

**SUPREME COURT OF NIGERIA**  
14TH JANUARY, 2011. SC. 239/2003  
**CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN,**  
**F. F. TABAI, I. T. MUHAMMAD, M. S.**  
**MUNTAKA-COOMASSIE JJSC**

FEDERAL AIRPORTS AUTHORITY ..... APPELLANT  
OF NIGERIA

AND

WAMAL EXPRESS SERVICES ..... RESPONDENT  
(NIG) LIMITED

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AFFIDAVITS - Averments - Failure to object - Averments in an affidavit which are not directly denied - Are deemed admitted - As in the case of appellant - With respect to the record of appeal (H1)

EVIDENCE - Public documents - Effect of non-certification - The non-certification of public documents - Such as volume 11 of the record of appeal herein - Makes it an unreliable evidence (H2)

COURTS - Applications - Duty to decide - It is the duty of a court to decide any application before it - Notwithstanding its pretrial opinion thereon - It is a party's constitutional right (H3)

JUDGMENTS - Validity - Pending applications - A judgment delivered without first deciding all interlocutory applications - Is a nullity and liable to be set aside (H4)

APPEALS - Grounds - Competence - The objection to the competence of the grounds of appeal - Before the Court of Appeal - Lacks merit in its totality (H5)

PRACTICE & PROCEDURE - Undefended list - Leave to defend - How obtained - The defendant must deliver a notice of such intention - With an affidavit setting forth his defence - Within five days before the date of hearing (H6)

PRACTICE & PROCEDURE - Undefended list - Transfer to general

cause list - Basis - Where there was conflicting affidavit evidence of parties - A triable issue had arisen - Which should be transferred to the general cause list (H7)

PRACTICE & PROCEDURE - Undefended list - Defence on the merit - Meaning - A defence is said to be on the merit - If predicated on legal defence against the substance of a claim - As opposed to a matter of procedure (H8)

### ***FACTS***

The plaintiff/appellant sued defendant/respondent before the Federal High Court holden at Lagos claiming the sum of \$38,475.00 (thirty eight thousand, four hundred and seventy five US Dollars) and 21% interest per annum thereon until the entire debt is liquidated. Upon filing the suit, appellant had applied and obtained an order placing same on the undefended list. Appellant's case was that it had engaged the respondent to clear and deliver to it, a consignment of thirty (30) electrical transformers from the Apapa Port. Respondent cleared the consignment and upon delivery of same, wrote to appellant, notifying it of the allegedly "brushed condition" in which the consignment arrived. However, on delivery, appellant examined the consignment and discovered that five (5) of the transformers were missing. It sought explanations from respondent but got nothing apart from the insinuation that the consignment did not land intact. This prompted the appellant to seek clarification from other organisations connected with shipment of the consignment, each of which replied that the consignment landed intact.

Consequently, appellant instituted the above suit claiming the cost of five missing transformers from the respondent. Respondent filed a notice of intention to defend, accompanied with an affidavit, setting out its defence. It deposed inter alia, that when it noticed the "brushed condition" of the consignment, it had invited one cargo superintendent, who then discovered that five transformers were missing. Trial court considered the affidavit and held that respondent had no defence to the suit. So, it gave judgment to appellant on limited interest rate of 6% per annum. Aggrieved, respondent appealed to the Court of Appeal, while the appellant cross-appealed, based on the interest rate. The Court of Appeal upheld the appeal but errone-

ously failed to consider a notice of preliminary objection filed and argued by respondent therein, against the competence of the appeal. Dissatisfied, appellant appealed to the Supreme Court against the decision of the Court of Appeal, raising for determination, the propriety and effect of failure to consider the said objection. The Supreme Court also assumed jurisdiction to rehear the appeal and cross appeal filed before the Court of Appeal.

### **ISSUES FOR DETERMINATION**

1. *“Whether the court below was right in [a] failing to consider the Appellant’s notice of intention to rely upon preliminary objection duly filed and argued [b] referring to the issue of jurisdiction in the said notice as having been raised by the Appellant.*

2. *“Whether the learned trial judge was right in refusing to grant the defendant/appellant leave to defend the action, having regard to the fact that the affidavit of the parties and the finding of the learned trial judge, showed that the action was in negligence and not in respect of a debt or liquidated money demand.*

**HELD** (Unanimously dismissing the appeal before it, allowing the appeal before the Court of Appeal and striking out the cross-appeal per **MUHAMMAD JSC**)

### **AFFIDAVITS - Averments - Failure to object**

1. With regard to vol. II of the record of appeal, which was received by this court on 13/7/05, the learned counsel for the appellant filed an affidavit on 24/11/06, challenging the said record. I consider it relevant to re-produce the challenge posed by the said counsel. He stated, inter alia:

4. *On 23/9/02 Chief G. N. Uwechue (“Respondent’s counsel”) argued the Respondent’s appeal before the Court of Appeal, Lagos, whilst I argued on the Applicant’s behalf in opposition to the Appeal, including the Notice of Preliminary Objection, which was not only filed separately but also incorporated in the Appellant’s Brief.*

5. *On the said date of hearing of the appeals, Respondent’s counsel withdrew the respondent’s objection to jurisdiction of the trial court.*

6. *I was surprised therefore to see the following excerpts from the proceedings of the Court of Appeal on 23/9/02 [page 265 of volume 2 of the record] and the judgment of the Court of Appeal on*

2/12/02 [last para. of page 238 - first line of page 239 of the record] respectively.

i. Musa: I am not pursuing the objection as to jurisdiction. I oppose the appeal. Respondent's brief was filed on 9/4/02. We have a cross appeal. A notice of preliminary objection was filed. I ask that  
B the appeal be dismissed.

ii. Excerpt from the judgment of the Court of Appeal on 2/12/02 [last para of page 238 - first line of page 239 of the Record] - Mr. Charles Musa, learned counsel for the respondent/cross-appellant adopted his client's brief of argument filed on 9<sup>th</sup> April, 2001 and  
C while referring to the Notice of Preliminary Objection filed on 12<sup>th</sup> April, 2002, but withdrawing his objection as to jurisdiction, urged that the appeal be dismissed and the cross-appeal be allowed.

7. The foregoing statements do not represent the facts of this  
D matter because the appellant, plaintiff at the trial court and respondent/cross-appellant at the Court of Appeal did not object to either the jurisdiction of the trial court or that of the Court of Appeal.

8. The said record of proceedings should have stated that it was Chief Uwechue, SAN who said "I am not pursuing the objection  
E as to jurisdiction."

I have observed that the averments in the above paragraphs of the affidavit which challenges vol. II of the record have not been responded to by the respondent.

F It is trite law that any averment in an affidavit which has not clearly, unequivocally and directly been denied, is deemed admitted.  
(pp. 189 B/190 E/G)

### **EVIDENCE - Public documents - Effect of non-certification**

G 2. Non-certification of a public document which includes court's proceedings or records (section 109 of the Evidence Act). Section 111 (i) of the Evidence Act provides as follows:

"Every public officer, having the custody of a public document which any person has a right to inspect, shall give that person  
H on demand a copy of it on payment of the legal fees thereof, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is

*authorised by law to make use of a seal, and such copies so certified shall be called certified copies.”*

Vol. II of the record of appeal in this appeal lacks all the requirements stipulated by the Evidence Act; it has not been done in conformity with the Evidence Act. It is difficult for this court to rely on such uncertified public documents. Vol. II of the record of appeal in this appeal is hereby discountenanced. (p. 190 H) B

### ***COURTS - Applications - Duty to decide***

3. The portion quoted by me earlier from the judgment of the court below, did not actually consider the notice of preliminary objection filed and moved by the appellant. It is the law that a court of law has neither jurisdiction nor discretionary power to refuse to take a pending process before it, whatever may be its pre-trial opinion on it. The process may be a downright abuse of the judiciary as an institution. It may be stupid, reckless, irregular, aberrant or unmeritorious, but still, the court must hear it and rule on it. C

Indeed, it is the duty of a court to entertain and decide on the merit or otherwise of any application brought before it by any party, notwithstanding the perceived strength or the weakness of such application. It is a party's basic and constitutional right which he cannot be denied of. (p. 191 D) E

### ***JUDGMENTS - Validity - Pending applications***

4. Thus, it would be wrong of a court to proceed to treat an appeal to its final conclusion, when other processes are still pending. F

The position of the judgment of the court below is a nullity, as it failed to do what it ought to have done in the first place, i.e. treating an impending application/process before it. That judgment is liable to be set aside and I accordingly do so. (p. 191 H) G

### ***APPEALS - Grounds - Competence***

5. I have carefully considered the elaborate submissions made by the learned counsel for the appellant as respondent at the court below and that of the learned SAN for the respondent as appellant at the court below. My inclination is more in line with the respondent's submission. The preliminary objection in its totality lacks merit. It is my finding that all the grounds of appeal are competent and could sus- H

tain the appeal before the court below. The preliminary objection is hereby dismissed. This entitles me to consider the merit of the appeal placed before the court below. (p. 198 F)

***Undefended list - Leave to defend - How obtained***

- B 6. Under the said rules, a defendant who receives the afore-mentioned process and who intends to defend the suit must within five days before the day fixed for hearing, deliver a notice in writing of his intention to defend the suit together with an affidavit setting forth the grounds of his defence. The court shall enter the suit on the general cause list for hearing. Where the defendant served with the writ of summons and affidavit fails to deliver his notice of intention to defend and affidavit as prescribed by the rule within the time allowed, the court may at any time before delivering judgment, upon the defendant filing an affidavit disclosing defence on the merit and satisfactorily explaining his neglect, grant the defendant leave to defend the suit. (p. 201 G)

***Undefended list - Transfer to general cause list - Basis***

- E 7. It is clear from the counter-affidavit evidence that the defendant/appellant denied liability for negligence. The claim for money certainly pre supposes that negligence has been admitted by the defendant or that it has been proved against him. F The issue of negligence is a matter of fact to be proved. No oral evidence was led. On the face of the printed evidence from both sides, it is my view that the case should ordinarily have been transferred to the general cause list. This is because there has arisen from the conflicting affidavit evidence before the court, controversy as to whether the defendant/appellant was guilty of negligence. That controversy would continue to rage on, without a readily decipherable and securely conclusive decision either way. In such a situation, the trial court is generally under a duty to allow for full and formal trial, by transferring the suit to the general cause list. A triable issue is said H to have arisen. (pp. 204 F/205 B)

***Undefended list - Defence on the merit - Meaning***

8. Having not filed their counter-affidavit within the prescribed period to be able to defend this action, the defendant must comply

strictly with the provisions of rule 12. Their affidavit, in the instant case, counter-affidavit must disclose a defence on the merit and a satisfactory explanation as to why they have failed to file their processes within the time prescribed by the rules of court. They have said that they could not file their processes within the time allowed, for reason of negotiations for settlement. This was not challenged. B This deposition explains the neglect. But, does the counter-affidavit contain materials which can pass for a defence on the merit? A defence contained in such a counter-affidavit will be said to be on the merit, if it is predicated on a legal defence, properly founded by the defendant/appellant against the substance of the plaintiff/respondent's C claim, as opposed to a mere matter of procedure, practice or form. (p. 204 F)

### **REPRESENTATION**

Charles Musa for the Appellant  
Emeka Olepoko for the Respondent

### **CASES REFERRED TO**

Agagu v. Dawodu (1990) 9 NWLR (Pt. 160) 56 E  
Okosebikan v. Williams (1996) 5 NWLR (pt. 449) 437  
Irolo v. Uka (2002) 7SC (Pt. 11) 77 (2002) NWLR (Pt. 786) 195 at 225  
A-G Federation v. AIC Ltd. (2000) FWLR (Pt. 26) 1744 at 1758 F  
Nigeria Unlimited & Anor v. Simcon Monokpo & Anor. (2003) 18 NWLR (Pt. 852) 346  
Adebisi Maccrecor Associates Ltd. vs. Nigeria Merchant Bank Ltd. (1996) 2 NWLR (Pt. 431) 378

### **STATUTES & RULES REFERRED TO**

Evidence Act, s. 109  
Supreme Court Act, Cap. 5.15, LFN 2004, s. 22  
Supreme Court Rules, as amended, O. 8 r. 12  
Federal High Court (Civil Procedure) Rules, O. 3 rr. 9, 10, 11, 12 & H 13

### **LEAD JUDGMENT BY MUHAMMAD JSC**

The plaintiff's claim against the defendant at the Federal High

Court (trial court) holden at Lagos is for:

1) the sum of \$38,475.00 (Thirty Eight Thousand, Four Hundred and Seventy Five US Dollars)

2) interest on the said sum at the rate of 21% per annum compounded monthly from 26<sup>th</sup> May, 1994, until the entire debt is liquidated.

The salient facts giving rise to the above claim, according to the plaintiff, is that the plaintiff was established pursuant to the Federal Airport Authority of Nigeria, Decree 1996. It manages and supervises, inter alia: all airports in Nigeria with offices in Lagos etc. and has taken over all the assets and liabilities of the body previously known as the Nigerian Airports Authority. The defendant, the plaintiff averred, is a limited liability Company incorporated in Nigeria and has offices in Nigeria including Lagos. The defendant carries on the business of clearing, customs and shipping agents.

The plaintiff averred that it instructed the defendant to clear from the Apapa Port a consignment of thirty (30) electrical transformers shipped from Rotterdam and deliver same to it. Pursuant to this instruction, the defendant cleared the said consignment which consignment was securely enclosed in a container bearing a number TPHU 41079273 and an original seal number 002595. Upon arrival of the consignment, the defendant wrote to the plaintiff and notified it only of the allegedly brushed condition in which the consignment arrived, but did not mention anything about part of the consignment being missing. This was by its letter dated 25<sup>th</sup> May, 1993. On taking delivery of the said consignment from the defendant and after examination of same, the plaintiff discovered that five (5) of the 100KVA DYII/400V oil cooled, step down transformers valued then at US\$38,475.00 (Thirty Eight Thousand, Four Hundred and Seventy Five US Dollars) were missing. The plaintiff promptly sought an explanation for the missing transformers from the defendant. The defendant sought to exculpate itself from liability by alleging that the consignment was delivered brushed, thus insinuating that the said consignment did not land intact but that the container housing the consignment was damaged.

Not satisfied with the above explanation, the plaintiff by a letter dated 11<sup>th</sup> June, 1993, wrote to the Nigerian Ports Plc. to furnish it with the Delivery Condition Report to enable it verify the



defendant's explanation. The plaintiff instructed its solicitors to seek clarification from other organisations connected with the shipment of the said consignment. The various organisations replied that the said consignment landed and was delivered with its consignment of thirty (30) transformers intact and its seal unbroken. By its letter to the defendant of 23<sup>rd</sup> June, 1993, the plaintiff demanded for documents from the defendant to prove that the defendant was not liable for the allegedly missing transformers. The plaintiff insisted that the defendant is responsible/liable for the missing transformers and that it would have gained interest of at least 21% per annum compounded monthly on the sum claimed had the defendant paid same to it on or before 25<sup>th</sup> May, 1993 when this debt arose. The plaintiff averred finally that the defendant has no defence to this action. B C

Leave was granted to the defendant by the High Court to file its counter-affidavit out of time. The counter affidavit was indeed filed. In the counter affidavit, the defendant claimed that the container in which the transformers were loaded had been brushed (damaged) before it took delivery. It also claimed in the counter affidavit that when it invited one "Marine Cargo Superintendent", it was he who discovered that 5 units of the transformers were missing. The defendant denied liability for the loss claiming that the brushing of the transformers had taken place before it took delivery and that it was as a result of the brushing that the electrical transformers may have become missing because of the nature of the container in which the goods were placed. D E F

The suit before the trial court was initiated through the undefended list procedure vide particulars of claim filed on 18/3/97 claiming the value of five transformers which the defendant failed to deliver to the plaintiff. According to the plaintiff, facts deposed to in the affidavit supporting the particulars of claim clearly revealed that the respondent had no defence to the suit. The suit was placed on the undefended list by the trial court. G

Based on his findings after having considered the affidavit evidence and the law, the learned trial judge entered judgment against the defendant and in favour of the plaintiff in the sum of US\$38,475.00 (dollars) with interest there on at rate of 6% per annum from 26/5/98 until the entire judgment debt is liquidated or its equivalent at the Central Bank of Nigeria. H

The defendant was unhappy with the trial court's judgment and it appealed to the Court of Appeal. The plaintiff was also unhappy with the trial court's judgment on the interest and as respondent at the court below, it cross-appealed. Both the notice of the Main Appeal and that of the cross-appeal were subsequently amended.

B And, in addition to the notice of Cross-appeal, the respondent at the court below filed a Notice of intention to rely upon a preliminary objection to the appeal.

C On 2/12/02, the court below delivered its judgment upholding the appeal of the appellant in that court and dismissed the respondent's cross-appeal.

Dissatisfied, the plaintiff/respondent and now appellant before this court, filed an appeal to this court vide Notice of Appeal of 27/2/03.

D In this court, the parties filed and exchanged briefs of argument. In his brief of argument, learned counsel for the appellant formulated the following issues for our determination:-

E *i. "whether the court below was right in [a] failing to consider the Appellant's notice of intention to rely upon preliminary objection duly filed and argued [b] referring to the issue of jurisdiction in the said notice as having been raised by the Appellant. (Ground 5 & 6 of the notice of appeal).*

F *ii. Whether the court below was right in setting aside the judgment of the trial court. (Grounds 1, 2, 3, 4 and 7 of the notice of appeal).*

*iii. Whether the court below was right in dismissing the cross-appeal. (Ground 8 of the notice of appeal)."*

G The questions for determination formulated by learned counsel for the respondent are as follows:

*1. "whether the Court of Appeal was right in setting aside the judgment of the trial court.*

*2. Whether the Court of Appeal was right in dismissing the Cross-Appeal.*

H *3. Whether the Court of Appeal was right in refusing to consider the Appellants Notice of Intention to Rely Upon Preliminary Objection challenging jurisdiction."*

Appellant's issue No. 1 tallies with respondent's third issue. The issue is on the lower court's refusal to consider the appellant's notice of

intention to rely upon preliminary objection filed by the appellant. Learned counsel for the appellant submitted that it is the right of parties to be heard on the merit on cases put forward by them before a court arrives at a decision, following the principle of *audi alteram partem*. Thus, the court is under a firm duty to determine all the applications filed before it gives judgment and failure to do so is fatal to the whole proceedings as well as the judgment delivered therefrom. Learned counsel cited and relied on the cases of *Mobil Producing Nigeria Unlimited & Anor. v. Simcon Monokpo & Anor.* (2003) 18 NWLR (Pt. 852) 346; *Elike v. Nwankwaola* (1984) 12 SC 30. And *A-G Federation v. A. I. C. Limited* (2000) FWLR (Pt. 26) 1744 at 1758 G-H. The learned counsel for the appellant submitted further that the preliminary objection was contained and argued in the appellant's brief of argument. The respondent proffered arguments in response to the notice of objection in its reply brief. At the hearing of the appeal, learned counsel for the appellant said that he moved the said preliminary objection. Learned counsel submitted that the court below was in grievous error when it failed to consider the notice of preliminary objection and the issue of award of relief not claimed duly raised in the appellant's brief filed before it. Learned counsel argued that the only mention of the notice of objection in the judgment of the court below is where it referred to the date the respondent's/cross-appellant's brief was adopted and that the objection as to jurisdiction was withdrawn by Mr. Charles Musa, learned counsel for the respondent/cross-appellant. Learned counsel argued further, that after acknowledging the existence of the said notice of preliminary objection, the trial court curiously failed to consider and or determine it. Learned counsel pointed that the appellant, as plaintiff and the successful party at the trial court, could not have objected to the jurisdiction of the court that entered judgment in its favour. Thus the court below, he argued, erred in holding that the appellant withdrew its objection to jurisdiction. Failure to hear the preliminary objection rendered the judgment of the said court a nullity and prays this court to set it aside as the court below denied the appellant its right to fair hearing as guaranteed on the constitution which renders the judgment a nullity.

Learned counsel for the respondent argued the appellant's notice of preliminary objection in his issue No. 3. He stated that the

appellant in the course of arguing its brief withdrew the Notice of intention to rely upon preliminary objection. He submitted that the court below was right in refusing to consider that withdrawn application. He argued that all the cases cited in support of the argument on the preliminary objection are not applicable to the present case as  
 B the application is no longer pending before the court.

It is true that the learned counsel for the appellant herein as respondent/cross-appellant at the court below, was one Charles Musa who filed a notice of intention to rely upon preliminary objection  
 C against the competence of all the grounds of appeal filed in the notice of appeal (see page 229 of the printed record of appeal). This was at the court below. It is also true that the learned counsel for the respondent/cross-appellant at the court below set out and argued the preliminary objection in his brief of argument in pursuit of the  
 D appeal, (pp. 170, esp 174-182 of the Record of Appeal).

Learned counsel for the appellant/cross-respondent at the court below, filed a reply brief/cross-respondent's brief of argument, (see pp. 198 - 221 of the record).

The appeal was heard by the court below on Monday the  
 E 23<sup>rd</sup> day of September, 2002. On that day, learned counsel for the appellant/cross-respondent adopted the briefs of argument filed by him and he urged the court below to allow the appeal. Learned counsel for the respondent/cross-appellant is recorded to have said as follows:  
 F

*"Musa: I am not pursuing the objection as to jurisdiction. I oppose the appeal. Respondent's brief was filed on 9/4/02. We have a cross-appeal. A notice of preliminary objection was filed. I ask that the appeal be dismissed.*

G *"(underlining for emphasis)*

*(see pp. 265 of Vol. II of the record of appeal).*

In its judgment which was delivered on the 2<sup>nd</sup> day of December, 2002, the court below, per Aderemi, JCA (as he then was), stated, inter alia:

H *"When this appeal came before us on the 23<sup>d</sup> of September, 2002, Chief Uwechue, SAN, learned counsel for the appellants, adopted the appellants brief of argument filed on 14<sup>th</sup> March, 2000 and the reply brief filed on 5<sup>th</sup> June, 2001, which was deemed to have been properly filed on 26<sup>th</sup> September, 2001; he urged that the*

appeal be allowed. Mr. Charles Musa, learned counsel for the respondent/cross-appellant adopted his client's brief of argument filed on 9<sup>th</sup> April, 2001 and while referring to the notice of preliminary objection filed on 12<sup>th</sup> April, 2002, but withdrawing his objection as to jurisdiction, urged that the appeal be dismissed and the cross-appeal be allowed,"

(underlining supplied for emphasis)

**With regard to vol. II of the record of appeal which was received by this court on 13/7/05, the learned counsel for the appellant filed an affidavit on 24/11/06, challenging the said record. I consider it relevant to re-produce the challenge posed by the said counsel. He stated, inter alia:**

2. "I have had charge of this matter since its inception at the Federal High Court, Lagos by virtue of which position I am conversant with the facts of this same.

3. I depose to this affidavit from facts within my personal knowledge.

**4. On 23/9/02 Chief G. N. Uwechue ("Respondent's counsel") argued the Respondent's appeal before the Court of Appeal, Lagos, whilst I argued on the Applicant's behalf in opposition to the appeal, including the notice of preliminary objection which was not only filed separately but also incorporated in the Appellant's Brief.**

**5. On the said date of hearing of the appeals Respondent's counsel withdrew the respondent's objection to jurisdiction of the trial court.**

**6. I was surprised therefore to see the following excerpts from the proceedings of the Court of Appeal on 23/9/02 [page 265 of volume 2 of the record] and the judgment of the Court of Appeal on 2/12/02 [last para. of page 238 - first line of page 239 of the record] respectively.**

**i. Musa: I am not pursuing the objection as to jurisdiction. I oppose the appeal. Respondent's brief was filed on 9/4/02. We have a cross appeal. A notice of preliminary objection was filed. I ask that the appeal be dismissed.**

**ii. Excerpt from the judgment of the Court of Appeal on 2/12/02 [last para. of page 238 - first line of page 239 of the record] - Mr. Charles Musa, learned counsel for the re-**

***spondent/cross-appellant adopted his client's brief of argument filed on 9<sup>th</sup> April, 2001 and while referring to the Notice of Preliminary Objection filed on 12<sup>th</sup> April, 2002 but withdrawing his objection as to jurisdiction, urged that the appeal be dismissed and the cross-appeal be allowed.***

***7. The foregoing statements do not represent the facts of this matter because the appellant, plaintiff at the trial court and respondent/cross-appellant at the Court of Appeal, did not object to either the jurisdiction of the trial court or that of the Court of Appeal.***

***8. The said record of proceedings should have stated that it was Chief Uwechue, SAN who said "I am not pursuing the objection as to jurisdiction."***

9. It was the respondent herein who, in its reply brief, for the first time, objected to the jurisdiction of the trial court.

10. The said respondent's counsel had informed me that the respondent would not pursue its said objection, a fact that I included in the appellant's Notice of Preliminary Objection, as follows

***"Alternatively the issue of jurisdiction raised in the appellant's Reply brief and reply to cross-appellant's brief especially at paragraphs 2.18, 2.19, 5, 6.02, 6.03, 6.04, 6.05 and 6.06 thereof should be struck out, the appellant having graciously agreed to withdraw the said issues."***

***I have observed that the averments in the above paragraphs of the affidavit which challenges vol. II of the record have not been responded to by the respondent.*** Secondly, I observe as well, that except for the enrolled order of the court below, which appears at the tail end of the said vol. II of the record of appeal (pp. 267 and 2688) none of the pages, or contents of any of the pages have been certified by the court below. Each of the two issues pointed above can have a fatal effect on the proceedings of the court below.

***It is trite law that any averment in an affidavit, which has not clearly, unequivocally and directly been denied is deemed admitted.*** See: *Lawson - Jack v. The S. P. D. C of Nig. Ltd. (2002) 7 SC (pt. II) 112*; *The Reg. Trustees of National Association of Community Health Practitioners of Nig. & Ors. v. Medical and Health Workers Union of Nig. & Ors. (2008) 71 SCNJ at 348*. Further, ***non-certification of a public document which includes court's proceed-***

**ings or records (section 109 of the Evidence Act). Section 111 (i) of the Evidence Act provides as follows:**

***“Every public officer having the custody of a public document which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees thereof, together with a certificate written at the foot of such copy, that it is a true copy of such document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.”***

**Vol. II of the record of appeal in this appeal lacks all the requirements stipulated by the Evidence Act; it has not been done in conformity with the Evidence Act. It is difficult for this court to rely on such uncertified public documents. Vol. II of the record of appeal in this appeal is hereby discountenanced.**  
See: *Agagu v. Dawodu* (1990) 9 NWLR (Pt. 160) 56.

***The portion quoted by me earlier from the judgment of the court below, did not actually consider the notice of preliminary objection filed and moved by the appellant. It is the law that a court of law has neither jurisdiction nor discretionary power to refuse to take a pending process before it, whatever may be its pre-trial opinion on it. The process may be a downright abuse of the judiciary as an institution. It may be stupid, reckless, irregular, aberrant or unmeritorious, but still, the court must hear it and rule on it.*** See the case of *Elike v. Nwankwaola* (1984) 12 SC 301, cited also by the learned counsel for the appellant. ***Indeed, it is the duty of a court to entertain and decide on the merit or otherwise of any application brought before it by any party notwithstanding the perceived strength or the weakness of such a application. It is a party's basic and constitutional right which he cannot be denied of.*** See: *Mobil Producing Nigeria Unlimited & Anor. v. Simeon Monokpo & Anor.* (2003) 18 NWLR (Pt. 852) 346. ***Thus, it would be wrong of a court to proceed to treat an appeal to its final conclusion when other processes are still pending.*** See: *Irolo v. Uka* (2002) 7SC (Pt. 11) 77 (2002) NWLR (Pt. 786) 195 at 225. A-G Federation

v. AIC Ltd. (2000) FWLR (Pt. 26) 1744 at 1758. ***The position of the judgment of the court below is a nullity, as it failed to do what it ought to have done in the first place, i.e. treating an impending application/process before it. That judgment is liable to be set aside and I accordingly do so.***

B As this court has been vested with the power to exercise full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may re-hear the case in whole or in part in accordance with the powers of that court, (section 22 of the Supreme Court Act, Cap 5.15, LFN, 2004; order 8 rule 12 of the Supreme Court Rules (as amended in 2002)). I shall therefore, by virtue of the above provisions, go on to consider the notice of preliminary objection filed and moved before the court below, as if they were filed and moved in this court. See the case of Odedo v. INEC (2008) 7SCNJ I at page 26.

The notice of intention by the respondent to rely upon preliminary objection is contained on page 229 of the record of appeal. It is couched as follows:

E “*TAKE NOTICE that the respondent herein named intends at the hearing of this appeal, to rely upon the preliminary objection notice whereof is hereby given to you viz: That the grounds of appeal filed in the notice of appeal are incompetent and should be struck out.*”

F This challenge is against all the grounds of appeal filed by the appellant at the court below. It is to be noted that the original notice of appeal was dated 12<sup>th</sup> of August, 1998. It was filed at the trial court on 13<sup>th</sup> August, 1998. It contained five (5) grounds of appeal, (pages G 61-64 of the record of appeal). Later, the appellant sought for, and was granted, leave by the court below on 17/1/2000, to amend the notice and grounds of appeal (see pp. 231-232 of the record). The amended notice and grounds of appeal appear on pages 131-135 of the record of appeal. It is my belief from the circumstances of the H appeal, discernible from the record of appeal that the latter are the notice and grounds of appeal being challenged or objected by the respondent at the court below. These grounds of appeal are, hereunder, set out for ease of reference:

#### “GROUNDS OF APPEAL



1. The learned trial judge erred in law when, having identified from the plaintiff's claim and the Defendant's defence that the case was based on negligence simpliciter arising from some missing containers and not a debt or liquidated money demand, he failed to transfer the matter to the general cause list for trial on the merits.

#### PARTICULARS OF ERROR

i. Assuming the jurisdiction to determine summarily the issue as to whether or not defendant was negligent and making a finding thereon, when he held at page 12 lines 9 to 16 as follows:

*'they did not report the matter to the police (sic), if at all they were stolen. They did not send any document to the plaintiff to explain away the theft, with the above observations (sic) lapses on the part of the Defendant, I find it very difficult to believe their story.... I find that they are very negligent in the handling of the whole matter'*

ii. *Failing to avert his mind to the rule that the procedure under the undefended list is not available to Torts and, in particular, negligence.*

2. *The learned trial judge erred in Law by holding that the defendant was negligent when particulars of negligence were neither proved nor pleaded by the plaintiff thereby placing wrong onus on the defendant.*

#### PARTICULARS

a) *The evidence of the defendant that the container was broached before they started the process of clearing the goods was not rebutted by the plaintiff*

b) *The onus is on the plaintiff to prove the negligence of the defendant in carrying out their job or that they were responsible for the theft of the plaintiffs goods. It is a trite law that he who asserts must prove. See section 135 (1) of the Evidence Act and case of J. W. AMU Vs. J. B. ATANE Vol. 9, 1974-75 N. S. C. at 446.*

c) *The wrong onus placed on the defendant by the court occasioned a miscarriage of justice.*

3. *The learned trial judge erred in law by holding that the defendant should have supplied the plaintiff with the particulars of the missing items or invited the police and therefore liable in negligence.*

#### PARTICULARS

a) The evidence of the defendant that upon noticing the broached on the container, property of the plaintiff, they quickly alerted the Marine Cargo Superintendent and also informed the plaintiff. This material piece of evidence was not rebutted.

B b) The defendant's proof of broach in the container before it was contracted to clear same, did not require multiplicity of witnesses.

C c) The learned trial judge failed to make finding of facts on the report of the Marine Superintendent about the state of the container, and prior notice of broaching of the container giving by the defendant to the plaintiff before they embarked on clearing of the said goods. These formed missing link in his evaluation of facts.

4. The learned trial judge erred in law by finding that the defendant were negligent when the plaintiff did not prove same.

D a) It is a trite law that he who alleges negligence must prove same. *J. W. Amu v. J.B. Atane & Ors. (supra)*.

b) It is in evidence that the consignment, the subject matter of this action arrived the Nigerian Ports in an open top roof container which makes the goods vulnerable to theft. The plaintiff did not take adequate care to protect their goods.

E 5. Decision is unreasonable and cannot be supported having regard to the weight of the evidence.

6. The learned trial judge erred in law when he held at page 12 lines 20 to 23:

F They were (sic) fact that they said that they admitted liability without prejudice, will not wish away liability from them. They said document was tendered by them. They cannot blow (sic) and cold.'

### **PARTICULARS**

G *I. Failing to advert his mind to the well settled rule that the admission or offer made expressly "without prejudice" in the course of bonafide negotiations for settlement is inadmissible against the Defendant/Appellant who tendered it specifically to show that the delay in filing the affidavit was because negotiations were going on, and not as admission of liability.*

H *II. Ignoring the facts that the plaintiff/respondent's pleadings do not allege any admission by the Defendant/Appellant through Exhibit or otherwise."*

The Grounds upon which the objection was raised are given along with the Notice of the Preliminary Objection and they are as follows:

*“AND TAKE NOTICE that the grounds of the said objection are inter alia as follows:*

*1. At the crux of this appeal are issues such as negligence, etc. which did not form part of the judgment of the lower court.*

*2. Issues of negligence, etc. not canvassed at the court below were raised on appeal without leave of court.* B

*3. Certain vital findings of the court below were not challenged in this appeal.*

*4. Other objections are as outlined and argued in the respondents brief (however, the respondent/cross-appellant abandons his objection that certain Grounds of appeal were wrongly labeled an error of law)* C

*5. There is no process known to law as “Reply Brief and Reply to Cross-appellant’s Brief and same should be struck out.*

*6. Alternatively the issue of jurisdiction raised in the appellant’s Reply Brief and Reply to Cross-appellant’s Brief especially at paragraphs 2.18, 2.19, 5, 6.01, 6.02, 6.03, 6.04, 6.05 and 6.06 thereof should be struck out, the appellant having graciously agreed to withdraw the said issue.”*

It is the submission of learned counsel for the respondent/appellant E that ground one is incompetent for several reasons:

i. the ground is not derived from the judgment of the lower court and same was based on misconception. The judgment of the lower court was not predicted on negligence but on the value of 5 F transformers which the appellant took delivery of but not delivered to the respondent

ii. the observation made by the learned trial Judge on negligence was an obiter as same was not canvassed and argued for the trial court’s consideration. The finding on negligence by that court G did not form the basis of the said judgment. It was a mere observation.

iii. the appellant/defendant never contended that from the facts at the lower court, it was being accused of negligence. The issue of negligence is therefore a new issue on appeal which requires leave H of court to raise and argue it as parties are not allowed to change the basis of their claim or defence on appeal. Adeola v. Abidoye (1999) 14 NWLR (Pt. 637) at p. 68 C-D was cited in support.

iv. this ground is referred to as an error of law, it indeed com-

plains of a misdirection. The particulars reveal that it is one of mixed law and facts, cites *Ikimi v. Omamidi* (1995) 3 NWLR (pt. 383) 355; *Okosebikan v. Williams* (1996) 5 NWLR (pt. 449) 437.

v. particular No. 1 of this ground of appeal accused the learned trial judge of an error of law in assuming jurisdiction to determine the issue of negligence, is misconceived. Learned counsel urged that Ground 1 should be struck out as it is incompetent.

On ground No. 2, the learned counsel for the respondent argued, among others, that the ground complains that there was no evidence of negligence at the lower court. It complains of insufficiency of facts to prove negligence or that there was wrong application of the law to disputed or unproved facts. This ground is at best a misdirection: *Oge v. Ede* (1995) 3 NWLR (Pt. 385) 584 A - C.

On ground No. 3 this ground does not derive from the judgment complained against and should be struck out.

On ground No. 4, learned counsel for the respondent argued that this ground is one of misdirection as it complains that the learned trial judge found negligence when the plaintiff did not prove same. The ground is incompetent and should be struck out.

Ground No. 5 is the omnibus ground. Learned counsel for the respondent argued that it is an incompetent ground as it is phrased as if it were in criminal matters. The case of *Egesie v. Elele* (2000) FWLR (pt. 10) at 1686, was cited in support. The ground should be struck out.

Ground No. 6 is rendered incompetent by its particulars as they do not relate to the ground itself or they were misconceived. The case of *Obatoyinbo v. Oshatoba* (1996) 5 NWLR (Pt. 450) 534 at 548 H and *Mba v. Agu* (1999) 72 LRCN 3152 at 3166 was cited in support.

Generally, on the entire appeal, learned counsel for the respondent submitted that there are some findings of facts, which he enumerated that have not been appealed against and they cannot be disturbed on appeal. Such unchallenged facts include inter alia:

a) the defendant did not take advantage of provisions of order 3 rules 11 & 12 by explaining his neglect to act within time and his affidavit did not disclose any defence on the merit.

b) Plaintiffs investigation revealed that the consignments of 30 transformers landed were delivered intact with no broken seal.

The said non-challenge to such findings, argued learned counsel for the respondent, is fatal to the appeal.

In his reply to the notice of the preliminary objection raised and argued by the learned counsel for the respondent, the appellant's learned senior counsel made the following submissions: that the appellant was represented on the 17<sup>th</sup> of January, 2000, and consented to the amendment of the grounds of appeal by order of the Court of Appeal. He cannot now challenge the grounds of appeal as incompetent. The order allowing the amendment of the grounds of appeal implies that the grounds as amended are competent. What the respondent is seeking the court to do is to overrule its decision of 17<sup>th</sup> January, 2000, which this court cannot do. He supports this submission with the case of *Adigun v. The Secretary, Iwo Local Government* (1999) 8 NWLR (Pt. 613) 30 at 33-38 H - A.

On the grounds of appeal, the learned senior counsel for the appellant submitted on ground one, after having quoted some portions of the trial court's judgment, that the claim before the trial court was not in respect of debt or liquidated money demand. It was based on the alleged defendants breach of its duty of care in respect of the transformers. The decision of the court found the appellant VERY NEGLIGENT in the handling of the matter. The ground of appeal properly arose from the judgment of the court. It is therefore erroneous for the plaintiff to argue that the issue of negligence was not raised at the trial court. The parties canvassed it and the trial court made a finding on it. On the challenge on the assumption of jurisdiction by the trial court, learned senior counsel contended that the case was one of a breach of contract by failure to deliver some transformers. He argued that the cause of action does not come with the Admiralty jurisdiction of the Federal High Court. It is a case of simple contract which should be tried only at a state High Court. The performance of the contract, he argued, was at Apapa Wharf not in the high seas. Several cases were cited in support including: *Patro Jessica Ent. Ltd. v. Leventis Tech Co. Ltd.* (1992) 5 NWLR (Pt. 244) 675 at 693 A; *Aluminum Manufacturing Company v. Nigerian Ports Authority* (1987) 1 NWLR (Pt. 51) 475 at 486 H.

On ground No. 2, the learned SAN urged that this ground of objection on the matter of whether ground 2 is that of misdirection rather than an error in law, should be struck out as it lacks merit.

On the remaining grounds of appeal i. e. 3-6, the learned SAN adopts his arguments as in ground 1 and urges that the objection be struck out as these grounds of appeal met the requirements of the rules.

On the competence of the entire appeal, the learned SAN submitted that the respondent is grossly in error in his submission that all the grounds of appeal are deficient in material particular, as certain crucial findings of the trial court were not challenged in the grounds of appeal and that such findings should be deemed admitted. The appellant, argued the learned SAN, is free to challenge the judgment on any of the issues decided. If the ground for the challenge is substantial the appeal will be allowed on it and all the other decisions not appealed against would be of no consequence. Learned senior counsel submitted further that the substance of the appeal is that the summary procedure under the “Undefended List” was adopted by the trial court pursuant to order III rules 9 - 14 of the Federal High Court Rules applicable, only relates to debts or liquidated money demands and not to breach of duty of care over transformers, pleadings must be filed and due evidence taken on the merit of the case. He cited the case of NAB v. Felly Keme (Nig.) Ltd. (1995) 4 NWLR (Pt. 387) 100 at 114 C-D. The trial, he argued further, must be at a State High Court as the Federal High Court has no jurisdiction on breach of duty of care on transformers and the findings referred to by the respondent would be irrelevant if the claim is not for a debt or liquidated money demand.

***I have carefully considered the elaborate submissions made by the learned counsel for the appellant as respondent at the court below and that of the learned SAN for the respondent as appellant at the court below. My inclination is more in line with the respondent’s submission. The preliminary objection in its totality lacks merit. It is my finding that all the grounds of appeal are competent and could sustain the appeal before the court below. The preliminary objection is hereby dismissed. This entitles me to consider the merit of the appeal placed before the court below.***

There is an amended notice of appeal filed, with the leave of court, containing six grounds of appeal. Briefs were filed and exchanged by the parties. There is also filed a cross-appeal by the re-

spondent.

Learned counsel for the appellant in the main appeal formulated 3 issues. They are as follows:

1. “ *Whether the learned trial judge was right in refusing to grant the defendant/appellant leave to defend the action having regard to the fact that the affidavit of the parties and the finding of the learned trial judge showed that the action was in negligence and not in respect of a debt or liquidated money demand.*” B

2. *Whether the learned trial judge was right in holding that the defendant was liable to the plaintiff in negligence and in insisting that the defendant had to prove its case “on the merit”* C

3. *Whether the learned trial judge was right in holding that the defendant was not protected from an admission contained in a letter marked “WITHOUT PREJUDICE” merely because the letter was tendered by the defendant to prove that the parties were engaged in negotiations, not as an admission of liability.*” D

Learned counsel for the respondent adopted the issues formulated by the appellant.

It is pertinent to observe that the first issue for determination is on whether the learned trial judge was right in refusing to grant the defendant/appellant leave to defend the action having regard to the fact that the affidavit of the parties and the findings of the learned trial judge showed that the action was on negligence and not in respect of a debt or liquidated money demand. I think this appeal can be determined on this issue alone. E  
F

The appellant argued in its brief that from the affidavit in support of the plaintiff’s respondent application, the action was in negligence and not for recovery of debt or liquidated money demand. The defendant/appellant denied negligence on their part in the counter-affidavit sworn to the trial judge, it was contended, ought to have transferred the suit to the general cause list reliance was placed on order 3 rules 9 - 14 of the Federal High Court (Civil Procedure) rules (Cap. 134) Laws of the Federation of Nigeria, 1990 (2) S. B. N. Plc. V. Kyenty (1998) 2 NWLR (Pt. 536) 41, (3) NAB Ltd. v. Keme (Nig.) Ltd. (1995) 4 NWLR (Pt. 387) 100 and (4) Shodipo v. Cemminkainep (1986) 1 NWLR (Pt. 15) 220. The argument proffered in support of issue I was adopted for issue No. 2 adding that since the particulars of negligence was not disclosed - the affidavit G  
H

evidence must be called, the case of NAB supra was called in aid. The respondent in its brief of argument had contended that the action was for recovery of the cost of the value of goods which the appellant undertook to clear and deliver to them under a contract they entered into with the appellant, The action, they further contended was based on contract and not tort the finding of the trial judge to the effect that the appellant were liable for the tort of negligence was made obiter, they further argued.

The plaintiff/respondent/cross-appellant claimed against the defendant/appellant thus:

- 1) The sum of \$38,475.00 (thirty eight thousand, four hundred and seventy five US Dollars)
- 2) Interest on the said sum at the rate of 21% per annum compounded monthly from 26<sup>th</sup> May, 1993 until the entire debt is liquidated.

As the claims stand, they no doubt sound like liquidated damages or not depend on the affidavit in support of the application and the materials put up by the defendant/respondent. But on the face the suit seems to have been brought under the undefended list procedure. The suit was taken out at the Federal High Court. What are the provisions dealing with actions on the undefended list brought in the Federal High Court? They are order 3 rules 9, 10, 11, 12 and 13 of the Federal High Court (Civil Procedure) Rules Cap 134 Law of the Federation of Nigeria, 1990, which are in the following terms:

#### Rule 9

Whenever application is made to the court for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent's belief, there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the "Undefended List" and mark the Writ of Summons accordingly, and enter thereon a date for hearing, suitable to the circumstances of the particular case.

#### Rule 10

There shall be delivered by the plaintiff to the registrar upon the issue of the writ of summons ad aforesaid, as many copies of the



above mentioned affidavit as there are parties against whom relief is sought and the registrar shall annex one such copy to each copy of the writ of summons for services.

Rule 11

If the party served with the writ of summons and affidavit delivers to the registrar not less than five days before the day fixed for hearing, a notice in writing that he intends to defend the suit together with an affidavit, setting out the grounds of his defence, then and in such a case the suit shall be entered in the general cause list for hearing.

Rule 12

Where the defendant neglects to deliver the notice of defence and affidavit as described in rule 11 of these rules within the time fixed by the said rule, the court may at any time before judgment is entered, on an affidavit disclosing a defence on the merits and satisfactorily explaining his neglect, let in the defendant to defend upon such terms as the court may think just.

Rule 13

Where any defendant neglects to deliver the notice of defence and affidavit prescribed by rule 11 of there (sic) rules of within the time fixed by the said rule, and is not let in to defend in accordance with the provisions of rules 12 of there (sic) rules, then and in such case, the suit shall be heard as an undefended suit, and judgment given thereon, without calling upon the plaintiff to summon witnesses before the court to prove his case formally.

The action has been brought under the above rules. These rules make it mandatory that an action meant for the undefended list shall be commenced by a writ of summons, accompanied by an affidavit setting forth the facts of the case and other ingredients stated in the aforementioned rule, which must satisfy the court before it is entered in the Undefended List. Upon the receipt of the writ and affidavit the registrar of the court, shall cause same to be served on the defendant/defendants personally. ***Under the said rules, a defendant who receives the afore-mentioned process and who intends to defend the suit, must within five days before the day fixed for hearing, deliver a notice in writing of his intention to defend the suit together with an affidavit setting forth the grounds of his defence. The court shall enter the suit on the***

**general cause list for hearing. Where the defendant served with the writ of summons and affidavit fails to deliver his notice of intention to defend and affidavit as prescribed by the rule within the time allowed, the court may at any time before delivering judgment upon the defendant filing an affidavit disclosing defence on the merit and satisfactorily explaining his neglect, grant the defendant leave to defend the suit.** The above procedure aims at shortening the hearing of a suit and eliminating technicalities. A plaintiff who seeks to come under these rules has a duty to comply strictly with the said provisions and need not suffer any injustice. If the defendant complies strictly with the provision of rule 11 it seems he will have an automatic right to defend the suit and rule 12 still comes to the aid of a defendant who neglects to comply with rule 11 by granting the court the discretion to allow a defendant who has not filed the required process within the required time to still defend the suit if at any time before judgment is delivered there is an affidavit from him disclosing a defence on the merit and explaining his neglect to file his processes within the time allowed by rule 11. What is the case presented by the plaintiff/respondent through their affidavit in support? Paragraphs 6, 7, 8, 9, 10 and 11 which thereunder set out:

Para 6

The plaintiff instructed the defendant to clear from Apapa Port a consignment of thirty (30) electrical transformers shipped from Rotterdam and deliver same to it.

Para 7

Pursuant to this instruction, the defendant cleared the said consignment was securely enclosed in a container bearing a number TPHU 410792/3 and an original seal No.002595.

Para 8

Upon arrival of the consignment, the defendant wrote to the plaintiff and notified it only of the allegedly brushed condition in which the consignment arrived, but did not mention anything about part of the consignment being missing.

Para 9

Upon taking delivery of the said consignment from the defendant and after examination of same, the plaintiff discovered that five (5) of the 100KVA, DV, 11KV/400w..... were missing.

Para 10

The plaintiff promptly sought an explanation for the missing transformers from the defendant by a letter.

Para 11

The defendant-sought to exculpate itself from liability by alleging that the consignment was delivered brushed, thus insinuating that the said consignment did not land intact but that the container housing the consignment was damaged. B

Going by the above depositions, it is clear to me that the case of the plaintiff/respondent against the defendant/appellant is rooted in negligence. The defendant/appellant through its counter-affidavit denied negligence on their part paragraphs 7, 8, 9, 10, 13 and 17 which read: C

Para 7

The defendant denies paragraph 7 of the affidavit and states that when the goods were assigned to her by the plaintiff for clearing in April, 1993, she discovered that the consignment were loaded on an open-top container which gives access to easy pilfering of its contents. D

Para 8

That further to paragraph 7 above, the defendant in the course of clearing the consignment discovered that the container was brushed which means that the goods must have been tampered with and she promptly reported to the plaintiff. E

Para 9

That when the defendant discovered that the container was brushed during custom examination, she invited the Marine Cargo Superintendent to survey the said container as it is the normal shipping procedure for eventual insurance claims. F

Para 10

That paragraph 8 of the affidavit is not true as I notified the plaintiff with spontaneous immediacy via a letter dated the 25<sup>th</sup> day of May, 1993, that the container was brushed. G

Para 13

That contrary to paragraph 11 of the affidavit, the defendant maintains that the consignment was brushed and left at the Port for over (5) months a fact which could lead to the goods being stolen at the port. H

Para 17

That the defendant vehemently denies and repudiates liability for the alleged loss being claimed by the plaintiff. After reviewing the affidavit and counter-affidavit, evidence of the parties, the learned trial judge held inter alia:-

“the defendant story as per their counter-affidavit when the  
B consignment was given them for clearance in April, 1993, they discovered that it was loaded on Open Top Container which gives access to easy pilfering of the content.....  
C That though, it was not their fault, they proposed a refund of the total cost for the missing (5) numbers of 100KVA.....  
D Step down transformers valued at \$38,475.00 US Dollars, in Naira equivalent and at the exchange rate in the market as at the time this transaction was made in 1994. The exchange rate at that time was N22 only to \$1. Therefore, the naira equivalent to US \$38,475.00 as mentioned above would be N84,4650, at the exchange rate of N22. 06.

The plaintiff obviously rejected this proposal.....  
The were fact that they said that they admitted liability “WITHOUT PREJUDICE” will not wish away liability from them. The said document was tendered by them they cannot therefore blow hot and cold. I therefore enter judgment for the plaintiff in the sum of \$38,475.00 dollars at the rate of 6% per annum from 26/5/98, until the entire debt is liquidated; or its equivalent at the current Central Bank of Nigeria.”

**It is clear from the counter-affidavit evidence that the defendant/appellant denied liability for negligence. Having not filed their counter-affidavit within the prescribed period to be able to defend this action, the defendant must comply strictly with the provisions of rule 12. Their affidavit, in the instant case counter-affidavit must disclose a defence on the merit and a satisfactory explanation as to why they have failed to file their processes within the time prescribed by the rules of court. They have said that they could not file their processes within the time allowed for reason of negotiations for settlement. This was not challenged. This deposition explains the neglect. But, does the counter-affidavit contain materials which can pass for a defence on the merit? A defence contained in such a counter-affidavit will be said to be on the merit, if it is**

**predicated on a legal defence, properly founded by the defendant/appellant against the substance of the plaintiff/respondent's claim, as opposed to a mere matter of procedure, practice or form** see: ADEBISI MACCRECOR ASSOCIATES LTD. VS. NIGERIA MERCHANT BANK LTD. (1996) 2 NWLR (Pt. 431) 378. **The claim for money certain presupposes that negligence has been admitted by the defendant or that it has been proved against him. The issue of negligence is a matter of fact to be proved. No oral evidence was led. On the face of the printed evidence from both sides, it is my view that the case should ordinarily have been transferred to the general cause list. This is because there has arisen from the conflicting affidavit evidence before the court, controversy as to whether the defendant/appellant was guilty of negligence. That controversy would continue to rage on, without a readily decipherable and securely conclusive decision either way. In such a situation, the trial court is generally under a duty to allow for full and formal trial, by transferring the suit to the general cause list. A triable issue is said to have arisen** see: JIPREZE VS. OKONKWO (1987) 3 NWLR (Pt. 62) 737. I hold that the trial court's judgment cannot stand. I hereby set it aside and order that the case be sent back to the Chief Judge of the Federal High Court for assignment to another Judge who shall place the case on the general cause list for trial on the merit. In view of this holding, I consider it unnecessary to dwell on other issues formulated by the appellant. Thus, this appeal before the court below succeeds.

On the cross-appeal, I do not consider it proper to treat it in view of my holding above. This is because the issues involved in it too, have to be reconsidered by the learned trial Judge assigned to take up the trial de-novo. The cross-appeal is accordingly struck out. I make no order as to costs in both appeals.

Having gone that far, the appeal before this court has no merit and same is hereby dismissed. N50,000.00 costs in favour of the respondent.

### MUKHTAR JSC

In a suit instituted on the undefended list, the respondent,

who was the plaintiff in the Federal High Court, Lagos, claimed the following, against the appellant:-

B “The sum of \$38,475.00 (thirty eight thousand four hundred and seventy five US Dollars).” Interest on the said sum at the rate of 21% per annum compounded monthly from 26<sup>th</sup> May, 1998, until the entire debt is liquidated.”

C The plaintiff exhibited several documents to the affidavit in support of the claim, and the defendant filed a counter-affidavit, to wit relevant documents were exhibited. The learned trial judge entered judgment in favour of the plaintiff as follows:-

“I therefore enter judgment for the Plaintiff in the sum of \$38,475.00 dollars at the rate of 6 percent per annum from 26/5/98 until the entire debt is liquidated; or its equivalent at the current Central Bank of Nigeria.”

D Dissatisfied with the judgment both parties appealed to the Court of Appeal, which found the main appeal meritorious and the cross-appeal unmeritorious and found thus:-

E “In conclusion, from all I have been saying it is my judgment that this appeal is meritorious; the judgment of the court below is hereby set-aside. In its place, I hereby order that the case be placed on the General cause list for trial on the merits. The chief Judge of the Federal High Court shall assign the case to another judge for trial. For the avoidance of doubt, the cross-appeal which is unmeritorious is hereby dismissed.”

F The plaintiff was not happy with the judgment, so he has appealed to this court on nine grounds of appeal, from which the following issues were distilled by learned counsel for the appellant in their brief of argument:-

G “i. Whether the court below was right in a) failing to consider the Appellant’s notice of intention to rely upon Preliminary Objection duly filed and argued b) referring to the issue of jurisdiction in the said Notice as having been raised by the Appellant.

H ii. Whether the court below was right in setting aside the judgment of the trial court.

iii. Whether the court below was right in dismissing the Cross-Appeal”.

The argument in respect of the issues have been thoroughly dealt with in the lead judgment, but I will highlight only that of issue

(1) supra; which is in parimateria with the third issue raised for determination in the respondent's brief of argument. The notice of intention to rely upon preliminary objection had in it the following grounds:-

*"1. At the crux of this appeal are issues such as negligence, etc which did not form part of the judgment of the lower court.* B

*2. Issues of negligence, etc not canvassed at the court below were raised on appeal without leave of court.*

*3. Certain vital findings of the court below were not challenged in this appeal.* C

*4. Other objections are as outlined and argued in the Respondents brief (however, the Respondent/Cross-Appellant abandons his objection that certain grounds of appeal were wrongly labeled an error of law).*

*5. There is no process known to law as "Reply Brief and Reply to Cross-Appellant's Brief and same should be struck out.* D

*6. Alternatively the issue of jurisdiction raised in the Appellants "Reply Brief and reply to Cross-Appellant's Brief" especially at paragraphs 218, 219, 5, 601, 602, 603, 604, 605 and 606 thereof should be struck out, the Appellant having graciously agreed to withdraw the said issue."* E

The grouse of the appellant in this issue is that the court below did not consider and decide on the notice of preliminary objection. The learned counsel for the respondent has in his brief of argument submitted that their grounds of appeal were amended by an order of the court below, and the appellant in the course of arguing their brief, withdrew their notice of intention to rely upon preliminary objection. F

It is on record that the learned counsel for the appellant/ respondent in the court below in adopting his brief of argument moved his notice of preliminary objection. The relevant proceeding 011 that 23/9/2002 when the appeal was taken reads as follows:- G

*"Musa:- I am not pursuing the objection as to jurisdiction. I oppose the appeal. Respondent's brief was filed on 9/4/02. We have a cross-appeal. A notice of preliminary objection was filed. I ask that the appeal be dismissed."* H

In as far as what transpired in court on that day is concerned, the learned counsel did not abandon his notice of preliminary objec-

tion in totality or wholesale, it was only a part of it that he thought not worthy of pursuing. If he had abandoned the whole notice of preliminary objection, he would have said so, in no uncertain terms, and it wouldn't have been necessary to draw the attention of the court to the notice, after referring to their respondent's brief of argument.

B This was correctly stated by the court- below in its judgment, which reads inter alia:-

*"Mr. Charles Musa, learned counsel for the respondent/cross-appellant adopted his client's brief of argument filed on 9<sup>th</sup> April 2001 and while referring to the Notice of Preliminary objection filed on 12<sup>th</sup> April 2002 but withdrawing his objection as to jurisdiction."*

C Having said that the correct and proper thing to do would have been to proceed with the treatment of the notice of preliminary objection, without that on the ground of jurisdiction, which has been D withdrawn. Contrary to the contention of the learned counsel for the respondent, the said notice was not withdrawn, and so the case of Elike v. Nwankwaola 1984 12 SC 30), and Oteju v. Magma Maritime Services Ltd 2000 1 NWLR part 640 page 331 are applicable. The Court of Appeal should have considered the other complaints. Such E grounds of objection as (1) and (2) supra on negligence should have been considered by the court on their merit.

The position of the law is that a notice of preliminary objection that has been moved, and for which argument has been proffered in F the brief, must be considered by the court and findings made there on. The court below having failed to do so erred, but this court is in a good position to give it the consideration it deserves. On objections (1) and (2) on negligence, I fail to see that negligence did not form part of the judgment of the court, of first instance. What about the find- G ing of the learned trial Judge on page 59 of the record of proceedings which reads:-

*"I find that they are very negligent in the handling of tire whole matter."*

H Did the above not touch on the negligence of the defendant/appellant? Of course it did. In the plaintiff/respondent's supporting affidavit to the summons will also be found the following depositions "16 The Defendant is responsible/liable for the missing trans- formers because:

*"a. It delivered the said container to the Plaintiffs warehouse*



and departed without informing the plaintiff about the missing transformer were missing by itself,

b. It did not respond to the Plaintiffs enquiries as to how the transformers got missing.

c. The Defendant ignored the Plaintiffs request in EXHIBIT J for documents to back up the so-called theft of the transformers. B

d. Reputable bodies such as the Nigerian Ports PLC, Wasa-Delams and Glenyork Ltd (London and Lagos) all state that the transformers were not stolen.

e. The Defendant did not report the alleged theft of the transformers to the Police.” C

Me think the above materials are suggestive of negligence and do imply negligence on the part of the defendant/appellant. In the light of these, the argument/objection of the appellant on negligence holds no water and cannot stand. The other grounds of objection D have been thoroughly dealt with in the lead judgment, so I will not dwell on them. The notice of preliminary objection has no merit, and so it is overruled.

The issues distilled from the grounds of appeal have been dealt with in the lead judgment, and resolved in favour of the respondent. E This is a case that should have been transferred to the general cause list, and not disposed of on the undefended list. It is a matter that should have been thrashed out vide proper pleadings and oral evidence.

It is in this wise that I agree with the lower court that the appeal to F it succeeds, when it said inter alia:-

“.....the judgment of the court below is hereby set-aside. In its place, I hereby order that the case be placed in the general G cause list for trial on the merits.”

I am in full agreement with the lead judgment of my learned brother, Muhammad JSC that the appeal is devoid of any merit, and should be dismissed. I hereby dismiss the appeal, and I abide by the consequential orders made in the lead judgment.

H

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### ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, MUHAMMAD, JSC just delivered. I agree with his

reasoning and conclusion that the appeal be dismissed and the matter remitted to the trial court to be heard de- novo by another Judge to be assigned by the Chief Judge.

I abide by the consequential orders made in the said laid judgment including the order as to costs.

B Appeal dismissed while the cross appeal is hereby struck out.

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***MUNTAKA-COOMASSSIE JSC***

C I have had the advantage of reading in draft the all-encompassing judgment of my learned brother, Tanko Muhammad JSC. In his lead judgment the facts and the issues raised thereon were carefully and competently considered by my learned brother to my satisfaction. Consequently I, with respect, adopt the reasoning and conclusions adumbrated therein as mine. I do not intend to reproduce them in my judgment. I agree that the appeal lacks merit and same is hereby dismissed. I abide by the consequential orders correctly and neatly adumbrated in the lead judgment. I endorse the orders as to costs.

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