

SUPREME COURT OF NIGERIA
20TH JANUARY, 2012. SC. 70/2005
CORAM: - **W. S. N. ONNOGHEN, J. A. FABIYI, S.**
GALADIMA, N. S. NGWUTA, M. U. PETER-ODILI, JJSC

1. MR. KWASI KARIKARI
ADUSEI
2. MR. JAMES ADJEI APPELLANTS
AND
MR. TOYIN ADEBAYO RESPONDENT
(Substituted for Amos Adebayo
deceased on 25/10/11)

EVIDENCE - Admission - Effect - Respondent's statements in exhibits 18, 18A & 18B constitute admission - Which do not require proof (H1)

EVIDENCE - Relevance - Adduced evidence - The available evidence show that the school is jointly owned by the parties - In spite of respondent being appointed the proprietor (H2)

ORDERS OF COURT - Non suit - Propriety - Parties ought to be given opportunity of being heard - Before the order was made by trial court - Hence Court of Appeal was right to set aside same (H3)

SUPREME COURT - Equity jurisdiction - Applicability - The court will consider the motive and intention of the parties - So as to give effect to what was proved but was not awarded in law - Because it was not specifically claimed (H4)

FACTS

Defendants/appellants hail from Ghana but reside in Nigeria. In 1991, they founded a school they called International Nursery and Primary School in Gboko, Benue State. The Appellants had some problems with the Benue State Ministry of Education over the registration of the school. The school was blacklisted as illegal by the Ministry of Education on the ground that it was not registered. Consequently, it was closed down. In their desire to secure the necessary

registration and reopen the school, the foreigners invited plaintiff/respondent to help them. With the intervention of respondent, the school was registered and reopened. The parties later shared responsibilities with respect to the administration of the school. Greed crept into the relationship between appellants on one side and respondent on the other.

As a result of the ensuing dispute, respondent sued appellants in the High Court of Benue State holden at Gboko. He claimed the following reliefs inter alia, “(i) A declaration that he is the sole proprietor of the school called Gboko International Nursery and primary School.” Appellants counter-claimed inter alia, “(i) That the defendants are the founders of Gboko International Nursery/Primary School and as such entitled to be declared joint owners of the said school.” The case was tried on the amended pleadings of the parties. In its judgment, the court entered a non suit in both the main claim and the counter-claim. Both parties were aggrieved by the judgment and consequently respondent appealed and appellants cross-appealed to the Court of Appeal, Jos Division. The court allowed respondent’s appeal and dismissed appellants’ cross-appeal. Aggrieved, appellants appealed to Supreme Court.

ISSUE FOR DETERMINATION

Was the Court of Appeal right to have entered judgment in favour of the Respondent on the totality of the evidence before the Court?

HELD (Unanimously allowing the appeal per **NGWUTA JSC**)

Admission - Effect

1. Similar statements are contained in Exhibits 18 and 18B which were statements made by the Respondent to the Police on 9/4/96. In Exhibit 18B, the Respondent stated, inter alia:

“... I agree that the school belongs to me and the complainant Head Master Mr. Dankwa John and James Adjei...”

As found by the learned trial Court, the above statements in Exhibits 18, 18A and 18B made by the Respondent to the Police in connection with the disputed ownership of the school constitute admission against the interest of the Respondent who made them. On admissions, this Court held:

“Another principle deeply enshrined in our jurisprudence is

that admissions made do not require to be proved for the simple reason, among others that 'out of the abundance of the heart the mouth speaketh' and that no better proof is required than that which an adversary wholly and voluntarily owns up." (p. 217 E)

EVIDENCE - Relevance - Adduced evidence

2. May be the lower Court was influenced in their decision by the assertion of the Respondent, conceded to by the appellants, that the Respondent was the proprietor of the school. What appeared to have influenced the lower Court the more is the literal meaning of the word "proprietor". I do not dispute the dictionary meaning of the word but with profound respect to the learned Justices of Appeal, the meaning was taken out of the context and the peculiar circumstances of this case.

Now the founder of a school would not need anyone to make or appoint him a proprietor of his own property. Under cross-examination, PW6, the Respondent's own witness stated thus:

"Our conclusion arising out of our meetings was that I should be the Headmaster of the School. The 1st defendant was to be the Assistant Headmaster. The 2nd defendant was to be the dean of studies and the plaintiff the proprietor."

The trial Court held, rightly in my view, that such office sharing cannot be the function of ordinary teachers in a school, a fact which the lower Court did not advert to. On this point, the evidence of PW6 called by the Respondent to the effect that the Respondent was appointed the proprietor of the school is in conflict with the evidence of PW7 also called by the Respondent who claimed the Respondent was not so appointed.

If the school was his exclusive property, he would not have joined any person or group of persons in its operation. He would invite others to join him; nor would he have been admitted as the proprietor of his own school. I entirely agree with the learned trial Judge that the totality of the evidence adduced showed that the school was jointly owned by the parties in spite of the Respondent being appointed the proprietor or a nominal proprietor. The Respondent himself, in Exhibit 18, said in part:

"... The reason why I gave the petitioner termination letter was

that he asked me to produce the school document before him and I refused them, he started beating me.”

Why would a teacher, a mere teacher, demand that the proprietor who employed him to teach in the school should produce the school documents before him? It is not possible. Only a teacher who has proprietary right/interest in the school can make such demand of the “proprietor” of the school whom he took part in appointing to that position.

In view of the above, it is my view that the lower Court erred in dismissing the appeal and holding that the school is the exclusive property of the Respondent. In the circumstances, I allow the appeal and set aside the decision of the lower Court.

The disputed school is not the exclusive property of the Respondent nor is it that of the appellant. Though there is sufficient evidence based on which the trial Court could have rightly declared joint ownership of the school by the parties, none of the parties made that claim and a Court does not award what is not claimed before it. The facts of the case clearly show that the appellants, aliens from Ghana, founded the school and when it was closed by the Benue State Ministry of Education for non-registration, they co-opted the Respondent, a Nigerian who helped secure the needed registration. The parties met for power sharing and appointed the appellant “proprietor” of the school which they operated as joint owners. (pp. 218 E/ 219 D/ 220 C)

ORDERS OF COURT - Non suit - Propriety

3. Then, what follows? What is left is the decision appealed against - the order of non-suiting the Respondent in the main claim and the appellants in their counter-claim. The lower Court was right in setting aside the order of non-suit made without giving counsel for the parties the opportunity to be heard. (p. 219 H)

SUPREME COURT - Equity jurisdiction - Applicability

4. My noble Lords, this Court has to invoke its equity jurisdiction to give effect to what was proved but could not be awarded at law because it was not claimed specifically. It is said that:

“Justice is the inflexible guardian of the public safety and being inflexible regards nothing but the facts whereas equity will consider

motives and intentions and modify its decisions accordingly. All that law declares is just. It belongs to equity to temper the rigour of its decrees”.

Law has made its decree based on the facts before the Court. But the rights and obligations of the parties remain unsettled. It is for this Court,

in its equity jurisdiction, to consider the motive and intention of the parties at the meetings at which it was:

“....our conclusion arising out of our meetings was that I should be the Headmaster of the school. The 1st defendant was to be the Assistant Headmaster. The 2nd defendant was to be the dean of studies and the plaintiff the proprietor.”

From the surrounding circumstances, it appears clear that the parties intended to own and operate the school as a joint project. The facts do not justify exclusive ownership by any party. In view of the above and consequent upon the allowing of the appeal and having vacated the order giving exclusive ownership of the school to the Respondent, I declare that the school - Gboko International Nursery/Primary School - is owned jointly by the appellants and the Respondent. (p. 220 F)

REPRESENTATION

Sylva Ogwemoh, Esq. with Messrs Usman Muhammed Enesi and Albert Attah Agada for the Appellants

A. Ayua, Esq. for the Respondent

CASES REFERRED TO

Craig v. Craig (1966) All NLR 165

Osayi v. Izozo (1969) All NLR 150

Anyaduba v. NRTC Ltd (1992) 5 NWLR (Pt. 243) 535

Awote v. Owodunmi (No. 2) (1987) 2 NWLR (Pt. 57) 366

Chief Olufosoye v. Olorunfemi (1989) 1 NWLR (Pt.65) 26

Odu v. Iyala (2004) 8 NWLR (Pt. 875) 283

Oyewole v. Akande (2009) 15 NWLR (Pt. 1163) 119

Nwosu v. Board of Customs & Excise (1988) 5 NWLR (Pt. 93) 255

Nneji v. Chukwu (1996) 10 NWLR (Pt. 373) 265

Ajadi v. Okenihun (1985) 1 NWLR (Pt. 3)

Ngwu v. Onuigbo (1999) 13 NWLR (Pt. 636) 512

Ogbechie v. Onochie (1988) 1 NWLR (Pt. 20) 320
 Oyewole v. Akande (2009) 15 NWLR (Pt. 1163) 119
 Akintola v. Lasupo (1991) 3 NWLR (Pt. 180) 508
 Odunukwe v. Administrator General (1978) 1 SC 25

STATUTES REFERRED TO

Court of Appeals Act LFN 2004, s. 15
 Constitution of the Federal Republic of Nigeria 1999 (as amended),
 s. 36(1)

C Evidence Act Cap 112 Laws of the Federation, s. 75

BOOKS REFERRED TO

Black's Law Dictionary 5th Ed. p. 1098
 Oxford Advanced Learners Dictionary of Current English 5th Ed p.

D 931

Advanced Law Lexicon Vol. 2D-1 Reprint 2009 p. 1628

LEAD JUDGMENT BY NGWUTA JSC

E Appellants hail from Ghana but reside in Nigeria. In 1991 they
 founded a school they called International Nursery and Primary
 School in Gboko, Benue State. The Appellants had some problems
 with the Benue State Ministry of Education over the registration of
 the school. The school was blacklisted as illegal by the Ministry of
 F Education on the ground that it was not registered. It was closed
 down.

In their desire to secure the necessary registration and reopen
 the school, the foreigners invited the Respondent to help them. With
 the intervention of the Respondent, the school was registered and
 G reopened, and operated by the parties. Greed crept into the rela-
 tionship between the appellants on one hand and the Respondent,
 on the other hand. As a result of the ensuing dispute, the Respond-
 ent sued the Appellants in the High Court of Benue State holden at
 Gboko. He claimed the following reliefs against the Appellants:

H “(i) A declaration that he is the sole proprietor of the school
 called Gboko International Nursery and primary School.

(ii) An order of the court directing an audit of the school fi-
 nances between January 1995 till judgment.

(iii) An order directing the Defendants to refund any unau-

thorized money spent by them.”

Appellants, as defendants, counter-claimed as follows:

“(i) That the defendants are the founders of Gboko International Nursery/Primary School and as such entitled to be declared joint owners of the said school.

(ii) A declaration that the plaintiff is an employee of the defendants as nominal proprietor of the school. B

(iii) An order directing the plaintiff to render accounts of the differences of N11,000.00 and N33,000.00 which he did not bank as directed by the school. C

(iv) An order directing the plaintiff to surrender all school properties in the plaintiff custody to the defendants.

(v) An injunction restraining the plaintiff by himself, heirs, servants, agents or whomsoever from further interference with defendants’ smooth administration of the school. D

(vi) Any other order(s) this Honourable Court may deem fit to make in the circumstances.”

The case was tried on the amended pleadings of the parties. In its judgment delivered on 14th October, 1999 the trial Court entered a non suit in both the main claim and the counter-claim. Both parties were aggrieved by the judgment and consequently the Respondent appealed and the Appellants cross-appealed to the lower Court; Jos. E

In the judgment delivered on 19th March 2003, the lower Court allowed the Respondent’s appeal and dismissed the Appellants’ cross-appeal. Appellants were not satisfied with the dismissal of their cross-appeal and they appealed to this Court on six grounds. The six grounds are hereunder reproduced, shorn of their particulars: F

“**GROUND OF APPEAL:**

1. The decision is against the weight of evidence. G

2. The learned Justices of the Court of Appeal, Jos erred in law when they set aside the specific findings of facts made by the trial High Court and substituted therefore the findings contrary to the established practice in respect thereof and this has occasioned a miscarriage of justice. H

3. The learned Justices of the Court of Appeal, Jos further erred in law when they re-evaluated the evidence of the parties on the issues raised thereby entering judgment in favour of the Respond-

ent and dismissing the cross-appeal of the Appellants and this has occasioned a miscarriage of justice.

4. *The learned Justices of the Court of Appeal, Jos misdirected themselves in law when they allowed the appeal of the Respondent before them thereby entering judgment in his favour and this has occasioned a miscarriage of justice.*

5. *The learned Justices of the Court of Appeal, Jos further misdirected themselves in law when they held that the cross-appeal of the Appellants herein before them lacked merit thereby dismissing same and this has occasioned a miscarriage of justice.*

6. *The learned Justices of the Court of Appeal, Jos erred in law when they dismissed the cross-appeal of the appellants herein after having found as a fact that the Appellants were not heard before an order of non-suit was made by the trial Court and this has occasioned a miscarriage of justice."*

From the six grounds of appeal, learned Counsel for the Appellants distilled "two broad" issues for determination. The issues are:

"(i) Was the Court of Appeal right to have dismissed the cross-appeal of the appellants after having found as a fact that the order of non-suit made by the trial Court was made without an opportunity given to the parties to be heard on the issue of non-suit? (Ground 6 of the Notice of Appeal).

(ii) Was the Court of Appeal right to have entered judgment in favour of the Respondent on the totality of the evidence before the Court? (Grounds 1, 2, 3, 4 and 5 of the Notice of Appeal)."

In his brief of argument, learned Counsel for the Respondent adopted the two issues framed by the appellant in their joint brief of argument.

In arguing issue one in his brief, learned Counsel for the Appellants referred to the order of non-suit made by the trial Judge and the finding of the lower Court that the order by the trial Court was erroneous. Based on the view expressed by the lower Court on the order of non-suit, Counsel argued it was wrong and contrary to its own views for the lower Court to have dismissed the cross-appeal, even though the trial Court made the order without hearing counsel for the parties. He relied on *Craig v. Craig* (1966) All NLR 165 at 169; *Osayi v. Izozo* (1969) All NLR 150 at 152; *Anyaduba v. NRTC Ltd.* (1992) 5 NWLR (Pt. 243) 535 at 559 - 560.

Learned Counsel contended that failure of the trial Court to hear Counsel before entering the order of non-suit will result in the order being set aside on appeal. He relied on *Awote v. Owodunmi* (No. 2) (1987) 2 NWLR (Pt. 57) 366; *Chief Olufosoye v. Olorunfemi* (1989) 1 NWLR (Pt.65) 26; *Odu v. Iyala* (2004) 8 NWLR (Pt. 875) 283 at 312. He urged the Court to set aside the judgment of the lower Court. He relied on *Oyewole v. Akande* (2009) 15 NWLR (Pt. 1163) 119 at 143, among others. B

He referred to s. 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and argued that the trial Court, in making the order of non-suit, violated the Appellants' right to fair hearing for which the lower Court ought to have set aside the judgment of the trial Court. He urged us to set aside the judgment of the trial Court as the lower Court ought to have done. C

On Issue 2, learned Counsel impugned the exercise of the lower Court's powers under s.15 of the Court of Appeal Act, Laws of the Federation 2004 as the evidence before the court did not justify the exercise of the lower court's power. He referred to the evidence before the court, particularly the admission of the Respondent and submitted that the appellants invited the Respondent to join them in running the school when they had problems with registration of the school. The above fact, he argued, was admitted by the Respondent in Exhibit 18. He relied on the evidence of PW3, PW6 and Exhibit 18B for the Respondents' admission: D

"...I agree that the school belongs to me and the complainant. Headmaster Mr. Dan Awu John and James Adjei (Appellant)..." E

Learned Counsel referred to pages 149 - 150 of the record of the trial Court and argued that it was erroneous for the lower Court to disturb the finding of fact made by the trial court who had the opportunity to hear oral testimony and watch the demeanour of the witnesses. He said that since the trial Court had evaluated the evidence before it, the lower Court should have affirmed the decision arrived at by the trial Court. He relied on *Nwosu v. Board of Customs & Excise* (1988) 5 NWLR (Pt. 93) 255; *Nneji v. Chukwu* (1996) 10 NWLR (Pt. 373) 265, among others. F

He submitted that the hearing of an appeal does not permit the lower Court to inquire into disputes but only to inquire into ways the disputes have been resolved. He relied on *Ajadi v. Okenihun* G

(1985) 1 NWLR (Pt. 3) and *Ngwu v. Onuigbe* (1999) 13 NWLR (Pt. 636) 512 at 523. Relying on *Ogbechie v. Onochie* (1988) 1 NWLR (Pt. 20) 320; *Oyewole v. Akande* (2009) 15 NWLR (Pt. 1163) 119 at 143, he argued that the lower Court should not have interfered with the finding of the trial Court. He referred to page 207 of the record of appeal and argued it was not the role of the lower Court to ascribe probative value to the evidence of witnesses. He further argued that even if it is assumed that the school founded in 1991 was declared illegal by the Benue State Ministry of Education, this does not ipso facto confer ownership of the school on the Respondent. Counsel referred to pages 221, 225 and 226 of the record and contended that the lower Court was confused as the trial Court as to which of the parties was entitled to judgment on the available evidence. He argued that on the preponderance of evidence, the lower Court ought to have entered judgment for the appellant. He urged the Court to allow the appeal for the reasons that:

(i) The parties were not heard before the order of non-suit was made.

(ii) The parties were denied their right to fair hearing.

(iii) The totality of the evidence does not justify the judgment in favour of the Respondent.

He urged the Court to allow the appeal with substantial costs.

In his own brief of argument, learned Counsel for the Respondent, in dealing with issue One, submitted that the order dismissing the appellants' cross-appeal was made pursuant to the power of the lower Court under s.15 of the Court of appeal Act, 2004. He referred to *Efetirorove v. Okpalefe II* (1991) 2 SCNJ (Pt. 1) 85 at 98; *Olayioye v. Oso* (1969) 1 All NLR 271; *Akintola v. Lasupo* (1991) 3 NWLR (Pt. 180) 508 at 515; *Odunukwe v. Administrator General* (1978) 1 SC 25 and submitted that the appellants having failed to prove the counter-claim, the lower Court was right to have dismissed the appeal. In the same vein, he submitted that the order setting aside the order of non-suit was rightly made since the lower Court found that the order of non-suit was a nullity. He relied on *Anyaduba v. NRTC Ltd.* (1992) 5 NWLR (Pt. 243) 535 at 559-560 and page (sic) 5 & 6 paragraph 4, 9 and 4.10 of the appellants' brief of argument. He contended it was wrong for the appellants to raise the issue of fair hearing in the failure of the trial Court to hear the parties

before the order of non-suit was made when the issue was raised in, and determined in their favour by the Court below. He submitted that the order for dismissal of the appellants' cross-appeal was properly made and urged the Court not to disturb but to confirm it.

On Issue 2, he submitted that the lower Court, having found that the judgment of the trial Court was perverse and occasioned a miscarriage of justice, properly invoked its powers under s.15 of the Court of Appeal Act 2004. He relied on *Salawu v. Olagunju Adeyeye Oyu Traditional Council v. Ajiboye* (1987) 2 SCNJ 1; *The Registered Trustees of the Apostolic Faith Mission v. Bassey James* (1987) 7 SCNJ 167. Learned Counsel referred to the claim of the Respondent and the counter-claim of the appellants in the trial Court and submitted that both the trial Court and the Court of appeal were right when they identified the sole issue in controversy between the parties as ownership tussle of the school.

He referred to the finding of the lower Court that; "the school which was in existence as at 1991 was in early 1992 blacklisted as an illegal school and closed down by the Ministry of Education and it was the respondent who later applied to the Ministry of Education for the establishment of the school in dispute", and submitted that by the authority of s.75 of the Evidence Act Cap 112 Laws of the Federation and *J. M. Din v. African Newspapers of Nig. Ltd.* (1990) 5 SCNJ 209 at 217; *Asafa Foods Factory Ltd. v. Alrain* (2002) 10 NSCQR (Pt. 1) 553 at 565, the facts found by the lower Court stand established.

He urged the Court not to disturb the said finding as the appellant did not appeal against same. He referred to pages 197 - 210 and 147 of the record and said that the lower Court affirmed the finding of the trial Court that "the respondent is the sole proprietor of the school in dispute". For the meaning of the word "proprietor", he referred to *Black's Law Dictionary* 5th Edition page 1098 and *Oxford Advanced Learners Dictionary of Current English* 5th Edition at page 931 as well as *Chief A. A. Fagunwa v. Chief N. Adibe* (2004) 7 SCNJ 322. He submitted that the lower Court was right when it set aside the findings of the trial Court in respect of the evidence of PW3 and PW6 as well as Exhibits 18, 18A and 18B from which portions favourable to the appellants were relied on by the trial Court in its judgment. He relied on *Mogaji & Ors v. Cadbury Nig. Ltd.* (1985) 2

NWLR (Pt. 7) 393; Mbam v. Bisi (2006) 26 NSCQR 583 at 602; Akaighe v. Idama (1964) All NLR 317 at 322. It is his case that the appeal lacks merit for the following reasons:

(a) Appellants' counter-claim/cross-appeal was properly dismissed because of failure of the appellants to prove same.

B (b) Issue one formulated by the appellants for determination has no nexus with the argument canvassed in support of it.

(c) The issue of non-suit was elaborately considered by the Court of Appeal and reopening a similar argument in this appeal constitutes abuse of process of Court process.

C (d) Considering the totality of the evidence before the trial High Court, the Court of Appeal was right to enter judgment in favour of the respondent.

Based on the above, he urged the Court to dismiss the appeal D and affirm the judgment and orders of the Court below. In Issue one, the appellants' case is that the lower Court ought not to have dismissed the cross-appeal since it found as a fact that the order of non-suit was made without the trial Court giving Counsel for the parties opportunity of being heard on the matter of non-suit.

E Learned Counsel for the appellant, in his brief appeared misguided when he dwelt on an issue the lower Court had disposed of and against which the appellants could not have appealed as the issue was resolved in their favour. The lower Court vacated the order of non-suit entered by the trial Court which was an issue in the appellants' cross-appeal. It is mandatory for the trial Court to give Counsel for the parties the opportunity to address the issue before entering an order for non-suit. See Craig v. Craig (1966) 1 All NLR 173; Akpakuna v. Nzeka (1983) 2 SCNLR 1. The lower Court rightly set F aside the order of non-suit at the instance of the appellant and it is not clear why learned Counsel for the appellants dwelt so much on the propriety of the trial court giving Counsel for the parties an opportunity to address it before making order of non-suit as if it was an issue before us.

H Whether or not the lower Court was right in dismissing the cross-appeal after vacating the order for non-suit is a matter to be dealt with in Issue 1. The lower Court having set aside the order for non-suit is entitled to invoke its general powers under s.15 of the Court of Appeal Act and take a decision one way or the other to

avoid further litigation on the issue. Having scrutinized the record and the briefs filed by the parties, it is my humble view that the only live issue in the appeal is Issue two, hereunder reproduced once more:

“Was the Court of Appeal right to have entered judgment in favour of the Respondent on the totality of the evidence before the Court?” (Grounds 1, 2, 3, 4 and 5 of the Notice of Appeal). B

From the totality of the evidence adduced by the parties at the trial Court, there is only one School - Gboko International Nursery/Primary School - with which both parties were involved. It is not a question of one school being blacklisted for non-registration and therefore closed down as illegal and a different school founded elsewhere. C

Exhibit 18 is a statement made by Respondent to the Police on 3/4/96 in connection with the disputed school. It reads in parts:

“...Gboko International School started in 1991 as illegal which government did not know anything about the very school. The School was started by the petitioner. Mr. K. K. Adusei and Mr. John B. Dankwa and also Mr. James Adjei where (sic) the people operating the school before I came to joined (sic) in 1991 and I was admitted as a proprietor of the school ...” (see page 149 of the record of the trial Court). D

Similar statements are contained in Exhibits 18 and 18B which were statements made by the Respondent to the Police on 9/4/96. In Exhibit 18B, the Respondent stated, inter alia: E

“... I agree that the school belongs to me and the complainant Head Master Mr. Dankwa John and James Adjei...” F

As found by the learned trial Court, the above statements in Exhibits 18, 18A and 18B made by the Respondent to the Police in connection with the disputed ownership of the school constitute admission against the interest of the Respondent who made them. On admissions, this Court held: G

“Another principle deeply enshrined in our jurisprudence is that admissions made do not require to be proved for the simple reason, among others that ‘out of the abundance of the heart the mouth speaketh’ and that no better proof is required than that which an adversary wholly and voluntarily owns up.” H

See Chief Chukwuemeka Odumegwu Ojukwu v. Dr. Edwin Onwudiwe & Ors (1984) 2 SC 15 at 38 per Aniagolu, JSC.

In Adeyemi Ogunnaike v. Taiwo Ojayemi (1987) 3 SC 213 at 247, this Court per Kawu, JSC held:

“Now an admission is a statement, oral or written (expressed or implied) which is made by a party to civil proceedings and which statement is adverse to his case. It is admissible as evidence against the maker as the truth of the fact asserted in the statement. See *Seismograph Services Nig. Ltd. v. Chief Keke Ogbenegweke Eyuafe* (1976) 9 & 10 SC 135 at 146.”

My Lords, I am not un-mindful that between themselves as counter-claimants and the Respondent as defendant to the said claim, the claim for joint ownership was not made. I will return to this later in the judgment but the point here is that had the appellants claimed joint ownership between themselves and the respondent at the trial court, there would have been no need to adduce evidence on the issue in view of the admission made by the respondent. Even learned counsel for the Respondent conceded that based on the evidence of PW3 and PW6, called by the Respondent as plaintiff, at the trial Court, and Exhibits 18, 18A and 18B the disputed school was jointly owned by the appellants and the respondent. In view of the evidence of his own witnesses - PW3 and PW6 who were not declared hostile witnesses, his Counsel’s admission and the contents of Exhibits 18, 18A and 18B which were not challenged by the respondent, the basis for his claim to exclusive ownership of the school, or the ground for upholding the claim by the lower Court, do not seem to exist.

May be the lower Court was influenced in their decision by the assertion of the Respondent, conceded to by the appellants, that the Respondent was the proprietor of the school. What appeared to have influenced the lower Court the more is the literal meaning of the word “proprietor”. I do not dispute the dictionary meaning of the word but with profound respect to the learned Justices of Appeal, the meaning was taken out of the context and the peculiar circumstances of this case.

Now the founder of a school would not need anyone to make or appoint him a proprietor of his own property. Under cross-examination, PW6, the Respondent’s own witness stated thus:

“Our conclusion arising out of our meetings was that I should be the Headmaster of the School. The 1st defendant was to be the Assistant Headmaster. The 2nd defendant was

to be the dean of studies and the plaintiff the proprietor.” See page 148 of the trial Court’s record.

The trial Court held, rightly in my view, that such office sharing cannot be the function of ordinary teachers in a school, a fact which the lower Court did not advert to. On this point, the evidence of PW6 called by the Respondent to the effect that the Respondent was appointed the proprietor of the school is in conflict with the evidence of PW7 also called by the Respondent who claimed the Respondent was not so appointed. However, in Exhibit 18, the Respondent stated:

“... The school was started by the petitioner, Mr. K. K. Adusei and Mr. John Dankwa and also Mr. James Adjei were the people operating the school before I came to join them in 1991 and I was admitted as the proprietor of the school...”

If the school was his exclusive property, he would not have joined any person or group of persons in its operation. He would invite others to join him; nor would he have been admitted as the proprietor of his own school. I entirely agree with the leaned trial Judge that the totality of the evidence adduced showed that the school was jointly owned by the parties in spite of the Respondent being appointed the proprietor or a nominal proprietor. The Respondent himself, in Exhibit 18, said in part:

“... The reason why I gave the petitioner termination letter was that he asked me to produce the school document before him and I refused them, he started beating me.”

Why would a teacher, a mere teacher, demand that the proprietor who employed him to teach in the school should produce the school documents before him? It is not possible. Only a teacher who has proprietary right/interest in the school can make such demand of the “proprietor” of the school whom he took part in appointing to that position.

In view of the above, it is my view that the lower Court erred in dismissing the appeal and holding that the school is the exclusive property of the Respondent. In the circumstances, I allow the appeal and set aside the decision of the lower Court. Then, what follows? What is left is the decision appealed against - the order of non-suiting the Respondent in the main

claim and the appellants in their counter-claim. The lower Court was right in setting aside the order of non-suit made without giving counsel for the parties the opportunity to be heard. See

Craig v. Craig (1966) 1 All NLR 173; Akpapuna v. Nzeka (1983) 2 SCNLR 1; Osayi v. Izozo (1960) 1 All NLR 155. Though I have set

B aside the judgment of the lower Court giving exclusive ownership of the school to the Respondent, the facts do not support the contrary. The evidence does not support the claim of exclusive ownership of the school by the appellants. As I said before in this judgment, neither party claimed joint ownership of the school with the adverse
C party, a fact upon which the learned trial Judge declined to make the declaration that was amply justified by his findings on the evidence before him.

***The disputed school is not the exclusive property of the Respondent nor is it that of the appellant. Though there is sufficient evidence based on which the trial Court could have rightly declared joint ownership of the school by the parties, none of the parties made that claim and a Court does not award what is not claimed before it. The facts of the case clearly
E show that the appellants, aliens from Ghana, founded the school and when it was closed by the Benue State Ministry of Education for non-registration, they co-opted the Respondent, a Nigerian who helped secure the needed registration. The parties met for power sharing and appointed the appel-
F lant "proprietor" of the school which they operated as joint owners.***

***My noble Lords, this Court has to invoke its equity jurisdiction to give effect to what was proved but could not be
G awarded at law because it was not claimed specifically. It is said that:***

***"Justice is the inflexible guardian of the public safety and being inflexible regards nothing but the facts whereas equity will consider motives and intentions and modify its decisions
H accordingly. All that law declares is just. It belongs to equity to temper the rigour of its decrees".*** See Advanced Law Lexicon Vol. 2D - 1 Reprint 2009 page 1628.

Law has made its decree based on the facts before the Court. But the rights and obligations of the parties remain

unsettled. It is for this Court, in its equity jurisdiction, to consider the motive and intention of the parties at the meetings at which it was:

“...our conclusion arising out of our meetings was that I should be the Headmaster of the school. The 1st defendant was to be the Assistant Headmaster. The 2nd defendant was to be the dean of studies and the plaintiff the proprietor.” See page 148 of the records. B

From the surrounding circumstances, it appears clear that the parties intended to own and operate the school as a joint project. The facts do not justify exclusive ownership by any party. In view of the above and consequent upon the allowing of the appeal and having vacated the order giving exclusive ownership of the school to the Respondent, I declare that the school - Gboko International Nursery/Primary School - is owned jointly by the appellants and the Respondent. C
D

In conclusion, the appeal is allowed. To give effect to the intention of the parties based on the facts proved and/or admitted, I declare that the school is owned jointly by the parties. Parties to bear their respective costs. E

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother NGWUTA, JSC just delivered. My learned brother has exhaustively considered the issues raised, the relevant facts and the laws applicable thereto leaving nothing useful for me to comment on without repeating what had been said. From the facts on record the justice of the case demands the conclusion reached. F
G

I agree with his reasoning and conclusion that the appeal be allowed. I accordingly allow the appeal and abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal allowed. H

FABIYI JSC

I have read before now the judgment just delivered by my learned brother - Ngwuta, JSC. I agree with the reasons as advanced,

leading the inescapable conclusion therein arrived at.

The appellants who are foreigners from Ghana founded a school called International Nursery and Primary School, Gboko, Benue State in 1991. The school was blacklisted and closed down as illegal by the Ministry of Education on the ground that it was not registered. To get the school reopened, the appellants invited the original respondent to help them. He was appointed as Proprietor. The appellants applied to him and they were employed as Headmaster and Assistant Headmaster respectively. With the intervention and good will of the respondent, the school was registered, reopened and operated by the parties. Thereafter, a dispute ensued between them.

The respondent, at the trial High Court, claimed, inter alia, as follows:-

“(1) A declaration that he is the sole proprietor of the school called Gboko International Nursery and Primary School.”

The appellants, as defendants, counter-claimed, inter alia, as follows:-

“(1) That the defendants are the founders of Gboko International Nursery /Primary School and as such entitled to be declared joint owners of the said school.”

The learned trial Judge in his judgment delivered on 14th October, 1999 non-suited the suit taken out by both parties. The respondent appealed to the court below while the appellants cross-appealed. Thereat, the respondent's appeal was allowed while the appellants' cross-appeal was dismissed. The appellants decided to appeal to this court. The appellants' notice of appeal contained six grounds of appeal from which two issues were distilled. I desire to discuss the second issue which reads as follows:-

“(ii) Was the Court of Appeal right to have entered judgment in favour of the respondent on the totality of the evidence before the court?”

It is not in serious contention that the respondent was appointed as a Proprietor to get the school back on track when it was blacklisted by the Government and closed down as an illegal school. The appellants cannot wriggle out themselves from this position as they agree with same. On the other hand, the respondent in Exhibit 18 admitted that the school was started by the appellants who invited him to help out and reactivate the school in 1991. In Exhibit 18B, he stated

as follows:-

“I agree that the school belongs to me and the complaint Head Master Mr. Dankwa John and James Adjie.”

It is trite that a crucial fact which is admitted needs no further proof and same would be taken as established. See: Agbanebo v. U.B.N. Ltd (2000) 7 NWLR (Pt. 666) 534 at 549; Edopolo & Co. Ltd. v. Ohenhen (1994) 7 NWLR (Pt. 358) 511 at 519. Further, let me observe that admission is a concession or voluntary acknowledgment made by a party of the existence of certain facts; a statement made by a party of the existence of a fact which is relevant to the cause of his adversary; a voluntary acknowledgment made by a party of the existence of the truth of certain facts which are inconsistent with his claims in an action. *Vockie v. General Motors Corp. Chevrolet Division D.C. Para. 66 FRD 57, 60* (Black Dictionary, Sixth Edition at page 47).

From the above depicted scenario, it is clear that none of the parties can claim that he is the sole owner of the school. The evidence, as can be garnered in the transcript record of appeal, directly points at joint ownership. Equity is fairness. That which belongs to two parties should not be ordered as belonging to one of them as done by the court below.

It is for the above reasons and those set out in the lead judgment that I too feel that exclusive ownership of the school should not be given to the respondent as tacitly done by the court below. The school is jointly owned by both sides of the divide. Parties should bear their respective costs.

GALADIMA JSC

I have read in advance the draft of the leading judgment delivered by my learned brother NGWUTA JSC. I agree with the reasons leading to his conclusion that this appeal be dismissed for lacking in merit.

The facts of this matter are simple and clear. The Appellants who hail from Ghana founded International Nursery and Primary School in Gboko, Benue State of Nigeria in 1991. It was closed down by that state Ministry of Education on the ground that it was not formally registered. The Appellants as foreigners sought for the assist-

ance of one Amos Adebayo now deceased, who got the school registered and reopened. He became the proprietor while the appellants were employed Headmaster and Assistant Headmaster respectively. The dispute which ensued between the parties ended up at the trial High Court where the Respondent now claimed to be the proprietor of the school. The Appellants now counter-claimed as the founders of the school. The learned trial Judge in 1999 non-suit both parties' claim. The Respondent's appeal to the Court of Appeal was allowed while the appellants' cross-appeal was dismissed.

The Appellants further appealed to this court on six grounds and formulated 2 issues:

"(i) Was the Court of Appeal right to have dismissed the cross-appeal of the appellants after having found as a fact that the order of non-suit made by the trial court was made without an opportunity given to the parties to be heard on the issue of non-suit (Ground 6 of the Notice of Appeal).

(ii) Was the Court of Appeal right to have entered judgment in favour of the Respondent on the totality of the evidence before the Court. (Grounds 1, 2, 3, 4 and 5 of the Notice of Appeal).

It is instructive to note that in his brief of argument learned counsel for the Respondent adopted these two issues formulated by the Appellants. It is my view that the second issue is quite apt as its consideration would determine the entire appeal. It is not disputed that the Respondent's assistance was solicited to get the school registered.

The Respondent admitted in Exhibit 18, the fact that the Appellants started the school. He was invited to help out and reactivated the school in 1991. This crucial fact was admitted by parties. It needs no further proof. It is established. While the appellants can be shown to have sown the seeds the Respondent nurtured and brought same to fruition. The reactivated and registered school in 1991 was the success story of both parties. None of the parties can now claim he is the sole proprietor or owner of the school. The totality of the evidence as can be seen from the Record of Appeal shows directly that the school is jointly owned and I so declare. I make no order as to costs.

PETER -ODILI JSC

By a writ of summons and statement of claim filed by the respondent to this appeal at the Gboko High Court against the appellants as defendants claiming the following reliefs:

- (i) A declaration that he is the sole proprietor of the school called Gboko International Nursery and Primary School. B
- (ii) An order of the court directing an audit of the school finances between January, 1995 till judgment.
- (iii) An order directing the defendant to refund any unaccounted moneys spent by them. C

The appellants as defendants at the High Court entered appearance to the suit of the respondent and filed a joint statement of defence and counter-claim against the respondent. In the counter-claim of the appellants, they claimed the following reliefs:

- (i) That the defendants are the founders of Gboko International Nursery/Primary school and as such entitled to be declared joint owners of the said school; D
- (ii) A declaration that the plaintiff is an employee of the defendants as nominal proprietor of the school;
- (iii) An order directing the plaintiff to render accounts of the differences of N11,000.00 and N33,000 which he did not bank as directed by the school. E
- (iv) An order directing the plaintiff to surrender all school properties in plaintiff's custody to the defendants.
- (v) An injunction restraining the plaintiff by himself, heirs, servants, agent or whosoever from further interference with defendant's smooth administration of the school. F
- (vi) Any other order(s) this Honourable court may deem fit to make in the circumstances. G

The brief facts as put forward by the appellants and which were not far from the findings of the two courts below are that the appellants are Ghanaians resident in Nigeria and sometime in October 1991, founded a school called Gboko International Nursery and Primary School. The appellants subsequently invited the respondent in 1992 to join them in the running of the school, when they had problems with the Benue State Ministry of Education over the registration of the school by the Benue State Government. Somewhere along the line the respondent went to the Gboko High Court. H

At some point the parties amended their pleadings at the High Court before the pleadings of the parties were finally settled. The matter proceeded to trial and the learned trial judge delivered his judgment on the 14th October, 1999 and non-suited the plaintiff/respondent's claim as well as the defendant/appellant's counter-claim.

^B In the non-suiting, the trial judge had not given the parties opportunity to be heard before the order of non-suit. The respondent and the appellants being dissatisfied appealed and cross-appealed against the judgment of the trial judge to the court of Appeal, Jos. The Court of Appeal sitting in Jos in a judgment delivered on the 19th March, ^C 2003 allowed the appeal of the respondent and dismissed the cross-appeal of the appellants. It is against the decision of the court below, Jos that the appellants have appealed to this court by a notice of appeal filed on 17th June, 2003. On the 25/10/11 date of hearing ^D the appellants through counsel Sylva Ogwemoh adopted their joint brief of arguments filed on 15/1/2010 and deemed filed on 18/1/2010. In the brief were crafted two issues for determination viz:

(i) Was the Court of Appeal right to have dismissed the cross-appeal of the appellants after having found as a fact that the order of ^E non-suit made by the trial court was made without an opportunity given to the parties to be heard on the issue of non-suit? (Ground 6 of the Notice of Appeal).

(ii) Was the court of Appeal right to have entered judgment in ^F favour of the respondent on the totality of the evidence before the court? (Grounds 1, 2, 3, 4 and 5 of the Notice of Appeal).

The respondent, through learned counsel, A.G. Ayua adopted their filed on 8/3/2010 and also adopted the issues as formulated by the appellants. Learned counsel for the appellants along the issues ^G couched submitted that the Court of Appeal ought not to have dismissed the cross-appeal after holding that the non-suit order of the court of trial would not stand the order having been made without taking addresses from counsel on the issues of non-suit which that court had raised suo motu. He cited: *Craig v Craig* (1966) ALL NLR ^H 165 at 169; *Osayi v Izozo* (1969) ALL NLR 150 at 152; *Anyaduba v NRTC Ltd* (1992) 5 NWLR (Pt.243) 535 at 559 – 560. He went on to say that the failure of the trial court to hear the parties on the issue of non-suit before it was made amounted to a breach of the fundamental constitutional right to fair hearing as guaranteed order section

36(1) of the Constitution of the Federal Republic of Nigeria 1999.

For the appellants was further contended that the Court of Appeal in an apparent exercise of its powers under section 15 of the Court of Appeal Act, Laws of the Federation of Nigeria, 2004 entering judgment in favour of the respondent was a decision not deserved or supported by available evidence. That the Court of Appeal clearly substituted its own views on the facts for those of the trial court. That the interference with the findings was erroneously made. He referred to the cases: *Ebba v Ogbodo* (1984) 1 SCNLR 272; *Balogun v Agboola* (1974) 1 All NLR (Pt.2) 66; *Nwosu v Board of Customs & Exercise* (1988) 5 NWLR (Pt.93) 225; *Nneji v Chukwu* (1996) 10 NWLR (Pt.378) 265; *Ajadi v Okenihun* (1985) 1 NWLR (Pt.3) 384; *Oroke v Ede* (1964) NNLR 118; *Ngwu v Onuigbo* (1999) 13 NWLR (Pt.636) 512 at 523; *Ogbechie v Onochie* (1988) 1 NWLR (Pt.70) 370; *Oyewole v Akande* (2009) 15 NWLR (Pt. 1163) 119.

On their own part learned counsel for the respondent submitted that the Court of appeal was right to have dismissed the cross-appeal of the appellants herein. That the court below was also right to have exercised its powers under section 15 of the Court of Appeal Act, 2004 in reviewing and re-evaluating the evidence of the parties before the trial High court and at the end dismissed the counter-claim and found for the respondent to whom, the Court of Appeal amended the judgment and upheld the respondent ownership claim to the school subject matter of the dispute. In support learned counsel had cited several cases viz: *J.M. Din v African Newspapers of Nig. Ltd* (1990) 5 SCNJ 209 at 217; *Asafa Foods Factory Ltd v Alrairie* (2002) 10 NSCQR (Pt.1) 553; *Dabup v Kolo* (1993) 12 SCNJ 1 at 10; *Adeyemi v Olakunri* (1999) 12 SCNJ 224; *Chief A.A Fagunwa v Chief N. Adibi* (2004) 7 SCNJ 208; *Balogun v Akanji* (1988) 2 SCNJ 104; S.15 Court of Appeal Act, 2004.

Having stated the summary of the submissions of counsel either way, I would like to start with a brief excerpt of the judgment of the trial court which is as follows:

“In the situation at hand since none of the parties who claimed ownership exclusively of the other has established such ownership I should dismiss their claims but I have seen that such a final action by the court will work hardship on the parties because a dismissal of an action raises certain estoppels. I think the ideal (sic) order to make is

an order of non-suiting which is a final decision of the court to the effect that none of the parties has won.”

On that decision the Court of Appeal in refusing the non-suit had this to say:

“The requirement that counsel should be heard before an order of non-suit is made is no longer merely desirable. It is not only prudent but important. The consequences of failure to hear the counsel before an order of non-suit is made is that the order non-suiting the claim would be set aside, except it is very obvious and incontestable on the evidence before the trial court and the law applicable therein that an order of non-suit is the only order it would make in the case in the exercise of its discretion.”

From the above and what was before the court of trial and later at the court of Appeal were undisputed facts that the appellants herein established the school sometime in 1991 and being Ghanaians, the Benue state Government under its Ministry of Education had it closed as an illegal enterprise based on improper constitution of the indigeneity(sic) of the proprietors.

To survive as an establishment the appellants in 1992 invited the respondent to partner with them under the guise of his being a teacher and also to sign and put forward his name as proprietor, he being a Nigerian. The school functioned with these disparate configurations and not surprising one party and this time, the respondent took a writ of summons claiming sole ownership. The conclusion of the trial court clearly stemmed from a difficulty on this partnership where each party claimed sole ownership and nothing else, which situation brought about the non-suit of the trial court without first getting a hearing in that regard from the parties.

On appeal, while acknowledging and rightly in my humble view that failure of the trial court to be addressed by the parties on the issue of non-suit which that court raised suo motu was fatal to the order. This court had laid down this rule from way back and it still remains the position. See *Craig v. Craig* (1966) ALL NLR 165 at 169; *Osayi v Izofo* (1969) ALL NLR 150 at 152; *Anyaduba v. NRTC Ltd.* (1882) 5 NWLR (Pt.243) 535. Getting the matter of the question raised in the second issue as to whether the Court of Appeal was right to have granted judgment in favour of the respondent and awarded him the sole ownership of the property in the face of the

available evidence and the clear findings of the learned trial Judge in that regard. The Court of Appeal had held as follows:

“However, on the totality of the evidence before the court, in particular the evidence of the plaintiff/appellant who gave evidence as PW1, PW2, PW4, PW6 and Exhibits 1, 2, 4, 5, 6A, 6B, 10A, 10B, 10D, 10E, 11, 16 and even 18, 18A, 18B, it is my view that the plaintiff/ appellant proved by preponderance of evidence that he is the sole proprietor of the said school. In that regard, I think the cross-appeal lacks merit and is accordingly dismissed. In the final analysis, the main appeal by the plaintiff/appellant succeeds and it is hereby allowed....Judgment is entered for the plaintiff/appellant in terms of the reliefs claimed in paragraph 18 of the amended statement of claim filed before the lower court.”

From what the Court of Appeal did it is easy to see not only that he interfered with the evaluation and findings of the trial court without justification since what was on ground did not bear out to the path chartered by the Appeal Court and to the conclusion it came to. I see it necessary to quote the salient part of the judgment of the court trial in contradistinction to what happened on appeal and it is thus:

“The plaintiffs’ claim that the old school which was in existence was closed down by Government and that the school as it now exists was solely established by him. I see this attempt as an effort by a drowning man to save his head. The evidence before me does not support that assertion. Presently the name of the school is the same, the operators are the same and there is no evidence that the school actually ceased functioning at any particular time. Moreso, that Exhibit “18B post dates the period of the blacklisting of the school and all other activities in the running of the school in which the defendants participated post dated the period the school was blacklisted.”

From all I have stated so far in this judgment and from the entire evidence before the court in this proceeding, it is not difficult to deduce a joint ownership of the school by the plaintiff and the defendants. Accordingly it is my opinion based on all the contributions made in the establishment and the running of the school Gboko International Nursery/Primary school as exposed by the entire evidence before me I do not agree with the plaintiff’s claim that he is the sole owner of the school. I also do not agree that the defendant own

the school exclusively of the plaintiff. I see evidence of joint ownership as between the plaintiff and the defendants unfortunately all the parties are so selfish that none of them pleaded joint ownership of all the parties to this suit.

The Court of Appeal had fallen into certain error as entering
 B into the trial of the case when it went on its own evaluation of the evidence including ascribing probative value to the evidence of the witnesses, a domain of only the trial court. See *Ogbeche v Onochie* (1988) 1 NWLR (Pt.70) 370; *Oyewole v Akande* (2009) 15 NWLR (Pt.1163) 119; *Ebba v Ogbodo* (1984) 1 SCNLR 272; *Nneji v*
 C *Chukwu* (1996) 10 NWLR (Pt. 378) 265.

The court below finding for respondent came from wrong premises as that court allowed itself to be persuaded that because the documents of re-application for the re-opening of the school bore
 D the name of the Nigerian associate, of the appellants and that is the respondent, the respondent above must be the single owner. The court cannot ignore the relationship between the parties and how they came to work together. There must be a holistic appraisal of how the institution came to be and that the trial court made a good
 E showing of. The morality or rightness of the arrangement between the parties is not what is before court; all that is the concern of the court is that there was joint ownership and then what next.

In conclusion therefore since none of the parties had made a
 F claim even if in the alternative upon which a clear relief can be rested the only option is a declaration that the appellant and respondent are joint owners of the school subject matter of this dispute.

From the above and the fuller details of my learned brother,
 N. S. Ngwuta JSC I allow the appeal and order that the school is
 G jointly owned by the parties. I abide the consequential orders in the lead judgment.

H