inform you that the mortgage of your landed property at Offa covered by Statutory Right of Occupancy No. 4379 at Offa has been approved by the Honourable Commissioner for N1,500,000.00 (One  
F Million Five Hundred Thousand Naira Only) with effect from 25th July, 1983 subject to the submission of a satisfactory deed of mortgage within four months and payment of stamp duty and registration fee. If a satisfactory deed of mortgage is not received for registration  
G within four months, then a penal rent of 10k per day will automatically be imposed after four months with effect from the date of this letter, and will remain in being until such time as satisfactory deed is received in this Ministry for registration.

Yours faithfully,  
H (J. OLA DADA) Ag. Chief Lands Offer  
For: Permanent Secretary.”

In considering the salient issue touching on the validity of Exhibit 1, the deed of mortgage executed by the appellant to secure the term loan, I need to reproduce sections 22, 26 and 45 of the Land

Use Act, Cap. 202, Law of the Federation 1990. The sections read as follows:-

*“22 (1) It shall not be lawful for the holder of a Statutory Right of Occupancy granted by the Governor to alienate his Right of Occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained : Provided that the consent of the Governor -*

*(a) shall not be required to the creation of a legal mortgage over a Statutory Right of Occupancy in favour of a person in whose favour an equitable mortgage over the Right of Occupancy has already been created with the consent of the Governor;*

*(b) shall not be required to the reconveyance or release by a mortgagee to a holder or occupier of a Statutory Right of Occupancy which that holder or occupier has mortgaged to that mortgagee with the consent of the Governor;*

*(c) to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sublease containing an option to renew the same.*

*(2) The Governor when giving his consent to an assignment, mortgage or sublease may require the holder of a Statutory Right of Occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon.*

xxxxxxxxxxxxxxxxxxxxxx

*26. Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.*

xxxxxxxxxxxxxxxxxxxxxx

*45. (1) The Governor may delegate to the State Commissioner all or any of the powers conferred on the Governor by this Act subject to such restrictions, conditions and qualifications, not being inconsistent with the provisions or general intendment of this Act as the Governor may specify.*

*(2) Where the power to grant certificate has been delegated to the State Commissioner, such certificate shall be expressed to be*

*granted on behalf of the Governor.”*

It is not in dispute that the Military Governor of Kwara State at the material time delegated his power under section 45(1) of the Act to the State Commissioner for Lands and Housing vide Kwara State Legal Notice No. 4 of 1978. The bone of contention is whether or not the letter of notice issued by the Acting Chief Lands Officer ‘for Permanent Secretary’ is in compliance with section 22(2) and 45 of the Land Use Act No. 6 of 1978.

At this point, it is of moment to refer to the case of *Savanah Bank of Nigeria Ltd. & Anr v. Ammel O. Ajilo & Anr (1989) N.S.C.C. (Pt. 1) (Vol 20) 135 at page 147*. The 1st respondent secured loan from the 1st appellant and mortgaged his landed property without a prior consent in writing of the Governor. He turned round to contend that the deed of mortgage was null and void. This court per Obaseki, JSC at page 147 pronounced as follows:-

*“Although the 1st plaintiff/respondent by the tenor of the Land Use Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor the express provisions of the Land Use Act makes it undesirable to invoke the maxim ex turpi causa non oritur actio and the equitable principle enshrined in the case of Bucknor Maclean v. Inlak Ltd. (1980) 8-11 S.C. 1.”*

**I must at this point refer to the case of *Union Bank of Nigeria Plc & Anor v. Ayo Dare & Sons (Nig.) Ltd. (2007) 4-5 S.C. 42*. I note that the decision of the court below in *N.I.D.B v. Olalomi Ind. Ltd. (2002) 5 NWLR (Pt. 761) 532* was cited before this court. This court pronounced that the approval letter was not in accordance with what is envisaged in section 22 of the Land Use Act. The consent of the Hon. Commissioner for Lands is not manifest on the face of the approval letter. Since the person who signed was not the Governor’s delegate, it would be wrong to assume that the signature of the Acting Chief Lands Officer on the letter attached to Exhibit 1 was an act done in a manner substantially regular on the face of it. The signature on the letter reproduced earlier on cannot be seen as being in substantial conformity with the signature of the Governor or his delegate, the Commissioner for Lands and Housing.**

In Ayo Dare's case, this court per Oguntade, JSC pronounced as follows:-

*"I am satisfied that the two courts below were right in following the decision in Savanah Bank (Nig.) Ltd. v. Ajilo (1989) 1 S.C. (Pt. 11) 90; (1989 1 NWLR (Pt. 97) 305 in views of the fact that this court had directly adverted its mind to the state of the law and judicial authorities on the equitable doctrine in the maxim ex turpi causa non oritur actio. It may seem wrong that the plaintiffs/respondents who had procured Exhibits 1 and D1 later turned round to rely on the supposed invalidity of the exhibits but the decision of this court in Ajilo is still binding on this court. I have not been called upon to consider overruling same."*

Mukhtar, JSC at page 78, with equal force pronounced as follows:-

*"My view is that the said letter of approval does not suffice for the purpose of the mortgage deed and has therefore negatively affected the validity of the mortgage even though it was the respondents who facilitated the approval/consent and who now want to benefit from that act. It is indeed not morally right, but then, one cannot circumvent the position of the law and the legal authorities settled by this court. The case of Savanah Bank (Nig.) Ltd. v. Ajilo (1989) 1 S.C. (Pt. 11) 90; (1989) 1 NWLR (Pt. 97) 305 has laid to rest a similar situation that is almost on all fours with the instant one."*

Let me state it here that it was erroneous for the court below to have attempted to tilt the behaviour of the appellant to one touching the realm of 'fraud' and 'cheating'. This is because 'fraud' was not pleaded; not to talk of due particulars being given. Even then, section 138 of the Evidence Act mandates that same must be proved beyond reasonable doubt. **The point should be limited to moral turpitude in respect of the appellant's behaviour. It has nothing to do with fraud which if proved, would have nailed the appellant.**

**In short, I agree that the maxim ex turpi causa non oritur actio is not applicable; and, as well, the equitable principle enshrined in Bucknor Maclean's case is not evocable in the face of the provision of section 26 of the Land Use Act, 1978. I form the opinion that the learned trial judge was right in declaring Exhibit 1 as null and void. The decision of the court**

***below, to the contrary, is hereby set aside.***

I now proceed to the consideration of Exhibit 28. This is a letter dated 15th January, 1988 addressed by the respondent to the appellant. It is in respect of approval of additional working capital loan to the appellant. I have carefully perused it. Certainly, it is not a document affecting land whereby any interest in any land is conferred, transferred, limited, charged or extinguished to fall within the scope of documents defined as instrument under the Land Registration Law of Kwara State. It does not qualify as an instrument such as to require any consent of the Governor or to be registered. The complaint in respect of Exhibit 28, in my view, completely missed the target. Without any doubt, Exhibit 28 was properly admitted in evidence. I am at one with the court below in this respect.

***Let me move to Exhibit 30 which, in essence, is a Deed of Debenture freely executed by the appellant creating a charge over its floating assets to secure the working capital loan as a follow up to its acceptance of the offer made to it in Exhibit 28 by the respondent. Exhibit 30 does not create any charge on land. It creates charge over floating assets. It is not made a supplement to Exhibit 1. As such, it does not require the Governor's consent to be valid. To my mind, the court below was on firm ground when it overruled the erroneous view of the trial judge that Exhibit 30 is null and void. The exhibit is clearly admissible and warrants being considered in an appropriate manner as done by the court below.***

On issue No. 1 decoded by the appellant, learned counsel submitted that the evidence adduced by PW1 has more probative value than that of DW1 as regards credibility. He felt that the evidence of PW1 who was the alter ego of the plaintiff company should be preferred to that of DW1 whose evidence is in the nature of hearsay.

Learned counsel for the respondent felt that apart from what is contained in Exhibits 28 and 30, PW1 on his own admission substantially relieved the respondent its burden of proof. He observed that DW1, in many respects, merely confirmed the facts admitted by the PW1.

It should be stated at this point briefly that ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard the witnesses. An appeal court

will not lightly interfere with same unless for compelling reasons. See *Ebba v. Ogodo (1984) 1 SCNLR 372*. An appellate court should not ordinarily substitute its own views of fact for those of the trial court. See *Balogun v. Agboola (1974) 1 All NLR (Pt. 2) 66*. An appellate court will not interfere with findings of facts except where wrongly applied to the circumstances of the case or conclusion reached was perverse or wrong. See *Nwosu v. Board of Customs & Excise (1985) 5 NWLR (Pt. 93) 225*; *Nneji v. Chukwu (1996) 10 NWLR (Pt. 378) 265*.

Learned counsel for the appellant referred to PW1, *Isaac Abodunrin* as the *alter ego* of his company. He was the head, mind and hand of the appellant when the loans were negotiated with the respondent. Under cross-examination, a potent tool for extracting the truth when properly employed, PW1 said that it is not all the machines in the factory that were purchased with N.I.D.B loan of N1.5 Million and that under the agreement, the repayment was to commence in January, 1985. He admitted that the plaintiff accepted the terms in Exhibit 28 unconditionally. By Exhibit 28, the plaintiff was expected to provide security for the loan by way of debenture on the fixed assets of the company in favour of the Bank. He admitted at page 71, lines 1-3 of the transcript record of appeal that:-

*“The first loan was repayable with interest at 14% per annum on the N1.5 Million. The second loan attached 13% interest per annum \$500,000 US as stated in Exhibit 28 and L40,000 (Pounds) amounting to N1,975,600 and N22,000 respectively.”*

At page 72 of the record, he admitted that the sum of N150,000 only was paid to the defendant -respondent. And at page 74, he said ‘for loans that have not been paid, I agree the plaintiff is indebted to the plaintiff (sic) defendant and all the interests are still outstanding’.

***From the admissions made by PW1 as high-lighted above, it is glaring that a fiduciary relationship existed between the parties. The appellant obtained a term loan in the sum of N1.5 Million with agreed 14% per annum interest with commencement of repayment from January 1985. The learned trial judge entered judgment for the respondent for the stated sum with no interest awarded from January 1985 to 31st May, 2000. In my considered opinion, that stance was not right. The respon-***

**dent is entitled to charge interest at the agreed rate of 14% per annum. The court below was right in applying the agreed interest rate; when it set aside the judgment of the trial judge in respect of same. The respondent is entitled to judgment on the term loan in the sum of N1.5 Million plus 14% per annum interest from 1/1/85 till judgment on 31/5/2000 and 10% per annum until judgment debt is fully liquidated. I order accordingly.**

As for the Working Capital Loan, the Naira equivalent is N2,262,600. The only part repaid is the sum of N150,000 paid in October, 1990. The interest on the loan is 13% per annum. PW 1 admitted same as reflected above. It is also confirmed in Exhibits 28 and 30. The outstanding amount on this loan is N2,112,000.

It goes without doubt and it is accordingly ordered, that the respondent is entitled to judgment in respect of the Working Capital Loan, in the sum of N2,112,000 with interest at the rate of 13% per annum from January 1, 1989 to 31/5/2000 and 10% interest per annum thereafter until judgment debt is fully paid. After all, PW1 agreed that the Working Capital Loan was disbursed and used for production and procurement of raw materials for the company. The court below acted in the right direction in respect of this issue.

The appellant tried to paint a picture that the rates of interest on the two loans appear unconscionable and inequitable. The short answer is that the two rates of interest were agreed by the parties. The agreed interest rates are, no doubt, clearly enforceable in the prevailing circumstance.

**On appellant's issue 9, learned counsel submitted that it was wrong for the court below to have delivered the judgments in respect of each party's appeal on different dates and to have awarded costs in respect of each judgment which led to awards of punitive costs.**

On behalf of the respondent, learned counsel submitted that the appellant has not alleged that any miscarriage of justice occurred in delivering the two judgments on different dates.

**I note it that it was the appellant who filed the 2nd appeal out of time with the leave of court. It should have filed a cross-appeal to avoid confusion for which a complaint is being raked up. If it had been an appeal by the respondent and a**

**cross-appeal by the appellant, each would have attracted its own separate judgment. The appellant did not say a miscarriage of justice occurred. I cannot pinpoint any miscarriage of justice in the prevailing circumstance. The appellant who did not appeal on costs awarded cannot be heard to raise it in a remote fashion.** There is no big deal in respect of the issue which is revolved against the appellant. B

**On issue 11, learned counsel for the appellant submitted that the judgment of the court below in respect of monetary award to the respondent was uncertain and not ascertainable. He felt that the appellant was entitled to a final award of N4,461,466.54.** C

**Learned counsel for the respondent submitted that the judgments of the court below on monetary awards were certain and ascertainable. He observed that the appellant's own appeal at the court below was dismissed while respondent's own appeal was allowed.** D

**I have no doubt that the monetary awards with attendant interest rates, as adjusted by the court below, in favour of the respondent is ascertainable.** No monetary award was made in favour of the appellant at the trial court. Its claim was found to be speculative by the trial court. The court below sustained same. I have no cause to disturb the concurrent findings of the two courts below. I shall not interfere with same. *See: Seven Up Bottling Co. v. Adewale (2004) 4 NWLR (Pt. 862) 183; Fajemirokun v. C. B. Nig. Ltd. (2009) 5 NWLR (Pt. 1135) 588 at page 599.* E F

In short, the issue is resolved against the appellant and in favour of the respondent.

In conclusion, I feel that basically, the appeal is not rooted on firm ground as the respondent is entitled to recover the two loans granted to the appellant at its own instance and duly utilized by it. The appeal, in the main, is hereby dismissed with N50,000 costs in favour of the respondent.

H

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### OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Fabiyi JSC. I agree with his reason-

ing and conclusion that this appeal has no merit. I would also dismiss with N50,000.00 costs in favour of the respondent.

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**MOHAMMED JSC**

B I have had the privilege before today of reading in draft the judgment just delivered by my learned brother Fabiyi JSC. I am in complete agreement with him in the manner he considered and resolved all the issues arising for determination in this appeal and in the conclusion he finally arrived at in finding that the appeal has no merit.  
C Accordingly, the appeal is hereby dismissed with N50,000.00 costs to the Respondent.

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**TABAI JSC**

D I had a preview of the lead judgment prepared by my learned brother Fabiyi JSC and I agreed with his reasoning and conclusion that the appeal has no merit. The result is that I also dismiss the appeal for lack of merit. I adopt the costs as assessed in the lead judgment.  
E

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**ADEKEYE JSC**

F I have had the opportunity of reading in draft the leading judgment of my learned brother J.A Fabiyi JSC. I agree with his meticulous analysis of the issues involved and his conclusions. My lord had aptly pronounced on the preliminary objection and I entirely agree with him. I wish to comment on the principal issues in this appeal by way of emphasis. The question was raised whether the alleged notice of consent signed by the Chief Land Officer of Kwara State in his letter for Permanent Secretary attached to Exhibit I was in compliance with Sections 22 (2) and 45 of the Land Use Act No. 6. of 1978 and the Delegation of Military Governor's Powers Notice (Kwara State Legal Notice) No. 4 of 1978. By virtue of the Kwara State Legal Notice of 1978, the Governor of Kwara State could delegate his power under Section 22 of the Land Use Act to the Commissioner of Lands and Housing as provided for in Section 45 (1) of the Land Use Act.  
H The Appellant, a carpet manufacturing company based in Offa Kwara

required working capital to meet its project, turned to the Respondent an Industrial Bank for loan. The Respondent granted to the Appellant a term loan, and a working capital loan. The term loan was secured on a collateral security in the nature of the property of the Appellant, and a Deed of loan and mortgage agreement Exhibit 1 was perfected to that effect. Equally the working capital loan was secured with the floating Assets of the Appellant over which a Deed of Debenture Exhibit 30 was signed by the parties. The Appellant applied to the Governor of Kwara State for Approval of the Mortgage arrangement as required by the provision of Section 22 of the Land Use Act 1978 for any transaction involving temporary or permanent transfer of landed property. The requisite approval was granted and incorporated into the document Exhibit 1. The Appellant experienced various hitches at the take off of the factories which prevented it from refunding the load as per the agreement reached by the parties. While seeking the intervention of court in respect of the outstanding loan, the Appellant fired the shot of the illegality of Exhibits 1 and 30, the Deed of loans and mortgage and the Deed of Debenture which at the time of procurement of the loans, both parties executed on the terms and conditions specified therein. What is involved here is a clear cut issue of law as provided for in Section 22 (1) of the Land Use Act 1978. It is trite that in the interpretation of statutes, a statute should not be given an interpretation that will defeat its purpose. Rather it must be given a literal, plain and unambiguous interpretation so as not to defeat the intention of the law makers.

*Aqua Ltd v. Ondo State Sport Council* (1988) 4 NWLR pt 91 pg 622

*Fawehinmi v. I.G.P.* (2000) 7 NWLR pt 665 pg 481

*Awolowo v. Shagari* (1979) 6 - 9 SC 51

*Alamieseigha v. FRN* (2006) 16 NWLR pt 1004 pg 1

By operation of law every holder of a right of occupancy whether statutory or other wise is regarded as having been granted the right by the Military Government or Local Government as the case may be, for the purpose and control of management of all lands comprised in the State. Accordingly every holder, whether under Sections 5, 34 or 36 of the Land Use Act requires the prior consent of the Military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy. This mean that Sec-

tion 22, is of general application to every right holder pursuant to Sections 5, 34 and 36. The letter emanating from the office of the commissioner conveying approval of the Governor was signed by Chief Lands Officer and it reads:-

B Reg.No.  
LAN/ARO/FND/549/65  
Ministry of Works, Land &  
Housing & Env.  
Lands Division  
C PMD 1425  
Ilorin Kwara State  
25th July 1983.

Olalomi Industrial Limited  
P.O.BOX 41

D Offa.

Dear Sir,

Approval of Mortgage of the Landed Property Offa covered by Statutory Right of Occupancy No 4379 to the Nigerian Industrial Development Bank Limited Lagos.

E I am directed to refer to your application of 21st July, 1983 and to inform you that that mortgage of your landed property in Offa covered by Statutory Right of occupancy No 4379 at Offa has been approved by the Honourable Commissions for N1,500,000 (One Million Five Hundred Thousand Naira Only) with effect from 25th  
F July, 1983 subject to the submission of a satisfactory deed of mortgage within four months and payment of stamp duty and registration fee. If a satisfactory deed of mortgage is not received for registration  
G within four months, then a penal rent of 10k per day will automatically be imposed after four months with effect from the date of this letter, and will remain in being until such time as satisfactory deed is received in this Ministry for registration.

Yours faithfully,  
J. Ola Dada  
H A G Chief Lands Officer  
For Permanent Secretary

The grouse of the Appellant is that the foregoing letter offends against Section 45 (2) of the Land Use Act as it does not bear the signature of Commissioner to whom the Governor may delegate such

power, all or any of the powers conferred on the Governor under the Act.

The learned counsel for the Respondent and the Lower Court are of the opinion that gleaning through the Record that the learned trial judge was in error to have applied the maxim *Delegates non potest delegare* to the facts of this case. If the learned trial judge had read the body of the letter he would have seen that the Ag Chief Lands Officer only conveyed on behalf of the Permanent Secretary to the Respondent the approval of the Commissioner for the mortgage transaction. This did not make the Ag Chief land Officer or the Permanent Secretary a sub-delegate of the Honourable Commissioner.

The case of *Savannah Bank of Nigeria Ltd & Anor v. Ammel O. Ajilo & Anor*, remains the locus classicus on the issue of securing the consent of the Governor in respect of a mortgage transaction. The full panel of the Supreme Court in that case pronounced as follows:-

*“There is no doubt that the general intendment of the Land Use Act, the express words vesting title, management and control of the use of land in the Military Governor, the curtailment of the interest of land holder prescribing consent to alienation in all cases. Any failure by a holder under Section 34 (2) of the Act to comply with the provisions of Section 22 would attract the full rigour of Section 26 of the Act and render a transaction or an instrument arising therefrom null and void. It was therefore declared that although the 1st Plaintiff/Respondent by the tenor of the Land Use Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor the express provisions of the Land Use Act makes it undesirable to invoke the maxim”* *Ex turpi causa non oritur actio* and the equitable principle enshrined in the case *Buknor Maclean v. Inlaks Ltd* (1980) 8-11 SC 1

The decision in this case had been distinguished from that in *Olalomi Ind. Ltd* (2002) 5 NWLR pt 761 pg 532 which had virtually set aside by the decision of this court in the case of *U.B.N Plc v. Ayodase & Sons (Nig) Ltd* (2007) 13 NWLR pt 1052 pg 567. In the latter case this court adopted the decision in *Ajilo’s case* to emphasis the desirability to comply with the provisions of the Land Use Act 1978.

But on the other hand both the Appellant and Respondent executed Exhibit I as collateral to raise a loan, being fully aware of its terms and conditions. It was the Appellant now complaining of the illegality of the document Exhibit 1, who applied for and got the consent, submitted same to the Respondent and received a loan. In short the Appellant had benefited under the illegal document.

The Appellant challenged the evaluation of evidence by the Lower Court and urged this court to accept and prefer that of the Trial Court. Evaluation of evidence is a duty which falls almost exclusively within the domain of the Trial Court which alone had the unique advantage of hearing and watching the demeanour of witnesses in the course of their testimonies. It is the duty of the Trial Court to consider the entire evidence before it both oral and documentary before giving a judgment. Thereafter such judgment must demonstrate in full a dispassionate consideration of all the issues raised and heard while the judgment must reflect the result of such exercise. An Appellate court cannot embark on the track to re-evaluate so as to substitute its own view where the Trial Court has evaluated satisfactorily. The Appeal Court can however interfere with the findings of the Trial Court and embark on a fresh re assessment of the evidence before a trial court where:-

- (1) The Trial Court failed to make findings on vital issues before it.
- (2) The Trial Courts evaluation of the evidence is perverse.
- (3) The Trial Court drew wrong inferences from the totality of the evidence
- (4) The Trial Court applied wrong principles of law to accepted facts in the case.

- G Woluchem v. Gudi (1981) 5 SC 291  
 Ebba v. Ogodo (1989) SCN LR pg. 372  
 Balogun v. Agboola (1974) 1 All NLR pt 2 pg 66  
 Fatoyinbo v. Williams (1956) SCN LR pg 274  
 Duru v. Nwosu (1989) 4 NWLR pt 113 pg 24  
 H Ajadi v. Ajibola (2004) 16 NWLR pt 898 pg 91

The evidence in support of the claim and counterclaim are mostly documentary and of particular importance are exhibits 1,2,28, and 30. The Appellant held that exhibits 1 and 30 are null and void for non-compliance with the provisions of the Land Use Act No.6 of

the Land Registration Law. The Lower Court was thereby gravely in error in not rejecting them in evidence.

It is note worthy that all the four Exhibits were tendered before the Trial Court with the consent of the parties. Exhibit 1 is the Deed of Loan and Mortgage Agreement, Exh. 28 is the letter of offer of facility and Exhibit 30 the Deed of Debenture. The Appellant, which did not object to the admissibility of exhibits 1 and 2 before the Trial Court cannot turn around to challenge the admissibility of the documents at the Appellate Court. Exhibits 28 and 30 are not registrable instruments defined by the land Registration Law of Kwara state. They are not documents affecting land whereby any interest in land is conferred, or transferred, limited, charged or extinguished as required by the lands Registration law of Kwara state. In the evaluation of evidence, the trial Court must have regard to the admissibility of evidence and relevancy of same, credibility of the evidence, conclusiveness of same, the probability of the evidence as between the two parties. It will as an outcome of that exercise apply the law to the sum total of the evidence before arriving at a conclusion one way or the other. The Trial Court applied this test in the circumstance of this case.

Mogaji v. Odojin (1978) 4 SC 91

Adeyeye v. Ajiboye (1987) 3 NWLR pt 61 432

Balogun v. Akanji (1988) 1 NWLR pt 70 pg 301

In the instant case the question of credibility of witnesses- between PW.1 and DW 2 does not arise as the whole evidence in support of the claim and counterclaim is purely documentary. Exhibits 24, 25 and 26 which the Appellant relied upon to establish the claim for estimated loss of profit is not realistic. It was not premised on actual production but calculated from alleged production capacity. The Court can make inferences or analytical deductions from certain established facts and situation before the Court but the Court must never speculate. Speculation is a mere imaginative guess which even when it appears plausible should not be allowed by Court to fill any gap in the evidence before it.

Ibori v. FRN (2009) 3 NWLR pt 1127 pg 94

The Trial Court was mindful of this when it turned down the claim of the Appellant for loss of estimated profit. The Court of Appeal did not tamper with the evaluation of evidence and findings of

the Trial Court on this issue. It was left with no option but to affirm it. In the same breath, the Court below re-evaluated the evidence on printed record to find in favour of Respondent as appellant before it, on the findings and conclusion of the Trial Court in respect of the debt of the Appellant in the instant appeal. The Lower Court awarded  
B the Respondent her claims as per Exhibit 33, the Statement of Account, having found that the Trial Courts exercise discretion was arbitrary. The law in that circumstance enjoins the Appellate Court to assume the role of re-evaluating and reassessing what had already been evaluated by the Trial Court.

C Woluchem v. Gudi (1981) 5-7 SC 291

Ebba v. Ogodo (1984) 1 SCN pg 372

Agbaje v. Ajibola (2002) 2 NWLR pt 750 pg 127

Lagga v. Surhuna (2009) All FWLR pt 455 pg 1617

D With fuller reasons given in the leading judgment, I hold that the appeal lacks merit and it is accordingly dismissed. I abide the order for costs.

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