

SUPREME COURT OF NIGERIA
18TH DECEMBER, 2009. SC. 62/2003
CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH, JJSC

MRS. ETHEL ONYEMAECHI DAVID ORJI APPELLANT
AND

1. DORJI TEXTILES MILLS (NIG) LTD.
2. IHEANYICHUKWU D. N. ORJI RESPONDENTS
3. CHUKWUEMEKA D. N. ORJI

BETWEEN

MRS. ETHEL ONYEMAECHI DAVID ORJI APPELLANT
AND

1. PALM GARDENS HOTELS LTD
2. IHEANYICHUKWU D. N. ORJI RESPONDENTS
3. CHUKWUEMEKA D. N. ORJI

EVIDENCE - Company law - Status as company member - Onus of proof - Is on appellant to prove her status - As a member and director of the company - In order to obtain judgment (H1)

COMPANY LAW - Memorandum and articles - Alteration - Powers of company - A company has power to alter its memorandum and articles - Once it does so validly - The altered document becomes lifeless in law (H2)

COMPANY LAW - Proof - Company membership - Effect of original memorandum - The document no longer has effect - In the light of the evidence that appellant's name was removed as a member - By the shareholders (H3)

EVIDENCE - Proof of company membership - Production of register - Onus - Though the register is in the custody of the company - The onus is on appellant to call the company as witness - To tender the relevant portions thereof (H4)

FACTS

Before the Federal High Court Port Harcourt, applicant/appellant brought this action seeking sundry reliefs centred on having the court order that an Extraordinary General Meeting of each of the two companies/respondents be convened and allowing her liberty, as a director/shareholder of each of the companies, to participate in the meetings. The application was brought pursuant to section 223 of Company and Allied Matters Act. It was in evidence that though appellant was originally allotted shares in both companies, her name was subsequently removed as shareholder in a meeting of the shareholders of the companies.

After hearing, the learned trial judge dismissed appellant's claims in its entirety as it held that appellant failed to prove her membership/directorship of the companies. The court also held that the onus was on appellant to produce the companies' registers of members to place reliance thereon. Aggrieved, appellant appealed to the Court of Appeal which dismissed the appeal. That court held that although it was wrong for trial court to cast onus of producing registers of membership on appellant, the error did not occasion any miscarriage of justice. Dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal (per Ogebe, JCA and Nsofor, JCA) was right in affirming the decision of the Court of first instance that Appellant failed to prove she was a member and shareholder of the two companies in question?"

2. Whether the Court of Appeal was right in holding that the onus of producing Register of the Companies wrongly placed on the appellant by the Court of first instance, did not affect the substance of the Judge's conclusion that the Appellant failed to prove she was a member and shareholder of the two Companies?"

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

Status as company member - Onus of proof

1. In view of the fact that the appellant based her action and sought the reliefs under section 223 of the Companies and Allied Matters Act, the section 137(1) burden of proof is on the appellant and not on the respondents. In accordance with section 137(1) of the Evi-

dence Act, I ask the question rhetorically: who or which of the parties will have or obtain judgment in this case if no evidence of directorship, membership or shareholding is given? Can that party be the appellant? No. Certainly not. Can that party be the respondents? Yes, and unequivocally so. After all, the appellant claims to be a director and member of the companies and should prove her dual status in order to obtain judgment. Section 223 clearly provides for the locus standi and the appellant must prove that she has the standing to sue. (p. 2735 C)

Memorandum and articles - Alteration - Powers of company

2. Sections 44 to 48 of CAMA provide for the alteration of the Memorandum and Articles of Association and where a company complies with the provisions, that is the end of the matter. The alteration in the Particulars of Directors was made on 23rd March, 1993, some seven years after the initial documents that gave birth to the companies. It is elementary law that where a document is altered, it no more enjoys any legal life. The document becomes moribund or dead to the extent of the alteration. Accordingly, a party cannot rely on such a document because it is lifeless in law. The existing legal life is transferred to the new document which provides for the alteration. It is in this regard, I come to the conclusion that the documents relied upon by the appellant in all her affidavits are totally spent in law and therefore of no evidential or probative value, and I so hold. (p. 2740 B)

Company membership - Effect of original memorandum

3. Learned Senior Advocate submitted that the appellant having subscribed to the Memorandum of Association of both companies, she automatically becomes a member and shareholder of the companies by virtue of sections 79 and 83 of CAMA.

In making the submission, learned Senior Advocate relied on the Memorandum and Articles of Association at pages 20 to 31 of the Record. The documents are dated 27th day of November, 1984. Can these documents still have effect in the light of those relied upon by the respondents in removing the appellant as indicated above? This is the crux of the matter and I do not think section 79(1) of the Act can really come to the aid of the appellant.

Section 79(1) can operate in the absence of any adverse or

contrary act against a member by the company. Where, as in this case, the appellant's name was removed by the shareholders, section 79(1) has no teeth to bite because the deeming provision becomes otiose and dead. (pp. 2740 E/G &2741 F)

B *Production of register - Onus*

4. On the production of the Register, the Court of Appeal said at page 157 of the Record:

"Although the trial Judge was wrong in casting the onus of producing the register of the companies on the appellant as such registers were in the custody of the companies that error did not in any way affect the substance of the Judge's conclusion that the appellant failed to prove that she was a shareholder, member and director of the companies."

D With respect, I do not agree entirely with the above. Although the Register is in the custody of the company, the appellant had a duty, in the course of proving her case, to call the company as witness to tender the relevant portion or portions of the Register. (p. 2742 H)

E

NOTABLE POINT OF INTEREST

TOBI JSC

1. A deeming provision is one which makes a supposition

F The operative and telling expression or word in section 79(1) is "deemed". The present tense of the word is "deem", it means to treat a thing as being something that it is not or as possessing certain qualities that it does not possess. It is a formal word often used in legislation to create legal fictions. A deeming provision, according to Advanced Law Lexicon, Vol. 2 (3rd edition) is a provision of law which makes supposition. The deeming provision is intended to enlarge the meaning of a particular word or to include matters which otherwise may or may not fall within the main provision. When a person, for example, is deemed to be something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were. I will be more comfortable to read section 79(1) in that context. (p. 2741 A)

H

REPRESENTATION

Chief Amaechi Nwaiwu, SAN, with him E. T. Okereke and G. O. Denwigwe for appellant.

Chief Donald Udogu for respondent.

CASES REFERRED TO

Amadi v. Okoli (1977) 7 SC 57

Woluchem v. Gudi (1981) 5 SC 291

Ojomo v. Aiao (1983) 9 SC 22 at 53

Adah v. Adah (2001) 5 NWLR (Pt. 705) 1

Starcolar v. Adeniji (1972) 1 SC 202 at 21

Agbaka v. Amadi (1998) 11 NWLR (Pt. 572) 16

Osasona v. Aiayi (2004) 14 NWLR (Pt. 894) 545

Chikwendu v. Mbamali & Anor. (1980) 3-4 SC 291

Onobruhere v. Esegine (1986) 1 NWLR (Pt. 19) 799

Ogundipe v. Awe (1988) 1 NWLR (Pt. 68) 118 at 127

Baytrust Holdings Ltd, v. I.R.C. (1971) 1 WLR 1333 at 1355

Ogbechie v. Onochie (1988) 1 NWLR (Pt. 70) 370 at 390-391

Echezazu v. Awka Community Council (1980) 7 CA (Part 1) 103

Ezeonwu v. Onyechi (1996) 3 NWLR (Pt. 438) at pages 503 and 504

Combined Trade Limited v. All States Trust Bank Limited (1998) 2 NWLR (Pt. 576) 56

STATUTES & RULES REFERRED TO

Companies and Allied Matters Act, 1990, ss. 26, 79, 83, and 223

Evidence Act, ss. 137 and 149

Supreme Court Rules, 1985, O. 8 r. 2

BOOKS REFERRED TO

Phipson on Evidence, Sweet and Maxwell (12th Edition) p. 36

Gower's Principles of Modern Company Law, (4th Edition).

LEAD JUDGEMENT BY TOBI JSC

The appellant, as applicant, asked for the following reliefs at the Federal High Court, Port Harcourt, in an originating summons:

“(i) That an Extraordinary General Meeting of the company and the Board may be convened by the court for the purpose of

considering and if thought fit passing the Resolution as set forth in the schedule hereto;

(ii) That the court may give directions as to the manner in which the said meeting is to be called, held and conducted and all such ancillary and consequential directions as it may think expedient.

B *(iii) That the court may direct that applicant be allowed to attend any general meeting or other meeting of the 1st Respondent and its board and to speak and vote on any resolution before the meeting and to participate in the business and activities of the 1st Respondent company without obstruction, restraint or interference by the 2nd and 3rd respondents, their servants, agents, privies workers howsoever.*

C *(iv) That the court may direct that applicant be allowed right of entry into the offices and premises of 1st respondent to attend meetings and participate in the business, activities and affairs of the 1st respondent company.*

(v) That the court may declare that applicant as director and share holder of the 1st Respondent company is entitled to all proprietary rights and profits accruing to the 1st Respondent company.

E *(vi) That the costs of this application be provided for.”*

The appellant swore to a 17-paragraph affidavit in support of the originating summons. The 3rd respondent swore to a counter-affidavit of 10 paragraphs. The appellant also swore to further and better affidavits. She exhibited Particulars of Director shares allotted, F Memorandum and Articles of Association and all that. The 3rd respondent also swore to a further counter-affidavit.

The learned trial Judge did not see any merit in the case of the appellant. Dismissing the originating summons, the learned trial Judge G said at page 102 of the Record:

“In conclusion, after a careful consideration of all the documentary evidence before me, in the instant case, I hold that the present Application fails on the ground that the Applicant has not satisfactorily proved before this Court that she is a shareholder, member/director of the Respondent Company entitled to seek for the relief claimed in the Originating Summons pursuant to the provision of Sec. 223 of the Companies and Allied Matters Act 1990. It is hereby dismissed.”

Dissatisfied, she appealed to the Court of Appeal. That court

also dismissed the appeal. The court in a majority judgment said at page 158 of the Record:

“From all I have said in the judgment, I find the appeal lacking in merit and I hereby dismiss it.”

Still dissatisfied, the appellant has come to this court. Briefs were filed and duly exchanged. The appellant formulated the following issues for determination:

“1. Whether the Court of Appeal (per Ogebe, JCA and Nsofor, JCA) was right in affirming the decision of the Court of first instance that Appellant failed to prove she was a member and shareholder of the two companies in question?”

2. Whether the Court of Appeal was right in holding that the onus of producing Register of the Companies wrongly placed on the appellant by the Court of first instance, did not affect the substance of the Judge’s conclusion that the Appellant failed to prove she was a member and shareholder of the two Companies?”

The respondents adopted the above issues formulated by the appellant. They also gave notice of preliminary objection that “the grounds of appeal are incompetent in that the particulars thereto are mere arguments or narratives contrary to Order 8 Rule 2(3) of the Supreme Court Rules 1985 (as amended). The cases of Adah v. Adah (2001) 5 NWLR (Pt. 705) 1; Agbaka v. Amadi (1998) 11 NWLR (Pt. 572) 16 and Amadi v. Okoli (1977) 7 SC 57 were cited in support of the preliminary objection. Learned counsel for the appellant also filed a Reply Brief.

Arguing the appeal, learned Senior Advocate for the appellant, Chief Amaechi Nwaiwu submitted on Issue 1 that the Court of Appeal was wrong in affirming the decision of the court of first instance that the appellant failed to prove that she was a member and shareholder of the two companies. Counsel referred to page 3 of the Record where the appellant averred that she is a member of both companies. He also referred to pages 25 and 71 of the Record for the evidence in proof of the originating summons. Counsel relied on sections 26(1); 79(1); 83(1) (a) of the Companies and Allied Matters Act, 1990; Gower’s Principles of Modern Company Law, 4th edition and the following cases Starcolar v. Adeniji (1972) 1 SC 202 at 210; Ezeonwu v. Onyechi (1996) 3 NWLR (Pt. 438) at pages 503 and 504; Baytrust Holdings Ltd. v. I.R.C. (1971) 1 WLR 1333 at 1355

2730 Orji v. Dorji Textiles Mills (Nig) Ltd (2009) 12 KLR Tobi JSC
and Evan's case (1867) LR 2 CH App. 427.

Learned counsel submitted that the respondents admitted that the appellant was gratuitously allotted shares in the companies. He contended that facts admitted need not be proved.

B Learned Senior Advocate submitted that the appellant as a
member and shareholder of both companies had the legal right and
standing to bring the application, the subject matter of the appeal
under section 223 of the Companies and Allied Matters Act. Counsel
argued that the appellant established that she was a member and
C also a shareholder of the two companies. He contended that the
majority judgment did not advert to the legal position on the proof of
membership and shareholding. He commended the minority judgment
of the Court.

Learned Senior Advocate urged the court to interfere with and
D set aside the findings of both the court of first instance and the Court
of Appeal. He cited Chikwendu v. Mbamali & Anor. (1980) 3-4 SC
291; Woluchem v. Gudi (1981) 5 SC 291; Ogbechie v. Onochie
(1988) 1 NWLR (Pt. 70) 370 at 390-391; Ojomo v. Ajao (1983) 9
SC 22 at 53; Onobruhere v. Esegine (1986) 1 NWLR (Pt. 19) 799
E and Ogundipe v. Awe (1988) 1 NWLR (Pt. 68) 118 at 127.

Learned Senior Advocate submitted on Issue 2 that the onus
of producing the Register of Companies wrongly placed on the ap-
pellant by the court of first instance actually affected the substance of
the Judge's conclusion that the appellant failed to prove that she was
F a member, shareholder and director of both companies. Relying on
sections 83(1) and 84(1) of the Companies and Allied Matters Act,
1990, section 98(1) of the Evidence Act, 1990; Ezeonwu v. Onyechi
(supra) and Iphie v. Plateau Auditing; Co. (1957) NRNLR 213, learned
G Senior Advocate submitted that the onus of producing the Register
of Companies was on the respondents who had the duty to produce
same. Relying further on section 149 (d) of the Evidence Act and the
case of Odili v. The State (1977) 4 SC 1, learned Senior Advocate
urged the court to hold that the respondents did not produce the
H Register because had it been produced it would have been
unfavourable to the decision of the court of first instance and the
Court of Appeal, deprived the appellant of the benefit of the Judge
properly applying the law. Counsel urged the court to resolve the
issue in favour of the appellant by holding that the Court of Appeal

was wrong in holding that the onus of producing the Register of the Companies was on the appellant. He urged the court to allow the appeal.

Learned counsel for the respondents, Chief Donald Udogu, submitted on Issue 1 that the appellant was not a member, director or shareholder of any of the companies. Citing the case of Oil Field Supply Centre Ltd v. Johnson (1987) 2 NWLR (Pt. 58) 625, learned counsel contended that the onus was on the appellant to establish her membership of the companies. Counsel argued that the appellant, as a matter of law, must stand or fall on the strength of her assertion that the shares in the two companies were allotted to her and she paid for them. He cited Emegokwe v. Okadigbo (1977) 4 SC 113.

On the issue of admission on the part of the respondents in respect of the shares by the appellant, learned counsel referred to paragraph 5 of the counter-affidavit where it was deposed that "*the consideration for which such shares have been issued is as follows: CASH*". Accordingly, the appellant cannot rely on gratuitous allotment, which is not her case, learned counsel argued. He maintained that it was when the appellant could not pay cash for the shares after allotment that her name was removed as member of the two companies on 23rd March 1993 as per Form CO7. He referred to pages 11, 13, 14, 61, 62 and 63 of the Record on the removal of the appellant and contended that she did not challenge her removal and hence stands removed at all times. On Issue 2, learned counsel quoted what Ogebe, JCA (as he then was) said at page 157 of the Record and submitted that the judgment of the Court of Appeal to the effect that the appellant who was validly removed from the companies on 23rd March, 1993, failed to prove that she was a shareholder, member and director of the two companies. He urged the court to dismiss the appeal.

Learned Senior Advocate in his Reply Brief submitted that the preliminary objection was not well taken as the grounds of appeal and their particulars fully comply with the provisions of Order 8 Rule 2(3) of the Supreme Court Rules (as amended). He cited Osasona v. Ajayi (2004) 14 NWLR (Pt. 894) 545 and Globe Fishing Industries Ltd. v. Coker (1990) 7 NWLR (Pt. 162) 265.

Learned Senior Advocate submitted that the grounds of ap-

peal and particulars therein in the Notice of Appeal which allege error in law are clearly stated and that there are no arguments or narratives as alleged by the respondents. Counsel urged the court to dismiss the preliminary objection.

On the merits of the Respondents Brief, learned Senior Advocate submitted that counsel for the respondents did not put the case of Oil Field Supply Centre Ltd v. Johnson (*supra*) in its correct perspective and cited the dictum of Oputa, JSC, in some length. He pointed out that the respondents contradicted themselves when on one hand they admitted to gratuitous allotment of shares to the appellant and on the other hand maintained that the gratuitous allotment was tied to cash payment.

In his reply to Issue 2, learned Senior Advocate submitted that the respondents missed the point in the argument of Issue 2. He tried to re-argue the issue. I do not think he can do that in his Reply Brief.

Counsel urged the court to set aside the concurrent findings of the two courts as the findings resulted in substantial miscarriage of justice. He cited Ezeonwu v. Onyechi (*supra*); Benmax v. Austin Motor Co. Ltd. (1956) AC 370 and Lion Buildings Ltd. v. Shading (1976) 12 SC 135 at 153.

Let me take first the preliminary objection. Order 8 Rule 2(3) of the Supreme Court Rules reads:

"The notice of appeal shall set forth concisely under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively."

I have carefully examined the grounds of appeal and am of the view that the preliminary objection is thoroughly misconceived and misplaced. The grounds of appeal do not offend Order 8, Rule 2(3) of the Supreme Court Rules. I do not see any arguments. I do not also see any narratives. The objection accordingly fails.

The appeal is on the burden of proof in our law of evidence. The main issue is whether the burden of proof is on the appellant or on the respondents. And that takes me to the Evidence Act.

Section 137 of the Evidence Act provides for the burden of proof in civil cases. The burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side,

regard being had to any presumption that may arise on the pleadings See section 137(1). If such party adduces evidence which ought reasonably to satisfy a court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively until all the issues in the pleadings have been dealt with. See section 137(2). Where there are conflicting presumptions, the case is the same as if there were conflicting evidence. See section 137(3). B

By the section, the burden of proof is not static, it fluctuates between the parties. Subsection (1) places the first burden on the party against whom the court will give judgment if no evidence is adduced on either side. In other words, the onus *probandi* is on the party who would fail if no evidence is given in the case. Thereafter, the second burden goes to the adverse party by virtue of subsection (2). And so the burden changes places almost like a chameleon or the weather cock in climatology until all the issues in the pleadings have been dealt with. C

Section 137(1) appears to be an enactment of the common law rule of *qui affirmat non ei qui negat incumbit probatio*. The rule was invoked by Lord Maugham in *Constantine Line v. Imperial Smelting Corporation* (1942) AC 154, where the learned Judge said: E

“The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is Ei qui affirmat non ei qui negat incumbit. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reason.” F

Phipson justified the rule by saying that it is adopted principally because it is but just that he who invokes the hand of the law should be the first to prove his case; and partly because, in the nature of things a negative is more difficult to establish than an affirmative. See Phipson on Evidence. Sweel and Maxwell (12th Edition) page 36. G

The burden is on a plaintiff to show that he is entitled to the reliefs sought. That burden does not shift to the defendant. See *Elisa v. Disu* (1962) 1 All NLR 214; *The Nigerian Safety Insurance Co. Ltd v. Zaria Cooperative Credit Marketing Union Ltd*, (1978) 1 NCA 1; *Echezau v. Awka Community Council* (1980) 7 CA (Part 1) 103; *Combined Trade Limited v. All States Trust Bank Limited* (1998) 2 NWLR (Pt. 576) 56. H

After all, a plaintiff should not rely on the weakness of the case of a defendant but rather on the strength of his case as proved in court. See *Attorney – General of Anambra State v. Onu Selogun -* (1987) 4 NWLR (Pt. 66) 547; *Nimanteks Associates v. Macro Construction Co. Ltd.* (1991) 2 NWLR (Pt. 174) 411; *Tokimi v. Fagite* B (1999) 10 NWLR (Pt. 624) 588; *Olowu v. Olowu* (1985) 3 NWLR (Pt. 13) 372. Accordingly, a plaintiff who fails to prove the relief or reliefs sought goes home without victory. There are no two ways about it. Our adjectival law is as constant as that, like the sun rising from the East and setting in the West.

C The burden of proof in a case cannot be determined *in vacua* but in relation to the issues raised in the pleadings. Where a fact is pleaded and no evidence is adduced to prove the fact pleaded, no onus is cast on the other side to disprove the fact not proved.

D So far so good on the law. What is the factual position in the case? I have reproduced in this judgment the reliefs sought. I will not repeat myself. All I should say is that the reliefs presuppose appellant's membership of the 1st respondent company, either as a director or as a shareholder. This is clear from the section of the Companies and E Allied Matters Act, 1990 under which the reliefs are sought. It is section 233 of the Act. The section reads:

“(1) *If for any reason it is impracticable to call a meeting of a company or of the board of directors in any manner in which meetings of that company or board may be called, to conduct the meeting of the company or board in the manner prescribed by the articles or this Act, the court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, in the case of the* F *meeting of the company, and of any director of the company in case of the meeting of the board, order a meeting of the company or board, as the case may be, to be called, held and conducted in such manner as the court thinks fit, and where any such order is made, may give such ancillary or consequential directions as it thinks expedient.* H

(2) *It is hereby declared that the directions that may be given under subsection (1) of this section shall include a direction that one member of the company present in person or by proxy in the case of a meeting of the company, and one director in the case of the board*

may, apply to the court for an order to take a decision which shall bind all the members.

(3) Any meeting called, held and conducted in accordance with an order under subsection (1) of this section, shall for all purposes be deemed to be, a meeting of the company or of the board of directors duly called, held and conducted.” B

It is clear from the above section and totality of the reliefs sought that the appellant claims to be a director and a member of the 1st respondent company. There cannot be any argument about that. Section 223(1) clearly provides that a director or a member of a company can initiate an action in a court of law for the purposes of calling or conducting a meeting. C

In view of the fact that the appellant based her action and sought the reliefs under section 223 of the Companies and Allied Matters Act, the section 137(1) burden of proof is on the appellant and not on the respondents. In accordance with section 137(1) of the Evidence Act, I ask the question rhetorically: who or which of the parties will have or obtain judgment in this case if no evidence of directorship, membership or shareholding is given? Can that party be the appellant? No. Certainly not. Can that party be the respondents? Yes, and unequivocally so. After all, the appellant claims to be a director and member of the companies and should prove her dual status in order to obtain judgment. Section 223 clearly provides for the locus standi and the appellant must prove that she has the standing to sue. D E F

Locus standi can only arise from a right conferred on the plaintiff by the enabling law. In other words, the enabling law must confer on the plaintiff the right to sue. The requirement of locus standi is mandatory where the judicial power is constitutionally limited to the determination of a case or controversy or a matter which is defined by reference to criteria which include the legal capacity of the parties to the litigation. See Chief Dr. Thomas v. The Most Rev. Olufosoye (1986) 1 NWLR (Pt. 18) 669. H

Section 137(1) and (2) enjoins the court to examine the pleadings in its search for the party on whom the burden of proof lies. See generally Elemo v. Omoledede (1968) NMLR 359. As the matter was commenced by originating summons, there are no pleadings. I do

not think I will be Wrong to look at the affidavit in support of the summons, in the absence of pleadings. In my view, the affidavit in support takes the place of pleadings in this case. I therefore take some paragraphs of the Affidavit in Support.

"1 That I am the applicant herein.

B *2. That I am a member of the 1st respondent company with RCNo. 67,377 having its registered office at Plot B Industrial Layout, Aba.*

3. That I am director and shareholder of the 1st respondent company.

C *4. That the late Managing Director of the 1st respondent company namely Chief David Nwokocha Orji was my husband who died on 20/9/93.*

D *5. That it has been impracticable and impossible to call a meeting of the 1st respondent company or of the board of directors. I have prevailed on the 2nd and 3rd respondents who are directors and shareholders of the 1st respondent several times to arrange to call a meeting of the 1st respondent but all to no avail. A copy of one of my written demands for a meeting of the 1st respondent is hereby*
E *exhibited and marked as Exhibit A.*

6. That as a director and shareholder of the 1st respondent company I have an interest to speak and vote on any resolution before the meeting of the 1st respondent and its board and to participate in the business and activities of the 1st respondent without
F *obstruction by the 2nd and 3rd respondents, their servants, agents, privies and workers howsoever.*

8. That the 2nd and 3rd respondents and their privies, agents and workers have prevented me from entering the offices and premises of the 1st respondent company to transact the business of the 1st respondent.

9. That it is necessary to call a meeting of the 1st respondent company, for the purpose of complying with statutory requirements concerning its minimum nominal capital and annual returns, and for
H *deliberating upon the business, activities and affairs of the company.*

11. That as a director and shareholder of the 1st respondent company, I am entitled to all proprietary rights and profits accruing to the 1st respondent company hence the need to call for a meeting of the company.

12. *That the failure to call a meeting of the 1st respondent company or of the Board of Directors in a manner in which meetings of the 1st respondent company and its board are called have adversely affected my interests and rights as a member, director and shareholder of the 1st respondent company.*”

The law is elementary that the burden of proof of any issue rests before evidence is gone into upon the party asserting the affirmative of the issue; but after all the evidence have been completed the burden rests on the party against whom the court at the time in question would give judgment if no further evidence was adduced. See *Okechukwu and Sons v. Ndah* (1967) NMLR 368.

While I concede that the burden of proof of the case does not invariably lie on the plaintiff, as it is dependent on the pleadings, I know as a matter of our adjectival law that in most cases, the burden falls on the plaintiff.

Let me also examine section 139 of the Evidence Act. It reads:

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in course of a case be shifted from one side to the other; in considering the amount of evidence necessary to shift that burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.”

By the above section, the burden can be on either party - the plaintiff or the defendant, depending on the party asserting the particular fact. The particular fact which, in my view, is the material and determining fact in this case is the claim by the appellant that she is a director and member of the 1st respondent company. This, being a particular fact within the knowledge of the appellant which she wants the court to believe in its existence, the burden is unequivocally on her to prove the particular fact. It is after the appellant has discharged the burden on her that it shifts to the respondents. Where the appellant fails to prove the particular facts in section 139 of the Evidence Act, the burden does not shift to the respondents.

Did the appellant satisfy the burden of proof placed on her by the Evidence Act? And here, the burden on her is to prove that she was a director and member of the 1st respondent company which

made her a director and shareholder. Let me take the evidence of the appellant. In the main affidavit in support of the originating summons of 17 paragraphs, appellant's only exhibit is the letter she sent to the Secretary of the 1st respondent asking him to summon a meeting of Directors/Shareholders. Is that letter proof that the appellant was a Director or shareholder of the company to justify or vindicate paragraphs 2 and 3 of the Affidavit in Support? I think not. A letter calling for a meeting of a company cannot by any way be regarded or taken as document or evidence of being a Director or Shareholder of a company. In other words, a letter requesting for a meeting of a company cannot metamorphose to membership of the company.

That takes me to the further affidavit in support of 6 paragraphs. The appellant exhibited two main documents as *Exhibits B* and *C*. *Exhibit B*, Form C07 is the Particulars of Directors made pursuant to section 191(4) of CAMA. It indicates the name of the appellant and the number of shares allotted to her which is 10,000 ordinary shares. *Exhibit B* was made on 13th day of January, 1986. *Exhibit C* is Form C07 also shows the number of shares allotted to shareholders. The name of the appellant is also in *Exhibit C*. It is written in *Exhibit C* that "The consideration for which such shares have been allotted is as follows: Cash." in the Remarks column is written as follows:

"Appointed by the authority to the Memorandum and Articles of Association at a meeting held on 13th January, 1986."

I take the further and better affidavit of the appellant at page 69 of the Record. *Exhibit D* is deposed to in paragraph 1 of the affidavit and exhibited. *Exhibit D* is the Memorandum and Articles of Association of the company. All the above documents are on Palm Garden Hotels Limited. And so *Exhibits A, B, C* and *D* are the documents relied upon by the appellant for her status in the Palm Garden Hotels Limited. So far so good for the appellant.

I now take the case of the respondents. In the counter-affidavit of 10 paragraphs sworn by the 3rd respondent, the respondents clearly joined issues with the appellant. Let me read paragraphs 1, 3, 4, 6 and 7.

"1. That I am the 3rd respondent in the above application and make this oath with the knowledge and consent of the other respon-

dents and on our behalf.

3. *That the applicant has no colour of right and/or interest in the 1st respondent company and is not entitled to any of the reliefs claimed by her and paragraph 15 of her affidavit is false,*

4. *That the applicant is not a shareholder, member and/or director of the 1st respondent and she is a stranger in respect thereof and is therefore not entitled to participation in the management of the 1st respondent.*

6. *That as at the death of the former Managing Director of the 1st respondent Chief David Nwokocha Orji, the applicant was not his wife and therefore paragraph 4 of her affidavit is false.*

7. *That all the members and directors of the 1st respondent have been holding normal meetings and managing the normal day to day business and affairs of the 1st respondent and paragraphs 5, 7, 10, 12 and 13 of the applicant's affidavit are false."*

In his further counter affidavit at page 59 of the Record, the 3rd respondent deposed as follows in paragraphs 4 and 5 thereof:

"4. *That paragraphs 1 and 2 of the said affidavit are false, that the true position is that the applicant was gratuitously allotted some shares in the 1st respondent which she never paid for and that was all.*

5. *That when the applicant could not perform, she was removed on 23rd March 1993 as per Form CO7 which she exhibited to her further affidavit to the originating summons as Exhibit B."*

The 3rd respondent deposed to and exhibited *Exhibit B* in paragraph 5 of the further counter affidavit. The Exhibit spreads through pages 61 to 63 of the Record. The exhibit, which is also Particulars of Directors, is dated 23rd day of March, 1993. The following appear in the Remarks column of the exhibit against the appellant:

"Removed by the shareholders at an extraordinary general meeting of the company held on 23rd March 1993 effective from 23rd March, 1993."

The documents relied upon by the appellant in respect of her status as director and shareholder of the company is dated 13th January, 1986. They are the documents which gave birth to the formation of the company. Companies have the legal right to amend, alter or change their memorandum and articles of association. They also

have the right to amend, alter and change their Particulars of Directors. This is clearly provided in Form CO7 as follows: “*Particulars of Directors of any changes therein*”. See *Yalaju Amaye v. AREC Ltd.* (1990) 4 NWLR (Pt. 145) 422. If any alteration or change is carried out in accordance with the provisions of the CAMA, a court of law is not competent to hold against the alteration or change. **Sections 44 to 48 of CAMA provide for the alteration of the Memorandum and Articles of Association and where a company complies with the provisions, that is the end of the matter. The alteration in the Particulars of Directors was made on 23rd March, 1993, some seven years after the initial documents that gave birth to the companies. It is elementary law that where a document is altered, it no more enjoys any legal life. The document becomes moribund or dead to the extent of the alteration. Accordingly, a party cannot rely on such a document because it is lifeless in law. The existing legal life is transferred to the new document which provides for the alteration. It is in this regard, I come to the conclusion that the documents relied upon by the appellant in all her affidavits are totally spent in law and therefore of no evidential or probative value, and I so hold.**

Learned Senior Advocate submitted that the appellant having subscribed to the Memorandum of Association of both companies, she automatically becomes a member and shareholder of the companies by virtue of sections 79 and 83 of CAMA.

Let me briefly examine the two sections. Section 79(1) is relevant and it provides:

“*The subscribers of memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.*”

In making the submission, learned Senior Advocate relied on the Memorandum and Articles of Association at pages 20 to 31 of the Record. The documents are dated 27th day of November, 1984. Can these documents still have effect in the light of those relied upon by the respondents in removing the appellant as indicated above? This is the crux of the matter

and I do not think section 79(1) of the Act can really come to the aid of the appellant. If anything, a close look at the Wordings of the provision in the light of the removal documents on the appellant, will go against her.

The operative and telling expression or word in section 79(1) is “*deemed*”. The present tense of the word is “*deem*”, it means to B
treat a thing as being something that it is not or as possessing certain qualities that it does not possess. It is a formal word often used in legislation to create legal fictions. A deeming provision, according to Advanced Law Lexicon. Vol. 2 (3rd edition) is a provision of law C
which makes supposition. The deeming provision is intended to enlarge the meaning of a particular word or to include matters which otherwise may or may not fall within the main provision. When a person, for example, is deemed to be something, the only meaning possible is that whereas he is not in reality that something, the Act of D
Parliament requires him to be treated as if he were. I will be more comfortable to read section 79(1) in that context.

In my humble view, a deeming provision in a statute is more of a caricature than anything. It is also more of a camouflage than anything. The word, in short, stands in the place of a reality. And a deeming E
provision in a section of a statute will always operate in the absence of the real provision; it cannot operate side by side with the real provision. In other words, both the real and deemed provisions cannot be in the same section dealing with the same subject matter. In F
such a situation, a supposed deeming provision will give way to the real provision.

So much of the law. Let me now apply it. **Section 79(1) can operate in the absence of any adverse or contrary act against a member fay the company. Where, as in this case, the G
appellant’s name was removed by the shareholders, section 79(1) has no teeth to bite because the deeming provision becomes otiose and dead.** It is in this respect, I find section 79(1) not helpful to the appellant.

I go to section 83. The section provides for the keeping of H
Register of Members. The section provides in part

“83(1) *Every company shall keep a register of the members and enter in it the following particulars;*

(a) *the name and addresses of the members and in the case of*

a company having a share capital, a statement of the shares and class of shares if any, held by each member, distinguishing each share by the number so long as the share has a number; and of the amount paid or agreed to be considered as paid on the shares of each member;

B *(b) the date on which each person was registered as a member; and*

(c) the date on which any person ceased to be a member.”

C Why did learned Senior Advocate place reliance on the section when the Register was not produced in the court? Who had the legal duty to produce the Register? Is it the company? This is the crux of the matter.

D In my humble view, proof of being a shareholder of a company is on the party asserting the shareholding and that party, in this case, is the appellant. In *Oil field Supply Centre Ltd, v. Johnson* (1971) 18 (Part II) NSCC 725 at 742, this court held that proof of being a shareholder can be by oral or documentary evidence. Disagreeing with *Omo-Eboh, JCA*, on proof by only documentary evidence, *Oputa, JSC*, said:

E *“But the important question is - is it then the only evidence? Is there statutory requirement in the Companies Act No. 51 of 1968 limiting proof of shareholding solely and only to documentary evidence? If the answer is - No - as it is bound to be, then one with the greatest respect say that the legal position asserted by Omo-Eboh,*
F *JCA that ‘in the absence of proof by documentary evidence the person concerned cannot be said to have conclusively, proved that he is a shareholder’ was a bit too narrowly stated. In fact by s. 83 prima facie evidence. It is not conclusive evidence. Evidence can be docu-*
G *mentary or oral...”*

Although the case dealt specifically with the method of proof - whether documentary or orally or both, it is also a dear authority that the burden is on the party alleging being a shareholder. And that party is the appellant.

H In view of the fact that the burden of proof of membership or being a shareholder was on the appellant, failure to discharge the burden is inimical to her case and I invoke section 149 (d) of the Evidence Act against her.

On the production of the Register, the Court of Appeal

said at page 157 of the Record:

“Although the trial Judge was wrong in casting the onus of producing the register of the companies on the appellant as such registers were in the custody of the companies that error did not in any way affect the substance of the Judge’s conclusion that the appellant failed to prove that she was a shareholder, member and director of the companies.” ^B

With respect, I do not agree entirely with the above. Although the Register is in the custody of the company, the appellant had a duty, in the course of proving her case, to call the company as witness to tender the relevant portion or portions of the Register. While it may not be convenient to tender the whole register, certified true copies of the relevant folios should have sufficed. To me, that was clearly a duty of the appellant. ^C

And that takes me to the issue of alleged admission by the respondents. Appellant relied on paragraph 4 of the further counter-affidavit of the 3rd respondent on the issue of admission. The paragraph reads: ^D

“That paragraphs 1 and 2 of the said affidavit are false, that the true position is that the applicant was gratuitously allotted some shares in the 1st respondent which she never paid for and that was all.” ^E

Denying that there was in law an admission on their part, the 3rd respondent relied further on paragraph 5 of the same affidavit: ^F

“That when the applicant could not perform she was removed on 23rd March 1993 as per Form CO7 which she exhibited to her further affidavit to the originating summons as Exhibit B.”

The dictionary meaning of the word “gratuitous” is something which is performed or done freely without reward or payment being expected. The act is done in the office of friendship without consideration and therefore not enforceable in law. It is a voluntary favour by way of gift, most of the time, without force. And so in the context of paragraph 4, it means that the appellant was allotted some shares without expectation of any payment or consideration. Is that the meaning intended to be conveyed by the deponent in paragraph 4 of the further counter-affidavit? I think not. The words “which she never paid for” do not convey the meaning of “gratuitous” in the same paragraph. They are clearly in conflict and here I am in entire ^H

agreement with learned Senior Advocate when he submitted in the Reply Brief that “the Respondents contradicted themselves when on one hand they admitted to gratuitous allotment of shares to the Appellant and on the other hand maintained that the gratuitous allotment was tied to cash payment.”

B The business idea or trend that dominates the whole transaction is that of payment of consideration for the shares allotted to the appellant. That is contained in the second leg of paragraph 4 of the further counter-affidavit. That is also the content of the whole of paragraph 5 thereof. That is not all. The appellant exhibit in paragraph 1 of the Further Affidavit in Support of her originating summons Form CO7 made pursuant to section 53 of Companies and Allied Matters Act, where it is stated in (b) the following: *“Number of the shares allotted payable in cash - 200,000”*. As the above was exhibited by D the appellant in paragraph 1 of the further affidavit in support of the originating summons, the submission of learned Senior Advocate on the apparent contradiction is neither here nor there. I regard Form CO7 exhibited by the appellant as an admission against interest.

E Admission, in order to bind the party admitting, must be clear, unequivocal and total. Admission is not a game of chance. It is not a subject of speculation or conjecture. On the contrary, it is a total and comprehensive statement orally made or in writing suggesting a clear and unequivocal inference as to any fact in issue or relevant fact F unfavourable to the conclusion contended by the person by whom or in whose behalf the statement is made.

I see in this case a wrong use of word and the word is “gratuitous”. This court cannot because of that come to the conclusion that the shares were gratuitously allotted to the appellant when evidence G to the contrary abound. That will be tantamount to pursuing the shadow and neglecting or avoiding the substances. I cannot take such a course because it is too technical for my liking. After all, that is not the case of the appellant and she cannot now rely on the word to procure judgment.

H In paragraph 2 of the further and better affidavit in support of the originating summons, the appellant deposed that she paid for the shares allotted to her. Where is the evidence of payment? I expected the evidence by way of document exhibited in the further and better affidavit at page 18 of the Record. Appellant only exhibited as Ex-

hibit D the Memorandum and Articles of Association of one of the companies. They are certainly not the evidence of payment for the shares allotted to her. Could she not have exhibited the document if she really paid for the shares? I have the temptation to invoke section 149 (d) of the Evidence Act, once again.

Let me also examine some of the authorities cited by learned Senior Advocate on the Issue of legal status of Memorandum and Articles of Association. In Starcolar v. Adeniji (1972) 1 SC 140, this court interpreted section 26(1) of the CAMA, when it was the Companies Decree, 1968 thus:

“Now it is our view that the learned trial Judge gave an interpretation to section 26(1) of the Companies Decree, 1968, that the words there cannot bear. What section 26(1) is dealing with is a subscriber to the memorandum and it provides that such person automatically becomes a member of the company and must be entered in the register accordingly.”

The construction tallies with the provision of section 79(1) of CAMA. As I indicated on the subsection, section 26(1) cannot operate in the light of the removal of the appellant. Section 26(1) deals with the initial stages in the formation of a company and the subsection should be parochially so construed. It does not affect the situation in this appeal where the appellant was duly removed from the company. And so, Starcolar does not apply at all.

In Ezeonwu v. Chief Onyechi (*supra*), this court similarly held that a person whose name and signature appear in a Memorandum and Articles of Association is prima facie a subscriber to it. Thus where such Memorandum and Articles of Association is tendered in evidence, it shows compliance with section 5 of the Companies Act, 1968 and the burden of introducing evidence in rebuttal is on the party who alleges the contrary. Ezeonwu, like Starcolar never involved removal of appellant and so the decision does not apply here.

Learned Senior Advocate also cited Orojo’s Nigerian Company Law and Practice, page 164. I have read page 164. It does not deal with the issue. It deals with transfer of shares. At page 259 of the Book, the learned author said:

“The subscriber must take and pay for all the shares subscribed by him when calls are duly made and he must take there from the company.”

The above is not helpful to the appellant. If anything, it supports the case of the respondents.

The English case of Baytrust Holdings Ltd. v. Inland Revenue Commissioners, supra, was also cited by learned Senior Advocate. That case dealt with the transfer of shares and the reconstruction of a company. It has nothing to do with the issue before the court.

This is a case of concurrent findings of the two lower courts: the Federal High Court and the Court of Appeal. The crux or fulcrum of this case is the removal of the appellant from the companies. On that issue, the learned trial Judge said at page 102 of the Record:

“From CO7 which contains the particulars of Directors and any changes therein filed in support of the Application as Exhibit B shows that the present applicant has been removed by the shareholders at an extraordinary General Meeting of the company held on 23/3/91 effective from 23rd March 1993.”

Dealing with the same issue, the Court of Appeal said at page 157 of the Record:

“The onus was clearly on the appellant to show that as at the time of the action she was still a shareholder or member of the companies. In respect of Palm Garden Hotels Ltd., page 63 shows that the appellant was removed as Director on the 23rd March 1993. There was also evidence at pages 11-13 that the applicant was removed as Director by an extraordinary General Meeting from the Board of Dorji Textile Mills Ltd. with effect from 23rd March, 1993. The appellant produced no evidence to show that she paid cash for shares in the two companies as she claimed and produced no evidence to show that she was not removed as Director.”

I do not see any perversity in the above concurrent findings of the two courts. They are clearly borne out from the Record and I so hold.

Whether the appellant was removed only as director and not as a shareholder and member of the companies, is neither here nor there. The important point is that she failed to pay for her shares and that means that she is not a member of the companies. I have referred to a plethora of evidence above and so I regard the dichotomy or cleavage in relation to the position she was removed from and the one she retains in law, is mere semantics, verbalism, empty rhetorics and arid legalism which have no place in the realities of this case. This

court is not interested in unnecessary hair splitting. On the contrary, this court is only interested in pursuing the substance of a matter and do substantial justice and not a caricature of it.

I expected the appellant to challenge her removal if she thought that it offended due process in that it did not comply with the relevant provisions of the Companies and Allied Matters Act, but she did not. In the absence of such action, appellant cannot succeed in the action she took asking the court to convene an Extraordinary General Meeting. If she was rightly removed as contended by the respondents and agreed by the two courts below and this court, she has no valid action and I so hold.

In sum, the appeal fails and I award N50.000.00 costs in favour of the respondents.

MUKHTAR JSC

By way of originating summons the appellant sought the following reliefs in the Port Harcourt Judicial Division of the Federal High Court:-

"(i) That an Extra ordinary General Meeting of the company and the Board may be convened by the court for the purpose of considering and if thought fit passing the Resolution set forth in the schedule hereto;

(ii) That the court may give directions as to the manner in which the said meeting is to be called held and conducted and all such ancillary and consequential directions as it may think expedient.

(iii) That the court may direct that Applicant be allowed to attend any general meeting or other meeting of the 1st Respondent and its board and to speak and vote on any resolution before the meeting and to participate in the business and activities of the 1st Respondent company without obstruction, restraint or interference by the 2nd and 3rd respondents, their servants, agents, privies workers howsoever.

(iv) That the court may direct that applicant be allowed right of entry into the offices and premises of 1st respondent to attend meetings and participate in the business, activities and affairs of the 1st respondent company.

(v) *That the court may declare that Applicants as director and share holder of 1st Respondent company is entitled to all proprietary rights and profits accruing to the 1st Respondent company.*

(vi)

(vii) "

B Affidavit, further affidavit and counter affidavit which were evaluated by the learned trial Judge were filed and exchanged by the parties. Documents relating to the dispute were also exhibited and considered. The learned trial judge dismissed the applicant’s application holding thus:-

C *“In conclusion, after a careful consideration of all the documentary evidence before me, in the instant case, I hold that the present Application fails on the ground that the Applicant has not satisfactorily proved before this Court that she is a shareholder member/director of the Respondent company entitled to seek for the relief claimed in the Originating Summons pursuant to the provision of Sec. 223 of the Companies and Allied Matters Act 1990.”*

The applicant was dissatisfied and she appealed to the Court of Appeal, which in a judgment of 2 to 1 dismissed the appeal as lacking in merit. The applicant has again appealed to this court on three grounds of appeal. Briefs of argument were exchanged by learned counsel. The following two issues for determination were raised in the appellant’s brief of argument:-

F *“1. Whether the Court of Appeal (Per Ogebe, J.C.A. and Nsofor, J.C.A.) was right in affirming the decision of the Court of first instance that Appellant failed to prove she was a member and shareholder of the two companies?*

G *2. Whether the Court of Appeal was right in holding that the onus of producing Register of the Companies wrongly placed on the appellant by the Court of first instance, did not affect the substance of the Judge’s conclusion that the Appellant failed to prove she was a member and shareholder of the two Companies?”*

H The issues were adopted by the respondents in their brief of argument. A notice of preliminary objection was raised in the respondents’ brief of argument which attacked the grounds of appeal as being incompetent, in that the particulars thereto are mere arguments or narratives contrary to the provision of Order 8 Rule 2 (3) of the Supreme Court Rules 1985. Learned counsel referred to the

case of Gabriel Amaikwu Adah v. John Okoh Adah (2001) 5 NWLR part 705 page 1. The appellant in her reply brief of argument contended that the grounds of appeal are competent and valid in that they comply with the provisions of Order 8 Rule 2 (3) of the Supreme Court Rules, and the teamed Senior Advocate relied upon the cases of Globe Fishing Industries Ltd v. Coker 1990 7 NWLR part 162 page 265, and Osasona v. Ajayi 2004 14 NWLR part 894 page 545. I have carefully perused the grounds of appeal, and I am satisfied that they are competent, and do not deserve to be struck out. The notice of preliminary objection is hereby overruled.

The pivot of this case revolves around the proof of the application by the appellant. Much as the affidavit and further affidavit contain a lot of facts supported by the documents exhibited, they did not support the reliefs sought to warrant their being granted. It is elementary law that civil matters are determined on preponderance of evidence, and balance of probability. See Elias v. Omo-Dare 1982 5 SC. 25. Odulaja v. Haddad 1973 11 SC.357. The law is also trite that he who asserts a fact must prove it, and where enough and relevant evidence are not adduced, then it is he who has failed to produce the evidence that will fail in his case. The burden of proof is not static for it shifts from one party to the other. See Imana v. Robinson 1979 3-4 SC 1, Elias v. Disu 1962 1 All W.L.R. page 214, and George v. U.B.A. 1972 8-9 SC. 264.

The appellant wanted the court to believe that she is a shareholder of the company, but she did not produce the evidence to establish that fact, for without doing so, the court cannot proceed to make the orders she asked for. The evidence should have been readily available to her for production to the court if indeed she is a shareholder, for the existence of the provision of Section 83(1) of the Company and Allied Matters Act Cap Laws of the Federation of Nigeria 1990 makes it easy for her to do so. The provision reads:-

“83(1). Every company shall keep a register of the members and enter in it the following particulars;

(a) the name and addresses of the members and in the case of a company having a share capital, a statement of the shares and class of shares if any, held by each member, distinguishing each share by the number so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each mem-

ber.

(b) the date on which each person was registered as a member; and

(c) the date on which any person ceased to be a member.”

As easily as the required and necessary document could have been obtained, the appellant did not source for it to put before the court. Could it be that she knew it may damnify her case? The appellant asserted that she was a shareholder then she must prove that she was one. See *Oilfield Supply Centre Ltd v. Johnson* 1971 18 (part ii) NSCC 725.

By virtue of section 137 of the Evidence Act, Cap. 62 Laws of the Federation of Nigeria 1990, the appellant was found wanting in her case. The provision stipulates thus:-

“137. (1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side regard being had to any presumption that may arise on the pleadings.”

It is clear that the above provision has not been met, and so, the appellant cannot be successful even in this court. In the circumstances this appeal lacks merit and deserves to be dismissed. I have read in advance the lead judgment of my learned brother Niki Tobi JSC, and I am in complete agreement with the reasoning and conclusion reached therein. I also dismiss the appeal in its entirety. I abide by the consequential orders made in the lead judgment.

G

OGBUAGU JSC

This is an appeal against the majority decision of the Court of Appeal, Port-Harcourt Division (hereinafter called “the court below”) delivered on 29th January, 2002. The trial court - per Sanyaolu, J, in his Judgment delivered on 31st January, 1996, dismissed the Appellant’s suit or application and all the reliefs she sought in her Originating Summons on the ground that she did not satisfactorily prove that she is a shareholder or a director of the Respondents’ Company.

Dissatisfied with the said decision, she has appealed to this Court

on three grounds of appeal. She has formulated two (2) issues for determination, namely,

“1. Whether the Court of Appeal (per Ogebe JCA and Nsofor, J.C.A) was right in affirming the decision of the court of first instance that Appellant failed to prove she was a member and shareholder of the two Companies in question?” B

2. Whether the Court of Appeal was right in holding that the onus of producing Register of the Companies wrongly placed on the appellant by the Court of first instance, did not effect (sic) the substance of the Judge’s conclusion that the Appellant failed to prove she was a member and shareholder of the two Companies?” C

I note that the Respondents, after giving Notice of Preliminary Objection, adopted the above two issues of the Appellant.

On the 19th October, 2009, when this appeal came up for hearing, Nwauwa, Esq. - learned counsel for the Appellant, relied on D both their Brief of Argument and their Reply Brief. He urged the Court to set aside the majority decision of the court below and allow the appeal.

Mrs. Udogu - the learned counsel for the Respondents, referred to their Brief of Argument incorporating their Preliminary E Objection and adopted the same. She/he, urged the Court to dismiss the appeal Thereafter, Judgment was reserved till to-day.

I will first deal quickly with the Preliminary Objection. I note that the particulars of the grounds of appeal, were/are clearly stated. F Also, leave of the court below, was sought and obtained on 8th April, 2002, to appeal on grounds other than law. As rightly stated in paragraph 2.2 of the Appellant’s Reply Brief, in the case of *Osasona v. Oba A. Ajayi & 3 ors. (2004) 14 NWLR (Pt.894) 545: (2004) 5 SCNJ. 82 @ 93*, this Court - per Uwaifo, JSC, stated that the whole G purpose of grounds of appeal, is to give to the other side, notice of the case it has to meet in the appellate Court. That particulars of the error alleged in a ground of appeal, are intended to highlight the complaint against the judgment on appeal. They are the specification H is going to be canvassed in an attempt to demonstrate the flaw in a relevant aspect of the judgment. With respect, I see no merit whatsoever in the Objection which I accordingly, overrule.

I will now take issue 1 because, its determination in my re-

spectful but firm view, will take care of this appeal. It is now firmly established in a number of decided authorities that he who asserts, must prove. See the cases of *Chief Okubule & ors. v. Oyagbola & ors.* (1990) 4 NWLR (Pt. 147) 723; (1990) 7 SCNJ. 227; *Ike v. Ugboaja & ors.* (1993) 6 NWLR (Pt. 301) 539; (1993) 7 SCNJ. 402; *Chief Archibong & 6 ors. v. Chief Ita & 4 ors.* (2004) 1. SCNJ. 141 @ 160 - per Niki Tobi referring to Section 137 (1) of the Evidence Act and *International Messengers (Nig.) Ltd. v. Pegafor Industries Ltd.* (2005) 5 SCNJ. 120 @ 135 - per Onu, JSC just to mention but a few.

The Case leading to the instant appeal, was fought on affidavit evidence. I note that the application of the Appellant for leave to amend the Originating Summons proceedings by filing and serving an Additional and Better Affidavit, was refused and dismissed by the trial court. I note and as stated by the learned trial Judge in his Ruling of 12th December, 1995, that the filing of the application, was after arguments had begun and completed and both learned counsel for the parties, had addressed the court and the case had been fixed for Judgment. That it was not an amendment as such, but an attempt, to re-open the case by the Appellant. There is/was no appeal against the said Ruling. The Court therefore, is to confine itself with the affidavits filed before the said application. In paragraph 3 of the affidavit in support of the application, the Appellant averred as follows:

"I am a director and shareholder of the 1st Respondents' company".

But in paragraph 4 of the counter-affidavit of the Respondents, it is averred as follows:

"That the applicant is not a shareholder, member and/or director of the 1st respondent and she is a stranger in respect thereof and is therefore not entitled to participation in the management of the 1st respondent"

At page 18 of the Records and in the Further and Better Affidavit in support of the application, the Appellant averred in paragraph 2 as follows:

"That I paid for the shares allotted to me".

She attached thereto, a photocopy of the certified true copy of the Memorandum and Articles of Association of Dorji Textile Mills Nigeria Ltd. as Exhibit "D" dated 27th November, 1984. In paragraph 4 of their further counter-affidavit sworn to on 17th May, 1985,

the Respondents averred as follows:

“That paragraphs 1 and 2 of the said affidavit are false, that the true position is that the applicant was gratuitously allotted some shares in the 1st Respondent which never paid for [sic] and that was all.”

From the above, it is beyond controversy, that issues had been joined in respect of the Appellant’s membership of the 1st respondent Company and as regards her paying for the shares said to be allotted to her. I see and note that at pages 11 and 61 - 63 of the Records, there is a document - Exhibit B in paragraph 5 of the Further counter-affidavit - Corporate Affairs Commission Companies and Allied Matters Decree 1990 containing the following:

“Particulars of Directors and of any changes therein Pursuant to Section 212 (4)”

It is dated 23rd March, 1993. It shows in respect of or against the Appellant, the following on the Remarks column:

“Removed by the shareholders at an extraordinary general meeting of the Company held on 23rd March 1993, effective from 23rd March 1993”.

In effect, as at 23rd March, 1993, the Appellant’s membership or office or as a director, was at an end. She was no longer a shareholder and/or director of the Companies. Period! So, when that action or Summons was taken out, she had no locus standi. She was no more a shareholder and/or director of the Company or Companies. It could not be true therefore, that at the time of the suit, she was a director or shareholder of the 1st Respondent Company. The trial court found as a fact and held at page 102 of the Records inter alia, as follows:

“..... There is also no oral evidence to establish the right of the Applicant as a shareholder, member/director of the Respondent Company. Form C07 which contains the particulars of Directors and any changes therein filed in support of the Application as Exhibit B shows that the present Applicant has been removed by the shareholders at an extraordinary General Meeting of the Company held on 23/3/91 effective from 23rd March, 1993.

In conclusion, after a careful consideration of all the documentary evidence before me, in the instant case, I hold that the present Application fails on the ground that the Applicant has not satisfacto-

rily proved before this Court that she is a shareholder, member/director of the Respondent Company entitle to seek for the relief claimed in the Originating Summons pursuant to the provision of Section 223 of the Companies and Allied Matters Act 1900. It is hereby dismissed”.

B I agree.

The court below in its majority judgment, at page 158 of the Records, stated inter alia, as follows:

C *“There is no where in the judgment the trial court held that the appellant’s actions were incompetent. The trial Judge dismissed the claims purely on the basis of the fact that the appellant failed to prove that she is a shareholder, member and director of the respondents’ companies. The actions were fought on their merit and rightly dismissed.*

D *From all I have said in this judgment, I find the appeal lacking in merit and I hereby dismiss it.....”.*

I also agree.

E Afterwards, and this also settled, in civil cases, the burden of proof, is cast on the party who asserts the affirmative of a particular issue. See the case of Ibrahim v. Ojomo & 3 ors. (2004) 4 NWLR (Pt. 862) 89 (2004) 1SCNJ. 309 @ 323 (2004) 1 S.C. (Pt.II) 136 citing the cases of Akinfosile v. Ajose (1960) SCNLR 447; Okechukwu v. Ndah (1967) NMLR 368 and N.B.N. Ltd. v. Opeola (1994) 1 NWLR (Pt. 319) 125 C.A. In other words, the burden, rests on the Party F whether plaintiff or defendant, who substantially asserts the affirmative of an issue. See the case of Messrs Lewis & Peat (NR) Ltd. v. A.C. Akhimien (1976) 7 S.C. 1157@) 169. There is also no evidence of her paying for the said shares allotted to her.

G Before concluding this Judgment, I note that the Appellant at page 10 of the Records averred in paragraph 3 of her Further Affidavit in support of the Originating Summons, averred as follows:

H *“That on 2/5/94, the petition of late Managing Director of the 1st Respondent Company (i.e. my husband) for dissolution of our marriage and custody of the children was struck out as a result of the death of my husband by the customary court of Aba South Local Government Area holden at Aba — Na-Ohazu, A certified true copy of the record of proceedings of the said court is hereby exhibited and marked as Exhibit “C”.*

I note at page 17 of the Records, that on 2nd May, 1994, the learned counsel for the Petitioner - Uzoma, Esq, confirmed to the said court, the death of the Petitioner. He applied to withdraw the suit which application was granted and accordingly the matter, was struck out. It can be seen that it is the Appellant who has produced this document which clearly shows that before the death of her husband, all was not well with both of them. Things had fallen apart that her husband had gone to court and not only asked for the dissolution of the marriage between them but even asked for custody of their children. The 2nd and 3rd Respondents appear to be brothers or relations of the Appellant's late husband. Any wonder that in paragraph 6 of the counter-affidavit, it is averred as follows;

"That as at the death of the former Managing, Director of the 1st Respondent Chief David Nwokocha Orji, the applicant was not his wife and therefore paragraph 4 of her affidavit is false".

There are also the relevant averments in paragraphs 7, 8 and 9 thereof. I will stop. I say no more. Over to the learned counsel for the Appellant.

Let me also note that there are concurrent findings of fact by the two lower courts which, in my respectful view, are not perverse and are borne out from the documentary evidence in the Records. The attitude of this Court in the circumstances, not to disturb or interfere, is now firmly established. See the case of *Madam Amadi v. Orisakwe & ors. (2005) 1 SCN.L.20 (@ 27; (2005) 1 S.C. (Pt.1) 35* citing other cases therein.

It is from the foregoing and the more detailed lead Judgment of my learned brother, Niki Tobi, JSC just delivered and which I had the privilege of reading before now and I agree with the conclusion, that I too find not merit in this appeal. I also dismiss it and affirm the decision of the majority Judgment affirming the Judgment of the trial court. I also abide by the consequential order in respect of costs.

MUHAMMAD JSC

I read in advance the judgment just delivered by my learned brother Tobi, JSC. I agree with him that the appeal is devoid of merit and it must fail. I too, accordingly, dismiss the appeal. I abide by orders contained in the leading judgment including order as to costs.

CHUKWUMA-ENEH JSC

I have read before now in draft the judgment of my learned brother Niki Tobi JSC just delivered. I agree with his reasoning and conclusions and that the appeal lacks merit, and should be dismissed.

B However, I must emphasis that there is no better way the appellant could have conclusively discharged the onus of proving that she is a member of the two companies that is, Dorji Textiles Mills (Nig) Ltd. and Palm Gardens Hotels Ltd, than by exhibiting to her affidavit in support of the Originating Summons the membership registers or
C the certified copies of the same, that is particularly as the two companies are still thriving concerns. Besides, it has been quite evident from the conflicting affidavits of the parties as to the facts in issue that commencing this action by way of Originating Summons is most inappropriate.
D In this regard the materials before the trial court fell far too short of making out any plausible case to support her claim of membership of the two companies.

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