

**SUPREME COURT OF NIGERIA**  
13TH APRIL, 2012. SC. 91/1999  
**A. M. MUKHTAR, F. F. TABAI, S. GALADIMA,**  
**N. S. NGWUTA, O. ARIWOOLA, JJSC**

JACKIE PHILLIPS	..... APPELLANT
AND	
EBA ODAN COMMERCIAL	
& INDUSTRIAL COMPANY LTD	..... RESPONDENT

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APPEALS - Issues - Proliferation - Need to avoid - Where appropriate - One issue should be distilled from combination of grounds of appeal (H1)

EVIDENCE - Admissibility - Exhibits P3 & P4 - Not pleaded - Fate - Court of Appeal was right in expunging the exhibits - Since same were not pleaded (H2)

APPEALS - Concurrent findings - Supreme Court will not disturb the findings - That evidence of appellant's handwriting expert is not reliable (H3)

PLEADINGS - Statement of defence - Reply to - Absence of - Effect - Allegation in statement of claim are deemed denied - Or joinder of issues is implied (H4)

PLEADINGS - Statement of defence - Fresh issues of fact - Need to reply - Plaintiff must reply to the new issues - Otherwise same will be deemed admitted (H5)

LAND LAW - Survey plan - Deed of Assignment - Attachment - Propriety - Although the attachment is condemnable - Same cannot affect validity of the Deed (H6)

***FACTS***

This action was instituted by plaintiff/appellant against defendant/respondent at the High Court of Lagos State, Lagos judicial division. The issue between the parties is whether the agreement they

**1612 Phillips v. Eba Odan Commercial & Industrial Co. Ltd. (2012)**

entered into was for a sublease or assignment of appellant's interest in the disputed property. Appellant sought for an order setting aside deed of assignment registered as No. 29 in the State's Land Registry. Pleadings were filed and exchanged. At the trial in the High Court, appellant claimed he did not sign the Deed of Assignment. He tendered several exhibits including exhibits P3 (tape recording) and P4 (transcript of the tape) in support of his claim.

On the other hand, respondent claimed that appellant signed the Deed of Assignment. Respondent objected to the admissibility of the exhibits on the ground that same were not pleaded and no foundation was laid for their admissibility. The court nevertheless admitted the exhibits in evidence. In its judgment, the trial Judge dismissed appellant's claim. Dissatisfied, appellant appealed to the Court of Appeal, Lagos Division. The court expunged exhibits P3 and P4, dismissed the appeal and affirmed the decision of the trial court. Aggrieved further, appellant appealed to Supreme Court.

**ISSUES FOR DETERMINATION**

*“One: Whether the Learned Justices of the court of Appeal were not right when they held that the tape recording - Exhibit ‘P3’ and ‘P4’ were strangely and abnormally admitted in evidence by the trial court:*

*(a) When there was no contention or controversy about the fact that Appellant did not plead any fact on tape recording.*

*(b) When on the merit of the admission of the tape recording no proper foundation was laid by the appellant before its admission and the admission process did not accord with the rules of evidence.*

*Two: Whether the learned Justices of the court of Appeal were not right when they upheld the decision of the learned trial Court which rejected as unreliable the evidence of the handwriting expert called by Appellants.*

*Three: Whether the court of Appeal was not right when it upheld the trial Court's decision which relied and acted on the opinion of the handwriting expert DW1 and the evidence of Dw2 in proof of the due execution of the Deed of Assignment Exhibit ‘P2’ by Appellants.*

*Four: Whether the learned trial Justices of the Court of Appeal were not right when they held that the mere fact that the survey plan attached to the Deed of Assignment-Exhibit ‘P2’ was prepared at a*

*date later than when the Deed itself was prepared was not fatal to the validity of the Deed of Assignment.”*

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

***APPEALS - Issues - Proliferation - Need to avoid***

1. In an appeal against the concurrent finding of fact by the trial High Court and the Court of Appeal, the appellant found and presented twelve grounds of appeal, from which he identified twelve issues for determination. One would have thought that issues in the case would have been scaled down between the two lower Courts but the reverse appears to be the case. The ideal and established practice is that one issue is distilled from a combination of grounds of appeal. Proliferation of issues and if I may add, proliferation of grounds of appeal, should be avoided. The established principle which governs the formulation of issues for determination is that a number of grounds of appeal could, where appropriate, be formulated into a single issue running through them. (p. 1618 D)

***EVIDENCE - Admissibility***

2. With due respect to learned Counsel for the appellant, the distinction between evidence prohibited in any circumstance and evidence admissible under certain conditions does not arise in this case. The point is that the exhibits admitted at the trial court but rejected by the lower court ought to have been pleaded but was not pleaded.

In my view, Exhibits P3 and P4 which were not pleaded and no foundation would have been laid for their admission were wrongly admitted by the trial Court and rightly expunged by the lower Court. I resolve the issue against the appellant. (p. 1625 C)

***APPEALS - Concurrent findings***

3. Issue Two is on the concurrent finding of the trial Court and the lower Court that the evidence of the appellant's handwriting expert is not reliable. It is noteworthy that Alhaji Musa who brought the documents to PW2 for examination on behalf of the appellant was not called to testify at the trial. Also Inspector Tayler who was alleged to have independently examined the documents and co-authored the report thereof with the PW2, was not called to testify at the trial. The documents examined by the PW2 and Inspector Tayler were

photocopies not originals of P2, P1, and D1. There is nothing in the record to justify the appellant's handwriting expert's preference of photocopies JP2, JP2A and JP3 to the original documents P2, P1- and D1 for examination. The findings of the trial Court which were affirmed by the lower Court were based on the trial Court's assessment of the evidence before it, bearing in mind that the trial Court has the opportunity of watching and hearing the witnesses testifying in Court. In my view, the decision of the trial Court affirmed by the lower Court is not perverse and is the result of proper exercise of judicial discretion, and this Court has no reason to disturb same. The lower Court was right when it upheld the rejection of the evidence of the appellant's handwriting expert by the trial Court. (p. 1625 F)

**D *Statement of defence - Reply to - Absence of - Effect***

4. In absence of a reply to the amended Statement of Defence generally the allegation in the Statement of Claim are implicitly denied or there is an implied joinder of Issues; in which case pleadings close with the statement of defence. (p. 1627 C)

**E *Statement of defence - Fresh issues of fact - Need to reply***

5. But where the statement of defence raises new issues of fact not arising from the statement of claim the plaintiff has a duty to deal with the new issues of fact in his reply otherwise the facts will be deemed admitted by the plaintiff, and this relates directly to the issue of due execution of the Deed of Assignment P2 by the appellant. (p. 1627 D)

**G *Survey plan - Deed of Assignment - Attachment - Propriety***

6. Issue Four is on the Survey Plan attached to the Deed of Assignment. The appellant's grouse is that the Survey Plan bears a date later than the date of the execution of the Deed of Assignment. It was argued on behalf of the appellant that the lower Court, having described the conduct of the Respondent in relation to the survey plan as reprehensible should have rejected the plan and the Deed of Assignment. Whether it was a case of a sub lease for twenty years as claimed by the appellant or assignment of the residue of the appellant's interest in the property, the identity of the property is not an issue

in the proceedings. Though the conduct of the Respondent in attaching the Survey Plan to the Deed of Assignment was rightly condemned by the lower Court a severance of the former for the latter cannot ipso facto adversely affect the validity of the latter. (p. 1628 A)

**REPRESENTATION**

B

A. Akintunde with Mohammed Salawu, for the Appellant  
Chief Dele Awoniyi, for the Respondent

**CASES REFERRED TO**

C

Ugo v. Obikwere (1989) 2 SC (Pt. 11) 41

Labiya v. Anretiola (1992) 10 SCNJ 1 2

Udechukwu v. Okwuka (1955) 1 FSC 70

Olukade v. Alade (1976) 2 SC 183

Saude v. Abdullahi (1989) 4 NWLR (Pt. 115) 387

D

Ayoola v. Adebayo (1969) 1 All NLR 15

Agbi v. Ogbah (2005) 8 NWLR (Pt. 926) 40

Awomuti v. Salami & ors (1978) 3 SC 105

Regina v. Ali (1956) 1 QBD 688

Kodilinye v. Odu (1935) WACA 385

E

Okoye v. Ejiofo (1934) 2 WACA 130

Akinloye v. Eyiola (1958) NMLR 92

Obot v. CBN (1993) 9 SC NJ 268

Spasco v. Alrairie (1995) 9 SCNJ 288

F

Ishola v. SB Bank (1997) 2 SCNJ 1

**STATUTE REFERRED TO**

Evidence Act Cap. 112 LFN 1990, s. 135

G

**BOOK REFERRED TO**

Modern Law of Evidence 2nd Ed. p. 545

**LEAD JUDGMENT BY NGWUTA JSC**

Endorsed on the Writ of Summons issued on 9th October, 1986 at the Registry of the High Court of Lagos State, Lagos Judicial Division is the appellant's (then plaintiff) claim against the Respondent (then defendant):

*"The plaintiff's claim against the defendant is for on order set-*

*ting aside the Deed of Assignment dated the 7th day of May, 1981 and registered as No. 29 at page 29 in Volume 1839 of the Registry of Deeds kept at the Lagos State Land Registry.”*

At paragraph 14 of the Statement of Claim dated 5th December, 1986 and filed on 8th December, 1986 the claim is as follows:

B *“14. Whereupon the plaintiff claim against the Defendant is a declaration that the Deed of Assignment registered at No. 79 at page 79 Volume 1983 of the register of Deeds kept at the Land Registry in the office at Lagos is null and void and of no effect.”*

C Pleadings were filed and exchanged. At the trial in the High Court, appellant claimed he did not sign the Deed of Assignment dated 7th May 1981. On the other hand the Respondent claimed that the appellant did sign the Deed of Assignment. In a reserved judgment delivered on the 14th day of September, 1990 the trial D Judge dismissed the appellant’s claim. The appellant appealed to the Court of Appeal, Lagos Division. In its judgment delivered on 8th May 1995, the Lower Court dismissed the appeal and affirmed the decision of the trial High Court. Against the concurrent decisions of the trial High court and the court of Appeal, the appellant appealed E to this court on 12 grounds. In accordance with the rules, learned counsel for the parties filed and exchanged briefs of argument. From the 12 grounds of appeal, learned counsel for the Appellant distilled 12 issues for determination in his brief. The 12 issues are hereunder reproduced:

F *“(i) Whether the Court of Appeal erred in failing to hold that the Defendant failed to discharge the burden which lay on it to prove that the plaintiff later changed his mind concerning the original agreement.*

G *(ii) Having held that the evidence of the handwriting analyst and DW2 (who claimed to have seen the plaintiff sign the document) did not go to prove that the original agreement between the parties to grant a sub lease was altered for on outright assignment whether the Court of Appeal (Kalgo JCA) erred in law in not resolving the H FIRST ISSUE for determination in favour of the plaintiff.*

*(iii) Whether the Court below erred in holding that the tape recording exhibit p4 was inadmissible in evidence.*

*(iv) Whether evidence of the Tape Recording needed to be pleaded.*

(v) *Whether the Court below failed to take into proper account crucial and material facts and factors in arriving at its decision that the plaintiff had executed the document in dispute.*

(vi) *Whether Order 3 Rule 12 of the Rules of the Court of Appeal entitled the Court of Appeal to decide the issue of admissibility of the tape recording.* B

(vii) *Whether the Court of Appeal erred in holding that the evidence of PW2 was irrelevant and that the only evidence available to the plaintiff's credit was his own evidence.*

(viii) *Whether the Court of Appeal erred in holding that there was no inconsistency in the evidence given by DW1 and that it was unnecessary to look at Exhibit D1 for the purpose of determining the authenticity of the signatures.* C

(ix) *Whether the Court of Appeal misdirected itself on the facts in relation to the evidence of DW1, the Respondent's handwriting analyst.* D

(x) *Whether the Court of Appeal misdirected itself in law by stating that '... there was nothing in the cross-examination to shake DW2 or challenge his evidence or credibility and that the Appellant did not call evidence to prove that he did not know DW2.'* E

(xi) *Having held that the conduct of the defendant in registering the document in dispute, a plan which could not have been in existence at the date the deal was supposed to have been executed was reprehensible, whether the Court of Appeal was wrong to have held that nevertheless it was not sufficient to render the evidence on behalf of the defendant unworthy of credit, and* F

(xii) *Whether the decision is against the weight of evidence."*

Learned counsel for the Respondent identified four issues in the Respondent's brief for determination. The four issues are: G

*"One: Whether the Learned Justices of the court of Appeal were not right when they held that the tape recording - Exhibit 'P3' and 'P4' were strangely and abnormally admitted in evidence by the trial court:*

(a) *When there was no contention or controversy about the fact that Appellant did not plead any fact on tape recording.* H

(b) *When on the merit of the admission of the tape recording no proper foundation was laid by the appellant before its admission and the admission process did not accord with the rules of evidence.*

Two: *Whether the learned Justices of the court of Appeal were not right when they upheld the decision of the learned trial Court which rejected as unreliable the evidence of the handwriting expert called by Appellants.*

B Three: *Whether the court of Appeal was not right when it upheld the trial Court's decision which relied and acted on the opinion of the handwriting expert DW1 and the evidence of Dw2 in proof of the due execution of the Deed of Assignment Exhibit 'P2' by Appellants.*

C Four: *Whether the learned trial Justices of the Court of Appeal were not right when they held that the mere fact that the survey plan attached to the Deed of Assignment-Exhibit 'P2' was prepared at a date later than when the Deed itself was prepared was not fatal to the validity of the Deed of Assignment."*

D ***In an appeal against the concurrent finding of fact by the trial High Court and the Court of Appeal, the appellant found and presented twelve grounds of appeal, from which he identified twelve issues for determination. One would have thought that issues in the case would have been scaled down between***  
 E ***the two lower Courts but the reverse appears to be the case. The ideal and established practice is that one issue is distilled from a combination of grounds of appeal. Proliferation of issues and if I may add, proliferation of grounds of appeal, should be avoided.*** See Ugo v. Obikwere (1989) 2 SC (Pt. 11) 41.  
 F ***The established principle which governs the formulation of issues for determination is that a number of grounds of appeal could, where appropriate, be formulated into a single issue running through them.*** See Labiyi v. Anretiola (1992) 10 SCNJ 1 at 2.

G I have read the transcripts from the two lower courts as well as the briefs filed by learned counsel for the parties. Going by the claim endorsed on the writ of summons, the issue in controversy is whether or not the appellant signed the Deed of Assignment admitted in evidence and marked Exhibit P2. On the other hand, by the statement  
 H of claim which supersedes the writ of summons; see Udechukwu v. Okwuka (1955) 1 FSC 70, the issue calling for resolution is whether or not the Deed of Assignment Exhibit P2 is null and void and of no legal effect. I do not think that the two lower courts or learned counsel for the parties did appreciate the distinction between the claim en-



dorsed on the writ and the claim in paragraph 14 of the statement of claim. There may be vitiating factors in Exhibit P2 to render it null and void even if it was signed by the appellant. The converse is true. Exhibit P2 may not necessarily be null and void just because the appellant did not sign it, though he may not be bound by its terms. From the trend of evidence and argument of learned counsel before the two lower courts and in the briefs before this Court, it is clear that the dispute is whether or not the appellant signed Exhibit P2, the Deed of Assignment, and not whether Exhibit P2 is null and void. Though the statement of claim supersedes the writ of summons, none of the parties will lose anything. If I determine the appeal based on the claim endorsed on the Writ in respect of which evidence was led by the parties rather than on the claim in the Statement of Claim on which the parties did not join issue and in respect of which no evidence was led.

Having isolated the main issue which is whether the appellant signed Exhibit P2 as claimed by the respondent and upheld by the two Courts below or the appellant did not sign Exhibit P2 as he claimed but which claim was rejected by the two lower Courts, I will determine the appeal on the four issues raised from the twelve grounds of appeal by the learned Counsel for the respondent.

Issue One is on the rejection of the tape recording Exhibit P3 and P4, the transcript of the conversation, by the lower Court even though it was admitted by the trial Court. This is the same as issue three in the appellant's brief. In his argument in issue three in his brief, learned Counsel for the appellant said that at the trial Court, the respondent objected to Exhibit P4 when it was tendered in evidence, the trial Court took argument on the objection and overruled same and admitted the tape recording and marked it Exhibit P4. He pointed out that the respondent did not appeal the ruling admitting the tape recording in evidence. He relied on *Salawu Jagun Olukade v. Abolade Agboola Alade* (1976) 2 SC 183 in his concession that the lower Court has a duty to expunge evidence improperly received even when there is no objection to its reception in evidence. Learned Counsel however, drew a distinction between cases wherein the evidence complained of is in no circumstance admissible and cases wherein such evidence is admissible under certain conditions as according to him, in the present case. He referred to *Modern Law of*

Evidence, 2nd Edition by Fidelis Nwadialo at page 545 and said that in the former class of cases, the evidence cannot be acted upon even if it was admitted by consent of the parties. In the latter case, he argued that if the evidence was admitted without objection or was used by the other party for the purpose of cross-examination for instance, it is within the competence of the trial Court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence. He argued that since the issue was not raised in the lower Court the said Court should not have re-opened or reconsidered the admissibility of the tape recording. He cited and relied on *Saude v. Abdullahi* (1989) 4 NWLR (Pt.115) p.387 at 408, para. D in his contention that it was wrong for the lower court to raise the issue of admissibility of the tape recording suo motu and resolved same without calling on the parties to address the Court on the issue raised by it. He maintained that the resolution of the issue of the admissibility of the tape recording without calling on the parties to address the issue is a misdirection grave enough to cause a miscarriage of justice. He relied on *Ayoola v. Adebayo* (1969) 1 All NLR 15. He urged the court to hold that the court below erred in holding that the tape recording was admissible in evidence.

Issue two in the Respondent's brief as well as issue Nine in the appellant's brief are concerned with the propriety vel non of the lower Court's rejection of the evidence of the handwriting expert called by the appellant. In his argument on the issue, learned counsel for the appellant said that the lower court concluded that upon the totality of the evidence in respect to diacritics the evidence of PW1 was not challenged. He argued that the evidence offered by the expert called by the Respondent DW2 was challenged by contrary evidence led by PW2. He said that the evidence of DW1 and DW2 was found unreliable and that the lower court misdirected itself in holding that the evidence was not challenged. He added that the misdirection affected the court's subsequent view of the evidence in the matter. He urged the court to resolve the issue in favour of the appellant. Issue Three in the Respondent's brief deals with the same subject matter as issue Two in the appellant's brief, that is: the opinion of the Respondent's handwriting expert DW1 and Respondent's other witness DW2. In this issue, learned Counsel for the appellant referred to the evidence led by the appellant to establish that the agreement between the

parties was for a 20 year sub-lease. He said that the Respondent who pleaded agreement to sell and outright sale of the property to him did not call evidence to establish his pleading. He referred to page 326 of the record where the lower Court held:

*“Therefore since the Respondent offered no evidence in support of his pleadings, he is deemed to have accepted the evidence of the appellant and has abandoned the averments in the pleadings.”*

He referred to the opinion of DW1 called by the Respondent as expert witness and DW2 and said that the lower court found, inter alia, that the evidence of the witnesses did not go to prove that the original agreement between the parties to grant a sub-lease was changed to one for outright assignment. He argued that the Respondent failed to prove the “change of mind” he pleaded and that the lower court ought to have so decided. He said that the Court of Appeal erred in its decision to uphold the judgment of the trial court.

Issue Four in the Respondent’s brief is the same as Issue 11 in the appellant’s brief. Arguing the said issue in his brief, learned counsel for the appellant cited Agbi v. Ogbeh (2005) 8 NWLR (pt. 926) p.40 at 134 paras. A-B in support of his argument that a court should only act upon evidence which is credible. He said that the Respondent admitted that the survey plan attached to the Deed of Assignment could not have been in existence at the date of execution of the Deed of Assignment. He argued that even though the plan was admitted, the fact that it did not exist at the execution of the Deed to which it was attached would go to the probative value to be ascribed to it. He relied on Awomuti v. Salami & ors (1978) 3 SC 105. Counsel submitted that even when a document is admitted in evidence, the probative value to be ascribed to the document so admitted would have to be considered by the Court. He referred to the evidence of DW2 and contended that it is confirmed that the document had been tampered with in that it was registered on a date different from the date on the plan attached to it. He contended that the document is a forgery. He argued that having described the conduct of the Respondent as reprehensible, the lower court should have treated the Deed of Assignment and the plan attached to it as forgery and the evidence relating to it unworthy of credit. He urged the court to resolve the issue in favour of the appellant. He urged the court to allow the appeal.

Arguing Issue One in his brief, learned Counsel for the Respondent referred to the tape recording and the transcripts of an alleged telephone conversation between the appellant and a Director of the Respondent company, a Chief N. O. Idowu, which were admitted by the trial Court but expunged as inadmissible by the lower Court for the various reasons in the judgment of the lower Court. He said that the appellant did not fault the decision of the lower Court in respect of the tape recording on the grounds stated in the judgment. In reaction to the argument that the lower Court dealt with the issue of the tape recording suo motu, learned Counsel for the Respondent drew attention to the two issues before the lower Court:

- “(a) *Whether the agreement between the parties was for a sub-lease or an assignment of the appellant’s interest in the property; and*
- (b) *Whether the trial Court properly evaluated the evidence adduced before arriving at its conclusion.*”

He referred to the brief filed by the appellant in the Court of Appeal and said that appellant contended that the Respondent did not lead evidence to challenge the evidence on the tape recording. He argued that the lower Court could not have dealt with the question of whether the agreement was for a sublease or an assignment without determining the issue of the admissibility of the tape recording in respect of which the appellant said the Respondent did not challenge his evidence.

In the same vein, argued Counsel, the lower Court could not have dealt with the evaluation of evidence by the trial Court in isolation of the tape recording. He contended that it was imperative that the lower Court should determine the admissibility vel non of the tape recording and its transcript Exhibit P3 and PW4 in the resolution of the two issues raised in the appellant’s brief before it. Learned Counsel referred to *Olukade v. Alade* (1976) 2 SC 183 in his submission that an appellate Court should decide an appeal before it only on legally admissible evidence whether or not objection was taken before the trial Court on the admission or rejection of such evidence. He argued that page 545 of the *Modern Law of Evidence* (supra) will not avail the appellant in view of the fact that the Respondent took objection to the admission of Exhibits PW3 and PW4 at the trial Court. He referred to the pleadings and maintained that the appel-

lant did not plead any fact relating to Exhibits P3 and P4 and submitted that the Court of Appeal rightly expunged the exhibits which were wrongly admitted over the objection of the respondent by the trial Court. He urged the Court to resolve the issue in favour of the Respondent. In Issue Two, learned Counsel referred to the evidence of the appellant's handwriting expert, PW2 who claimed that one B Alhaji Musa brought to him an envelope containing Exhibits JP2, JP2A and JP3 and requested that he should examine them for the appellant. The PW2 claimed that he and one Police Inspector Tayler conducted separate examination of JP2, JP2A and JP3 and prepared C a report signed by both of them. He said that the appellant who disclaimed the signature on Exhibits P2 introduced Exhibits PL and D1 which he claimed he signed for the purpose of proving that he did not sign Exhibit P2. He argued that both the trial Court and the lower Court held that PW2 did not link JP2, JP2A and JP3 with D Exhibits P2, P1 and D1. He said that the lower Court held that Exhibits JP2, JP2A and JP3 were unknown to the trial Court and that was the reason both Courts discountenanced PW2's so-called expert opinion. Counsel said that though Counsel for the appellant said that Exhibits JP2, JP2A and JP3 were proved to relate to Exhibits P2, P1 E and D1 and were eventually admitted as Exhibits P5, P6 and P7, Counsel for both parties agreed that Exhibits JP2, JP2A and JP3 were photocopies of Exhibits P2, P1 and D1. He said that contrary to the PW2 who examined photocopies of Exhibits P2, P1 and P3, the F Respondent's expert examined the original Exhibits P1, P2 and D1 and based his opinion thereon, adding that it is logical and reasonable that the opinion of the Respondent's expert witnesses be preferred to the opinion of PW2. He referred to *Elijah Okoh v. State* (1971) NMLR 140 in his argument that a Court is not bound to rely G on the opinion of an expert especially when the opinion conflicts with common sense, particularly the opinion of PW2 which conflicts with the opinion of PW1 who examined the original exhibits and not photocopies. He urged the Court to resolve the issue in favour of the Respondent. In Issue Three, he referred to the evidence of DW1 and H DW2 and said that the Court of Appeal rightly upheld the decision of the trial Court that the said evidence proved the due execution of the Deed of Assignment Exhibit P2, by the appellant. He said that the DW1 examined the signatures on the original P2 and P1 and came

to the conclusion that both were signed by the same person - the appellant. He said that the DW1 said he could not determine that the person who wrote Exhibits P2 and P1 also wrote Exhibit D1 because the said exhibit is a photocopy. He referred to the evidence of DW2, a legal practitioner whose evidence was found credible by both lower  
 B Courts. He urged the Court to accept the evidence of DW2 that the appellant signed Exhibits P2 in his presence. He urged the Court to resolve the issue in favour of the Respondent.

Issue Four is on the Survey Plan attached to Exhibit P2. Learned  
 C Counsel argued that the validity of Exhibit P2 on the basis of the Survey Plan is not the issue but whether or not the appellant executed Exhibit P2 to which the Survey plan was attached. He contended that the case of Awomutu v. Salami (1978) 3 SC 105 relied on by the appellant has no bearing on the issue of the signature on  
 D Exhibit P2. He said the identity of the land in Exhibit P2 is not in dispute and if there is a defect in the Survey Plan the defect will not affect the validity of the Deed of Assignment. He contended that the question of whether or not the appellant signed Exhibit P2 can be resolved without reference to the Survey Plan. He urged the Court  
 E to resolve the issue in favour of the respondent. He urged the Court to dismiss the appeal. Having adopted the Respondent's issue, I intend to resolve them seriatim: Issue one is on the tape recording P3 and its transcript P4. The trial Court admitted the exhibits over the  
 F objection of the respondent but the lower Court expunged them on the ground that they were not pleaded and no foundation was laid for their admission. I have perused the proceedings in the trial Court and the lower Court. If the appellant had the tape recording and the transcript of a conversation between him and a representative of the  
 G respondent, that is Exhibits P3 and P4, and intended to rely on them at the trial, he ought to have pleaded them. He did not nor did he lay any foundation for the admission of the exhibits. At page 39 of the record of the trial court, the PW1 stated:

*"I asked my secretary to get Chief Idowu on the telephone. I  
 H asked Chief Idowu about the land.... and he confirmed it was a lease for twenty (20) years. I arranged and recorded the telephone conversation."* That was the totality of the appellant's evidence on Exhibits P3 and P4. There was no evidence relating to the time and place of the recording, or who recorded the alleged telephone con-

versation. I think that the learned trial Judge was in a haste in admitting Exhibits P3 and P4 in the circumstances of this case. The identity of the voice in the tape was not even considered by the trial court before the objection of counsel for the Respondent was over-ruled and the exhibits admitted. The English case of Regina v. Ali (1956) 1 QBD 688 relied on by learned Counsel for the appellant is of no avail in this case. In the case above, the accuracy of the tape was proved and the voices properly identified. Appellant relied on Modern Law of Evidence, 2nd Edition by Fidelis Nwadialo, page 545 for the distinction between evidence not admissible under any circumstances and evidence admissible under certain conditions.

***With due respect to learned Counsel for the appellant, the distinction between evidence prohibited in any circumstance and evidence admissible under certain conditions does not arise in this case. The point is that the exhibits admitted at the trial court but rejected by the lower court ought to have been pleaded but was not pleaded.*** This court was faced with a similar scenario in the case of Olowofoyeku v. A-G Oyo State & Anor (1996) 10 NWLR (Pt. 477) 190 at 214. The Court held that if the exhibit in the case, Exhibit 33, was true the respondents would have pleaded what was said thereon in their joint statement of defence, Since Exhibit 33 was not pleaded, the Court held that all the submissions on it went to no issue and of no consequence in the case. ***In my view, Exhibits P3 and P4 which were not pleaded and no foundation would have been laid for their admission were wrongly admitted by the trial Court and rightly expunged by the lower Court. I resolve the issue against the appellant.***

***Issue Two is on the concurrent finding of the trial Court and the lower Court that the evidence of the appellant's handwriting expert is not reliable. It is noteworthy that Alhaji Musa who brought the documents to PW2 for examination on behalf of the appellant was not called to testify at the trial. Also Inspector Tayler who was alleged to have independently examined the documents and co-authored the report thereof with the PW2, was not called to testify at the trial. The documents examined by the PW2 and Inspector Tayler were photocopies not originals of P2, P1, and D1. There is nothing in the record to justify the appellant's handwriting expert's preference of***

**photocopies JP2, JP2A and JP3 to the original documents P2, P1- and D1 for examination. The findings of the trial Court which were affirmed by the lower Court were based on the trial Court's assessment of the evidence before it, bearing in mind that the trial Court has the opportunity of watching and**  
 B **hearing the witnesses testifying in Court. In my view, the decision of the trial Court affirmed by the lower Court is not perverse and is the result of proper exercise of judicial discretion, and this Court has no reason to disturb same.** See Kodilinye  
 C v. Odu (1935) WACA 385 at 338; Okoye v. Ejiofo (1934) 2 WACA 130; Akinloye v. Eyiola (1958) NMLR 92. **The lower Court was right when it upheld the rejection of the evidence of the appellant's handwriting expert by the trial Court.**

In determining whether the final agreement between the parties was for a sub lease for 20 years or outright assignment of the appellant's residual interest in the property, it is necessary to consider an aspect of the pleading. Not only did the Respondent deny the appellant's claim that the agreement was for a 20 year lease, the Respondent introduced a set of facts in answer to, but completely  
 E outside, the appellant's statement of claim.

In paragraph 3 of the amended statement of defence, the Respondent pleaded thus:

*"3. In answer to paragraph 11 of the statement of Claim the defendant says (b) The Defendant agreed to take the lease and after*  
 F *some preliminary negotiation it was agreed that the yearly rent should be three thousand naira per annum (N3, 000.00) subject to the payment of all outgoings and the fulfilment of all the term of the original lease by the defendant.*

*(c) A few days later and before the final agreement for the sub lease was reached as to the mode of payment, the number of years or rents to be paid in advance and other vital details and terms of the sub lease were discussed and agreed upon, the plaintiff again approached the defendant with the information that he had changed*  
 G *his mind to grant a sub lease of the land as the rents payable thereof would not be sufficient to meet his heavy financial commitments at the time and consequently he had made up his mind to make on outright sale of all his rights and interest in the unexpired residence of the lease to any interested person that could meet his terms and that*  
 H



*if the defendant was interested he was ready to negotiate with him on the outright sale basis.*

*(d) That both the plaintiff and the defendant thereby started negotiations for the sale of the unexpired residue of the lease and eventually mutually agreed on the payment of the price of N200,000.00 (Two hundred thousand Naira) by the defendant for the same and also that the defendant should discharge all the obligations of the plaintiff under the Head Lease including the payment of the rents reserved and all other fees and rates which may be imposed by the Local Government.” See page 24 of the record.*

***In absence of a reply to the amended Statement of Defence generally the allegation in the Statement of Claim are implicitly denied or there is an implied joinder of Issues; in which case pleadings close with the statement of defence.*** A reply is not necessary if its purpose is to deny the allegations in the statement of defence. See *Obot v. CBN* (1993) 9 SC NJ 268 at 284; *Spasco v. Alaine* (1995) 9 SCNJ 288 at 305 and *Ishola v. SB Bank* (1997) 2 SCNJ 1 at 16. ***But where the statement of defence raises new issues of fact not arising from the statement of claim the plaintiff has a duty to deal with the new issues of fact in his reply otherwise the facts will be deemed admitted by the plaintiff, and this relates directly to the issue of due execution of the Deed of Assignment P2 by the appellant.*** I resolve Issue Two in favour of the Respondent. Issue Three is on the opinion of the Respondent’s handwriting expert on the due execution of the Deed of Assignment accepted and relied on by the trial Court and affirmed by the lower Court. Again, this is a finding of facts by the two courts below. Contrary to PW2 who examined photocopies of P2, P1 and D1 Respondent’s handwriting expert examined the originals of P2, P1 and D1 and came to the conclusion that Exhibits P1 and P2 were signed by the same person; but could not say the same of Exhibit D1 which was a photocopy. In my view, the fact that DW2 stated he could not come to a conclusion on D1 (a photocopy) lends credence to his opinion of Exhibits P1 and P2 and reflects adversely on the opinion of PW2 on the photocopies of P2, P1 and D1. The trial Court’s finding was supported by credible evidence which was properly evaluated and in my view the Court of Appeal was justified in its affirmation of the finding of the trial court. In the circumstances, this

court has no reason to interfere. See *Mogo Chinwendu v. Mgbanegbo Mbamali* (9990) 3-4 SC 31; *Ezenwani v. Onwordi* (1986) 4 NWLR (pt. 33) 27. I resolve the issue against the appellant.

***Issue Four is on the Survey Plan attached to the Deed of Assignment. The appellant's grouse is that the Survey Plan bears a date later than the date of the execution of the Deed of Assignment. It was argued on behalf of the appellant that the lower Court, having described the conduct of the Respondent in relation to the survey plan as reprehensible should have rejected the plan and the Deed of Assignment. Whether it was a case of a sub lease for twenty years as claimed by the appellant or assignment of the residue of the appellant's interest in the property, the identity of the property is not an issue in the proceedings. Though the conduct of the Respondent in attaching the Survey Plan to the Deed of Assignment was rightly condemned by the lower Court a severance of the former for the latter cannot ipso facto adversely affect the validity of the latter.*** I resolve the issue against the appellant.

Right from the onset, the appellant had an uphill task. The crucial issue in the appeal is whether or not the appellant executed Exhibit P2 the Deed of Assignment. That issue and all other subsidiary issues relating to same (except P3 and P4) were resolved in favour of the Respondent and against the appellant by the trial Court and the said findings were affirmed by the Court of Appeal. Findings of fact in a trial Court and confirmation of same by the Court of Appeal amount to a concurrent findings of facts by the two Courts below. See *Ibhafidon v. Igbinosu* (2001) 8 NWLR (Pt. 716) 653. Every determination of a Court consists of findings of facts. Based on the facts found and the inference drawn therefrom, the Court comes to its ultimate conclusion which may be of fact or law or both. See *Metal Construction (WA) Ltd. v. Migliore* (1990) 1 NWLR (Pt. 126) 299 at 313. Consistent with the established principle and practice of this Court, that without cogent reasons, the Court will not disturb a concurrent finding of the two courts below, all the issues on the concurrent findings of facts of the court below are resolved against the appellant who did not advance any reason for the Court to interfere with the said findings. Consequently, the appeal has no merit and it is hereby dismissed in its entirety. I order that parties bear their costs.

**MUKHTAR JSC (CFR)**

I have read in advance the lead judgment delivered by my learned brother Ngwuta, JSC, and I am satisfied with the reasoning and conclusion reached that the appeal has no merit and substance and should be dismissed. The facts of the case have been stated in the lead judgment, and the issues raised for determination have been reproduced and dealt with in the said lead judgment. I will however, by way of emphasis add my contribution to the treatment of some of the issues. In civil suits what is expected of a plaintiff is to file a statement of claim stating all the facts which he intends to rely on to prove his case vide evidence in support of the averments in the said statement of claim.

The assertions and claim contained in the pleadings casts a burden on the plaintiff, which the law requires must be discharged. By virtue of Section 135 of the Evidence Act Cap. 112 of the Laws of the Federation of Nigeria 1990, he who asserts facts must prove them. See *Ojo v. Kamalu* 2005 18 NWLR pt. 958 p. 523, *George v. U.B.A.* 1972 8 - 9 SC. 264, and *Lewis and Peat v. Akhimien* 1976 7 S.C. 157. The salient averments in the plaintiff/appellant's statement of claim upon which the plaintiff predicated his case are:-

*"2. In 1981 the plaintiff entered into an agreement with the defendant acting through its chairman Chief N. O. Idowu to grant a Sub-lease of the said property to the defendant for a term of 20 years in consideration of a premium of N200, 000.00.*

*3. Subsequently the defendant, through Chief N. O. Idowu purporting to be acting in pursuance of the aforesaid agreement presented the Plaintiff with a document titled "Deed of Assignment for Signature.*

*4. The document was in fact an assignment of the residue of the plaintiff's interest in the said property to the defendant.*

*5. The Plaintiff thereupon refused to execute the same but informed the defendant's Chairman that he would only execute a sub-lease for the agreed period of 20 years.*

*6. Thereupon the defendant's Chairman took the said document stay (sic) and produced to the plaintiff for signature a sub-lease for 20 years in accordance with the aforesaid agreement.*

*7. The plaintiff thereupon duly executed the said sub-lease*

*and handed it over to the defendant's Chairman for registration. In pursuance of the said agreement and Deed of lease the Defendant paid the sum of N200, 000.00 to the plaintiff who issued a receipt therefore.*

B *8. In 1986 whilst the plaintiff was (sic) asking an inventory of his properties with a view to putting his affairs in order, the plaintiffs' interest in the said property had been registered in favour of the defendant as No. 79 at page 79 volume 1839 of the Register of Deeds kept at the Land Registry in the Office at Lagos.*

C *9. There appeared on the said Deed a signature which appeared to be that of the plaintiff, but the plaintiff did not sign the said Deed of Assignment."*

In its amended statement of defence the defendant made the following averments:-

D *"In further answer to paragraph 1 of the statement of claim the Defendant says as follows:-*

E *(b) The Defendant agreed to take the lease and after some preliminary negotiations it was agreed that the yearly rent should be Three thousand Naira Per Annum (N3, 000.00) subject to the payment of all outgoings and the fulfilment of all the terms of the original lease by the Defendant.*

F *(c) A few days later and before the final agreement for the sublease was reached as to the mode of payment, the number of years to be paid in advance and other vital details and terms of the lease were discussed and agreed upon, the plaintiff again approached the Defendant with the information that he had changed his mind to grant a sub lease of the land as the rents payable thereof would not be sufficient to meet his heavy financial commitments at that time and consequently he had made up his mind to make an outright sale of all his rights and interests in the unexpired residue of the lease to any interested person that could meet his terms and that if the Defendant was interested he was ready to negotiate with him for an outright sale basis.*

H *(d) That both the Plaintiff and the Defendant thereby started negotiations for the sale of the unexpired residue of the lease and eventually mutually agreed the price of N200, 000.00*

*(f) The Plaintiff received the said sum of N200, 000.00 (....) being the price of the Assignment of his rights and interests in the*

*demised land paid promised to execute the Deed of Assignment as soon as the same was prepared by the Solicitors and approved by the Plaintiff after perusal.*

*(g) The Plaintiff thereafter handed over the executed Deed of Assignment to the Defendant for registration which was duly registered at the Lands Registry in Lagos.”*

It is on record that the plaintiff gave evidence on the lease agreement he claimed he signed as a result of the lease of the land he leased to the defendant, and the defendant adduced its own evidence. The learned trial judge evaluated the evidence before him, and at the end of the day the plaintiff's case was dismissed. The plaintiff appealed to the Court of Appeal, which also dismissed the appeal. Again dissatisfied with the lower Court's decision the plaintiff has appealed to this court. The learned counsel for the parties exchanged briefs of argument, which were adopted at the hearing of the appeal. In the appellants' brief of argument are proliferations of issues raised for determination, which I consider to be unnecessary. Four issues for determination were however raised in the respondent's brief of argument. These issues are more succinct, so I will reproduce and highlight the argument of one of them in particular. The first issue in the respondent's brief of argument is:-

*“Whether the learned Justices of the Court of Appeal were not right when they held that the tape recording Exhibits “P3” & “P4” were strong and abnormally admitted in evidence by the Trial Court.*

*a. When there was no contention or controversy about the fact that Appellant did not plead any fact of tape recording.*

*b. When on the merit of the admission of the tape recording no proper foundation was laid by Appellant before its admission and the admission processes did not accord with the rules of evidence.”*

It is on record that when the plaintiff/appellant wanted to tender the tape recordings of a conversation between him and the defendant's chairman, the following transpired in the trial court:-

*“I asked my secretary to get Chief Idowu on the telephone. I asked Idowu about the land at Apapa and he confirmed it was a lease for twenty (20) years. I arranged and recorded the telephone conversation. This is the tape recording of the conversation.*

*Chief Ajayi: I ask to put in evidence the tape recording.*

*Mr. Awoniyi He says he objects because it was not pleaded;*

and secondly because it offends Section 76 (a) and (b) of the evidence Law, Cap. 39.

Mr. Ajayi, SAN: He refers to *Regina v. Ali* (1966) 1 QBD 688 which deals with tape recording, He submits that tape recording could be admitted in evidence.

B Court: The tape recording will be admitted as exhibit 'P3'.

Mr. Awoniyi: He says he objects to transcript of the telephone conversation in Exhibit 'P3'.

C Court: The transcript of the conversation in Exh. P3 has been admitted as Exhibit 'P4'."

The above proceedings clearly show that the defendant/respondent resisted the admission of exhibits 'P3' and 'P4', but its counsel's objection was overruled. Now, these were facts and exhibits that were not pleaded to meet the requirement of the law, that matters D that are to be relied upon, and which forms part of the issues in controversy must be pleaded clearly in order to avoid taking the opponent by surprise. It is elementary law that parties are bound by their pleadings and any fact that emerges from matters that are not pleaded go to no issue and should be discountenanced. See E *Emegokwue v. Okadigbo* 1973 4 S.C. 113, *Oduka v. Kasumu* 1967 1 All NLR 293, and *Shell B.P. v. Abedi* 1974 1 S.C. 23. In the present case, the plaintiff neither raised the issue of recording a conversation between the plaintiff and the defendant's chairman, nor did he plead the tape recording and the transcript. In such circumstance, what F then happens to such exhibits when they are wrongly admitted? In the case of *Abolade Agboola Alade v. Salawu Jagun Olukande* 1976 2 SC p. 183 Idigbe, JSC. (of blessed memory) posited thus:-

G "It has frequently been stated (as, indeed, learned counsel for the appellant has done) that where a matter has been improperly received in evidence in the court below, even when no objection has been there raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence." See *Jacker v. International Cable Company Ltd.* 1888 ST. L.R. 13. When the above principle is H applied to the instant case, the effect of the wrong admission of exhibits 'P3' and 'P4', is that it would be rejected by the Court of Appeal, the exhibits being inadmissible. The learned counsel for the appellant has in his brief of argument argued that the Court of Appeal could not in law entertain a complaint on the admissibility of

such evidence as in this case, not to talk of raising it suo motu. This contention is misleading, for a careful perusal of the record of proceedings of the lower court, particularly the briefs of argument of the parties therein reveal that the lower court was in firm ground to entertain the issue of the inadmissibility of the said exhibits 'P3' and 'P4'. On pp. 126 - 127 of the printed record of proceedings can be seen the analysis of the evidence of the witnesses and comments, including exhibits 'P3' and 'P4', in the appellant's brief of argument. Then on page 207, the learned counsel for the respondent specifically made the admissibility of exhibits 'P3' and 'P4' an issue for determination thus:- ISSUE NO. 1

*"Whether the evidence led by the plaintiff as to a telephone conversation between him and Chief Idowu and the tape recording of that conversation was admissible in evidence"*.

Towards this, the lower court was not in error when it entertained the complaint, and the following was stated in its judgment:-

*"It is trite that any evidence given by a party which is not supported by any part of his pleadings goes to no issue and shall be disregarded, parties are bound by their pleadings... It cannot be argued in my view, that the evidence need not be specifically pleaded. I have no doubt in my mind that it is a special type of evidence which must be pleaded and if not pleaded, it cannot be received."*

On the strength of the above discussion, I resolve this issue, which is in pari materia with issues (3) and (4) in the appellant's brief of argument in favour of the respondent. The other issues raised for determination have been thoroughly dealt with in the lead judgment. This is an appeal against concurrent findings of two lower courts, which this court has been enjoined not to disturb. See *Aroyewun v. Adediran* 2004 13 NWLR pt. 891 p. 628 and *Balogun v. Akanji* 2005 10 NWLR pt. 933 p. 394. I also dismiss the appeal and affirm the judgment of the Court of Appeal. I abide by the consequential orders made in the lead judgment.

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### **GALADIMA JSC**

I have read before now the lead Judgment delivered by Ngwuta JSC. I am satisfied with his reasoning and conclusion that the appeal is lacking in merit and should be dismissed. The facts of this case have

been set out in the lead judgment. The case of the Appellant (as Plaintiff) before the trial High Court had been that he did not and could not have possibly executed a deed of assignment of the residue of the term granted to him in respect of the property at Apapa Road Industrial Area, known as Plot 61. He therefore claimed against the Respondent (then a Defendant) a declaration that the Deed of Assignment registered at the Land Registry in Lagos was null and void and of no effect. The trial Judge dismissed his claim.

The Appellant's appeal at the Lagos Division of the Court of Appeal was dismissed. Hence his further appeal to this Court. From the 12 grounds of appeal 12 issues were distilled for determination. These are unnecessarily proliferated. Four issues raised by the Respondent are quite apt. The central issue is that, going by the claim endorsed on the writ of summons whether the Appellant signed Deed of Assignment, (Exhibit P2) and not whether it is null and void. The survey plan is attached to Exhibit P2. The validity of Exhibit P2, on the basis of the survey plan, is not the issue but whether or not the appellant executed Exhibit P2 to which the survey plan was attached. The case of *AWOMUTI V. SALAMI* (1978) 3 SC. 105, relied on by the Appellant has no bearing on issue of the signature on Exhibit P2. The identity of the land in Exhibit P2 is not in dispute and if there is a defect in the survey plan, the defect will not affect the validity of the Deed of Assignment. Evidence of DW1 and DW2 proved due execution of the Deed of Assignment by the Appellant. DW1 examined the signature on the original P2 and by P1 and came to the conclusion that both were signed by the Appellant. The evidence of DW2 is that the Appellant signed P2 in his presence. This crucial issue and all other subsidiary issues relating to Exhibit P2 were resolved in favour of the Respondent and against the appellant by the trial court and affirmed by the court below; I cannot disturb the findings.

Consequently, in view of this short contribution and for the elaborate consideration and resolution of all other issues in favour of the Appellant in the lead judgment, I too, have come to the conclusion that the appeal lacks merit, and it is dismissed, without costs to the Respondent.