

SUPREME COURT OF NIGERIA
30TH MARCH, 2012. SC. 185/2004
CORAM:- **F. F. TABAI, C. M. CHUKWUMA-ENEH,**
M. S. MUNTAKA-COOMASSIE, B. RHODES-VIVOUR,
M. U. PETER-ODILI, JJSC

UNITY BANK PLC

(Formerly New Nigeria Bank) APPELLANT
AND

1. DENCLAG LIMITED

2. I. AUDU RESPONDENTS

(2nd Respondent substituted by
George Audu by Order of Court
on 19/1/12)

APPEALS - Grounds - Preliminary objection - Competence - The
objection is invalid - Since the grounds stated the issues in contention
- Between the parties (H1)

JUDGMENTS - Judgment debt - Interest payable - Limitation - Bauchi
State High Court Rules O.40 r.7 - Application of interest cannot be -
Overtaken by effluxion of time (H2)

COURTS - Pleadings - Failure to raise triable issue - Court can in
appropriate case - Draw conclusions from pleadings - And enter judg-
ment for a party (H3)

FACTS

Bauchi State Government entered into contract with respond-
ents for the refurbishing of her general hospitals. The contract sum
was 1,476,777.94 pounds. To finance the contract, the State Gov-
ernment secured an initial loan of N9,500,000.00 and subsequently
an additional loan of N8,094,581.00 from appellant. As a way of
repaying the loan, the State Government authorized the Central Bank
of Nigeria to deduct the sum of N500,000.00 from its monthly statu-
tory allocation and pay same to appellant. The Central Bank ac-
cepted the arrangement and complied with same. To secure the nec-
essary foreign exchange to import the equipment, 1st respondent

applied to appellant to bid for foreign exchange in accordance with the CBN regulations. However, request for bidding for foreign exchange is not enough to import the equipment into Nigeria. It is only through the opening of irrevocable letters of credit and fulfilment of other conditions that will ensure that the goods are brought into Nigeria.

However, as a result of delay in remitting the foreign exchange, respondent sued appellant at the High Court of Bauchi State claiming damages of 616,019.36 pounds sterling. The court awarded the claim. Seven months after it delivered its judgment, the court gave another order of payment of 10% interest until the judgment debt is liquidated. Being dissatisfied, appellant filed appeal at the Court of Appeal Jos Division. The court dismissed the appeal but interfered on the award of 616,019.36 pounds sterling by giving an option to cross-respondent to pay the sum of N80,082.516 in lieu of the pounds sterling. Aggrieved further, appellant appealed to the Supreme Court. Respondent filed preliminary objection to the hearing of the matter and also cross-appealed on the interference on the award in foreign currency by the Court of Appeal, asking the court to affirm the judgment of the State High Court.

ISSUE FOR DETERMINATION

The main challenge here is whether or not the court of trial was correct to have awarded 10% interest on the judgment six months and 5 days after delivering judgment precisely on the 26th May 1999.

HELD (Unanimously dismissing the appeal and allowing the cross-appeal per **PETER-ODILI JSC**)

APPEALS - Grounds - Preliminary objection - Competence

1. This Preliminary Objection is an academic exercise as it can be seen very clearly indeed that the grounds of appeal including the one complained of have stated what the problems between the contending parties are and have not left anyone in doubt including the objector of what the substance of the complaint is and what is expected of them in rebuttal. The Rules of Court have not been breached and the grounds of appeal are competent. (p. 1448 B)

Judgments debt - Interest payable - Limitation

2. For guide, it is necessary to refer to some judgments of this apex court where even the provisions of Order 40 Rule 7 in Bauchi State just as in the case at hand were interpreted with clarity. I first refer to *Berliet (Nig.) Ltd v Kachalla* (1995) 9 NWLR (Pt. 420) 478 this court held that a court cannot be said to be *functus officio* when it grants an application for post judgment interest after the delivery of its judgment as the effect is that the rule of court places on the judgment debtor a statutory duty to pay interest at the rate of 10% from the date of judgment.

The appellant's counsel had particularly taken exception to the award because of the passage of over 5 months but he seems to have overlooked the fact that the only time frame in the Order 40 Rule 7 is after judgment and nothing else. Therefore interpreting that Rule as provided is that there is no limit to time at which it can be said the application for the interest has been overtaken by effluxion of time. (pp. 1453 D/1454 A)

Pleadings - Failure to raise triable issue

3. The question first arising is if the trial court was right to make use of the pleadings taken as constructive admission of the fact that the cross-respondent was aware of the shortfall of 616,019.36 pounds claimed by the cross appellant. In answering that poser I would refer to Order 30 Rule 3 of the Rules of the High Court, Plateau State applicable to Bauchi State and it is as follows:

“where admission of facts are made by a party either by its pleading or otherwise any other party may apply to the court for such judgment or order as upon those admissions he may be entitled to without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order on the application as it thinks just. And application for an order under this rule may be made by motion or summons.”

The above takes care of admissions but it has been settled in this court that where pleadings do not raise serious triable issue, the court is entitled to draw necessary conclusions from the pleadings and proceed to enter Judgment for the party in an appropriate case. (p. 1462 A)

REPRESENTATION

G. O. Ofodile Okafor SAN and R. E Edebianga, for the Appellant
Dr. J. O. Olatoke with A. F. Yusuf and J. O. Nkwota (Miss), for the Respondents

B CASES REFERRED TO

- Ogbe v. Asade (2009) 18 NWLR (pt.1172) 106
Ugo v. Obiekwe & Anor (1989) 7 NWLR (Pt. 99) 566
Osinupei v. Saibu (1982) 7 SC 104
Ndiwe v. Okocha (1992) 7 NWLR (Pt.252) 129
C Maigoro v. Garba (1999) 7 SCNJ 270
Agbaka v. Amadi (1998) 11 NWLR (Pt.572) 16
Okafor v. Nweke (2007) 10 NWLR (Pt. 1043) 521
Koya v U.B.A. Ltd (1997) 1 NWLR (Pt. 481) 251
D Nwabueze v Nwora (2005) 8 NWLR (Pt. 926) 1
Governor of Ekiti State v Osayomi (2005) 2 NWLR (Pt. 909)
Addax Pet. Dev. Nig. Ltd v Duke (2010) 8 NWLR (Pt. 1196) 278
Berliet Nig Ltd v. Kachalla (1995) 9 NWLR (pt.420) 478
Himma Merchant Ltd v. Aliyu (1994) 5 NWLR (pt.347) 667
E Nsirim v. Nsirim (1990) 3 NWLR (Pt.138) 285
Odofin v. Agu (1992) 3 NWLR (Pt. 229) 350

STATUTES & RULES REFERRED TO

- Constitution of Federal Republic of Nigeria 1999, ss. 36(1), 233(2)
F Legal Practitioners Act Cap 207 LFN 1990, ss. 2(1), 24
Supreme Court Rules (as amended), O. 8 r. 2(5), O. 6 r. (5)(c),
O. 2 r. 9(1), O. 8 r. 2 (2)(3)(4)
Bauchi State High Court (Civil Procedure) Rules, O.30 r.3, O.40 r.7
G Court of Appeal Rules 2002, O. 19 r. (3)(4)

LEAD JUDGMENT BY PETER-ODILI JSC

- This appeal is against the judgment of the court of Appeal, Jos Division delivered on the 13th day of April, 2004 in a leading judgment delivered by Amiru Sanusi JCA, the appeal was dismissed except for the amendment of the award of 616,019.36 pounds with an option to pay a sum of N80,082,516 being the Naira equivalent as claimed. Being dissatisfied with the judgment aforesaid, the defendant herein Appellant appealed to the Supreme Court on eleven

grounds. The plaintiff herein Respondent also cross-appealed on two grounds. On the 30/11/2004 Appellant filed a Motion on Notice to amend the Notice and Grounds of Appeal containing 19 grounds.

The facts relevant backgrounds to this appeal are stated hereunder:-

STATEMENT OF MATERIAL FACTS:

The Government of Bauchi State was desirous of equipping and refurbishing her two general hospitals at Kumo and Alkalari. On the 16/9/87 a contract for the supply of hospital equipment was signed between the Bauchi State Ministry of Health and the 1st Respondent Denclag Limited. The agreement Exhibit '1' was executed on behalf of the 1st Respondent by the 2nd Respondent I. Audu being the Chairman and Chief Executive Officer. See para 5 of the Amended Statement of claim at page 68 of the record. See also page 102 lines 21 to 34; page 108 lines 5 to 10 of the record. On execution of the contract, the 1st plaintiff's witness Alhaji Yahaya Bappah said:

"The 2nd plaintiff was the principal negotiator on behalf of the plaintiff. The 2nd plaintiff did everything on behalf of the 1st plaintiff. The plaintiffs executed the contract 100%. The agreement was signed by the 2nd plaintiff for the 1st plaintiff."

The contract sum was 1,476,777.94 pounds. The initial loan in Naira was N9,500,000.00 with additional sum of N8,094,581.00. See Exhibit 4 and paragraphs 5 and 30 of the Amended Statement of Claim at pages 68 and 71, of the record.

To finance the contract with the 1st Respondent, the Bauchi State Government secured a loan of N9,500,000.00 and N8,094,581.00 from the Appellant. See paras. 10 and 30 of the Amended Statement of Claim at pages 69 and 71 of the Record, A separate loan agreement was entered into between the Appellant and Bauchi State Government for financing the contract. That agreement is not in evidence. The only parties to the contract agreement Exhibit 1 were the Bauchi State Ministry of Health and the 1st Respondent. On cross examination by counsel to the appellant the PW1 Alhaji Yahaya Bappah said:

"The Defendant is not a party to Exhibit '1'.... The role of the defendant to open letters of credit in favour of the 1st plaintiff is not stated in Exhibit '1'."

PW2 Garba Daugauda was the Commissioner for Health Bauchi

State. He signed the contract agreement. He said on examination-in-chief.

"This is the contract (Exhibit '1' identified) I signed it. Bauchi State Government and the 1st plaintiff were the parties to the agreement p.14 (a) (e) of Exhibit '1' made reference to the defendant who was to finance the contract. The defendant was to make all payments to the '1' plaintiff" See page 108 lines 10 to 15 of the record. Indeed clause 14 (d) of Exhibit '1' provided:

"The bank will be responsible for all payments due to the contractor while Bauchi State Government will be dealing with the Bank on all financial matters."

The PW3 Peter Ali Tula was the Assistant Director in the Bauchi State Ministry of Health in charge of equipment. The equipment were fully supplied in 1990 and were duly received by him. On cross examination the witness said:

"I told this court that I received the on behalf (sic) the Ministry of equipment were fully supplied." See page 110 lines 29 to 31 of the record.

The PW4 Alhaji Aliyu Baffa Tilde was the Deputy Accountant General for Bauchi State. He confirmed that the Bauchi State Government took loan from the Appellant to finance the contract with the 1st Respondent. This witness tendered a letter dated 20/4/88 Exhibit 2 by which the Government of Bauchi State authorized the Central Bank of Nigeria to deduct a sum of N500,000.00 monthly from the States statutory allocation and pay same to the appellant. The deduction commenced on July 1988 and was to last for 25 months. The central Bank of Nigeria by a letter dated 25/4/88 Exhibit 3 confirmed to the Appellant that they would keep to the repayment agreement. Exhibit 4 was tendered to confirm that the repayment schedule was adhered to. When the initial loan of N9,500,000.00 could not cover the cost of the equipment due to fluctuations of the Naira against other hard currencies, the Bauchi State Government secured additional loan of N8,094,581.00 from the appellant. By their letter dated 20/2/90 Exhibit 5, the Bauchi State government requested the CBN to deduct same N500,000.00 for 16 months and pay same to the appellant. The CBN accepted this arrangement and complied on Exhibit 4. The PW4 confirmed that the loan was taken in Nigerian currency he said:

"If I see the agreement I will recognize, I signed it on behalf of the 1st plaintiff, this is the agreement (Exhibit '1' identified.)"

The PW5 brokered the loan package between the appellant and Bauchi State Government. Even though clause 9 and 10 of Exhibit '1' made the holding of an Arbitration condition precedent to any suit in court, parties would seem to have waived their right and this issue therefore does not call for determination in this appeal. The supplier by Exhibit '1' is Denclag Limited. The evidence by PW5 at page 118 lines 6 to 9 of the record that:

"The payment for the materials was to be made by the defendant to the supplier Sartra International Ltd of London by means of letters of credit on behalf of the 1st plaintiff, the actual contractor" is at variance with Exhibit '1'.

Indeed the name Sartra International Limited of London is not reflected anywhere in Exhibit '1'. There is no other agreement between the respondents, Sartra International Limited of London and the appellant. There is also no agreement between the appellant and the respondent.

To secure the necessary foreign exchange to import the equipment, the 1st respondent applied to the appellant to bid for foreign exchange in accordance with the CBN regulations. In appreciation of this fact, the 1st respondent made several written requests for bidding for pound sterling. These requests include:

Exhibits 11 & 19 dated 23/12/88: for N460,000.00

Exhibits 17 dated 10/5/88 for N4.5 million

Exhibit 18 dated 11/11/88 for N1.75 million

Exhibit 20 dated 26/1/90 for N5 million

Exhibit 21 dated 19/1/89 for N435,000.00

Exhibit 22 dated 18/5/89 for N470, 000.00

By their letter dated 2/4/90 Exhibit 23, the respondent requested the appellant to transfer N1,000,000.00 to the bank's foreign exchange department to be used for bidding for foreign exchange for importation of hospital equipment for Bauchi State Government. In appreciation of the fact that mere bidding is not automatic allocation of the foreign exchange sought, Exhibits 11, 18, 19, 20, 21, and 22 ended with the following words *"you are further authorized to keep the fund with you pending successful bidding."*

Request for bidding for foreign exchange is not enough to

import the equipment into Nigeria. It is only through the opening of irrevocable letters of credit and fulfilment of other conditions attached hereto that will ensure that the goods are brought into Nigeria. The appellant at the instance of 1st respondent established four irrevocable letters of credit Exhibits 12, 13, 14 and 25 as follows:

- B a. Exhibits 12 LC No. HO/JO/LC.199/58 dated 01/7/88 for 387,615.90 pounds.
- b. Exhibit 13 LC No. HO/KN/LC.291/88 dated 13/9/88 for 480,546.90 pounds
- C c. Exhibit 14 LC No. HO/JO/LC.140/90 dated 20/7/90 for 486,790.13 pounds.
- d. Exhibit 25 LC No. HO/JO/I.C.282/89 dated 1/12/89 for 74,861.33 pounds.

The beneficiary of the four letters of credit is Sartra International London. On oath the PW5 testified that the appellant failed to open the letters of credit in the months of April, May and June 1988 but did so only on the 1/2/88. See page 119 lines 5 to 7 of the record. The respondent wrote five letters to the appellant complaining of nonpayment or delayed payments. They are Exhibits 6, 7, 8, 9 and 10. Exhibit 10 is dated 21.10.86 and Exhibit B is dated 6/5/88, Exhibit 7 is dated 15/7/88, Exhibit 9 is dated 22/12/88, Exhibit 6 is dated 28/3/91.

In Exhibit 6 the 1st respondent wrote inter alia.

- F *“We are not going to comment on our agreement with the State Government but between you and us.”*

In Exhibit 9 the Respondent referred to “Your agreement with State Government and us” and breach of contract. However during the trial no contract oral or written with the respondents was made available to the court. Exhibit 10 is a letter dated 21/10/86 addressed to The Managing Director of Mecliquip Nigeria Limited, Lagos warning about substantial price increases in November and December 1986. This letter was written 11 months before Exhibit 15. It is dated 20/3/91, from Sartra International Limited to the Denclag Limited.

- H Paragraph 1 is instructive and states:

“We very much regret to note that we have not received any news from you in respect of the outstanding payment due to us value (sic) 616,019.36 pounds in respect of Hospital Equipment supplied to you but not covered by the existing letters of credit issued by the

New Nigeria Bank, Lagos. Please advice us by return how you are going to remit these funds which are urgently required by us."

At page 224 lines 9 and 10 the trial court ordered.

"(a) The defendant shall pay the plaintiffs the sum of 616,019.36 as specified in Exhibit 5."

By the tenor of Exhibit 15 the sum of 616,019.36 is the outstanding payment due to Sartra International Limited London in respect of Hospital Equipment supplied to the 1st Respondent but not recovered by the existing letters of credit issued by New Nigeria Bank Lagos. The Court below interfered with the award in Exhibit 15 by including the Naira equivalent of 616,019.36 pounds or N80,082,516. See pages 587 of the record. When the manufacturers of the equipment Sartra International Limited London increased the price, the respondents approached the Bauchi state Government and secured additional sum of N8,094,581.00. In justifying the additional payment PW5 said in cross examination at page 126 lines 4 to 5 of the record.

"I approached the Bauchi State government for more money because the suppliers increased the prices of the materials due to delay in remitting the money. I approached the Bauchi State government because it was responsible for paying for the materials and not the 1st plaintiff."

The PW 5 claimed to have paid the 616,019.36 pounds to the overseas company Sartra International Limited. See page 136 lines 18 and 19 of the record. There is no evidence of payment apart from the ipse dixit of the 2nd plaintiff. The Respondent refused to sue the Bauchi State Government with whom there existed a contractual obligation but rather chose to sue the appellant with whom they had no contractual obligation. The Pw5 received a Commission of 100,000.00 pounds from Sartra International Limited London. See page 137 lines 10 to 13 of the record. Four Proforma Invoices were received from Sartra International Limited London and were tendered in evidence as follows:

Proforma Invoice for 287,615.90 pounds dated 16/6/88 Exhibit 27

Proforma Invoice for 74,861.33 pounds dated 30/9/89 Exhibit 26

Proforma Invoice undated for 486,790.13 Exhibit 28

The value of the three Pro Forma Invoices is 949,267.36 pounds.

Four letters of credit were established by the Bank based on available Pro Forma Invoices as follows:-

a. Letter of credit No.HO/JO/LC/99/88 valued 397,615.90
B Exhibit 12 is based on Proforma Invoice Exhibit 27.

b. Exhibit 12 is based No.HO/JO/LC/291/88 value 80,546.90
Exhibit 13.

c. Letter of credit No. HO/JO/LC.140/90 valued 486,790.13
C pounds Exhibit 14 is based on Pro forma Invoice Exhibit 28.

d. Letter of credit No.HO/JO/LC.282/89 valued 74,861.33
pounds. Exhibit 25 is based on pro forma Invoice Exhibit 26.

The total sum remitted overseas in Exhibits 12, 13, 14 and 25
D is 1,429,814.3 pounds. If the sum of 949,267.36 on the three available Pro-Forma Invoices is subtracted from the sum of 1,429,814.3 pounds actually remitted overseas by the bank, there is a surplus of 480,546.94 pounds. Letters of Credit are based on Pro Forma Invoices. See page 138 line 10 of the record.

On the issue of shortfall in the Letters of credit raised for the
E 1st Respondent, the PW 5 who is also the 2nd respondent gave a categorical answer. He said under cross-examination.

"They (sic) money specified in Exhibit 13, 13, 14 and 25 was the amount for which the Letter of credit were raised it was remitted to Sartra International Ltd but not at the appropriate time."
F

The correct position is what is stated in Exhibit 15 i.e. letter from Sartra International Limited London complaining of outstanding payment of 616,019.36 pound not covered in the Letters of Credit issued by the Bank. The 2nd Respondent on re-examination
G said that exhibits 17 to 23 have nothing to do with the case, they are for his personal business. He said at page 147 lines 27 to 31 of the record.

Exhibits 17 - 23 are applications for bidding for foreign exchange, have nothing to do with this case; they are for my personal business.
H But all the exhibits were applications by Denclag Limited not I. Audu as a person. The application for allocation of foreign exchange in Exhibit 17 to 23 were tied to the importation of Hospital equipment by Bauchi State Government.

The trial court on the 10/6/95 made an order for accelerated

hearing from day to day until the suit was determined due to another case against the 2nd plaintiff at the Kano Zone of the Failed Bank Tribunal. The order for accelerated hearing from day to day could not be actualized because the counsel to the appellant was involved in the Gombe State House of Assembly Election Petition Matters. When the case came up on the 26/6/98, the defence counsel though put on notice was not in court. The court on the application of counsel to the plaintiff closed the further cross examination by the counsel to the defendant. The suit was adjourned to 29/6/98 for defence to open. On the 29/6/98 the solicitor to the defendant notified the court in writing that he travelled to Gombe and requested for a date for hearing in the third week of July 1-998. That trial court obliged but adjourned to 2nd July 1998. On 2/7/98, the defendant's counsel appeared and explained to the court why he was not in court on the 26/6/98. He indicated that he would not be available at the back of the hearing notice served on him. The trial Chief Judge advised counsel to the defendant to file a written application for leave to conclude the cross examination of the PW5. The defence counsel on the 7/7/98 filed a motion on notice together with affidavit in support. The plaintiff filed a counter affidavit. In a considered ruling delivered on the 10/7/98 the learned trial chief Judge dismissed the application. He said -

"The learned counsel for the applicant has not referred me to any law which confers jurisdiction on the court to recall a witness who has given evidence for the party who has closed his case, because there is no such law, the applicant remedy in this case if it still needs the evidence of PW5 is to call him as its own witness.

The applicant has failed to satisfy me that it still needs some material evidence to elicit from PW5, which cannot be elicited." See pages 157 to 158 lines 211 to 34 and 13 to 11 of the record respectively. The defendant sought for and obtained leave to appeal against the ruling of 10/7/98. The notice of appeal is at page 412 of the record.

On the 14/7/98 after granting the defendant leave to appeal, the learned trial chief Judge called upon the defendant to present their defence. The counsel to the defendant applied for adjournment to enable him prosecute the appeal. The learned trial chief Judge agreed to adjourn only on proof that the appeal has been entered in

the court of Appeal, Jos. The Chief Judge ruled inter alia:

“The application for adjournment is hereby refused, I hereby call on the defendant to enter its defence.”

The learned counsel to the defendant replied thus:

B *“We are not in a position to do so. Our witnesses are not in court. If we are given one week we will do something. We have 4 witnesses.”*

C The learned chief Judge rather than give one week as requested gave only two days and adjourned defence to 16/7/98. On the 16/7/98 the counsel to the defendant intimated the court that he had filed application for stay of further proceeding. The counsel to the plaintiff informed the court that he was served with the motion that same morning and needed time to read to the application. The court ruled inter alia:

D *“Court: It is true that this suit is slated for hearing today. My order must be obeyed. The defendant must start its defence today. I will be constrained to close its defence.”*

E The court made no mention of the counter claim which was also pending. Upon being called upon to proceed with the defence, the counsel to the defendant reminded the court of a pending application for stay of further proceeding. The learned Chief Judge reacted by closing the defence of the defendant; He said:

F *“Court: I have made the order, if the defendant does not want to obey my order will obey it. The application for adjournment is consequently refused. I hereby call on the defendant to enter its defence.”*

G Since the defendant could not enter its defence in view of the pending application for stay of further proceeding the court ordered as follows:-

“Court: since the defendant does not want to enter its defence and as I cannot force it to enter its defence, its defence is hereby declared closed. This suit is hereby adjourned to 23/7/98 for final address.”

H The motion for stay of further proceeding was moved on the 28/7/98. The counsel to the defendant submitted inter alia:

“The appeal has been filed in this case as shown by Exhibits A and B and has been entered in the Court of Appeal.” See Exhibit ‘C’.

The application was dismissed by the Honourable Chief Judge. When the suit came up on the 1st day of September 1998 the defence counsel notified the court of a pending motion at the Court of Appeal for stay of further proceeding scheduled for hearing on the 21/10/98 at the Court of Appeal Jos Division. The learned chief Judge refused the application and held: B

"I am inclined therefore, to believe that the date for hearing the motion was not fixed by the court of Appeal. The application for adjournment is consequently refused."

The Respondent's counsel made his final address on the 1/9/98 and 2/9/98. The counsel to the appellant addressed the court on the 2/9/98 and 3/9/98. On the 3/9/98 the learned trial Chief Judge adjourned the case for judgment on p.190 of the record. On the 22/9/98 the Respondents filed a motion on notice dated 18/9/98 for leave to amend the Statement of claim and to deem the Amended Statement of Claim marked Exhibit A as duly filed and served. The amended Statement of Claim is on pages 68 to 73 of the record. In paragraph 38 (a) (b) and (e) at pages 72 and 73 of the record the respondent claimed inter alia: C D

38. WHEREUPON the plaintiffs claim against the defendant as follows:- E

a. *"A DECLARATION that the defendant inexplicably caused an undue delay in the remittance of foreign exchange to plaintiffs overseas suppliers, namely SARTRA INTERNATIONAL LIMITED towards the procurement of Hospital Equipment under and by virtue of Tender Agreement dated 16th day of September, 1987, as well as Mandate(s) to deduct Bauchi State share of Federal allocation at source thereby causing a shortfall or balance of 616,019.36 pounds which the defendant is obliged to pay back to the plaintiffs."* F G

A MANDATORY ORDER compelling the defendant to pay the said sum of 616,019.36 pounds to the plaintiff OR its Naira equivalent at the rate of N130.00 to 1 pound; that is to say N80,082,516 being money due and payable to the plaintiff as the differential short fail and/or special damages on the Hospital Equipment procured from SARTRA INTERNATIONAL LIMITED. H

b. *N4,917,484.00 as general and exemplary damages for defendant's gross palpable delay in remitting currency as well as inconveniences caused the plaintiffs.*

c. Cost of this action.”

In the Statement of Claim filed on the 15/8/95, the respondent claimed the following reliefs in paragraph 35:

35. WHEREUPON the plaintiffs claim from the defendant as follows: N80,082,516.00 as special damages.

B PARTICULARS OF SPECIAL DAMAGES:

i. N80,082,516.00 being the current Naira Equivalent of 616,019.366 pounds at the rate of N130.00 to 1 pound.

C ii. N4,917,484.00 as general and exemplary Damages for defendant's gross and palpable delay in remitting, currency as well as inconveniences cause the plaintiff.

iii. Costs of this action.

Dated this 11th day of August 1995.

The original claim in the Statement of Claim at page 11 of the record is only in Naira i.e. N80,082,516.00 as special damages. The sum of N80,082,516.00 was the current value of 616,019.36 pounds at exchange rate of N130.00 to one 1 pound. But in the Amended Statement of Claim at pages 72 of the record, the claim was for the sum of 616,019.36 pounds sterling or its Naira equivalent i.e. E N80,082,516.00. Both in the original and amended Statement of claim, the cause of action remain damages for delay in remitting the foreign exchange and N80,082,516.00 being the differential short-fall and/or special damages on the hospital equipments procured from Sartra International Limited.

F Both in the original and amended claim there was no claim for interest. But on the 26/5/99, a period of about seven months after it has delivered judgment, the trial court made another order for payment of 10% interest as follows:

G *“The court's (sic) order is that this application succeeds as prayed. The judgment debtor is hereby ordered to pay 10% interest per annum on the whole judgment debt plus costs starting from 22/10/98 until the whole judgment debt and costs are liquidated.”* See pages 274 and 281 to 282 of the record.

H The Appellant promptly appealed against the judgment of the court. The notice and grounds of appeal is on pages 379 to 402 of record. The notice dated 23d of October 1998 was filed by Ibrahim and Co.

At the Court of Appeal, Jos Division both parties had filed and

exchanged their respective briefs of argument. The appellant's brief of argument is at pages 417 to 457 of the record. It was filed by Ibrahim Hamman Esq., on the 23/3/2000. The respondent's brief is at page 458 to 496 of the record and dated 18/4/2002. The original brief was filed by Akubo & Co. solicitors to the Respondent. The Amended Respondent's Brief was filed by Oba Maduabuchi Esq. A B
reply brief at pages 496 to 513 of the record was filed by Ibrahim Hamman Esq.

By a motion on notice filed on the 18/4/2002 at pages 231 to 232 of the record, the respondent sought leave of the Court of Appeal to withdraw the Respondent's Brief of argument filed on the 8/ C
3/2000 signed by one "Akubo & Co." and also leave to file a new brief. On the 23/4/2002 the Appellant also sought leave of the Court of Appeal to regularize the Notice and Grounds of Appeal in terms of Exhibit A annexed thereto. On the 25/4/2002 the court of Appeal, D
Jos Division granted leave to the respondent to withdraw the original brief of argument filed by Akubo & Co. and deemed the new one at pages 458 to 496 of the record as properly filed and served. The application was not opposed by Chief Debo Akande SAN of blessed memory. Chief Debo Akande (SAN) sought leave of court to with- E
draw his motion and to waive its rules and take his oral application. The Court of Appeal granted both prayers. Chief Debo Akande (SAN) then applied for leave to substitute the last page of the Notice of Appeal with the one bearing his name. See page 517 of the record. F
The Court of Appeal, Jos Division made a short ruling as follows:

*"The application now seeks to amend this Notice of Appeal by substituting the page with another page. I think in order to meet the ends of Justice I shall allow the oral application. Accordingly leave is granted to Chief Akande to replace the last page of the Notice of G
Appeal filed at the Lower court with one now to be signed by Chief Akande himself. Time extended for that purpose by 7 days from today within which to file the last page of the Notice of Appeal.*

Sign I. T. Muhammad, JCA"

This order was made on the 25/4/2002. At page 267 of the H
record is the last page substituted. It was dated 23/4/2002 but filed on the 25/4/2002. There is no appeal against the order of Court of Appeal made on the 23/4/2004. At page 386 to 391 of the record the Respondent applied to strike out the appeal for being incompe-

tent on the ground that the Notice of Appeal dated 23rd day of October 1998 was purportedly filed by one Ibrahim and Co. This motion sought to challenge a process which had been substituted as at 25/4/2002. The motion was moved on the 14/1/2004 and ruling embodied in the judgment now subject matter of this appeal.

B During the pendency of the appeal at the court below several applications were made for stay of execution. The Court of Appeal Jos on the 10/5/2000 and 10/6/2000 granted leave to the appellant to pay 50% of the judgment sum to the Respondent through the Deputy Chief registrar of the Court. See pages 239 to 246 of the record. The appellant still dissatisfied, appealed to the Supreme Court which on the 11/12/2000 granted a conditional stay on the condition that the Appellant provide a bank guarantee from either First Bank of Nigeria Plc.; Union Bank of Nigeria Plc and United Bank for Africa plc. See page 247 and 294 - 295 of the record. The appellant provided a First Bank of Nigeria Plc guarantee for the total sum of N103,911,155.70 which covered the judgment of debt 616,019.36 pounds and N3,500,000.00 general damages, On the 8/10/2002 the Supreme Court of Nigeria dismissed the interlocutory appeal on the issue of payment of 50% of the judgment sum. See pages 286 and 310 of the record. The appellant upon dismissal of the interlocutory appeal by the Supreme Court immediately complied with the judgment of the Court of Appeal by paying the sum of N51,955,577.85 which is 50% of the judgment sum. See pages 250 to 252 of the record. Having complied with the order of the court of Appeal by paying the 50% of the judgment sum, the Respondents insisted on payment of 100% judgment sum based on the interlocutory order of Supreme Court made on the 11/12/2000.

G The appellant went back to the Supreme Court for a variation of the order of 11/12/2000 since the appeal was whether or not the Appellant should pay the 50% judgment debt as ordered by the Court of Appeal, Jos Division. The Supreme Court on the 2/12/2002 dismissed the application. With this dismissal, the appellant had no choice than to pay the entire judgment debt of N103,911,155.70 to the Respondent. After receiving N103,911,155.70 cash, the Respondent went back to the Jos High court to execute the judgment to the tune of N77,271,901.66. Execution was carried out on the 22/4/2003 against the bank in Jos and several properties seized and con-

fiscated including their visual satellite thereby making it impossible for the bank to operate. The items seized are at pages 257 and 258 of the record. On the following day being 23/4/2003, the Appellant filed motion on notice at the Court of Appeal to set aside the execution and return all the properties seized. The Court of Appeal Jos in a unanimous judgment delivered on the 10/6/2003 allowed the Appeal of the bank and set aside the execution levied on the bank. The ruling also covered the Notice of Preliminary Objection filed on the 30/4/2003 at pages 323 to 327 of the record. The Respondents went back to the Supreme Court on the 21/5/2003 to recover the sum of N77,271,901.66 which they claimed was additional sum due to them on the judgment sum. They claimed that the sum of N103,911,155.70 already paid did not cover the interest. The motion No. SC/109/2000 was struck out by the Supreme Court on the 17/6/2003.

The substantive appeal was set down for hearing on the 14/1/2004. On that very day the Respondents' counsel filed a Motion on Notice to strike out the appeal or otherwise discontinue or strike out grounds 7, 8, and 9 of the grounds of appeal. See pages 408 to 411 of the record. Arguments on the substantive appeal and two motions dated 24th September 2003 and 14/1/2004 were taken together. In a unanimous judgment delivered by the Court of Appeal Jos division on the 13th day of April 2004, the appeal was dismissed. See pages 541 to 607 of the record. Being dissatisfied with the judgment, the Appellant on the 12/7/2004 appealed to the Supreme Court on eleven grounds. See pages 608 to 610 of the records. The Respondent also cross-appealed on two grounds. See pages 611 to 613 of the record.

Pursuant to Order 8 Rule 2 (5) and order 6 Rule (5) (c) Supreme Court Rules 1985 as amended, the appellant on the 30/11/2004 filed a motion on notice for leave to amend the notice and grounds of appeal. On the 1/11/11 date of hearing learned counsel for the Appellant adopted their Brief filed on 17/12/04 and deemed filed on 11/7/07. The Brief was settled by G. Ofodile Okafor SAN and in it were distilled 8 issues for determination, viz:-

1. whether the Respondents could maintain this action against the Appellant. (Grounds 1, 2, 3 and 4)

2. Whether the Amended Notice and Grounds of Appeal dated 23/4/2002 but filed on 25/4/2002 is valid and whether the court

below could refuse to give effect to the amendment. Grounds 5, 7, 8 and 9)

3. Whether the dismissal of appeal No: CA/J/210/98 operates as *Res Judicata* against the Appellant (Grounds 6 and 10).

B 4. Whether leave of the court below or trial court was required to appeal against denial of fair hearing and bias on the part of the trial Judge (Ground 11).

C 5. Whether it was proper for the court below suo motu to strike out ground of appeal number 6 and whether in the circumstances of this case, the appellant could appeal as of right against interlocutory decision even though it was not appealed against when the interlocutory order was made (Grounds 12 and 13).

D 6. Whether the amendment filed after the close of addresses which introduced new relief in foreign currency is proper (Ground 16).

7. Whether the award of N3.5 million general damages was proper having awarded special damages of 616,019.36 and 10% interest. (Ground 17)

E 8. Whether on the totality of the evidence, the claim is proved and also whether the defendant was denied fair hearing (Grounds 14, 15 and 18).

F The Respondents through learned counsel on their behalf adopted their Brief settled by Lateef O. Fagbemi SAN which was filed on 23/3/10 and deemed filed of 12/5/10. In the Brief was argued the Preliminary objection of the Respondents, viz:-
NOTICE OF PRELIMINARY OBJECTION:

G Pursuant to Order 2, Rule 9 (1), Order 8 Rule 2 (2), (3) & (4) of the Supreme Court Rules, 1999 as Amended.
TAKE NOTICE that the Respondents shall at or before the hearing of the appeal raise **PRELIMINARY OBJECTION** thereto and shall urge the Honourable Court to:

H A. Strike out Grounds 1, 4, 6, 8, 9, 14, 15 and 18 of the Amended Notice and Grounds of Appeal dated the 29th day of November, 2004 but filed on 30/11/2004 and deemed filed by order of court on 11th July, 2007 as being incompetent.

B. Strike out Grounds 7 and 19 of the amended Notice and Grounds of Appeal (*supra*).

AND FURTHER TAKE NOTICE that the Grounds upon which

the PRELIMINARY OBJECTION is anchored are as follows:-

1. Grounds 1, 6, 9, 14, 15 and 18 of the Amended Notice and Grounds of appeal are inchoate and devoid of essential particulars.

2. Grounds 4, 8, 9, 14 and 18 of the Amended Notice of Appeal do not directly challenge any part of the decision of the Lower court. B

3. No issue(s) for determination have been (expressly) formulated in respect of Grounds 7 and 19 of the Amended Notice of Grounds of Appeal hence deemed abandoned.

4. Grounds 6, 9, 14 and 18 are vague general in terms and disclose no reasonable grounds of appeal. C

AND FURTHER TAKE NOTICE that the Respondents shall at the hearing of the PRELIMINARY OBJECTTON use and rely on the Record of Proceedings, the Amended Notice of Appeal as well as the arguments canvassed hereunder. D

ARGUMENT IN SUPPORT OF NOTICE OF PRELIMINARY OBJECTION:

Learned counsel for the objector contended, that the Notice of Preliminary objection herein challenges in limine the competence of Grounds 1-, 4, 6, 8, 9, 14, 15 and 18 of the Grounds of Appeal in the Amended Notice of Appeal. It equally challenges Grounds 7 and 19 in respect of which no issues have been formulated. E

The Respondents will contend that Grounds 1, 4, 6, 8, 9, 14, 15 and 18 of the Amended Notice and Grounds of Appeal are incompetent. First, Grounds 1, 6, 9, 14, 15 and 18 of the Grounds of Appeal are inchoate and completely devoid of particulars. By order 8, Rule 2 (2), any ground alleging misdirection or error of law must give the particulars and the nature of the misdirection or error. This is utterly lacking regarding the said grounds. Second, the said grounds are vague or general in terms and do not disclose any reasonable grounds of Appeal particularly Ground 6, 9, 14 and 18 as such are liable to be struck out. Order 8, Rule 2 (4) and 7 is relevant. Third, Grounds 4, 8, 9, 14 and 18 of the Amended Notice and Grounds of Appeal do not directly challenge any part of the decision of the Lower Court. We submit that a ground of Appeal ought to be an attack against a decision of the court. See section 233 (2) of the Constitution of the Federal Republic of Nigeria, 1999. There can be no ground of appeal against indecision or refusal to decide. Section 233 (2) of F H

- the Constitution (supra) makes it very clear that an appeal to this Honourable court “*shall lie from decisions of the court of Appeal.*” The emphasis is on the word “*decisions.*”. See also the case of OGBE v. ASADE (2009) 18 NWLR (pt.1172) 106 at 126; UGO v OBIEKWE & ANOR (1989) 7 NWLR (Pt. 99) 566 at 580; BALONWU V GOVERNOR ANAMBRA STATE (2009) 8 NWLR (Pt.1172) 13 at 44- 45.
- Four, some of these grounds impugn on facts and for mixed law and facts. For instance, Grounds 1, 8, 9 and 18 are grounds of mixed law and facts which require prior leave of this Honourable Court even though erroneously couched as grounds of law. Admittedly, the Appellant had by its Motion dated 29th day of November, 2004 but filed on 30th November, 2004 sought the leave of this Honourable court to appeal in respect of grounds of facts or mixed law and facts in relation to Grounds 2, 3, 4, 7, 16 and 19. The said leave was subsequently granted on 11th July, 2007. But it must be stressed that the leave granted aforesaid only covers Grounds 2, 3, 4, 7, 16 and 19 and does not extend to Grounds 1, 8, 9 and 18 under contention. That being so, the grounds in question are incompetent for want of prior LEAVE.
- Prince Lateef Fagbemi for the Respondent submitted that by Order 8, Rule 2(4) of the Supreme Court Rules, 1985 as Amended, this Honourable Court has the power to strike out any ground of Appeal that is not permitted under the rules.
- As for Grounds 7 and 19, the fundamental vice that affects them is straight forward. It is this: At page 2 of the Appellant’s Brief of Argument containing issues for determination, none of the eight issues formulated for determination covers Ground 19 which is the omnibus ground of Appeal. In the case of Ground 7, even though issue 2 formulated is said to cover it, in reality, issue 2 is in congruous with Ground 7. Specifically, while issue 2 formulated by the Appellant concerns itself with the Notice of Appeal dated 23/4/2002 but filed on 25/4/2002, Ground 7 on the Amended Notice and Grounds of Appeal is in respect of the original Notice of Appeal dated 23/10/98. Little wonder then that no argument was canvassed whatsoever in respect of the original Notice of Appeal dated 23/10/98. That being so, Ground 7 is deemed to be abandoned. The same thing goes for Ground 19 aforesaid. It is the law that a Ground of Appeal in which no issue is formulated is deemed to be abandoned and liable

to be struck out. See the case of *OGBE V. ASADE* (2009) 18 NWLR (Pt.1172) 106 at 124 and 127; *OSINUPEBI V. SAIBU* (1982) 7 SC 104 at 110 - 111; *WESTERN STEEL WORKS LTD. & ANOR. V. IRON AND STEEL WORKERS UNION OF NIG. & ANOR.* (1987) 1 NWLR (Pt.49) 284 at 304; *UGO V. OBIKWE & ANOR.* (1989) 1 NWLR (Pt.99) 566 at 580; *NDIWE V. OKOCHA* (1992) 7 NWLR (Pt.252) 129 at 139. Learned senior counsel for the objector stated on that in the light of the foregoing, we respectfully urge the Court to sustain the Preliminary objection by striking out Grounds 1, 4, 6, 8, 9, 14, 15 and 18 as manifestly incompetent. We urge the court to also strike out Grounds 7 and 19 as having been abandoned. The incorporation of the Preliminary Objection in this brief is sufficient on the authorities of *MAIGORO v GARBA* (1999) 7 SCNJ 270 at 282; *OKAFOR V. ATTORNEY-GENERAL* (1999) 7 SCNJ 192 at 201; and *AGBAKA V. AMADI* (1998) 11 NWIR (Pt.572) 16 at 25.

Reacting to the Preliminary Objection, learned counsel for the Appellant sequel to their Reply Brief contended that the position of the Respondents is wrong in that a ground of appeal is the complaint the appellant has on the decision of the Lower court and to give ample notice to the other party of the appellant's complaints on the judgment appealed against and the part of the judgment he is attacking. That the particulars of a ground of appeal need not be separately set out as it may be embodied in the ground itself provided the ground is framed in such a way that it leaves no one in doubt of the errors being complained of. He cited *Ushie v. Edet* (2010) 6 NWLR (Pt.1190) 386 at 402; *Koya v U.B.A. Ltd* (1997) 1 NWLR (Pt. 481) 251 at 274; *Ukpong & Anor v. Commissioner of Finance and Economic Development* (2006) 12 SC 36 at 46. That in the instant case, grounds 1, 6, 9, 14, 15 and 18 of the Appellant's Amended Notice and grounds of appeal are well framed with built in particulars and leaves the Respondents in no doubt as to the part of the judgment or errors being complained of. That Order 8 Rule 2(2) of the Rules of this court is not breached. That grounds 6, 9, 14, and 18 are not vague and general in terms as each ground disclosed sufficient and reasonable grounds of appeal. He stated that the grounds are cogent, explicit and leaves no one in doubt as to the aspect of judgment of the Lower court complained about. That the grounds are competent and any question of the validity of a ground of appeal is not

simply predicated on form but on substance. He referred to Hambe v Hueze (2001) 2 SC 26 at 42; Nwabueze v Nwora (2005) 8 NWLR (Pt. 926) 1 at 22; Governor of Ekiti State v Osayomi (2005) 2 NWLR (Pt. 909) at 67; Addax Pet Dev. Nig. Ltd v Duke (2010) 8 NWLR (Pt. 1196) 278 at 294.

B ***This Preliminary Objection is an academic exercise as it can be seen very clearly indeed that the grounds of appeal including the one complained of have stated what the problems between the contending parties are and have not left anyone in doubt including the objector of what the substance of the complaint is and what is expected of them in rebuttal. The Rules of Court have not been breached and the grounds of appeal are competent.*** See Koya v. United Bank for Africa Ltd. (1997) 1 NWLR (Pt.481) 251 at 274; Addax Petroleum Development (Nig.) Ltd. v. Duke (2010) 8 NWLR (Pt.1196) 278 at 294; Nwabueze v. Nwora (2005) 8 NWLR (Pt.926) 1 at 22.

In the light of the foregoing this Preliminary Objection is dismissed for lacking in merit. I shall proceed with the main appeal.

MAIN APPEAL

E The respondents in their brief couched seven (7) issues for determination viz

1. Whether having regard to the circumstances of this case, the respondents could maintain this action against the appellant.

F 2. Whether the notice of appeal of the appellant before the lower court was valid in law.

G 3. Whether the learned Justices of the Court of Appeal were right or justified in law in striking out of Grounds of Appeal Nos. 7, 8, 9 and 13 and the issues related thereto particularly having regard to the dismissal of Appeal No. CA/J/210/98.

4. Whether the striking out of Ground 6 of the Notice of Grounds of appeal together with issue 3 related thereto amounted to a denial of fair hearing to the appellant bearing in mind that the lower court nevertheless still considered same on the merits.

H 5. Whether the learned Justices of the Court of Appeal were right in holding that there was nothing wrong in the amendment of respondents' statement of claim before judgment.

6. Whether on the totality of evidence, the claim of respondents was proved so as to justify the award in their favour.

7. Whether having regard to the circumstances of this case, the appellant was denied fair hearing.

Arguing the appeal, G.O. Ofodile Okafor SAN contended for the appellant that this court has the power to deal with a substantial point of law even when none of the parties raised it on appeal. He cited *Ukaegbu v. Nwololo* (2009) 3 NWLR (Pt.1125) 2222. He referred to Order 40 Rule 7 Rules of the High Court of Plateau State 1987 applicable to the case in hand. That in respect to the interest awarded by the Court on 26/5/99, eight months after judgment which was delivered on 22/10/98. That for such an interest to be awarded by the court under Order 40 Rule 7 Rules of the High Court Plateau State such an interest must be claimed. That the Kano State Rules provided for interest of 10% whether claimed or not and that is not the case here and so the case of *Berliet (Nig) Ltd v Kachalla* (1995) 9 NWLR (Pt. 420) 478 at 503 did not apply to the case in hand since it the Kano State Rules. On Issue 2, the appellant's counsel contended that the application for amendment of the notice and grounds of appeal was granted so as to amend the fast page signed by Ibrahim Hamman & Co. That the appeal should be allowed.

Learned counsel for the respondents referred to their submission on order 40 Rule 7 of the High court (Civil Procedure) Rules of 1987 filed on 19/1/12. That Exhibit 1 seen at page 84 of the Record that the exhibit showed that New Nigerian Bank Ltd was a party to the transaction, He said there needs to be a competent ground of appeal before the court can entertain a substantial point of law, and so *Ukaegbu v. Nwololo* cannot apply. He referred to pages 305 - 306 of the record where the trial court made post judgment for interest pursuant to Order 40 Rule 7 Rules of court. Learned counsel for the respondents said appellant did not appeal against that order at the Court of Appeal or even this court and cannot raise it now since they did not file a ground of appeal on it and such an issue did not come up at the court of Appeal. That Order 40 Rule 7 cannot avail the appellant.

Replying on point of law Mr. Ofodile Okafor for the appellant said Exhibit 1 is the Contract Agreement and that the legal mortgage has nothing to do with this case. He referred to page 72 of the record for the claim of the respondent. The matter of the defective Notice of Appeal at the court below with respect to the legal practitioner on

behalf of the appellant therein signing IBRAHIM HAMMAN & CO. was brought to the fore herein. Learned counsel for the appellant at this court said, when Debo Akande SAN (of blessed memory) took over the appeal he had orally applied to have that Notice of Appeal amended with particular reference to the last page to correct the matter of the signature to properly reflect Debo Akande SAN being the legal firm which application was granted on 25/4/2002. Rather than file an amended notice of appeal, learned counsel at the lower court merely replaced the last page. The question arising from each party's position is whether or not the appeal had not been vitiated by a fundamental vice. While learned counsel for the respondent, Lateef Fagbemi SAN argues that the effect is that there was no valid Notice of Appeal at the court below and so the purported Notice of Appeal should have been struck out. Mr. Ofodile Okafor SAN for the appellant disagrees contending that the lower court having made the order of amendment of the Notice of Appeal on account of that irregular or defective signature not being made by a legal practitioner, the process remained valid. Indeed Section 2(1) of the Legal Practitioners Act had provided thus:

"A person shall be entitled to practice as a barrister and solicitor if and only if his name appears on the roll."

This court in the case of Emmanuel Okafor & 2 Ors v Augustine Nweke & 4 Ors (2007) 10 NWLR (Pt. 1043) 521 at 531 - 532 per Onnoghen JSC stated what the position should be thus:

"The combined effect of the above provisions is that for a person to be qualified to practice as a legal practitioner he must have his name in the roll otherwise he cannot engage in any form of legal practice in Nigeria. The question that follows is whether J.H.C. OKOLO SAN & Co is a legal practitioner recognized by the law?"

From the submissions of both counsel, it is very clear that the answer to the question is in the negative. In other words both senior counsel agree that J.H.C. OKOLO SAN & Co is not a legal practitioner and therefore cannot practice as such by say, filing processes in the courts of this country. It is in recognition of this fact that accounts for argument of learned Senior Advocate for the applicants that to determine the actual person who signed processes evidence would have to be adduced which would necessarily establish the fact that the signature on top of the inscription J.H.C. OKOLO SAN & Co

actually belongs to J.H.C. OKOLO SAN & Co who is a legal practitioner in the roll. I had earlier stated that the law does not say that what should be in the roll should be the signature of the legal practitioner but his name. That apart it is very clear that by looking at the documents, the signature which learned senior advocate claims to be his really belongs to J.H.C. OKOLO SAN & Co or was appended on its behalf since it was signed on top of that name. Since both counsel agree that J.H.C. OKOLO SAN & Co is not a legal practitioner recognized by the law, it follows that the said J.H.C. OKOLO SAN & Co cannot legally sign and for file any process in the courts and as such the motion on notice filed on 19th, December, 2005, notice of cross appeal and applicants brief of argument in support of the said motion all signed and issued by the firm known and called J.H.C. OKOLO SAN & Co are incompetent in law particularly as the said firm of J.H.C. OKOLO SAN & Co. is not a registered legal practitioner.”

The Court of Appeal had therefore held in this case:

“From these pieces of facts highlighted above, it a (sic) clear that IBRAHIM HAMMAN & CO. is not competent to issue the Notice of appeal since the said firm that signed and issued it is not a registered legal practitioner who is competent to issue a Notice of Appeal. See Section 2(1) of the Legal Practitioners Act, 1990 Laws of the Federation. See also Section 24 of the same Act which defines a “Legal practitioner.” Having not been issued by a registered legal practitioner, the original notice of appeal, signed, issued and filed by the said firm is incompetent, invalid and null and void since it was issued by person not authorized by law to issue it. The said Notice of Appeal is also incurably defective.”

Going by decision in Okafor v Nweke (supra), learned counsel for the respondents submits that the implication is that there was no appeal. That sweeping assertion and solution cannot be in keeping with the tenets of substantial justice and the age long principle that a litigant should not be made to suffer for the inadvertence or mistake of counsel. Bearing that in mind therefore and the attempts made to rectify the anomaly and the order of amendment made by the Court of Appeal itself, even though the right process as a full Amended Notice of Appeal not having been filed but learned counsel merely filed the amended offending last page properly signed, this in keeping with the oral application and order of court. In that amendment

sought from the Court of Appeal, per I. T. Muhammad JCA (as he then was) it had been granted in following terms, viz:-

“*The application now seeks to amend this Notice of Appeal by substituting the page with another page. I think in order to meet the ends of Justice I shall allow the oral application. Accordingly leave is granted to Chief Akande to replace the last page of the Notice of Appeal filed at the Lower Court with one now to be signed by Chief Akande himself. Time extended for that purpose by 7 days from today within which to file the last page of the Notice of Appeal.*”

This comes into one of those exceptions that could alleviate the hardship that otherwise would have re-sifted. Therefore the process was redeemed and consequently valid. The main challenge here is whether or not the court of trial was correct to have awarded 10% interest on the judgment six months and 5 days after delivering judgment precisely on the 26th May 1999. The judgment had been delivered on 22/10/98 and interest had not been claimed and none awarded on that day of judgment. The appellant version of the law is that the trial court was functus officio and lacked the jurisdiction to make that award of interest. The respondent disagrees saying the vires was present at the time of the award in view of Order 40 Rule 7, Rules of High Court of Plateau State 1987 applicable to Bauchi State and this matter at hand.

In view of the novelty of the presentation of this rule of Court and the import, this court had asked the counsel on either side to file a special submission on it and address the court specifically on the sole issue on an appointed date. All these were done. Curiously when the order making the award of 10% interest was made, the appellant in the court below did not appeal upon it or make it part of the appeal that was entered in the court of Appeal. It is at this stage that the appellant is raising the issues.

Prince Lateef Fagbemi SAN for the respondent said since the appellant through counsel had conceded that point at the trial court it was too late in the day to contest it here and now especially since it did not form part of their appeal in the court below. He cited Order 40 Rule 7 rules of the trial court which provides as follows:

“*The court at the time of making any judgment or order, or at any time after wards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of the*

judgment or order, or from some other point of time, as the court thinks fit, and may order interest at a rate not exceeding ten (10) naira percent per annum to be paid upon any judgment commencing from the date thereof or afterwards as the case may be.”

Based on the above stated provision appellant’s counsel said at the trial court: B

“Order 40 Rule 7 undoubtedly gives this court the discretion to order the payment of interest after judgment. We however submit that it will not be in the interest of justice to order the payment of interest at this time. We leave the whole matter to the discretion of this court” See pages 305 - 306 of the record. C

The trial court then stated in conclusion as follows:

“Mr. Angavan has conceded that Order 40 Rule 7 has undoubtedly vested me with the jurisdiction to make the order being requested for.” D

For guide, it is necessary to refer to some judgments of this apex court where even the provisions of Order 40 Rule 7 in Bauchi State just as in the case at hand were interpreted with clarity. I first refer to Berliet (Nig.) Ltd v Kachalla (1995) 9 NWLR (Pt. 420) 478 this court held that a court cannot be said to be functus officio when it grants an application for post judgment interest after the delivery of its judgment as the effect is that the rule of court places on the judgment debtor a statutory duty to pay interest at the rate of 10% from the date of judgment. E F

In a situation on all fours with the present, Onu JSC in Himma Merchant Ltd v Aliyu (1994) 5 NWLR (Pt. 347) 667 at 679 stated as follows:

“Order 40 Rule 7 of the Bauchi State High Court (Civil Procedure) Rules deals with interest on outstanding judgment debt. It has nothing to do with a claim of interest as a right either under a contract, a mercantile custom or a principle of equity. It is a statutory authority for a court to award interest at 10% per annum on outstanding judgment debt and for the interest to apply or commence from the date of judgment.” G H

Belgore JSC had even said in Berliet Nig. Ltd v Kachalla (supra) at 495 - 496, thus:

“In matter of claim for debt, it is presumed that interest will be

paid and once application is made for this, even after the judgment has been delivered to award interest is omitted in the judgment.”

The appellant’s counsel had particularly taken exception to the award because of the passage of over 5 months but he seems to have over sighted the fact that the only time frame in the Order 40 Rule 7 is after judgment and nothing else. Therefore interpreting that Rule as provided is that there is no limit to time at which it can be said the application for the interest has been over taken by effluxion of time. In the English case of *Wilson v Carter* (1893) AC 638 at 39 - 640 it was held that where an error arising from an accidental omission was corrected after the lapse of forty years by the court, there was no impropriety thereby.

The conclusion from the above is that the trial court was well empowered to make the award which it is, the passage of time notwithstanding. Clearly this appeal is lacking in merit and therefore dismissed.

I award the sum of N50,000.00 to the respondents to be paid by the appellant.

E CROSS-APPEAL

GROUNDS OF APPEAL

(1) The Court of Appeal erred in law when it held that the learned trial judge was wrong to have used pleadings as the basis of admission of proof of the Cross-appellants case when on a proper construction of pleadings no issue was joined on the claim of the cross-appellants for a sum of 616,019.30 thereby making oral evidence unnecessary and thereby occasioning a great miscarriage of justice.

G PARTICULARS OF ERROR

(a) At page 39 of the judgment which is page 584 of the record, the Court of Appeal faulted the learned trial Chief Judge thus.

“To my mind therefore, the learned trial Judge was wrong in referring to and relying on the depositions in the Statement of Defence as if they were admissions. That is wrong approach to the issue since the defendant/appellant did not lead any evidence to support those averments in its pleadings. “

(b) Pleadings of the parties can utilized when no triable issue has been raised.

(c) The respondents/cross-appellants led evidence in rebuttal of cross-respondent's pleadings.

(d) In any case, the learned trial Judge did not just rely on the pleadings of the cross-respondent but the unrebutted evidence led by the cross-appellants.

(2) The court of Appeal erred in law when it amended the award of 616,019.36 pounds after it had held that the amendment which gave rise to the award by the learned trial judge was rightly and properly made. B

PARTICULARS OF ERROR

(i) It is common ground that the unit of account in this case was in pound sterling while the unit of payment was in Naira. C

(ii) The evidence which the Court of Appeal found supportive of the cross-Appellants case was in pound sterling and it is to in effect that the cross-appellants have suffered shortfall to the tune of D 616,019.36 pounds which the cross-respondent was duly bound to pay.

(iii) A debtor is obliged to provide enough local currency to meet his obligation in foreign currency at the prevailing rate of exchange at the time of such debt. E

(iv) It is the duty of the court to take judicial notice of the dwindling value of Naira vis-a-vis foreign currencies.

(v) Having found that the amendment on which the award of 616,019.36 pounds anchored was properly made there is no basis F for the Court of Appeal to amend or tamper with the award made by the learned trial Judge.

(3) The Court of Appeal misdirected itself in Law by interfering with the award of 616,019.36 pounds when is said at page 59, lines 19- 23 and page 592, lines 1- 2 of the records thus: G

"I think this is a clear example of a situation where this court should and indeed must interfere with or disturb the order made by the lower court regarding the first award. To that effect, I accordingly slightly amend the award of special damages in which the relief sought in the amended Statement of Claim so that the defendant/appellant should have the option to either pay the plaintiffs the sum of 616,019.36 pounds OR its Naira equivalent at the rate of N130 to E1, (sic) as at the time the suit was filed, that is to say N80,092.516 being the differential shortfall." H

On the ground that the order of the trial court for the payment of 616,019.36 pounds simpliciter will definitely over reach the appellant and that same was perverse and thereby occasioned a miscarriage of justice.

PARTICULARS OF MISDIRECTION

B (a) The Court of Appeal had in the same judgment validated the amendment of cross-appellants claim in the substantive sum of 616,019.36 pounds.

C (b) The Court of appeal was entitled to take judicial notice of exchange rate of pounds sterling to Naira as at 13th April, 2004 when it delivered its judgment which made the sum of N80,082.516 as the Naira value of 616,019.36 pounds manifestly unrealistic

(c) The cross-respondent never challenged the award of 616, 019. 36 as being perverse vice its notice of appeal much less preferring the Naira equivalent in the sum of N80,082.516 as part of its reliefs before the lower court.

(d) The award of 616,019.36 pounds by the trial court was based on uncontroverted evidence before it, particularly having regard to Exhibit 15 hence cannot be said to be perverse warranting E interference by the lower court.

(4) The Court of Appeal erred in law and lacked the jurisdiction to amend the award of 616,019.36 pounds by the trial court by giving the cross-respondent the option to pay N80,082.516 when:

F (i) Such amendment of award cannot be said to be consequential especially as the same court dismissed the appeal in its entirety.

(ii) None of the parties, doubtless, the cross-respondent sought for such an amendment; and

G (iii) The amended suo motu greatly prejudiced the cross-appellants when in effect it reduced the actual entitlement of the cross appellant which was to be the value of British pound (sterling) at the date when payment is made in Naira.

H (5) The Court of Appeal erred in law when it suo motu amended the award of 616,019.36 pounds to giving the option to the cross-respondent to pay the sum of N80,082.516 without affording the opportunity to the parties, particularly the cross-appellants to address the court denied the cross appellants a fair hearing having regard to section 36(1) of the Constitution of the Federal Republic of Nigeria,

1999.

RELIEFS SOUGHT FROM THE SUPREME COURT

(a) To affirm the judgment of the trial court in its entirety including

(i) That portion that utilized the pleadings of the parties, particularly that of the cross-respondent. B

(ii) Award of 616,019.36.

(b) Set aside that part of the decision of the lower court interfering with the decision of the trial court whereby

(i) The learned trial judge was faulted for using and utilizing the pleadings of the cross-respondent. C

(ii) The award of 616,019.36 pounds was amended by giving the cross-respondent the option to pay N80,082.516.

The cross-respondent in a brief settled by G. Ofodile Okafor SAN filed on 20/6/06 raised an argument on a preliminary objection. D The crux of the objection being that the ground of appeal is an obiter dicta and not the ratio of the judgment and also the issue raised in the ground of appeal is merely academic as a right of appeal can be exercised against a judgment or that part of the judgment which is against such a party. That a ground of appeal must relate to the decision and should be a challenge to the validity of the ratio of the decision and that is not the case here. He cited *Egbe v Alhaji* (1990) NWLR (Pt 128) 546 at 590; *Odessa v FRN* (No.2) (2005) 10 NWLR (Pt 934) 528; *A.G. Anambra State v NIWA* (2004) 3 NWLR (Pt 861) F 640 at 654. *Asafa Foods Factory v Alrairie (Nig.) Ltd* (2002) 12 NWLR (Pt.781) 353; *Controller Nigerian Prisons Service Ors v Adekanye* (2002) 15 NWLR (Pt 790) 362; *A.G. Federation v ANPP* (2003) 18 NWLR (Pt. 851) 182 at 210 - 211.

Responding in line with the reply on point of law of the cross-appellant, learned counsel on their behalf said the ground one of the amended notice of cross-appeal is not an obiter dicta but a ratio decidendi of the judgment. He cited *Egbe v. Alhaji* (1990) 1 NWLR (Pt.128) 546; *Coker v. UBA* (1997) 2 NWLR (Pt.490) 641 at 664; *Odessa v FRN* (No.2) (2005) 10 NWLR (Pt. 934) 528 at 555 - 556. H That it is not correct that the ground one does not raise a live issue or is academic. He stated that since pleadings define the scope of litigation, the pronouncement of the court below on this score ought not to be left unchallenged. He cited *Akintola & anor. v. Solano* (1986)

ALL NLR 395 at 422. *Oshodi v. Eyifunmi* (2002) 13 NWLR (Pt. 684) 298 at 337

This preliminary objection is a distraction and even has no merit and is dismissed.

MAIN CROSS APPEAL

B Prince Fagbemi SAN for the cross-appellants contended that a careful scrutiny of paragraphs 44 - 48 of the further Amended Statement of Defence of the cross-respondent will show a case of constructive admission of the fact that the cross-respondent was not only aware of the shortfall of 616,019.36 pounds claimed by the cross-appellants but made determined efforts to compromise same with the latter, albeit, unsuccessfully. That the cross-respondent introducing the issue of estoppels was a face saving measure. That the court below was right in referring to the defendant's/cross-respondents pleadings as the law is that what is admitted needs no proof. He cited 75 of the Evidence Act; *I.B.W.A. Ltd. v. Unaka Zamba* (1998) 9 NWLR (Pt. 565) 245 at 264. That Order 27 Rule 2(1) of the Rules of the High Court of Plateau State 1987 as amended and applicable to Bauchi State allows for judgment for default of defence in a claim for debt or liquidated money demand thereby obviating the necessity of evidence. He referred to order 27 Rules 4, 5 and 6; Order 30 Rule 3 which provides for judgment on the basis of admission.

F For the cross-appellants was further contended that where pleadings do not raise serious triable issue, the court is entitled to draw necessary conclusions from the pleadings and proceed to enter judgment for the party in appropriate cases. He cited *Akintola v. Anor. v. Solano* (1986) ALL NLR 395 at 422; *Honika Sawmill v. Hoff* (1994) 2 SCNJ 86 at 94, 96 & 98

G On issue two which has to do with the question of jurisdiction having regard to the interference by the lower court with the award of 616,019.36 pounds by giving the option to the cross-respondent to pay the sum of N80,082.516, the cross-appellant contended that the court below was wrong to tinker with the award in foreign currency in the sum 616,019.36 pounds and was perverse. That since that court found the amendment on which the award of 616,019.36 pounds was predicated was properly made, it was a compete anti-thesis to turn around to amend or tamper with the award made by the learned trial Judge. Prince Fagbemi SAN said it was inconsistent

and irreconcilably incongruous with the judgment of the lower court dismissing the appeal of the cross-respondent and holding that the amendment was consequential. That it is settled law that a consequential order flows naturally in terms of consistency and gives effect to the main judgment. That the interference with the award of 616,019.36 pounds by the lower court is a marked departure which makes nonsense of the verdict dismissing the entire appeal. That the amendment is all the more flawed for want of jurisdiction as none of the respondents asked for it. He cited *Akinbobola v Plisson Fisko Nigeria Ltd. & Ors.* (1991) 1 NWLR (Pt.167) 270 at 288; *Dantosoho v. Mohammed* (2003) 6 NWLR (Pt.817) 489 - 490; *Owena Bank v. Stock Exchange* (1997) 7 SCNJ 160 at 175; *Nwanya v. Nwanya* (1987) 3 NWLR (Pt.62) 697. The cross-appellants further submitted that the lower court having earlier on granted a conditional stay whereby it recognized the need to apply the current exchange rate of 616,019.36 pounds that court was *functus officio* and could no longer make any fresh order detracting from the previous one. That the interference of the lower court with the award of 616,019.36 pounds is capable of undermining this court's earlier order on the conditional stay to the effect that the entire judgment debt included 616,019.36 pounds be paid to the cross-appellants. That one of the cardinal principles of *stare decisis* is that a lower court is bound by the decision of this apex court as the final court of the land. He cited section 235 of the Constitution of the Federal Republic of Nigeria, 1999; *Alao v. NIDB* (1999) 9 NWLR (Pt 617) 103 at 111; *University of Lagos & Ors. v. Olaniyan & Ors.* *Dalhatu v. Turaki* (2003) 7 SCNJ 1 at 12; *Odingbo v. Abu* (2001) 14 NWLR (732) 45; *G.C. Lines v. Olaleye* (2000) 10 NWLR (Pt.676) 613 at 634.

On issue 3 that had to do with the right of fair hearing of the cross-appellants, if it was not breach not having been given the opportunity to address court below before that court *suo motu* interfered with the award of 616,019.36 pounds by giving the option to the cross-respondent to pay the naira sum of N80,082.516, the learned senior counsel cited *S.G.B.N. Ltd. v. Adewunmi* (2003) 10 NWLR (Pt. 829) 525 at 546; *Okonkwo v. Okonkwo* (1998) 10 NWLR (Pt. 571) 554 at 570; *Nwokoro v. Onuma* (1990) 3 NWLR (Pt.136) 22 at 31. Learned senior advocate for the cross-respondent stated that it is trite that pleadings do not amount to evidence and aver-

ments therein must be supported by evidence unless they are admitted by the opposing party's pleadings. That every allegation of fact in a statement of claim if not denied specifically or by necessary implication or stated not be admitted in the statement of defence shall be taken as established. Learned senior counsel said since the court below had found as a fact that the deposition in paragraphs 44 to 48 do not amount to admission, the implication is that the issue of shortfall of 616,019.36 pounds must be proved by evidence. He referred to *Adebunmi v. Abdullahi* (1997) 2 NWLR (Pt.489) 526 at 539 - 540; *Insurance Brokers of Nigeria v. Atlantic Textile Manufacturing Co. Ltd.* (1996) 8 NWLR (Pt. 466) 316 at 328 - 329; *Debs v. Cenico Ltd.* (1986) 3 NWLR (Pt. 32) 846 at 848. Mr. Ofodile Okafor SAN stated on that paragraphs 44- 48 of the further Amended Statement of Defence constitutes constructive admission and by virtue of Order 30 Rule 3 Rules of High Court Plateau State 1987 what is admitted needed no further proof and the court below had so held. He cited *Kraus Thompson Ltd. v. Unical* (2004) 9 NWLR (Pt.879) 631 at 653, *Okonkwo v. Okonkwo* (2004) 5 NWLR (Pt. 865) 87; *Akintola v. Solano* (1986) ALL NLR 396 at 422. For the cross-respondent was canvassed that the amendment granted included claim in foreign currency or its equivalent in the sum of N80,082.516, at exchange rate of N130 to 1 pound sterling and what the court tampered with is the final order which ignored the equivalent claim in local currency. That where a claim is specific as to the exchange rate between the local and foreign currency the court cannot take judicial notice of the diminishing value of the naira. That indeed the court cannot go outside the pleadings as parties and the court are bound by the pleading. He cited *George v. Dominion Flour Mills Ltd.* (1963) ALL NLR 70.

Mr. Ofodile Okafor of counsel said the amendment made is a consequential order because it flows naturally from the claim made by the cross-appellant in their Amended Statement of Claim and evidence of PW2, the 2nd cross-appellant. He cited *Akinbobola v. Plisson Fisko Nig. Ltd. & Ors.* (1991) 1 NWLR (Pt. 167) 270 at 288; *Dantsoho v. Mohammed* (2003) 6 NWLR (Pt.817) 457 at 489 - 490; *Akapo v. Hakeem-Habeeb* (1992) 6 NWLR (Pt.247) 266 at 296. Learned counsel for the cross-respondent said order 3 Rule 23(i); Order 19 Rules (3) (4) Court of Appeal Rules 2002 and Section 16

Court of Appeal Act 1976 giving the court below power to make any order which ought to have been given or made by the trial High Court. That the order by the court below granting a conditional stay on 10/5/2000 had lapsed with the delivery of the judgment on the 13th April 2004 and by which judgment the cross-respondent is obliged to pay the judgment sum of 616,019.36 pounds or N80,019.36. Mr. Ofodile Okafor SAN went on to contend that since it was not a final judgment, the issue of being functus officio would not apply. For the cross-respondent was farther submitted that a court of law can raise an issue suo motu as in the case in hand if it is in the interest of justice to do so and no breach of fair hearing had occurred. That the Supreme Court cannot allow this cross-appeal because of the failure of the court below to give the parties an opportunity to address on the issue since it cannot be taken that there is a miscarriage of justice established by the cross-appellant. He referred to *Stirling Civil Engineering Nig. Ltd. v. Yahaya* (2005) 11 NWLR (pt. 935) 181 at 212; *Imah v. Chief Okogbe* (1993) 9 NWLR (Pt. 316) 159 at 178.

Replying on points of law, prince Fagbemi SAN said the lower court was wrong for questioning the propriety of the trial court relying on the Statement of Defence of the cross-respondent vis-a-vis the issue of admission. That the cross-respondent was obliged to pay the entire sum in Pounds Sterling or its naira equivalent on the basis of the governing exchange rate at the time of payment. He cited *Afribank Nig. Plc. V. Akwara* (2006) 5 NWLR (Pt. 974) 619. He stated on that this court below had the jurisdiction to give judgment in foreign currency if the facts so justified. He cited a long line of cases such as *Saeby Jernstoberi MF A/S v Olaogun Enterprises* (1999) 14 NWLR (Pt.637) 128 at 146 etc.

In summary this cross-appeal is contested along the divergent views of the appellant and respondents respectively being while the appellants are of the view that the amendment of the award of 616,019.36 pounds was bad, the parties not having been given the opportunity of being heard and an award unilaterally done by the Court of Appeal. The respondents contend the court had the power to do what they had done in the amendment of the award and that the trial court should not have utilized the pleadings in the Statement of Defence of the cross-respondent in coming to its decision.

The question first arising is if the trial court was right to make use of the pleadings taken as constructive admission of the fact that the cross-respondent was aware of the shortfall of 616,019.36 pounds claimed by the cross appellant. In answering that poser I would refer to Order 30 Rule 3 of the Rules of the High Court, Plateau State applicable to Bauchi State and it is as follows:

“where admission of facts are made by a party either by its pleading or otherwise any other party may apply to the court for such judgment or order as upon those admissions he may be entitled to without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order on the application as it thinks just. And application for an order under this rule may be made by motion or summons.”

The above takes care of admissions but it has been settled in this court that where pleadings do not raise serious triable issue, the court is entitled to draw necessary conclusions from the pleadings and proceed to enter Judgment for the party in an appropriate case. I would cite for effect those views made through Oputa JSC in (1986) ALL NLR 395 at 422 thus:

“It is high time our trial courts (and counsel for the plaintiffs’ speciality) begin looking critically at the pleadings and where appropriate giving judgment on the pleadings if no triable issue of fact plaintiff’s case should be considered on his pleadings and the applicable law. Where the plaintiff’s statement of claim does not disclose a cause of action that is where, even if all the allegations of fact therein averred are established yet still the plaintiff would not be entitled to the relief sought there instead of filing a Statement of Defence, the defendant should move the court to have the case dismissed. Alternatively where the Statement of Defence does not answer deny, or not admit the essential facts on which the plaintiffs case rests, the plaintiff should be courageous enough to ask for judgment on his Statement of Claim.”

This court followed the same path in *Honika Sawmill v Hoff* (1994) 2 SCNJ 86 at 94 and in *Oshodi v Eyifunmi* (2002) 13 NWLR (Pt.684) 298 at 337 stated as follows:

“...the averment in the defendant’s pleadings that the land in

dispute in this case is part of the parcel of land litigated upon not having been specifically traversed by the plaintiffs in their reply must, in the circumstances be deemed to be established and needed not be subjected to any further proof.”

It is clear therefore that it was the Court of Appeal that erred when it faulted the use by the trial court of the admissions in the Statement of defence. What the trial court did was in considering it was in the privileged position of hearing and assessing the witnesses and in this instance the PW5 which evidence was not rebutted and fortified by the pleadings of the cross-respondent.

On the interference and amendment by the lower court with the award of the 616,019.36 pounds by giving the cross-respondent the option to pay the sum of N80,082.516, it is difficult to comprehend why the Court of appeal would do that. Firstly the Court below found to be correct the amendment on which the award of 616,019.36 pounds was predicated made by the trial court. Also the lower court found that the evidence adduced supported the cross-appellant's case for payment in pound sterling and the cross appellants having suffered the shortfall aforesaid which cross-respondents was obligated to pay and in view of the ever changing exchange rate to the loss which would definitely occur against the cross-appellants in the utilization of the exchange rate at the time of the award to the time payment is made. That a miscarriage of justice would occur is a given in the light of the cross-appellants interest being compromised. Therefore it would be economical with the facts to say that such an amended award in Naira can be described as consequential. Consequential denotes a order following naturally in terms of consistency and giving effect to the main judgment. That is not the case here. I rely on the following cases: Akinbobola v. Fisko Nigeria Ltd & Ors. (1991) 1 NWLR (Pt.167) 270 at 288; Dantsoho v. Mohammed (2003) 6 NWLR (Pt.817) 489 - 490; Owena Bank v Stock Exchange (1997) 7 SCNJ 160 at 175; Nwanya v. Nwanya (1987) 3 NWLR (Pt. 62) 697.

As if the above were not enough hindrance to supporting what the court below did is the fact that it is not easy to justify this unilateral amendment of the award of 616,019.36 pounds considering a conditional stay earlier ordered and sustained by this court on the judgment debt including 616,019.36 pounds to be paid to the lower

court. Therefore the lower court went outside its mandate to do what it did with that interference that was bad enough and worse still without calling for the address of the parties before taking the decision and making the offending award. Clearly that decision made suo motu without hearing from the parties was a gross violation of their right to fair hearing and occasioning a miscarriage of justice would certainly not stand. See *Alao v NIDB* (1999) 9 NWLR (Pt. 617) 103 at 111; *University of Lagos & Ors v Olaniyan & Ors Dalhatu v Turaki* (2003) 7 SCNJ 1 at 12 *Societe General Bank Nig. Ltd v Adewunmi* (2003) 10 NWLR (Pt.829) 525 at 546, *Okonkwo v. Okonkwo* (1998) 10 NWLR (Pt.571) 554 at 570; *Nwokolo v Anuma* (1990) 3 NWLR (Pt. 136) 22 at 31

From the above it is clear beyond par adventure that this cross-appeal has succeeded. I allow the cross appeal and set aside the decision of the lower court interfering with the decision of the trial court whereby:

- (i) The learned trial Judge was faulted for using and utilizing the pleadings of the cross-respondent.
 - (ii) The award of 616,019.36 pounds was amended by giving the cross-respondent the option to pay of N80,082.516.
 - (b) restore the judgment of the trial court in its entirety including:
 - (1) That portion that utilized the pleadings of the parties particularly that of the cross-respondent.
 - (2) Award of 616,019.36 pounds.
- N50, 000.00 costs to the cross-appellant to be paid by the cross-respondent.

G

CHUKWUMA-ENEH JSC

The appeal in this matter turns on a well-known case of *Okafor v. Nweke* (2007) 10 NWLR (Pt.1047) 521 in which I rendered a contribution in support of the lead judgment albeit to the effect that a notice of motion signed by a legal practitioner on behalf of the applicant must be as prescribed by the Legal Practitioners Act, Cap. 207 Laws of the Federation of Nigeria 1990. See Sections 2(1) and 24 thereof. In the cited case the notice of motion as well as the proposed notice of cross-appeal and the appellant's brief in support of

the said notice of motion have all been signed by J.H.C. Okolo SAN & Co. This court per Onnoghen JSC held that the documents as per the notice of motion being defective are incompetent and have to be struck out. Thus leaving the applicants with the opportunity to present a proper application. This strict construction of the said law as per Okafor v. Nweke (supra) has now arisen in this matter. B

Before leaving the point, the crucial implication of the decision in Okafor v. Nweke (supra) is that the said processes declared incompetent for being incurably defective should have been signed by a legal practitioner on behalf of the applicant that is by a Legal Practitioner whose name appears in the Roll of Legal Practitioners lodged in the Supreme Court as any other sign or mark as J.H.C. Okolo SAN & Co. etc being incurable defective is incompetent. Again, I cannot leave this point without observing further that the decisions such as in Banjo v. Eternal Sacred Order of Cherubim and Seraphim (1975) 3 SC (Reprint) 26 at 82 and Registered Trustees of Apostolic Church, Lagos Area v. Akindele (1967) NMLR 268 at 265 (1967) ANLR 118 at 120-121; Augusta Cole v. Sergius Olatuaji Martins (1968) ANLR 161 at 164-165, and many other similar decisions that have decided this similar question differently have done so clearly against the background of practice and procedure as applicable in the High Court of Justice of England and therefore distinguishable from the strict application of the said law in Okafor v. Nweke (supra). I have subscribed my concurrence to the said decision in Okafor v. Nweke (supra) and I do not see any reasons to differ from my judgment in that case. Needless saying that I am bound by it as well as this court. E F

I am aware that a full court of the Supreme Court has been empanelled with regard to suits Nos.204/2002 and 269/2005 to revisit, reverse or depart, from the decision in Okafor v. Nweke. In this regard See: Okulate v. Awosanya (2002) 2 NWLR (Pt. 246) 530 at 548, Rossek v. ACB Limited (1993) 8 NWLR (Pt.312) 382 at 447, Adegoke Motors Ltd. vs. Adesanya (1989) 3 NWLR (Pt.109) 250 at 275. It has to be noted that this court has inherent power to differ from its earlier decision where the said decision has been reached per incuriam which is not the gravamen of the dispute in this matter. However until the judgment of the full court reached in the said suits is delivered it is my view that the decision in Okafor v. Nweke a binding authority on this court still subsists and it holds sway. The facts H

and circumstances of the instant matter have been set out in the lead judgment of my learned brother Mary Peter-Odili JSC in this matter of which judgment I have had a preview before now. For purposes of this contribution I have also set forth such other facts of the matter as they have become necessary in the course enable decide this issue.

B The controversy in this appeal turns on the requirement that a Notice of Appeal filed as in this matter must be signed by the appellant himself or by a legal practitioner on his behalf. It is upon this requirement that the said Notice of Appeal dated 23/10/1998 and
C filed in this matter and purportedly signed by “*Ibrahim Hamman and Co*” not being a registered practitioner under the law i.e. Legal Practitioners Act being incurably defective is in competent and consequently there is no valid appeal to sustain the instant appeal. The lower court without any equivocation has reached the conclusion as
D the law stands today that is, the said notice of appeal of 23/10/1998 being incurably defective is incompetent and liable to be struck out. See *Uwazurike & Ors. v. Attorney-General of the Federation* (2007) 2 SC.169 and so I refer to the salient portions of the judgment of Sanusi JCA in lower court as at page 514 of the record in this matter
E to buttress this point as follows:

“On 14/1/2004 this appeal was set down for hearing. Before the appeal was taken the learned Senior counsel for the respondents drew this court’s attention to two motions he filed on 24/9/2003 and
F 14/1/2004 and sought for this court’s leave to argue them before the appeal was heard, with the consent of the learned Senior counsel for the appellant, Chief Debo Akande SAN, the court agreed to take the two motions together and both motions were taken together before the parties argued the appeal. The first motion dated 24th of Sep-
G tember 2003 and filed on the same dated contained the following reliefs:-

1. Striking out this appeal for being incompetent OR IN THE ALTERNATIVE.

(c) An order striking out the Briefs of arguments dated 23rd
H March 2000 and filed by the appellant

(c) AND upon granting 2 above.

An order dismissing the appeal the

The grounds on which the application is predicated are as follows:

(c) THE NOTICE OF APPEAL

Dated 23rd day of October 1998 was purportedly filed by one "IBRAHIM HAMMAN AND CO."

(c) There is no such legal practitioner as "IBRAHIM HAMMAN AND CO" registered at the Supreme Court of Nigeria to practice in Nigeria.

(c) The issue of the propriety of the Notice of Appeal was raised earlier in the respondents brief of argument as a result of which appellant was granted leave to change the last page of the Notice of Appeal as filed in the lower court.

4. The appellant's change of the record of proceedings has not diminished the impropriety of the Notice of Appeal. "

"The motion was supported by an affidavit containing 24 paragraphs deposed to by one Agu Ikenna Victor. Also annex to it are three exhibits marked as OBA 1-3. I do not find it necessary to set out the second motion as it irrelevant for the opinion I have expressed in this matter and indeed as will be seen has been rendered otiose by my opinion on the first motion. At page 549 of the record in regard to the first motion the lower court held as follows:

The result of all have said above is that there is merit in the first application. The application succeeds and the first prayer is hereby granted. The appeal is incompetent and is accordingly struck out."

Having reached the above conclusion on the said Notice of Appeal before it without more, one would have thought the lower court has become functus officio as there is nothing further to consider or even determine in the matter other than to strike it out as the lower court has rightly declared in the above abstract. The defect goes to the jurisdictional competence of the court to hear and determine the appeal. See *Nwaeze v. Eze* (1999) 3 NWLR (Pt.595) 410 at 418, *Atuyeye v. Ashamu* (1987) 1 NWLR (Pt.49) 267, *Nsirim v. Nsirim* (1990) 3 NWLR (Pt.138) 285, *Odofoin v. Agu* (1992) 3 NWLR (Pt. 229) 350 and *Ihewuezi v. Ekeanya* (1989) 1 NWLR, (Pt.96) 239. And so there can be no cause to justify considering the 2nd motion or even the merits of the appeal for what it is worth per Sanusi JCA as has been denoted in his judgment. The consideration of a substantive appeal on the merits in the alternative as in this matter in the event of having delivered a wrong ruling/decision in a preliminary objection as here in most cases although of great assistance to the

appellate court in the next step in the hierarchy of the courts has not always been the case, that is, a necessary requirement as in this case but has to depend on the nature of the action and the reliefs sought therein- By the nature of the instant matter as well as the reliefs sought in the same, it does not call for a decision in the alternative as in a claim for damages in tort where the trial court is not minded to grant the same. The lower court nonetheless in this matter has proceeded to consider the second motion filed on 14/2004 and even the case on the merits. At page 552 of the record the lower court has pronounced as follows:

“As a corollary (sic), the motion is adjudged meritorious. The first reliefs sought in the application is hereby granted. Grounds of Appeal Nos. 7, 8 and 9 are hereby struck out and the said grounds are discountenances (sic)- All the arguments relating to them in issue No.5 in the appellant’s brief of argument are also struck out and discountenanced.

The reliefs in two motions filed by the applicants have been granted and in the result the appeal has been dismissed. However, in the event that I am wrong in my reasoning and the conclusion reached on the two motions, I shall still consider the appeal for whatever purpose it will serve. “

The lower court as per the above portion of the judgment of Sanusi JCA has again dismissed the appeal. Even then it has gone on to consider the appeal on the merits and has reached the following conclusions on the merits of the case as per pages 548 and 549 of the record as follows:

“As I said earlier, the original notice of appeal dated 23/10/1998 issued, filed and signed by the firm of Ibrahim Hamman & Co is fundamentally defective having not been issued and signed by a Legal Practitioner. Where a notice of appeal is fundamentally defective there is no foundation for the appeal and therefore there is no appeal before the court. The appeal then collapsed for being devoid of necessary foundation. Having not been issued by a competent authority, the appeal is not predicated on a valid notice. See Odofin v. Agu (1992) 3 NWLR (Pt.229) 350; NBN v. NET (1986) 3 NWLR (Pt.31) 667; Atuyeye v. Ashamu (1987) 1 NWLR (Pt.594) 410 at 418. The learned Senior Advocate of Nigeria representing the respondent/appellant referred to his application which this court granted

for him to replace the last page and argued that the date of the new page should covers or applies of the brief he filed. He as well has relied on the case of Nigerian Airways v. Baguma (supra). I think the issue involved in this appeal is not an issue of amendment of process or notice of appeal. The original notice of appeal dated 23/10/98 is defective ab initio. No amount of amendment will cure it. Being fundamentally defective therefore, it can not be amended. It is totally incompetent and does not more or less exist at all, so the authorities cited and relied on by the learned silk are of no moment. The result of all I have said above is that there is merit in the first application. The application succeeds and the first prayer therein is hereby granted. The appeal is incompetent and is accordingly struck out."

Further to the foregoing abstract there can be no question in regard to the conclusion ultimately reached in this appeal before the lower court. The lower court dismissed the appeal as the Notice of Appeal of 23/10/1998 an originating process in the appeal is incurably defective and otherwise incompetent as it cannot sustain the instant appeal and so is liable to be struck out and accordingly it is stuck out. Applying to this appeal the law as it stands today that is, as decided and expounded in Okafor v. Nweke (supra) which is binding on this court as the facts and circumstances on the point in issue here and those in Okafor v. Nweke are similar that is to say, for failing to sign the notice of appeal as in this matter in the manner prescribed by the Legal Practitioners Act which necessarily has to be construed in strict application of the provisions of Section 2(1) and 24 of the Legal Practitioners Act as decided in Okafor v. Nweke (supra). In this regard what has happened here is completely at variance with the requirement as decided in Okafor v. Nweke (supra) and cannot be discountenance in any circumstances upon the bindingness of the cited case.

In the circumstances I must observe that the instant case serves to bring to the fore the urgent need of having the strict application of the law i.e. per Sections 2(1) and 24 of the Legal Practitioners Act as to signing of court processes and legal documents in this respect revisited by the law makers so as to ameliorate the rigours its apparent harness amounting unarguably injustice as has been occasioned to the instant appellant and litigant as well as members of the public who have relied on the state of the law as per the decisions in the

cases of Registered Trustees of Apostolic Church Lagos Area v. Akindele (supra), Bayo v. Eternal Sacred Order of Cherubim & Seraphim (supra) and Augusta Cole v. Sergius Martins (supra) that is, before the decision in Okafor v. Nweke (supra) in organizing the execution and signing of their legal documents in their everyday businesses including court matters.

My Lords, it is for the above reasons that I beg to disagree with the lead judgment of my learned brother Mary Peter-Odili JSC in this appeal. For these reasons I find no merit in the appeal, it should be dismissed and I dismiss the same with N50,000 costs to the respondents.

RHODES-VIVOUR JSC

I am in full agreement with the leading judgment prepared by my learned brother, Peter-Odili, JSC which I had the privilege of reading in draft. I intend to add my observations on Order 40 Rule 7 of the Plateau State High Court Rules 1987 applicable in Bauchi State. It states that:

“The Court at the time of making any judgment or order or at any time afterwards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of the judgment or order, or from some other point in time, as the court thinks fit, and may order interest at a rate not exceeding ten naira percent per annum to be paid upon any judgment commencing for the date thereof or afterwards as the case may be.”

Order 40 Rule 7 supra is designed to ensure that a judgment creditor is not shut out from what he is genuinely entitled to, the passage of time notwithstanding. See *Berliet Nig Ltd v. Kachalla* (1995) 9 NWLR pt.420 p.478, *Himma Merchant Ltd v. Aliyu* (1994) 5 NWLR (Pt.347, p.667)

Post judgment interest is granted entirely at the discretion of the judge. So where it was not given on the date judgment was delivered all that the judgment creditor needs to do is to file an application with an affidavit explaining in detail the reasons for the delay. The length of the delay, be it years are irrelevant if and only if the judge is satisfied with the explanation for the delay. There is no limit to the time such an application can be brought.

The court at first instance was correct to award interest on the judgment sum six months after judgment was delivered.

For this, and the detailed reasoning in the leading judgment I am in complete agreement with my learned brothers reasoning and conclusions.

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