

SUPREME COURT OF NIGERIA
11TH DECEMBER, 2009. SC. 231/2006
CORAM:- D. MUSDAPHER, G. A. OGUNTADE,
F. F. TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC

1. MINI LODGE LIMITED APPELLANTS
2. PRINCE BENJAMIN MABADEJE
AND
1. CHIEF OLUKA OLAKA NGEI RESPONDENTS
2. CHIEF DONALD DIBOYE-SUKU

EVIDENCE - Evaluation - Appellate Courts - Position of - Though evaluation of evidence is for the trial court - Where it would not entail assessment of credibility of witnesses - Appellate court is in advantage as trial court (H1)

JUDGMENTS - Findings of fact - When made - Observations during summary of evidence - Are not findings of fact made during evaluation - In this case evaluation started from page 195 - What came before are mere observations (H2)

JUDGMENTS - Findings - Verdict of no valid interest in appellants - Affirmation - Propriety - Trial court made the finding with ample support of evidence - Court of Appeal was therefore right to have affirmed same (H3)

APPEALS - Briefs - Extension of time to file reply brief - Failure to consider motion - Effect - Though Court of Appeal had a duty to consider the application - Failure to do so did not occasion any miscarriage of justice (H4)

FACTS

Before the High Court Port Harcourt, plaintiffs/appellants/cross respondents sued defendants/respondents/cross appellants claiming sundry reliefs by which they contested the sale of the property in dispute by the 1st respondent to the 2nd respondent. It is appellant's case that prior to the alleged sale the 1st respondent had executed an agreement to sale with the 1st appellant whereby he was to sell

the property to 1st appellant, an agreement pursuant to which appellants had allegedly made some payments to 1st respondent. In the alternative, appellants also claimed a refund of what they had already paid as well as damages for breach of contract of sale. Respondents counter-claimed against appellants jointly and severally for a declaration that appellants had no interest in the property, for arrears of rent, damages for use of the property by appellants, and for possession.

After hearing, the court dismissed appellants' suit in its entirety but allowed the counter-claim in part, refusing the claims for arrears of rent and damages for use. Aggrieved, both parties appealed to Court of Appeal. Respondents by their cross-appeal contested the refusal of the claims for arrears of rent and damages for use. Appellants failed to file a cross-respondents' brief and their motion for extension of time to file a reply brief was refused by the court. Eventually Court of Appeal dismissed appellants' appeal while allowing respondents' cross-appeal. Appellants have brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was wrong in affirming the trial Court's verdict that the Appellants did not have a valid interest in the property vis-à-vis the assignment by the 1st Respondent to the 2nd Respondent.

2. Whether the refusal by the Court of Appeal to entertain the Appellants' motion for extension of time to file the Appellants' Reply Brief is a denial of fair hearing.

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

EVIDENCE - Evaluation - Appellate Courts - Position of

1. The evaluation of evidence remains the exclusive preserve of the trial Court because of its singular opportunity of hearing and watching the demeanour of witnesses as they testify and thus the court best suited to assess their credibility.

Where however the nature of the case is such that the evaluation would not entail the assessment of credibility of witnesses and would be confined to drawing inferences and making findings from admitted and proved facts and from the contents of documentary evidence, the appellate court is in as vantage a position as the trial court

to evaluate or re-evaluate the evidence and make its own findings.
(p. 2649 B)

JUDGMENTS - Findings of fact - When made

2. Firstly at page 3 paragraph 3.3 of the Appellants' Brief, learned counsel for the Appellants reproduced the observation of the trial court at page 186 of the record.

It was his contention that in view of the foregoing observations it was inconceivable for the trial court to arrive at the opposite conclusion in the judgment. I agree with learned counsel that in the course of his summary of the evidence, the learned trial judge made observations as if they were findings. It is settled principle of law that the summary of the evidence led by the parties or re-statement of the evidence does not constitute evaluation.

In this case a careful reading of the judgment of the learned trial judge shows that the actual evaluation of the evidence started from page 195 line 11 to the end of the judgment at page 199. It is from page 195 that the court formulated four issues for determination and then set out to resolve the issues one after the other. (p. 2650 A/C)

Verdict of no valid interest in appellants - Affirmation

3. I have thoroughly examined the pleadings of the parties, the evidence in support thereof and the judgment of the trial court. There is no doubt that in its judgment the trial court thoroughly and meticulously examined the totality of evidence placed before it and made findings which are amply supported by the mass of oral and documentary evidence. The judgment of the trial court cannot be faulted in any way. It is not surprising therefore that the Court of Appeal endorsed the findings and decision of the trial Court. On the first issue therefore, I hold, in conclusion that, the Court of Appeal was right in affirming the trial court's verdict that the Appellants did not have a valid interest in the property vis-a-vis the assignment by the 1st Respondent to the 2nd Respondent. (p. 2652 E)

Failure to consider motion - Effect

4. I have already endorsed the concurrent finding of the two courts below that there was no sale of the property by the 1st Respondent to Appellants and that Exhibit "G" was a mere fabrication. There is

also abundant oral and documentary evidence about the demand for rents and for possession. Evidence for rents and for possession is contained in Exhibits “K” “N” “B” “M” “MI” “Y” and “ZI”. The Reply Brief could not therefore have altered the findings and ultimate decision in the case. Although the Court below had a duty to consider and determine the application, the failure so to do did not occasion any miscarriage of justice. In the event I also resolve this issue in favour of the Respondents. (p. 2655 D)

NOTABLE POINTS OF INTEREST
ADEKEYE JSC

1. An offer must be accepted to become a contract
 An offer must be accepted in order to crystallize into a contract. A contract of sale exists where there is a final and complete agreement of the parties on essential terms of the contract, namely the parties to the contract, the property to be sold, the consideration for the sale and the nature of the interest to be granted. Once there is agreement on these essential terms, a contract of sale of land or property is made and concluded.
 In the instant case, the plaintiff/appellant and the 1st respondent were not in agreement about the sale of the property. The intention of the appellant to purchase the property was not effectively communicated to the 1st respondent. (p. 2661 C)

2. A reply brief is unconnected with a cross-respondent’s brief
 An applicant can not complain about lack of fair hearing in an application that is in it self incompetent ab initio.
 A reply brief is not meant to re-argue or fine tune an appellant’s case. A reply brief has no connection or affiliation with the Cross-Respondents brief and can only be filed by an appellant in the main appeal or cross-appeal.
 Issue of lack of fair hearing has not been properly identified by the appellants. (p. 2665 D/H)

CASES REFERRED TO

LONGJOHN v BLACK (2005) ALL FWLR Part 289 1219
 MACAULAY v TUKURU (1881 - 1911) 1 NLR 36

AKINLOYE v EYIYOLA (1968) NMLR 92
OBISANYA v NWOKE (1974) 6 SC 69
WOLUCHEM v GUDI (191) 5 SC 291
OBODO v EGBA (1987) 1 NSCC Vol. 18416
ARJAY LTD v AIRLINE MANAGEMENT SUPPORT LTD (2003) 7
NWLR (Part 820) 577 at 634 B
NZEKWU v NZEKWU (1989) 2 NWLR (Part 104) 373 at 393
OGUMDULU v PHILLIPS (1973) 2 SC 71 at 80
OKAFOR v IDIGO (1984) 1 SC NLR 481 at 499
ONOWAN v ISERHIEN (1976) 9-10 SC 95 at 99 C
OKEOWO v MIGLIORE (1979) NSCC 210 at 239
ADER v CUSTOMS AND EXCISE (1965) ANLR 33 at 37

STATUTE & RULES REFERRED TO

Evidence Act, s. 135 (1) D
Court of Appeal Rules, 2002, O. 6 r. 10

LEAD JUDGMENT BY TABAI JSC

This is an appeal against the judgment of the Port Harcourt Division of the Court of Appeal on the 12th of April 2006. The original action itself was initiated at the Port Harcourt Judicial Division of the High Court of Rivers State by a writ of summons issued in April 1992. The Plaintiffs were the Appellants/Cross-Respondents at the court below and are the Appellants in this Court. The Defendants were the Respondents/Cross-Appellants at the Court below and are the Respondents herein. I shall herein after in this judgment simply refer to the Plaintiffs as Appellants and the Defendants as Respondents. E F G

Both the writ of summons and the Statement of Claim were amended. In the amended writ of summons a claim for N2 million naira for breach of contract was added to relief No.4. In the amended claim which is reproduced in paragraph 18 of the Amended Statement of Claim the Appellants claimed against the Respondents jointly and severally as follows: H

1. A declaration that the purported sale of Plot 136 Borokiri Layout otherwise known as No, 4 Etche Street Borokiri, Port Harcourt within the jurisdiction of the Honourable Court by the 1st Defendant

to the 2nd Defendant is illegal, null and void.

2. A declaration that the Plaintiff is entitled to the Right of Occupancy of the said property.

3. An Order of Specific Performance against the 1st Defendant to perfect the title of the 1st Plaintiff by executing the necessary Deed of Assignment.

4. In the alternative, the sum of N70,145.85 (seventy thousand, one hundred and forty-five naira, eighty-five kobo) being money paid to the 1st Defendant by the Plaintiffs and the Plaintiffs also claim the sum of N2 million representing general damages for breach of contract against the 1st Defendant for failure to perfect the sale of Plot 136 Borokiri Layout to the Plaintiffs.

5. The sum of N100,000.00 (one hundred thousand naira) being damages for trespass against the 2nd Defendant in that on the 30th September 1988 the 2nd Defendant without leave or license broke into the premises aforesaid and caused extensive damages to the Plaintiffs' property.

6. A perpetual injunction restraining the Defendants and each of them by themselves, servants or agents from further interference with the possession of the Plaintiffs.

In their counter-claim the Defendants/Respondents sought against the Plaintiffs/Appellants jointly and severally as follows:-

A. To 1st Defendant

(i) The sum of N91,538.53 made up as follows:

(a) Arrears of rent N87,000.00

(b) Unrefunded Guarantee N4,538.53

N91,538.53

(ii) 25% interest per annum on N91,538.53 with effect from 1st January 1984 until judgment.

B. To 2nd Defendant

(i) A Declaration that the Plaintiffs have no interest in No.4 Etche Street Borokiri, Port Harcourt whether legal or equitable and that the assignment of the said property by the 1st Defendant to the 2nd Defendant was legally valid and proper.

(ii) The sum of N70,000.00 per annum with effect from 1st November 1988 being annual value of the property held over by the Plaintiffs.

(iii) 25% interest per annum on the sum accruable from B (ii)

above.

(iv) Vacant possession of the property in dispute (that is No.4 Etche Street Borokiri, Port Harcourt) on grounds of (i) Plaintiffs' refusal to recognise 2nd Defendant as their landlord making them to be bad tenants (2) refusal to pay rent and (3) setting up a claim of ownership adverse to 1st Defendant's interest (4) complete breakdown of landlord and tenant relationship making it unsafe for the 1st Defendant to visit and view the state of repairs of the property. B

The Defendants are entitled to earn interest at 25% per annum or at current bank rate as the Plaintiffs are doing business with their money kept by the Plaintiffs to the economic disadvantage of the Defendants. The matter proceeded to trial. The 2nd Plaintiff Prince Benjamin Mabadeje was the sole witness for the Plaintiffs/Appellants. The two defendants, Chief Oluka Ngei, Chief Donald Diboye-Suku and two others testified for the defence and counter-claim. D

In its judgment on the 14/7/2000 the trial Court, dismissed the Plaintiffs/Appellants' claim in its entirety. The Court however granted reliefs (i) and (iv) of the counter-claim to the effect that the Plaintiffs have no interest whether legal or equitable in the property in dispute and that the 2nd Defendant was entitled to vacant possession of same. E Reliefs (ii) and (iii) of the counter-claim were dismissed. The Plaintiffs were aggrieved by the judgment and proceeded on appeal to the Court below. The Defendants/Respondents were also not satisfied with the trial court's dismissal of reliefs (ii) and (iii) of the counter-claim and thus filed a cross-appeal to the Court below. Briefs were F filed and exchanged in the substantive appeal. With respect to the Cross-Appeal the Defendants/Cross-Appellants filed their Cross-Appellants' Brief. The Plaintiffs/Cross-Respondents did not file a Cross-Respondents' Brief. By the operation of order 6 Rule 10 of the Court G of Appeal Rules the Plaintiffs/Cross-Respondents were not heard in oral argument on the Cross-Appeal.

In its judgment on the 12th of April 2006 the main appeal was dismissed for lack of merit. The cross-appeal was however allowed and judgment was accordingly entered for the Defendants/Cross-Appellants in terms of paragraph 14A (i) and (ii) and B (ii) and (iii). H

The Plaintiffs were still not satisfied and have come on further appeal to this Court. Briefs of argument have been filed and exchanged. The Appellants' Brief was prepared by Eberechi Adele Esq.

and same dated 22nd of November 2006 was filed on the 3rd of April 2007 but deemed filed on the 14th of January 2008. The Respondents' Brief is dated the 14th of January 2008 and filed the same day. The Appellants formulated two issues for determination and which issues were adopted by the Respondents. The issues are:-

B 1. Whether the Court of Appeal was wrong in affirming the trial Court's verdict that the Appellants did not have a valid interest in the property vis-a-vis- the assignment by the 1st Respondent to the 2nd Respondent.

C 2. Whether the refusal by the Court of Appeal to entertain the Appellants' motion for extension of time to file the Appellants' Reply Brief is a denial of fair hearing.

The substance of the arguments of Eberechi Adele for the Appellants is as follows: Learned counsel referred to the observations D of the trial Court at page 186 lines 23-33 of the record to the effect that there was an agreement by the 1st Defendant to sell the property to the Plaintiffs and which agreement gave birth to Exhibits "F" and "G" in 1975 and submitted that in the face of the finding thereat the conclusion at pages 196-197 that there was no agreement to sell E the property is a contradiction and therefore perverse. He placed reliance on a number of cases namely LONGJOHN v BLACK (2005) ALL FWLR Part 289 1219; MACAULAY v TUKURU (1881 - 1911) 1 NLR 36; AKINLOYE v EYIYOLA (1968) NMLR 92; OBISANYA v NWOKE (1974) 6 SC 69, WOLUCHEM v GUDI (191) 5 SC 291 F and OBODO v EGBA (1987) 1 NSCC Vol. 18416.

It was counsel's further submission that Exhibits' "H" and "L" in no way nullified the sales agreement in Exhibit "F" and confirmed in Exhibit "G", contending that the intention of the contracting parties should be that expressed in the contract itself and not from extraneous sources. He relied on ARJAY LTD v AIRLINE MANAGEMENT SUPPORT LTD (2003) 7 NWLR (Part 820) 577 at 634. Learned counsel argued that the 1st Defendant/Respondent was manifestly unreliable and his evidence deserved no credibility. In support of this H submission learned counsel referred to the fact that although the 1st Defendant/Respondent denied knowledge of the Plaintiffs/Appellants use of the property as a hotel, it was established by Exhibit "C" that he knew the fact, and even gave out his title documents as collateral for a loan for the expansion of the hotel. Counsel also referred to the

1st Defendant/Respondent's sale of the property to Mr. Atey and his ultimate refusal to convey same to him. It was learned counsel's submission therefore that the concurrent findings of the two courts below have no foundation and urged this Court to re-evaluate the evidence and set aside the said findings. He relied on *ADEMUJLOLA v STATE* (1988) 1 NWLR (Part 73) 683 at 690 and *ONWUGBUFOR v OKOYE* (1976) 1 NWLR (Part 424) 252. According to learned counsel, the concurrent findings are against the logical drift of the evidence.

On the second issue it was the submission of counsel for the Appellants that the refusal of the Court of Appeal to hear the motion for extension of time to file the Appellants' Reply Brief constituted a denial of fair hearing and that the refusal occasioned a miscarriage of justice. In support of this submission learned counsel relied on *OKONKWO v OKONKWO* (1998) 10 NWLR (Part 571) 136; *NWOKORO v ONUMA* (1990) 3 NWLR (Part 136) 22; *TUNBI v OBAWOLE* (2000) 2 NWLR (Part 644) 275 and *AFRO-CONTINENTAL LTD v CO-OPERATIVE ASSOCIATION OF PROFESSIONAL INC.* (2003) 5 NWLR (Part 818) 303 at 317-318. He urged that the appeal be allowed.

In the Respondents' Brief Faye Dikio Esq. proffered the following arguments. On the first issue learned counsel referred to the Statement of Claim filed on the 12th of July 1993 and wondered why they failed to plead the Deed of Assignment purportedly executed by the 1st Respondent in their favour as far back as 10th May 1979 until same was pleaded in paragraph 3 of their Defence to Counter-Claim in 1995. With respect to the alleged finding of the trial Court at page 186 of the record and its conclusion at pages 196-197 counsel argued that the texts were misconstrued by the Appellants.

It was further argued by learned counsel for the Respondents that counsel for the Appellants completely misconstrued the contents of Exhibits "F" "G" "H" and "L". It was his further contention that there is abundant oral and documentary evidence that clearly contradicted the appellants' assertion about the contents and purport of Exhibits "F" and "G". The documentary evidence according to counsel include Exhibits "H" "L" "B" "D2" "M" "MI" "N" "O" "R" and "ZI". Then at pages 7-10 learned counsel for the Respondents was at pains

to analyse these documents to demonstrate that there never existed any contractual relationship between the Appellants and 1st Respondents to be “sealed” and that the only relationship between them was that of landlord and tenant. Learned counsel contended that the findings and conclusions of the two courts below were abundantly supported by the evidence and therefore that there was no basis whatsoever for any interference. He relied on *NZEKWU v NZEKWU* (1989) 2 NWLR (Part 104) 373 at 393; *AKINLOYE v EYIOLA* (1968) NMLR 92 at 95; *OGUMDULU v PHILLIPS* (1973) 2 SC 71 at 80; *OKAFOR v IDIGO* (1984) 1 SC NLR 481 at 499 and *ONOWAN v ISERHIEN* (1976) 9-10 SC 95 at 99. It was counsel’s further submission that from the weight of documentary evidence, the Appellants’ case is weak and failed to meet the standard of proof required. Conversely, the Respondents’ case on the Counter-Claim is strong and remains uncontroverted and urged therefore that the first issue be resolved in favour of the Respondents.

With respect to the 2nd issue learned counsel for the Respondents pointed out that the motion in question was filed on the 17/1/06 but that it does not form part of the record. He referred however to paragraph 10 of the affidavit in support of the motion for extension of time to file Reply Brief wherein it was disposed that the Reply Brief was the Appellant’s answer to the Cross-Appeal and the Reply Brief itself at pages 258-261 of the record and argued that the purported Reply Brief was in fact and indeed the Appellants’ Response to the Cross-Appeal. Learned counsel pointed out the main argument in the Reply Brief to the effect that the trial court was right in dismissing reliefs (ii) and (iii) of the counter-claim because there was no demand for rent and possession and argued that demands for rent and possession were pleaded and evidence in respect thereof adduced through Exhibits “K” “N” “S” “T” and Suit No. PRT/857/91 at the Rent Tribunal. He contended further that the Reply Brief has nothing to change the judgments of the two lower Courts and also that the failure to consider it did not occasion any miscarriage of justice. In support of these submissions he relied on *OKEOWO v MIGLIORE* (1979) NSCC 210 at 239 and *NADER v CUSTOMS AND EXCISE* (1965) ANLR 33 at 37. He urged in conclusion that the appeal be dismissed.

I shall now proceed to deliberate on the two issues in this ap-

peal. The first issue turns on the question of evaluation. The settled principle of law is that it is the trial court which alone has the primary function of fully considering the totality of evidence placed before it, ascribe probative value to it, put same on the imaginary scale of justice to determine the party in whose favour the balance tilts, make the necessary findings of facts flowing therefrom, apply the relevant law to the findings and come to the logical conclusion. ***The evaluation of evidence remains the exclusive preserve of the trial Court because of its singular opportunity of hearing and watching the demeanour of witnesses as they testify and thus the court best suited to assess their credibility.*** Where therefore a trial court makes a finding as to the credibility of a witness an appellate court would not ordinarily interfere. ***Where however the nature of the case is such that the evaluation would not entail the assessment of credibility of witnesses and would be confined to drawing inferences and making findings from admitted and proved facts and from the contents of documentary evidence, the appellate court is in as vantage a position as the trial court to evaluate or re-evaluate the evidence and make its own findings.*** These principles have been applied in a number of cases amongst which are WOLUCHEM v GUDI (1981) 5 SC 291; MOGAJI v ODOFIN (1978) 4 SC 91; DURU v NWOSU (1989) 4 NWLR (Part 113) 24; OLADEHIN v CONTINENTAL TEXTILE MILLS LTD (1978) 2 SC 28; CHUKWU v NNEJI (1990) 6 NWLR (Part 156) 363; AKINTOLA v BALOGUN (2000) 1 NWLR (Part 642) 532 at 546.

I have gone through the evidence of the witnesses on record and the judgment of the trial Court and I am firmly of the view that there was no issue of the trial court's assessment of the credibility of witnesses. The result is that this Court, like the court below, is in as good a position as the trial court to appraise or re-appraise the evidence on record to see if the concurrent findings of the two courts below are not perverse. With respect to the evidence itself, there is a lot of oral as well as documentary evidence. I am however of the view that the issues raised would be resolved mainly by the documentary evidence. I am guided in this view by the settled principle of law that oral evidence is only to be hangers on for documentary evidence.

Firstly at page 3 paragraph 3.3 of the Appellants' Brief, learned counsel for the Appellants reproduced the observation of the trial court at page 186 of the record which states:

- B *"It must also be noted that in the application for loan from Plaintiffs' Bank for N100,000.00 to purchase the property, the title documents of the property were to be used as collateral. This application was dated 4th October 1997 and it is Exhibit "C" If there had been no agreement to sell the property to the Plaintiffs, 1st Defendant would not have agreed to the title document of the property*
 C *being used as-collateral. It does appear that in 1977 there was an agreement to sell the property to the Plaintiffs which said agreement gave birth to Exhibits "F" and "G" in 1979. In other words by 1979 the sale of the property to the Plaintiffs had been completed,"*
 D ***It was his contention that in view of the foregoing observations it was inconceivable for the trial court to arrive at the opposite conclusion in the judgment. I agree with learned counsel that in the course of his summary of the evidence, the learned trial judge made observations as if they were findings.***
 E ***It is settled principle of law that the summary of the evidence led by the parties or re-statement of the evidence does not constitute evaluation.*** See *UWEGBA v A-G BENDEL STATE* (1986) 1 NWLR (Part 16) 303; *IMAN v OKOGBE* (1993) 9 NWLR (Part 316) 159 at 177. ***In this case a careful reading of the judgment of the learned trial judge shows that the actual evaluation of the evidence started from page 195 line 11 to the end of the judgment at page 199. It is from page 195 that the court formulated four issues for determination and then set out to***
 F ***resolve the issues one after the other.***
 G

H The first issue he formulated was whether there was any contract of the sale of the property in dispute between the Plaintiffs and the 1st Defendant to entitle the Plaintiffs to the remedy of specific performance. In his evaluation and resolution of this issue the learned trial judge had this to say:-

"By Exhibits "F" and "G" the property was purportedly sold to the Plaintiffs by the 1st Defendant in 1979. By Exhibit "C" an application was made to the International Bank for West Africa Ltd for N100,000.00 loan to purchase the property using the title Deed of

the property as collateral. These three Exhibits appeared to have sealed the contract of sale.

However by the pleadings and evidence Plaintiffs are still talking about payments of rents when they purported to have bought the property in 1979. By Exhibit “H” tendered by the 1st Defendant and which was written by the 2nd Plaintiff and dated 14th January 1985 the Plaintiffs gave statement of affairs regarding rents so far paid in respect of the property. The said Exhibit “H” made no reference to any sale or agreement to sell, rather it talked about rents so far paid simpliciter. It did not even say that the rents were for part payment of the purchase price for the property.

Again in Exhibit “L” the 2nd Plaintiff stated that since 1st Defendant had sold to Mr. Atey, he the first Defendant was no longer entitled to rent in respect of the property. If Plaintiffs had actually bought the property in 1979 as per Exhibit “F” and “G” why must they still be talking about payments of rent even in 1988.

By paragraph 9 of the said Exhibit “L” written on 29th August 1985 Plaintiffs offered to buy the property if the 1st Defendant was still desirous to sell since Mr. Atey could not pay the balance of the purchase price and that the sum of N28,269,60 being held by the 1st Defendant as various sum of money collected from Plaintiffs could stand as deposit against the purchase price. It is very highly preposterous for the Plaintiffs in 1988 to be making an offer or purchase when by Exhibits “C”, “F” and “G” they claimed they had bought the property in 1979. It is also preposterous for the Plaintiffs to be continuing talking about rents when he claimed that he had bought the property. Exhibit “H” and “L” aforesaid made by the Plaintiffs are totally at variance with Exhibits “F” and “G”. No reason for this variance in the documentary evidence by the Plaintiffs.

In law it is not the duty of the Court to pick and choose which evidence to believe. The above documents clearly showed Plaintiffs conflicts of interest in the property and the court cannot judiciously and judicially hold that there was a contract of sale and there was actual sale, By this variance in the evidence coupled with 1st Defendant’s denial that he never entered into any agreement to sell nor sold the property it is my view and I so hold that Plaintiffs and 1st Defendant never entered into any agreement to sell the property and Plaintiffs never bought....” (See page 196-197 of the record)

In its judgment the Court of Appeal reproduced the foregoing reasoning and conclusions of the trial court and held that it was unassailable. At pages 282-283 of the record the Court per M.D. Muhammad, JCA stated:-

“The foregoing summation by the lower court is unassailable. Indeed as the court concluded further in its judgment, in law it is not the duty of a court of law to pick and choose which evidence out of the lot advanced by a party to prove an only case. See *ONUBOGU v STATE (1974) 9 NSCC 358*. Where a party in a case has tendered a document in proof of his case and the contents of the document is inconsistent with the contents of another document equally tendered in proof of the same facts and the inconsistency remains unexplained, the court should, as was done by the court below, regard the contents of the two documents as evidence that is far from being reliable. In the instant case the lower court rightly found that Exhibits “H” and “L” totally are at variance with Exhibits “F” and “G”. All the documents were tendered in proof of specific paragraphs in the Appellants’ Statement of Claim to the effect that 1st Respondent herein had assigned the property in question to the Appellants. A decision not to rely and act on any of the documents is not only logical but a necessity occasioned by the uncertainty as to what version the court would choose and believe out of the two.”

Are the foregoing views and findings of the Court of Appeal correct? As I said earlier in this judgment, **I have thoroughly examined the pleadings of the parties, the evidence in support thereof and the judgment of the trial court. There is no doubt that in its judgment the trial court thoroughly and meticulously examined the totality of evidence placed before it and made findings which are amply supported by the mass of oral and documentary evidence. The judgment of the trial court cannot be faulted in any way. It is not surprising therefore that the Court of Appeal endorsed the findings and decision of the trial Court. On the first issue therefore, I hold, in conclusion that, the Court of Appeal was right in affirming the trial court’s verdict that the Appellants did not have a valid interest in the property vis-a-vis the assignment by the 1st Respondent to the 2nd Respondent.** The result is that I resolve the first and main issue in favour of the Respondents and which therefore substan-

tially disposes of the appeal.

However before going to the conclusion I would like to comment on two aspects of the case which tend to expose the absolute bad faith of the Appellants and the falsity of their case. The two aspects both relate to and emanate from the reliefs they claimed in their amended writ of summons, the amended statement of claim and their Defence to counterclaim. With respect to the property in dispute their case as pleaded in the amended statement of claim was that they had acquired an equitable interest in the property in that they had part-purchased it from the 1st Respondent. This fact of the part-purchase and thus equitable interest were pleaded in paragraphs 12, 13 and 15 of the amended statement of claim at pages 40-42 of the record. In paragraph 15 (c) thereof they specifically pleaded.

"That before the purported sale to the 2nd Defendant, the Plaintiffs had already acquired an equitable interest by paying a substantial part of the purchase price."

No mention was made of any Deed of Assignment by the 1st Defendant/Respondent to the Plaintiffs/Appellants. However in their Defence to Counter-Claim they now pleaded their purported Deed of Assignment. In paragraph 3 thereof they pleaded:

"By a Deed of Assignment made on the 10th day of May 1979 the 1st Defendant transferred ownership of the building in dispute to the 2nd Plaintiffs."

Thus while in their amended statement of claim they claimed to have had an equitable interest in the property through part-purchase, in their Defence to counter-claim they claimed absolute title over the self-same property through a Deed of Assignment. In my view these divergent and irreconcilable claims establish the manifest falsity of the Appellants' case even before it was tried.

The second aspect of the Appellants case is even more devastating to their cause. In relief three of the Amended Statement of Claim, they claimed *"an order of specific performance against the 1st Defendant to perfect the title of the 1st Plaintiff by executing the necessary Deed of Assignment"*. And in the fourth relief, they claimed *"the sum of N2 million representing general damages for breach of contract against the 1st Defendant for failure to perfect the sale of Plot 136 Borokiri Layout to the Plaintiffs."* The implication of these claims is that at the time this action was initiated in 1992 and up to

the time the Amended Statement of Claim was filed in February 1995 no Deed of Assignment had been executed by the 1st Defendant/Respondent in favour of the Plaintiffs/Appellants. In other words in 1992 when this action was commenced and up to the time the Amended Statement of Claim was filed in 1995 there could not
B have been and indeed no Deed of Assignment Exhibit “G” in existence.

Reliefs 3 and 4 are therefore in direct conflict with the case subsequently put forth by the Appellants in Exhibit “G” which signature was however established to be a mere free hand simulated forgery of the 1st Respondent’s authentic model signature. The whole
C case of the Appellants was founded on falsehood and fabrication and was therefore rightly dismissed by the trial Court and which dismissal was rightly affirmed by the Court below.

With respect to the 2nd issue it is perhaps necessary to start by re-examining the reasoning of the trial court in dismissing the claims in reliefs B (ii) and (iii) of the Counter-Claim. In relief B(ii) the Respondents claimed the sum of N70,000.00 per annum with effect from the 1st of November 1988. The sum represents the annual
D value of the property held over by the Appellants. And in relief B (iii) they claimed 25% per annum on the sum accruable from B (ii). The trial Court dismissed these heads of claim and its reasons for doing so are contained in page 198 lines 12-25 of the record. Therein the trial
E court reasoned that since the Appellants were in physical possession of the property before the 1st Respondent’s sale of same to the 2nd Respondent and the 1st Respondent failed to recover possession and put 2nd Respondent into possession and also having regard to the
F fact that he failed to demand for rents from the Appellants the 2nd Respondent was not entitled to the two reliefs claimed.
G

As I said earlier in the opening paragraphs of this judgment the Respondents were aggrieved by the dismissal of the two heads of the counter-claim and cross-appealed to the Court below. In allowing the cross-appeal the Court of Appeal reasoned at 286 of the record
H as follows:-

“I agree with learned counsel to the cross-appellants that the lower court’s reasons regarding respondents counter-claim are contrary to the available evidence and established legal principles. By the relevant paragraphs of their pleadings, and Exhibits “K” “N” “B” “M”

“MI” “Y” and “ZI” in proof of the paragraphs, respondents have not only claimed but proved their claim in respect of rent arrears and such other relief that draws from appellants continued use of a property which the lower court correctly found to have been validly assigned by 1st Respondent to the 1st Respondent, I so hold.”

The Appellants’ Reply Brief which they sought to use is at pages 259-261 of the record. The main argument relevant is at page 259 of the record and it runs thus:

“It is submitted that the counter-claim for arrears of rent was a mere after thought. The pleadings and evidence showed that for the many years that the Plaintiffs/ Appellants were in occupation of the disputed property, the 1st Defendant who was the original owner never made any serious claim for rents or even possession of the property. And he could not do so for the simple reason that he had already sold the property to the Appellants”

There is no substance in this argument. ***I have already endorsed the concurrent finding of the two courts below that there was no sale of the property by the 1st Respondent to Appellants and that Exhibit “G” was a mere fabrication. There is also abundant oral and documentary evidence about the demand for rents and for possession. Evidence for rents and for possession is contained in Exhibits “K” “N” “B” “M” “MI” “Y” and “ZI”. The Reply Brief could not therefore have altered the findings and ultimate decision in the case. Although the Court below had a duty to consider and determine the application, the failure so to do did not occasion any miscarriage of justice. In the event I also resolve this issue in favour of the Respondents.***

In conclusion, I hold that the appeal lacks merit. There was no evidence the part-purchase of the property which they pleaded. Nor was there any evidence of the purported assignment of the property by the 1st Respondent to the Appellants through Exhibit “G” which they later introduced in the case. Exhibit “G” which signature was established to be a mere simulated forgery of the genuine signature of the 1st Respondent was itself a contradiction of the claims for specific performance and damages for breach of contract. The case of the Appellants as pleaded in the amended Statement of Claim and the defence to the counter-claim told the lie against itself. The result is that this appeal ought to be dismissed and is accordingly dismissed

with costs which I assess at N50, 000. 00 in favour of the Respondents.

MUSDAPHER JSC

I have read before now the judgment of my lord Tabai, JSC
 B just delivered with which I entirely agree. The claims of the appellants
 against the respondents before the trial court were for declarations
 and for an order of specific performance and in the alternative claims
 for damages and. The respondents for alternative relief at the trial
 C also counter-claimed. In its judgment the trial court dismissed the
 appellants' claims in their entirety but partially granted the counter-
 claims. Both the appellants and the respondents were not happy
 with the judgment and both appealed. There was thus an appeal and
 a cross-appeal before the court below. In its judgment, delivered 12/
 D 4/2006, the appeal was dismissed as lacking in merit while the cross-
 appeal by the respondents was granted and judgment entered in
 terms of paragraph 1-4 A(i), B(ii) and (iii) of the Counter claims.

The plaintiffs/appellants still feeling dissatisfied have now ap-
 pealed to this court.

E Two issues or the determination of the appeal have been sub-
 mitted by the parties. The first issue is centered round the concurrent
 findings of facts by the two courts and the second issue is concerned
 with the refusal of the court below to entertain the appellants' mo-
 F tion for extension of time to file the appellants' Reply Brief, which the
 learned counsel argued that it amounted to a denial of fair hearing.

In his judgment under reference, my lord Tabai JSC has ad-
 equately dealt with the first issue, and I agree with him that the trial
 court had meticulously and properly examined the totality of the
 G evidence placed before it and made findings of facts which are clearly
 supported by the massive oral and documentary evidence. The judg-
 ment of the trial court cannot be faulted at all and the lower court
 was right in affirming and endorsing the findings of the trial court.
 This court will not ordinarily interfere with the concurrent findings of
 H fact of the lower courts unless it is shown that such findings are per-
 verse and not based on the evidence led and accepted. The appel-
 lant has failed to convince me that this is a situation in which this
 court should interfere. I resolve issue No, 1 against the appellants. I
 equally resolve the 2nd issue against the appellants, the Reply Brief

even if” filed within time, would not make any difference. On an application to take any procedural step, the court below has the discretion to extend time or not and each situation depends on its peculiar circumstances. In the instant case, even if time is extended, the Appellants’ Reply Brief would not increase the fortunes of the appellants. The facts are very clear, the Reply would not serve any useful purpose. Under the circumstances, the court below exercised its discretion properly and there is no denial of fair hearing. B

In the end, I too find this appeal unmeritorious and I dismiss it. I abide by the order for costs proposed in the lead judgment. C

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tabai J.S.C. I agree with his reasoning and conclusion. I would also dismiss this appeal with N50,000.00 costs against the appellant in favour of the respondent.

MUHAMMAD JSC

My learned brother Tabai, JSC, permitted me to read his leading judgment in draft form. I am satisfied with his treatment of all issues raised in the appeal and I am in agreement with his conclusion. The appeal lacks merit and must be dismissed. I dismiss the appeal. I abide by orders made in the leading judgment including order as to costs. E
F

ADEKEYE JSC

The two appellants as plaintiffs before the high Court of the River State, Port Harcourt Judicial Division sued the 1st and 2nd respondents as defendants jointly and severally for: - G

(1) A declaration that the purported sale of plot 136 Borokiri Layout otherwise known as No. Etche Street, Borokiri, Port Harcourt within the jurisdiction of the honourable Court by the 1st defendant to the 2nd defendant is illegal, null and void. H

(2) A declaration that the 1st plaintiff is entitled to the right of occupancy of the said property.

(3) An order of specification performance against the 1st defendant to perfect the title of the 1st Plaintiff by executing the necessary deed of Assignment.

(4) In the alternative, the sum of N70,145.85 (seventy thousand, one hundred and forty-five naira, eight-five kobo) being money paid to the 1st defendant by the Plaintiffs.

(5) The sum of N100,000.00 (one hundred thousand naira) being damages for trespass against the 2nd defendant in that on the 30th September 1988, the 2nd defendant without leave or license broke into the premises aforesaid and caused extensive damage to the plaintiffs property.

(6) A perpetual injunction restraining the defendant and each of them by themselves, servants or agents from further interference with the possession of the plaintiffs.

The respondents also counter-claimed against the appellants seeking declaration that the respondent is entitled to the Statutory right of occupancy to No. Etch Street, Borokiri, Port Harcourt.

(2) That the plaintiffs were informed of the change of title to the property by the Ministry of Lands and Housing in its letter No. RSL/2587/98 dated the 28th of October 1988.

(3) That the plaintiffs have been in arrears of rent since 1st January 1984, N18,000.00 (eighteen thousand naira) per annum and are therefore owing the 1st defendant the sum of N87, 000. 00 (eighty-seven thousand naira) as arrears of rent.

(4) The plaintiffs refused to negotiate terms of tenancy with the 2nd defendant and despite repeated demands they failed or neglected to pay any rents to him.

The trial court dismissed the claims of the plaintiffs, while the counter-claims of the respondents were granted in part. The respondents were granted declaration of title while appellants were to deliver possession of the property. Both parties were dissatisfied with the judgment of the trial court, appealed and cross-appealed against the same judgment. The court of appeal dismissed the lone issue in the main appeal and allowed the cross-appeal. The appellants lodged a further appeal against the judgment of the lower court. Both appellants and respondents formulated same two issues for the determination of this court as follows:-

(a) Whether the court of Appeal was wrong in affirming the

trial court's verdict that the appellants did not have a valid interest in the property vis-à-vis the assignment by the 1st respondent to the 2nd respondent.

(b) Whether the refusal by the court of Appeal to entertain the appellants motion for extension of time to file appellant's reply brief is denial of fair hearing. B

Issue One brings into question the evaluation of the evidence proffered by the parties by the trial court. The evidence before the court in respect of the main claim and the counter-claim are both oral and documentary. C

The duty of appraising evidence given at a trial is pre-eminently that of the trial court which had the advantage of seeing, hearing and watching the demeanor of witnesses. It is the right of the court to ascribe probative value coming to a decision on the matter. The trial court does not come to a decision by the quantity of the witnesses but on the quality or probative value of the testimony of the witnesses. If there is proper evaluation of the evidence by the trial court, in that every material finding is supported by the totality of evidence on record, the appellate court has no business to embark on a reappraisal of the evidence in order to arrive at a different conclusion. An appellate court shall reverse the finding of a trial court where such does not reflect a proper assessment of the totality of the evidence before the court or the judgment turns out to be perverse or shows lack of judicious or judicial exercise of discretion. E

Ogundolu v. Philips (1973) 2 S.C. 71 F

Fashanu v. Adekoye (1974) 1 All NLR pt.1 pg.35

Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR pt. 7 pg. 393

Mogaji v. Odofin (1978) 3-4 S.C. 91

Adekele v. Iyanda (2001) 13 NWLR pt. 729 pg. 1 G

Adenji v. Adenji (1972) 4 S.C. pg. 10

Woluchem v. Gudi (1981) 5 S.C. 291

Olatunde v. Abidogun (2001) 18 NWLR pt. 725 pg. 592

Ebba v. Ogododo (1984) 1 SCNLR pg. 372.

In order to determine a case and come to a just conclusion, proper evaluation of evidence is absolutely important, so also in a claim for a declaration of title to Land the onus of proof lies on the plaintiff who must succeed on the strength of his own case, and he cannot achieve this through conflicting or contradictory evidence but H

by cogent and credible evidence. The plaintiff can however rely on the evidence of the defendant which supports his case. *Kodilinye v. Odu* 4 WACA 336; *Woluchem v. Gudi* (1981) 5 S.C. 291.

The judgment of the trial court as affirmed by the lower court is now being challenged on the platform that the inferences and conclusions led in proof of the appellants' case were wrong. In the cross-appeal the cross-appellants are challenging the conclusion of the trial court that had found the existence of a valid transfer of title of the property in dispute by the 1st to the 2nd respondent. In its conclusion, the trial court had refused the two reliefs sought by the appellants. The learned trial judge made meticulous findings after evaluation of the evidence at pages 195 to 196 of the record as follows: -

“By Exhibits “F” and “G” the property was purportedly sold to the plaintiff by the 1st Defendant in 1976. By Exhibit “C” an application was made to the International Bank for West Africa Ltd for N100,000.00 loan to purchase the property using the title Deed of the property as collateral. These Exhibits appeared to have sealed the contract of sale.

However by the pleadings and evidence plaintiffs are still talking about payments of rent when they purported to have brought the property in 1979. By Exhibit “H” tendered by the 1st Defendant and which was written by the 2nd plaintiff and dated 14th January 1985 the plaintiffs gave statement of affairs regarding rent so far paid respect of the property. The said Exhibit “H” made no reference to any sale or agreement to sell, rather it talked about rents so far paid simpliciter. It did not even say that the rents were for part payment of the purchase price for the property.

Again in Exhibit “L” the 2nd plaintiff stated that since 1st Defendant had sold to Mr. Atey, he the first Defendant was no longer entitled to rent in respect of the property. If Plaintiff had actually bought the property in 1979 as per Exhibit “F” and “G” why must they still be talking about payments of rent even in 1988.

By paragraph 9 at the said Exhibit “L” written on 29th August 1985 Plaintiff offered to buy the property if the 1st Defendant was still desirous to sell since Mr. Atey could not pay the balance of the purchase price and that the sum of N28,269. 60 being held by the 1st Defendant as various sum of money collected from Plaintiff could stand as deposit against the purchase price. It is also preposterous for

the purchase when by Exhibits "C" "F" and "G". No reason for this variance in the documentary evidence by the Plaintiffs.

In law it is not the duty of the court to pick and choose which evidence to believe. The above documents clearly showed Plaintiffs conflicts of interest on the property and the court cannot judiciously and judicially hold that there was a contract of sale and there was actual sale. By this variance in the evidence coupled with 1st Defendant's denial that he never entered into any agreement to sell nor sold the property it is my view and I so hold that plaintiffs and 1st Defendant never entered into any agreement to sell the property and Plaintiffs never bought . . ." (see page 196-197 of the record)

The evidence before the court portrayed what could have been a simple contract of sale and transfer of property. An offer must be accepted in order to crystallize into a contract. A contract of sale exists where there is a final and complete agreement of the parties on essential terms of the contract, namely the parties to the contract, the property to be sold, the consideration for the sale and the nature of the interest to be granted. Once there is agreement on these essential terms, a contract of sale of land or property is made and concluded. In a contract for sale of property, where part payment was paid, the law is that the contract for purchase, has been concluded and is final, leaving the contract for the balance outstanding, to be paid. The contract for the sale and purchase is absolute and complete for which each party can be in breach for non-performance and for which an action can be maintained for specific performance. In the instant case, the plaintiff/appellant and the 1st respondent were not in agreement about the sale of the property. The intention of the appellant to purchase the property was not effectively communicated to the 1st respondent. The documents meant to confirm the sale and transfer of the property are contradictory and conflicting in their contents. The 2nd appellant was still discussing about arrears of rents owed to the landlord at a stage of the transaction when he should concentrate on taking absolute possession and transfer of ownership of the property. The documents relevant to the sale are Exhibits "H", "L", "M" and "G". They are riddled with contradictions and it will be foolhardy to rely on them to prove the fact of the sale of the property in dispute to the appellant. The decision of the lower court to affirm the judgment of the trial court is not by any standard perverse. The

2nd appellant came into contact with the property in 1975 when he moved into the premises of the 1st respondent. He intimated the 1st respondent with the intention of running the property as a mini lodge. He expended money to reconstruct the place and expressed his desire to acquire the property. He made an effort to secure a loan to purchase the property with Exh C. The 1st respondent gave his approval to use the property as collateral for the loan. The application for the loan was not successful. He had expended a sum of N25,394.17 to reconstruct the property which was hitherto dilapidated and uninhabitable. There was a discussion as to acquiring the new premises at the sum of N120,000.00. The 1st respondent however offered the premises to one Mr. K. Atey on sale for a sum of N60,000.00 in 1979. The sale was aborted by the court and the deposit of a sum of N20,000.00 returned to Mr. Atey. In 1988 the 1st respondent sold the property to the 2nd respondent for the sum of N30,000. 00. The 2nd appellant claimed to maintain an equitable interest in the property having paid a substantial part of the purchase price. On the 10th of May 1979, the 1st respondent executed a Deed of Assignment, Exh. "G" whereupon the ownership of the premises was transferred to the 2nd appellant.

The 1st respondent referred the court to a hand written note Exh. F to forward the Deed of Assignment to the 2nd appellant and another letter from the Ministry of Lands and Housing. With the foregoing, the sale of the property appears to be completed and ownership could have been vested in the 2nd appellant. The case of the respondent as revealed in Exh. L, a letter written by the 1st defendant to the appellant that the loan from the bank was not for the purchase of the property. Exh. L explained further that the amount paid by the appellant was not for the purchase of the property but for rents for the use of the property. The 1st respondent sold the property to the 2nd respondent and executed the Deed of Assignment Exh. J for the purpose. The 2nd respondent was introduced to the 2nd appellant as his new landlord. The 1st respondent wrote Exh. H to the 2nd appellant in which he analysed the position as to the payment of rents in respect of the property. The 2nd appellant wrote a letter Exh. L dated the 29th of August 1988 to the defendant where he raised two important issues as follows:-

(a) That in view of the sale to Mr. Atey, the 1st respondent

cannot be entitled to rents.

(b) If the property had not been sold to Mr. Atey, the 1st respondent should Consider him as a sitting tenant who had occupied the property for 12 years while the sum of N28,269.60 belonging to the 2nd appellant in possession of the 1st defendant could be used as deposit against the purchase price. B

The contents of this letter gave an insight into a very important aspect of a valid contract which was missing in the relationship of the parties – which is, consensus ad idem. There was no meeting of the minds of both parties in respect of the sale of the property. The offer made by the 2nd appellant was never accepted by the 1st respondent. Their relationship did not go beyond that of a landlord and a tenant. Exhs. F and G did not pass ownership of the property to the 2nd appellant. C

By virtue of section 135 (1) of the Evidence Act, whoever D desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist. It is equally trite that proof in a civil case is on the balance of probability or on the preponderance of evidence. At any trial, parties give evidence as to the claim before the court and judgment will at the end of the day be given to the party that the evidence tilts in favour of in the case. E

In this appeal, the finding of fact made by the trial court was affirmed by the lower court. This court has no reason to interfere with the concurrent findings of fact of the two lower courts. The counsel for the appellants had urged this court to allow the appeal as the lower courts in their findings wrongly believed the denial of the transaction by the 1st respondent. We have to emphasize all over again that the Supreme Court will not interfere with the concurrent findings of a trial court and the Court of Appeal on issue of fact. The two courts are presumed to have considered all the facts necessary for their coming to such findings. The Supreme Court will only disturb or upturn a concurrent findings of fact of the two lower courts in exceptional circumstances like:- F G H

(1) Where violation of some principles of law or procedure exists, and such erroneous proposition cannot stand if not corrected.

(2) Patently erroneous findings of fact which amount to a travesty of justice if not left uncorrected.

- (3) Where the findings of fact are erroneous or perverse
 Ude v. Chumbo (1968) 12 NWLR pt. 527 pg. 168
 Enang v. Adu (1981) 11-12 S.C. pg. 17
 Abdullahi v. State (1985) 1 NWLR pt. 3 pg. 523
 Okonkwo v. Adigwu (1985) 1 NWLR pt. 4 pg. 694
- B Bunge v. Gov. Rivers State (2006) 12 NWLR pt. 995 pg. 573
 Amusa v. State (2003) 4 NWLR pt. 811 pg 595
 Olokotirin v. Triangles Ltd. V.C.M. & Ltd (2002) 15 NWLR pt. 789 pg. 194.
- C A finding of fact is said to be perverse:
 (a) Where it runs counter to the evidence and pleadings.
 (b) Where it has been shown that the trial court took into account matters which it ought not to have taken into account.
 © Where the trial court shuts its eyes to the obvious.
- D (d) When the decision has occasioned a miscarriage of justice.
 State v. Agie (2000) 11 NWLR pt. 678 pg. 434
 Atolagbe v. Shorun (1985) 1 NWLR pt. 2 pg. 360
 Adimora v. Ajufo (1988) 3 NWLR pt. 80 pg. 1
 Akinloye v. Eyiola (1968) NMLR 92.
- E The appellants failed to establish that the findings of fact of the two lower courts were affected by any of the foregoing factors. On the overall evidence, I find no reasons to warrant the interference of this court into the concurrent findings of fact of the two lower courts.
- F The appellants also complained about the refusal by the Court of Appeal to entertain the appellants' motion for extension of time to file the Appellants' Reply brief which he concludes amounts to a denial of fair hearing. The judgment of the lower court shows that at the hearing of the appeal, the parties filed and exchanged brief in
- G respect of the Substantive appeal. In the cross-appeal, only the cross-appellants who were respondents in the substantive appeal filed their brief of argument. The appellants in the main appeal now cross-respondents brief. The court had this to say:
"We must immediately fall back on the provisions of Order 6
- H *Rule 10 of the Court of Appeal Rules 2002.*
It States:-
"10. Where an appellant fails to his brief within the time provided for in Rule 2 of this order, or within the time as extended by the court, the respondent may apply to the court for the appeal to be

dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of court. From the foregoing since the appellants in the main appeal being cross-respondents to the cross-appeal had failed to file their brief and leave had not been granted to them, they were not entitled to and were not heard in oral argument regarding the cross-appeal, The cross-appeal is accordingly determined on the cross-appellants' brief and oral argument only."

Rather than filing the cross-respondent's brief to the cross appeal, the appellant in the main appeal on the 23rd of February 2006 filed a motion on notice praying for an extension of time within which to file and serve the appellant Reply Brief .The copy of the Reply brief was attached to the affidavit in Support as Exhibit A and captioned "*Appellants Reply Brief Reply to Respondents Cross-Appeal, As . Argued in the Respondents Brief.*" It is needless to say that the Court of Appeal Rule 2007 does not recognize or make provision for this brief filed by the Cross-Respondent in a Cross-Appeal. An applicant can not complain about lack of fair hearing in an application that is in it self incompetent ab initio. Before a court can exercise jurisdiction in respect of any matter, It must: -

(a) be properly constituted as regards numbers and qualification of the member of the bench, and no member is disqualified for one reason or the other.

(b) the subject-matter of the case is within the jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and

(c) The case comes by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Leg (C) of the above was not fulfilled by the 2nd Appellant.

The function of a reply brief is to refute the new arguments in the respondents brief. A reply brief is necessary when an issue of law or argument is raised in the Respondents brief which requires a reply by the appellant. Failure to file a Reply brief can adversely affect the case of the appellant if the issues raised in the respondents brief are weighty, sustantial and relevant in law. A reply brief is not meant to re-argue or fine tune an appellant's case. A reply brief has no connection or affiliation with the Cross-Respondents brief and can only

be filed by an appellant in the main appeal or cross-appeal.

A. C. B. V. Apugo (1995) 6 NWLR pt. 399 pg. 65;

E .I.I. A. v. C. I.E. Ltd. (2006) 4 NWLR pt. 969 pg. 119;

Popoola v. Adeyemo (1992) 8 NWLR pt. 257 pg. 1;

Akinrinade v. Lawal (1996) 2 NWLR pt. 429 pg. 218.

B Issue of lack of fair hearing has not been properly identified
by the appellants.

For the foregoing and fuller reasons given in the leading judgment of my learned brother, F. F. Tabai, JSC, I also dismiss this appeal
C as lacking in merit. I abide by the consequential orders made in the
leading judgment including the orders for cost.

D

E

F

G

H