

AUGUSTINE ABBA APPELLANT
(Doing business under the name
and style of ABBA AVO
ENTERPRISES NIG.)
AND
SHELL PETROLEUM DEVELOPMENT
CO. OF NIG. LTD. RESPONDENT

SALE OF GOODS - Offer - Concept of - Under Sale of Goods Law s. 3(1) - Offer made by appellant must be capable of acceptance not by mere delivery - But its acceptance as well (H7)

SALE OF GOODS - Title - Proof - Sale of Goods Law s. 13(a)(b)(e) imposes duty on seller to show title - And exhibit A has not relieved appellant of such duty (H8)

COURT PROCESSES - Filing fee - Claim for interest - Proof of rate - As there was no claim for interest in the writ - Its claim in statement of claim cannot be entertained - Since no such claim was assessed - Nor was filing fee paid for it (H9)

CONTRACTS - Interest - Basis - Where appellant claimed 45% interest per month - Trial court's award of 45% interest per annum - Is awarding what was not claimed in statement of claim or oral evidence (H10)

FACTS

Plaintiff/appellant had before the High Court of Delta State Warri, claimed against defendant/respondent the sum of N2, 500,000.00 being the agreed price of American Crane Spare Parts supplied by appellant to respondent. Appellant did not however claim any interest rate on the said sum in the writ of summons. The main issue between the parties as seen from their pleadings is whether there was a valid contract of sale of the goods delivered to respondent. In its judgment, the court found in favour of appellant. Being dissatisfied, respondent appealed to the Court of Appeal, Benin City Division.

The court in its judgment, held that exhibit A (appellant's Local Purchase Order) is a mere invitation to treat and does not constitute an offer to respondent. The court also held that appellant did not act in conformity with the condition stipulated under the Sale of Goods Law Cap 50 Laws of Bendel State 1976, with particular reference to proof of title to sell the goods. The court eventually dismissed appellant's suit in its entirety. Aggrieved, appellant lodged an appeal in Supreme Court. Respondent on its part filed notice of preliminary objection to grounds (d) (e) (f) (g) (h) (i) of appellant's

grounds of appeal as being incompetent and invalid on the ground that each of the said grounds is ground of fact or at best of mixed law and fact.

ISSUES FOR DETERMINATION

“(a) Whether or not the Appellant was denied fair hearing in the circumstance when the Court below did not consider and/or adequately consider issues a, b, c, and d (issue e) and their arguments thereof as contained in the Appellant’s brief at the Court below

(b) Did the issues raised suo motu by the court below and upon which the appeal was heard and determined cover the real points in controversy between the parties in the appeal before the said Court

(c) Whether from the circumstances of this case, the learned Justices were right when they held that it was the Appellant who has the burden of proving the source and genuineness of the spare parts.

(d) Whether from the state of the pleadings and available evidence on record, there was a binding contract between the parties known to law

(e) Was the Appellant entitled to the interest claimed and awarded by the trial Court having regard to the records before the Court below.”

HELD (Unanimously dismissing the appeal per GALAD-
IMA JSC)

APPEALS - Preliminary objection - Notice of - Filing

1. Order 2 Rule 9 of the Rules of this Court provides that the Respondent intending to rely on preliminary objection shall give three days notice before the date of hearing the appeal.

(p. 1484 D)

APPEALS - Preliminary objection - Leave

2. Any preliminary objection not moved at the hearing of the appeal is deemed abandoned. These are the basic rules of practice and procedure the Respondent intending to rely upon preliminary objection must observe

Notice of preliminary objection can also be given in the Respondent’s brief as in the instant case, but a party filing it in the brief, must ask

the Court for leave to move the objection before the oral hearing of the appeal commences.

(p. 1484 E)

Preliminary objection - Basis

- B 3. Preliminary objection, by its very nature, deals strictly with law and there is no need for a supporting affidavit in a formal application, as being suggested by the Appellant herein. In a preliminary objection the applicant deals with law and the ground is that the court process has not complied with the enabling law or rules of court and therefore should be struck out. This could be on the ground of an abuse of court process.

(p. 1484 H)

Sale of goods - Offer & acceptance

- D 4. In contract for the sale of goods 'due delivery' requires the buyer's acceptance of the goods delivered by the supplier. Unless and until the buyer accepts and signs the waybills, due delivery is not done. It is clear from the appellant's own evidence, therefore that there was no proper delivery to the Respondent herein, as it refused to sign the waybills for the reasons admitted and accepted by the appellant, namely that the Respondent had demanded for source documents before they sign the said waybills. Appellant's admission of Respondent's refusal of delivery clearly negates any contractual relationships
- E
- F Similarly, having regard to the facts and circumstance of this case, the conclusion of the court below that there was no acceptance of the Appellant's goods by the Respondent, consequently there was no contract, is legally sound.

(pp. 1488 E/1491 A)

G APPEALS - Issues - Basis

5. The Appellants further complained that his issues (a) (b) (d) and (e) were not also considered by the court below and by this he was denied fair hearing of his case. How tenable is this argument? The law is settled that a case is decided on the basis of the issues arising from the valid grounds of appeal filed in the case. A purported issue which does not flow from any valid ground of appeal is not an issue on which the lower court can base its Judgment. It is to be noted in
- H

the case at hand that the Appellant, as respondent did not cross-appeal against the Judgment of the trial Judge and has not raised any ground of appeal in the court below. Also, it has not been shown that the Respondent filed any Respondent's notice raising any ground for affirming the Judgment of the learned trial judge. It must be noted that all that was before the court below was the notice and grounds of appeal filed by the Respondent herein and the issues they had presented for determination of the appeal. See pp. 134 - 142 of the Records. I agree with the Respondent that, giving the foregoing facts, appellant herein, in order to raise a valid issue fit for determination, in the court below, must rely on and formulate issues from the grounds of appeal filed by the Respondent (as appellant in the court below. (p. 1491 B)

APPEALS - Issues - Suo motu raising

6. The Appellant has asserted that the court below raised the issues suo motu. As a matter of practice and procedure the appellate court is allowed to set out issues that are considered apt and relevant to the determination of the appeal. The court below considered the six issues formulated by the appellant and at pages 188 - 189 set out three issues which it considered could effectively determine the appeal and found rightly that all other issues are variants of and are subsumed in the three issues formulated by that court. The Court confined itself to the issue properly arising from the valid grounds of appeal. It is for the court below to set out in clear and concise terms the issue upon which the appeal is to be determined by a party. Appellant has not complained that the issues so summarized by the learned Justices did not flow from the valid grounds of appeal. The appellant has contended at page 14 paragraph 3.39 of his Reply brief of argument that the court below did not adequately consider the effect of Exhibit 'A' on the contractual obligations of the parties in the consideration and determination of issue 2 as formulated by the court below. I have carefully read over and over the lead Judgment of the court below. It is my view that the Appellant's complaint is untenable in Law as that court fully and effectually determined the appeal before it on the issues that arose from the grounds of appeal. Appellant has not shown why the court should have decided otherwise in his favour. (p. 1492 F)

SALE OF GOODS - Offer - Concept of

7. I do not agree with the Appellant on the foregoing submissions but I agree with the Respondent in their consistent contention that the matter giving rise to this appeal is governed by the provisions of the Sale of Goods Law, Cap 50 Laws of Bendel State 1976, as applicable in Edo State.

Indeed this is the law on the point. It is the Appellant herein, who has made the offer, on the fact of this case. Consistent with S. 3(1) of the Sale of Goods Law (supra), the Appellant made an offer to transfer the property in the crane spare parts when he took them to the Respondent. This offer must be capable of acceptance not by mere delivery but its acceptance as well.

I agree entirely with the conclusion of the court below that in purporting to accept an offer allegedly contained in Exhibit 'A' by delivery of the spare parts to the respondent, the appellant was merely inviting the respondent herein to deal with him in the transaction of sale of goods. On the clear fact of this case without calling further evidence it would appear that the respondent, rather than accepting the offer contained in Exhibit 'A' proceeded to make a counter-offer. The genuineness of the spare parts as well as their source was put in issue in the Respondent's Amended Statement of Defence. By promising to come up with the source documents, the appellant had waived his right to object that the genuineness and source document were not part of the contract. I have reproduced earlier, the statement of the Appellant under cross-examination. He knew that unless the source document was produced, his waybill could not be signed. I agree with the lower court that even if the appellant had not accepted to furnish the respondent with the source documents there is no circumstance that could preclude the implied condition on his right to sell the spare parts. There is always the implied warranty that the Appellant would enjoy quiet possession of the goods and implied warranty that the goods shall be free from any charge or encumbrance from any third party not declared or known to the Respondent. (p. 1494 C)

SALE OF GOODS - Title - Proof

8. Section 13 (a) (b) and (e) of the Sale of Goods Law (supra) re-inforces the Latin Maxim, "Nemo dat quod no habet", that is, one

cannot give what he does not have.

In the case at hand, it is therefore up to the Appellant to show that he has title to the goods he purports to sell. There is nothing in Exhibit 'A' or even in the evidence of the appellant that the Respondent intended to relieve him of the statutory duty to show that he has title. The court below was right in holding that, an LPO was an invitation to treat which is not enforceable. The court below did not place any burden of proof on Appellant. This burden arose from the nature of the Sale of goods, where the Law imposes on the seller a warranty that he has title to the property. (p. 1495 E)

COURT PROCESSES - Filing fee - Claim for interest

9. As no bank was called to give evidence in the case, the current rate of interest in Commercial Banks either as at February 1992 or at the time of Judgment was not proved. In the Writ of Summons, appellant claimed N2,500,000.00 and no more. There was no claim for interest and no filing fees was assessed or paid in respect of a claim for interest. It follows therefore that interest claimed in the Statement of Claim cannot be entertained because no such claim was made in the Writ of Summons by which this action was commenced. (p. 1496 B)

CONTRACTS - Interest - Basis

10. In his evidence, the Appellant claimed interest of 45% per month amounting to 540%, calculated in simple interest per annum. The trial Court awarded to the Appellant what he did not claim in paragraph 10 of the Statement of Claim or in the oral evidence of the Appellant in court. There was no basis for the award of interest at the rate of 45% per annum and for seven years. I am of the view that the court below was right in holding that the appellant was not entitled to the interest awarded him by the trial Judge. (p. 1496 D)

NOTABLE POINT OF INTEREST

GALADIMA JSC

1. Preliminary objection – Purpose of

A preliminary objection as the phrase connotes, at the hearing of an appeal, is an opposition to the hearing of the appeal by the Respondent's counsel before opening of oral submission by the Appellant's

counsel. The purpose of preliminary objection if successful is to terminate the hearing in limine either partially or totally.
(p. 1484 C)

REPRESENTATION

- B O. A. OKPAKPOR Esq. with Ayodele Gatta Esq., for the Appellant
T. OKPOKO Esq., for the Respondent

CASES REFERRED TO

- C Ogbimi v. Nig. Construction Ltd. (2006) All FWLR (pt. 317) 390
Adigun v. Ayinde (1993) 8 NWLR (pt. 313) 534
Tiza v. Begha (2005) 5 SC (pt. II)
Nsirim v. Nsirim (1990) 3 NWLR (pt. 138) 285
Oforkire v. Maduike (2003) 5 NWLR (pt. 812) 166
Onwe v. Ogbunya (2001) FWLR (pt. 37) 1031
D Edem v. Canon Balls Ltd (2005) FWLR (pt. 276) 693
Onyekwelu v. Elf Petroleum Nig. Ltd (2009) AFWLR (pt. 469) 426
Nwaosu v. Nwaosu (2000) 4 NWLR (pt. 643) 351
Akunyili v. Ejidike (1996) 5 NWLR (pt. 449) 381
Psychiatric Hospital Mgt. Board v. Ejitagha (2000) FWLR (pt. 9) 1510
E Akerele v. Atunrase (1969) 1 All NLR 20
Adelaju v. Atoiki (1990) 2 NWLR (pt. 131) 157
Majekodunmi v. NBN (1978) 3 SC 119

F STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, ss. 36, 233(3)
Sale of Goods Law Cap 50 Laws of Bendel State 1976, ss. 3(1),
13(a)(b)(e)
Supreme Court Rules 1999 (as amended), O. 2 r. 9(1)

G LEAD JUDGMENT BY GALADIMA JSC

This is an appeal against the Judgment of the Court of Appeal, Benin Division in Appeal CA/B/162/99 delivered on the 10th day of June, 2004. The simple facts of this case, summed up from the available Records of this Court are as follows: The Appellant as plaintiff, in the trial High Court of Warri, Delta State in Suit No. W99/93, had claimed against the Respondent who was the Defendant, the sum of N2, 500,000.00 (Two Million, five hundred thousand Naira)

H

being the agreed price of American Crane Spare Parts supplied by the Appellant to the Respondent.

The case was tried on pleadings filed and exchanged by the parties in their 10 paragraph statement of claim and 15 paragraph Amended Statement of Defence respectively. From the pleadings, the germane issue in the case at the trial was whether there was a valid contract of sale of the goods delivered to the Respondent herein. B

Appellant testified in the case and called no witness. Respondent rested its case on the Appellant's evidence and called no witness of its own. At the close of oral evidence, counsel for respective party each addressed the trial court after which the learned trial judge reserved the Judgment which was delivered on 27/11/98 in favour of the Appellant. C

Dissatisfied with the Judgment of the learned trial Judge, the Respondent herein by Notice of appeal filed on 21/2/99 appealed against the Judgment on five original grounds of appeal set out in the Notice of Appeal. By Leave of the Court of Appeal, Appellant filed seven additional grounds numbered 6 - 12. D

At the court below briefs were filed and exchanged and the court heard the appeal and dismissed the Appellant's Suit in its entirety. Their Lordships concluded thus: E

"The Local Purchase Order Exhibit "A" issued by the appellant to the respondent is on the fact before the court, no more than an invitation to treat, not an offer to the respondent. F

Even if it was an offer to him the respondent in purporting to accept same, made a counter-offer or modified the terms of the LPO. In addition he did not act in conformity with the condition and warranty stipulated in the Sale of Goods Law (supra) with particular reference to the ownership or right to sell the spare parts which he testified belonged to 3rd party who fixed the prices. G

Again even if he had succeeded in proving his entitlement to any sum of money, which he did not prove, his evidence on the issue of interest was at variance with his pleading. For instance, the 45% interest per month was not pleaded and such evidence went to no issue in the case. On the other hand there was no evidence to establish the claimed rate current in commercial banks at any point in time. The respondent's case has no merit and the court below ought to have dismissed same." H

The Appellant being dissatisfied with the Judgment of the court below sought and obtained leave of this Court on 21/12/05 to appeal against the said Judgment out of time and filed 9 (nine) grounds of appeal. The Appellant has also filed an application for leave to file and argue an additional ground of appeal dated the 17th day of May 2006.

The Appellant submits the following issues for determination.

“(a) Whether or not the Appellant was denied fair hearing in the circumstance when the Court below did not consider and/or adequately consider issues a, b, c, and d (issue e) and their arguments thereof as contained in the Appellant’s brief at the Court below. - Grounds A, B, C and E.

(b) Did the issues raised suo motu by the court below and upon which the appeal was heard and determined cover the real points in controversy between the parties in the appeal before the said Court. - Ground D.

(c) Whether from the circumstances of this case, the learned Justices were right when they held that it was the Appellant who has the burden of proving the source and genuineness of the spare parts. - Ground J (the additional ground of appeal)

(d) Whether from the state of the pleadings and available evidence on record, there was a binding contract between the parties known to law. - Ground G and I

(e) Was the Appellant entitled to the interest claimed and awarded by the trial Court having regard to the records before the Court below. - Ground H”

The Respondent took preliminary objection to grounds (d) (e) (f) (g) (h) (i) of the Appellant’s grounds of appeal as being incompetent and invalid on the ground that each of the said grounds is ground of fact or at best of mixed law and fact.

However, subject to the preliminary objection to the above grounds of appeal, respondent has submitted that the issues for determination are as set out as follows:

“(i) Was the Appellant denied fair hearing by the learned Justices of the Court of Appeal as alleged by appellants in (a), (b), (c) and (e) of the grounds of appeal?

(ii) Were the learned Justices wrong in their perception and or appreciation of the issues in the appeal before them?

(iii) Were the learned Justices wrong in holding that the onus was on appellant to establish the genuine title to the goods?

(iv) Were the Justices wrong in Law in holding that there was no contract of sale between appellant and respondent?

(v) Were the learned Justices wrong in Law in holding that the appellant was not entitled to interest awarded by the trial Judge?" B

Upon the service of the brief of argument of the Respondent on the Appellant, he deemed it necessary to respond and react to the grounds on which the Respondent raised its preliminary objection and also to some points and assertions made by him. Hence, the Appellant filed his Reply Brief on 22/03/2012 which was by leave of this Court deemed filed on 4/2/2013. C

On the 4th February 2013, this appeal was heard. Before proceeding further with the arguments of counsel in the appeal there is need to look into the preliminary objection raised by the Respondent. D

In its Brief of argument, the Respondent has raised and given notice of a Preliminary Objection to grounds (d) (e) (f) (g) (h) (i) and (j) of the Appellant's grounds of appeal. The grounds upon which it raised its preliminary objection is to the fact that these said grounds of appeal are incompetent and invalid as the said grounds are either grounds of fact or are grounds of mixed law and fact. Consequently, the Respondent contended that no leave of either the lower court or this Court was obtained before filing and arguing the said grounds. E

Appellant in his Reply brief has sharply reacted to the Preliminary Objection as follows: Firstly, that even though the law allows the Respondent to raise a notice of preliminary objection in its brief of Argument, such Notice must as of necessity assume a formal application and not of such a simplistic manner as contained in the Respondent's brief. Reliance was placed on Order 2 Rule 9(1) of the Rules of this Court 1999, (as amended) and the cases of OFORKIBE V. MADUIKE (2003) FWLR (PT. 147) 1090; and OGBIMI V. NIGERIA CONSTRUCTION LTD. (2006) ALL FWLR (Pt. 317) 390 at 397-398. Secondly, that there is no where the Respondent proffered any argument in its brief, to demonstrate how the Appellant's said grounds of appeal are grounds of fact or of mixed law and fact thus requiring leave to file. F

A preliminary objection as the phrase connotes, at the hearing of an appeal, is an opposition to the hearing of the appeal by the H

Respondent's counsel before opening of oral submission by the Appellant's counsel. The purpose of preliminary objection if successful is to terminate the hearing in limine either partially or totally.

Order 2 Rule 9 of the Rules of this Court provides that the Respondent intending to rely on preliminary objection shall give three days notice before the date of hearing the appeal.

Any preliminary objection not moved at the hearing of the appeal is deemed abandoned. These are the basic rules of practice and procedure the Respondent intending to rely upon preliminary objection must observe: See: ADIGUN V. AYINDE (1993) 8 NWLR (Pt. 313) 534, TIZA V. BEGHA (2005) 5 SC. (Pt. II), also (2005) 15 NWLR (Pt. 949) 616.

Notice of preliminary objection can also be given in the Respondent's brief as in the instant case, but a party filing it in the brief, must ask the Court for leave to move the objection before the oral hearing of the appeal commences. See: NSIRIM V. NSIRIM (1990) 3 NWLR (Pt. 138) 285. OFORKIRE & ANOR V. MADUIKE & 5 ORS. (2003) 5 NWLR (Pt. 812) 166 at 178 - 179.

Preliminary objection, by its very nature, deals strictly with law and there is no need for a supporting affidavit in a formal application, as being suggested by the Appellant herein. In a preliminary objection the applicant deals with law and the ground is that the court process has not complied with the enabling law or rules of court and therefore should be struck out. This could be on the ground of an abuse of court process.

In the circumstance of this case and the nature of the objection raised by the Respondent, there is need to file formal application and support argument to demonstrate how the Appellant's grounds (d) (e) (f) (g) (h) (i) and (j) and grounds of fact or of mixed law and fact requiring the leave of court to file. This court has been guided by the principle of law enunciated in its plethora of cases on the subject matter; and would, without much ado, in an appropriate case, decide when the grounds of appeal are grounds of fact or at best, mixed law and fact requiring leave of the court below or that of this Court by virtue of Section 233(3) of the 1999 Constitution (as amended).

In the instant case, however, it would appear, the Respondent's notice of preliminary objection, considered, is totally devoid of merit. In as much as the Appellant's said grounds of appeal are of

mixed law and fact and thus requiring leave to file and argue them, records however show that, the appellant had by a motion On Notice dated 13th and filed on 15th September 2004, applied for, inter alia, an “order for leave to appeal on grounds of mixed law and fact” The said application was heard and granted by this Court on the 31st day of October 2005. See page 212 of the Records of appeal. B

In the light of the foregoing, the Respondent’s Preliminary Objection cannot be sustained, it is accordingly dismissed.

Now I shall proceed to consider the issues distilled by the Appellant for determination in this appeal. C

ISSUE (a)

On this issue, it is the submission of the learned counsel for the Appellant that the Appellant was denied fair hearing as enshrined under Section 36 of the Constitution of Federal Republic of Nigeria, 1999, when the court below did not consider and/or adequately D consider issues a, b, c, and d, (issue e) and their arguments thereof as contained in the Appellant’s brief at the Court below in its Judgment. It is the Appellant’s contention in his brief of argument dated 30/6/2003 and filed vide a motion on notice on 10/7/2003, which E was heard and granted on 4/12/2003, by the court below, that the Appellant submitted FIVE issues for determination; that in its Judgment, the court stated that the appellant only presented FOUR issues for determination and enumerated them. It is therefore contended that the court below in its Judgment, did not acknowledge and/or consider F issue (c) as presented in the Appellant’s brief. It was this failure, the Appellant has submitted, that occasioned a denial of fair hearing to the Appellant, relying on the authorities of ONWE V. OGBUNYA (2001) FWLR (Pt. 37) 1031 at 1047, and EDEM V. CANON BALLS LTD. (2005) FWLR (Pt. 276) 693 at 716. The Appellant has noted G with emphasis that from the issues raised suo motu and determined by the learned Justices of the court below, nothing was said about the matter that was agitated in the said issue (c) of the Appellant, which is whether the Respondent took delivery or not of the said items supplied by the Appellant. The Appellant further contended that H the learned Justices of the court below “unilaterally” struck out the issues in question contained in the Appellant’s brief without affording any opportunity to the parties to address it on the point of validity or competence of the said issue before the order striking it out; the court

therefore denied the appellant his constitutional right to fair hearing in a matter that adversely affects his interest in the circumstances.

On this issue, the learned counsel for the Respondent in the brief of argument has submitted that the appellant was wrong to say that he was denied fair hearing in the court below or that the court
B did not consider his issue (c). It is contended that the Appellant mis-
conceives the concept of right of fair hearing as enshrined in Section
36 of the 1999 Constitution. That the right, asserted to be breached
does not avail the Appellant who had had the opportunity to argue
C the said issue 'C' in his brief of argument at pages 167 to 193 of the
records. He argues that the substance of issue 'C' is whether there
was proof of due delivery of the Crane Spare Parts. He said in his
evidence at page 14 of the Records, the Appellant stated that there
was no due delivery of the spare parts to the Respondent. That the
appellant knew right from day one that the Respondent did not ac-
D cept delivery of the spare parts from the Appellant, as they refused to
sign Appellant's Way bill for the reasons best known to the appellant.
Reference was made to pages 144 - 147 of the records where under
issues Nos. 1, 2 and 5 in the court below, respondent herein as ap-
pellant raised the issue as to whether Exhibit 'A' - the Local Purchase
E Order (LPO) constituted a contract and whether there was proof of
acceptance of the goods even if it was assumed that the said Exhibit
'A' created a contract, but the appellant herein as Respondent did
not respond to the issue as to the status of Exhibit 'A', the question of
F due delivery or acceptance of the spare parts by the respondent. That
at page 190 of the records their Lordships noted this failure and its
consequences on the part of the appellant. The Respondent has con-
tended further that after considering the appellant's evidence relevant
to the issue in question the learned Justices of the court below rightly
concluded that there was no acceptance of the appellant's goods and
G consequently there was no contract. Regarding Appellant's further
complaint that issues Nos (a), (b) (d) and (e) were not considered by
the court below, and by this he was denied fair hearing of his case,
Respondent herein has submitted that the law is well settled that a
purported issue which does not flow from any valid ground of appeal
is not an issue on which the court below can found its Judgment.
H Further point has been made by the Respondent to the fact that the
Appellant as respondent did not cross appeal against the Judgment

of the trial Judge and has therefore not raised any ground of appeal in the court below. It is also contended that the Appellant did not file any Respondent's Notice, raising any ground for affirming the Judgment of the trial court. That all that was before the court below was the notice and grounds of appeal filed on behalf of the instant Respondent. Given these facts, the Respondent has contended that appellant in order to raise a valid issue fit for determination in the court below must rely on and distill his issues from the grounds of appeal filed by respondent as appellant in the court below. B

The Respondent having taken the Appellant's issues (a), (b) (d) raised at the lower court, one after the other now comes to the conclusion that the Appellant has failed to show that the issues arose from any of the valid grounds of appeal on record and has thus failed to fault the conclusion reached by the learned Justices, who are not under any duty to consider and determine an issue which did not arise from any ground of appeal. C D

Appellant's first ground for contending that the learned Justices of the lower court denied him fair hearing is because the court did not make any pronouncement and or consider issue (c) raised in his brief. E

In the Appellant's brief of argument at the court below at pages 167 to 173 of the records, with leave of court, he argued issues (a), (b), and (c) together. The substance of issue ('c') is essentially whether there was proof of due delivery of the American Crane Spare Parts to the Respondent. The evidence of the Appellant at page 14 of the records clearly shows that there was no due delivery of the spare parts to the Respondent. This is what he had to say on oath on 6/10/97 at the trial court: F

"...I know what a source document is. I did not accompany the supply with source document. I didn't also accompany the supply with documents to indicate they were not stolen items... People have stock of American spare parts; they may have papers to cover them. I do not expect the defendant company to buy without receipt. I was shocked that Shell asked me for source document. The relevant waybills were not therefore signed by the defendant. All delivery to defendant is accompanied by waybills to know they have been properly delivered. In respect of these, American Crane Spare parts were not signed by the defendant. The defendant said they demanded for G H

source documents before they sign the waybills. Up till now I have not furnished the defendant with source document.”

From the foregoing, it is clear that the Appellant knew from the beginning that the Respondent by refusing to sign his “relevant waybills” did not acknowledge receipt of the spare parts. In contract
B for the sale of goods ‘due delivery’ requires the buyer’s acceptance of the goods delivered by the supplier. Unless and until the buyer accepts and signs the waybills, due delivery is not done. It is clear from the appellant’s own evidence, therefore that there was no proper
C delivery to the Respondent herein, as it refused to sign the waybills for the reasons admitted and accepted by the appellant, namely that the Respondent had demanded for source documents before they sign the said waybills. Appellant’s admission of Respondent’s refusal of delivery clearly negates any contractual relationships.

D In any case, the learned Justices of the court below considered all the issues in the case. At page 188 of the records their Lordships had this to say:

“In this Judgment, therefore, I will consider the 6 issues formulated by the Appellant along with the remaining issue (c) in the respondent’s brief. Having considered the 6 issues formulated by
E the appellant and the issue left for the respondent, I have come to the conclusion that the appeal can be determined on the following issues.”

I agree with the contention of the Respondent that the mere
F fact that their Lordships incorrectly described appellant’s issue ‘C’ as dealing with “interest” did not detract from the fact that they considered and determined on the evidence on records, that is, the question as to whether there was one delivery of the spare parts as shown in the Judgment.

G Learned counsel for the Respondent has advanced an interesting argument, that the determination of due delivery of the spare parts raised in appellant’s issue ‘C’ will be necessary only if there was a finding that Exhibit ‘A’ - the Local Purchase Order constituted a valid and enforceable contract between the parties. This must be so because if there was no valid and enforceable contract, the question of due delivery and acceptance of the goods will not arise. I agree that
H the Appellant would appear to have based its case on the erroneous view of the law that a Local Purchase order is per se an enforceable

contract. It is this wrong view of Exhibit 'A' that has led the appellant into his contention on issues (a) (b) and (c) in the court below. From the records from pages 144 - 147 it is quite clear that under issues 1, 2, and 5, in the court below, respondent as appellant raised the issue as to whether Exhibit 'A' constituted a contract and whether there was proof of acceptance of the goods. B

It would appear the Appellant did not respond to the issue as to the status of Exhibit 'A', the question of due delivery or acceptance of the spare parts. The court below at page 190 of the records noted that the failure to respond to the issues on whether or not Exhibit 'A' is an offer the acceptance of which would create an enforceable contract between the parties, does not relieve the court to consider the issue so raised by the respondent but so ignored by the appellant herein. Thus, the court considered Exhibit 'A' and came to the right conclusion that there was no acceptance of the Appellant's goods D and consequently there was no contract. By this finding the court below had thereby resolved whatever the question of delivery of goods, which could possibly have arisen from Appellant's issue 'C'. The court below having found that there was no contract for the sale of the spare parts, the question of due delivery no longer arose and the court was not obliged to go beyond the extent they did in their Judgment. E

I have had the cause to read in detail the Appellant's Reply brief, particularly his paragraph 3. 35. Relying on two decisions of this Court in CHEMICAL and ALLIED PRODUCTS PLC. V. VITAL INVESTMENT LTD. (2006) ALL FWLR (pt. 342) 1502; and ONYE-KWELU V. ELF PETROLEUM (NIGERIA) LTD (2009) ALL FWLR (Pt. 469) 426. My understanding of these cases is that the facts and issues raised therein cannot be said to be on all fours with the instant case. However, the legal principles enunciated in the latter case of ONYEKWELU (supra) will serve as a guide. The court decided generally on the bindiness of terms of contract on parties to the contract. At page 438 of the Report, this Court held: F G

"The contract between the parties being one for supply of goods for payment on acceptance of the supply, is clearly governed by the terms of the contract, namely the terms contained in the LPO, and the law governing the transaction between the parties on the subject of sale of goods under the Sale of Goods Law of Rivers State H

of Nigeria on Exhibit No. 5, 1988. The Law is well settled that, where there is a contract by which one party undertakes to supply the other with goods at a stipulated price the seller is bound to deliver the goods, and the buyer, upon accepting the delivery of the goods, is bound to pay the purchase price of the goods. Clement Horst to - V Biddel Bross. (1912) AC 18.)

In that case the LPO under which the appellant supplied the goods gave the respondent as the buyer of the goods the right to refuse the goods in condition 3 of the contract document. It states:

“3. We reserve the right to reject at supplier’s expense any items not conforming to specification on the LPO.”

In that case, this court guided by this foregoing term of the contract and having regard to the evidence in the respondent thereat; that having inspected the goods supplied and found them not conforming with the specifications in the contract, particularly that the items supplied, were found to have been refurbished rather than being new, agreed with the respondent to have rightly exercised its right of rejection of the goods supplied by virtue of provisions of Sections 43, 44 and 45 of the said Rivers State Sale of Goods Law, 1988.

Similarly, having regard to the facts and circumstance of this case, the conclusion of the court below that there was no acceptance of the Appellant’s goods by the Respondent, consequently there was no contract, is legally sound.

The Appellants further complained that his issues (a) (b) (d) and (e) were not also considered by the court below and by this he was denied fair hearing of his case. How tenable is this argument? The law is settled that a case is decided on the basis of the issues arising from the valid grounds of appeal filed in the case. A purported issue which does not flow from any valid ground of appeal is not an issue on which the lower court can base its Judgment. It is to be noted in the case at hand that the Appellant, as respondent did not cross-appeal against the Judgment of the trial Judge and has not raised any ground of appeal in the court below. Also, it has not been shown that the Respondent filed any Respondent’s notice raising any ground for affirming the Judgment of the learned trial judge. It must be noted that all that was before the court below was the notice and grounds of appeal filed by the Respondent herein and the issues they had

presented for determination of the appeal. See pp. 134 - 142 of the Records. I agree with the Respondent that, giving the foregoing facts, appellant herein, in order to raise a valid issue fit for determination, in the court below, must rely on and formulate issues from the grounds of appeal filed by the Respondent (as appellant in the court below.

I have carefully read through Appellant's issues (a) (b) (c) and (d) in the court below, this complaint that these issues were not considered by the court below is not tenable in law. At pages 183 to 184, the court set out FOUR not FIVE issues formulated by the Appellant for determination. At page 186, the court below stated C thus:

"Having disposed of these seemingly peripheral matters in the appeal, I shall examine the issues presented by both sides in the light of the grounds of appeal and considering that the respondent did not cross appeal nor did he file a respondent's notice." D

Issues (a) and (b) were considered together at pages 186 to 187 and the court below concluded that these "are neither an adoption of any issues raised by the appellant nor is any of them formulated from any of the grounds of appeal filed by the appellant." E It held that the issues are divergent from the ones presented by the Appellant, even though the respondent filed neither a cross-appeal nor a respondent's notice. On the authorities of NWAOSU V. NWAOSU (2000) 4 NWLR (Pt. 643) 351, and AKUNYILI V. EJIDIKE (1996) 5 NWLR (Pt.449) 381, the court rightly held that the appellant herein F could not do so. Issue (d) was considered at page 187 from line 20 of the records and at page 188 and the court rightly held on the authority of AKUNYILI V. EJIDIKE (supra) that the issue is not related to any ground of appeal. Consequently, the court below struck out issues (a) (b) and (d) for being incompetent. Since the Appellant has not shown that his issues (a) (b) and (d) arose from any of the valid grounds of appeal on record I cannot fault the conclusion of the court below that in law, it was not under any duty to consider and determine an issue which did not arise from any ground of appeal. G

ISSUES (b) and (c) H

The first leg of the issue that is (b) is a complaint against the issues raised by the court below. It is the contention of the Appellant that the issues did not cover the real points in controversy between the parties in the appeal before the said court. The second issue,

that is (c), whether the court below rightly held that the onus was on appellant to establish the source and genuineness of the crane spare parts.

The Appellant has asserted that the court below raised the issues suo motu. As a matter of practice and procedure the appellate court is allowed to set out issues that are considered apt and relevant to the determination of the appeal. The court below considered the six issues formulated by the appellant and at pages 188 - 189 set out three issues which it considered could effectively determine the appeal and found rightly that all other issues are variants of and are subsumed in the three issues formulated by that court. The Court confined itself to the issue properly arising from the valid grounds of appeal. It is for the court below to set out in clear and concise terms the issue upon which the appeal is to be determined by a party. Appellant has not complained that the issues so summarized by the learned Justices did not flow from the valid grounds of appeal. The appellant has contended at page 14 paragraph 3.39 of his Reply brief of argument that the court below did not adequately consider the effect of Exhibit 'A' on the contractual obligations of the parties in the consideration and determination of issue 2 as formulated by the court below. I have carefully read over and over the lead Judgment of the court below. It is my view that the Appellant's complaint is untenable in Law as that court fully and effectually determined the appeal before it on the issues that arose from the grounds of appeal. Appellant has not shown why the court should have decided otherwise in his favour.

On the issue of onus of proving source and genuineness of the spare parts, the court below stated in its Judgment at page 193 of the records thus:-

"In its amended statement of defence, the Appellant put in genuineness of spare parts as well as their source in issue. Even if those were not part of the contract the respondent waived his right to object by promising to come up with source documents. Pleadings do not constitute evidence but on the pleadings the onus of proving the source and genuineness (sic) of spare parts was on the respondent and it makes no difference whether or not the appellant called evidence."

The basis for this decision of the court below has been the

evidence elicited from the Appellant under cross-examination at p.16 of the records to the effect that:

“I told Oboh and Omars to accompany me to supply, but to make available the documents to backup the American crane spare parts, I told them that except that, my waybill will not be signed.

On page 14 he said “up till now I have not furnished the defendant with the source document”

Learned counsel for the Appellant has contended that in the operative contractual agreement between the parties in Exhibit ‘A’ there is no where the Appellant is obligated with the responsibility of producing source document while supplying the items contained therein. That reference was first made to the issue of source document by a letter from the Respondent to the Appellant (Exhibit ‘B’ written six months after Exhibit ‘A’ has been issued) which letter purported to have terminated the contractual agreement between the parties on account of failure on the part of Appellant to produce the source document as allegedly promised by the Appellant. Concluding on this point, the learned counsel for the Appellant has submitted that by issue 2 formulated by the court below, the court was wrong in placing burden of proving the source document and the genuineness of the American Crane spare parts on the Appellant when such responsibility on the part of the Appellant was never envisaged in the contractual relationship between the parties. It was submitted that this was a defect that occasioned a miscarriage of justice on the Appellant as the learned justices unjustly weighed the relevant issues and facts outlined in favour of the Respondent. Reliance was placed on the case of *PSYCHIATRIC HOSPITAL MANAGEMENT BOARD V. EJITAGHA* (2000) FWLR (Pt. 9) 1510 at 1516.

I do not agree with the Appellant on the foregoing submissions but I agree with the Respondent in their consistent contention that the matter giving rise to this appeal is governed by the provisions of the Sale of Goods Law, Cap 50 Laws of Bendel State 1976, as applicable in Edo State. On this, the Court below has put it succinctly thus in its Judgment on p. 192 of the record:

“The concept of offer is not defined in the said law but S. 3(1) of the law gives an insight into what will constitute an offer in a given transaction. S. 3(1) provides ‘A contract of Sale of Goods is a contract whereby the seller transfers or agrees to transfer the property in the

goods to the buyer for a money consideration called the price... My understanding of the said provision is that the transfer or agreement to transfer in the goods constitutes the offer that can be accepted by the other side by accepting delivery of the goods”

Indeed this is the law on the point. It is the Appellant herein, B who has made the offer, on the fact of this case. Consistent with S. 3(1) of the Sale of Goods Law (supra), the Appellant made an offer to transfer the property in the crane spare parts when he took them to the Respondent. This offer must be capable of acceptance not by C mere delivery but its acceptance as well.

I agree entirely with the conclusion of the court below that in purporting to accept an offer allegedly contained in Exhibit ‘A’ by delivery of the spare parts to the respondent, the appellant was merely inviting the respondent herein to deal with him in the transaction of sale of goods. On the clear fact of this case without calling further ev- D idence it would appear that the respondent, rather than accepting the offer contained in Exhibit ‘A’ proceeded to make a counter-offer. The genuineness of the spare parts as well as their source was put in issue in the Respondent’s Amended Statement of Defence. By promising to come up with the source documents, the appellant had waived his E right to object that the genuineness and source document were not part of the contract. I have reproduced earlier, the statement of the Appellant under cross-examination. He knew that unless the source document was produced, his waybill could not be signed. I agree with F the lower court that even if the appellant had not accepted to furnish the respondent with the source documents there is no circumstance that could preclude the implied condition on his right to sell the spare parts. There is always the implied warranty that the Appellant would enjoy quiet possession of the goods and implied warranty that the goods shall be free from any charge or encumbrance from any third G party not declared or known to the Respondent.] See: AKERELE V. ATUNRASE (1969) 1 All NLR 20; ADELAJU v. ATOIKI (1990) 2 NWLR (Pt. 131) 157.

Section 13 (a) (b) and (e) of the Sale of Goods Law (supra) reinforces the Latin Maxim, “Nemo dat quod no habet”, that is, one cannot give what he does not have. H

In the case at hand, it is therefore up to the Appellant to show that he has title to the goods he purports to sell. There is nothing in

Exhibit 'A' or even in the evidence of the appellant that the Respondent intended to relieve him of the statutory duty to show that he has title. The court below was right in holding that, an LPO was an invitation to treat which is not enforceable. The court below did not place any burden of proof on Appellant. This burden arose from the nature of the Sale of goods, where the Law imposes on the seller a warranty that he has title to the property. B

Appellants' issue 'c' is predicated on the erroneous view that the Local Purchase Order (LPO) per se constitutes a valid and enforceable contract. The court below was right in holding that the LPO does not constitute a valid contract, in the circumstance of this case but an invitation to treat. C

ISSUE (E)

On the question of Appellant's entitlement to the interest awarded by the trial court at the rate of 45% per annum for seven years, it is necessary to note the following facts. In paragraph 10 of the Statement of Claim, Appellant's claim to interest was tied to a:

"Rate current in the Commercial Banks in February 1992 or at the time of Judgment in this case".

As no bank was called to give evidence in the case, the current rate of interest in Commercial Banks either as at February 1992 or at the time of Judgment was not proved. In the Writ of Summons, appellant claimed N2, 500,000.00 and no more. There was no claim for interest and no filing fees was assessed or paid in respect of a claim for interest. It follows therefore that interest claimed in the Statement of Claim cannot be entertained because no such claim was made in the Writ of Summons by which this action was commenced. In his evidence, the Appellant claimed interest of 45% per month amounting to 540%, calculated in simple interest per annum. The trial Court awarded to the Appellant what he did not claim in paragraph 10 of the Statement of Claim or in the oral evidence of the Appellant in court. There was no basis for the award of interest at the rate of 45% per annum and for seven years. I am of the view that the court below was right in holding that the appellant was not entitled to the interest awarded him by the trial Judge. E
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In all the circumstances of this case, this appeal lacks merit, it is dismissed. The decision of the court below is hereby affirmed. I award costs of N100,000 to the Respondent.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, GALADIMA, JSC just delivered. I agree with
B his reasoning and conclusion that the preliminary objection has no merit and the same be overruled and that the appeal be dismissed for lack of merit.

My learned brother dealt exhaustively with the issues raised
C by Counsel for appellant for determination leaving me with very little to add.

The decision of the lower court as contained at page 198 of the record cannot be faulted and I hereby adopt same as mine. The court held as follows:-

“The local purchase order Exhibit “A” issued by the appellant
D to the respondent is, on the fact before the court, no more than an invitation to treat, not an offer to the respondent.

Even if it was an offer to list the respondent, in purporting to accept same, made a counter -offer or modified the terms of the LPO. In addition he did not act in conformity with the condition and
E warranty stipulated in the Sale of Goods Law (supra) with particular reference to the ownership or right to sell the spare parts which he testified belonged to 3rd party who fixed the prices.

Again even if he had succeeded in proving his entitlement
F to any sum of money which he did not prove, his evidence on the issue of interest was at variance with his pleading. For instance, the 45% interest per month was not pleaded and such evidence went to no issue in the case. On the other hand there was no evidence to establish the claimed rate current in commercial banks at any point in time. The respondent’s case has no merit and the court below ought
G to have dismissed same.”

The above decision is very much supported by the facts, pleadings and evidence on record, which facts have been stated in detail in the lead judgment.

The appeal has no merit whatsoever and is consequently
H dismissed by me.

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

Preliminary objection overruled and appeal dismissed.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment prepared by my learned brother, Galadima, JSC. So completely do I agree with it that I have hesitated for some time before deciding to add a few paragraphs of my own. This case is about the basics of a contract, offer, acceptance and consideration. The appellant (as plaintiff) had claimed N2.5m for American crane spare parts which he claimed he supplied to the respondent. The issue is whether the Court of Appeal was correct when, much to the displeasure of the appellant it set aside the finding of the trial court which found that there was a contract between the parties. B C

Before there is a contract there must be a definite offer by the offeror (the appellant) and a definite acceptance by the offeree (the respondent), and contracts are enforceable when there is consideration. Consideration is something that indicates conclusively that the promisor intended to be bound. Consideration is thus mandatory for enforceability. Consideration must move from the promisee and it need not be adequate but must have some value in the eyes of the law. An offer must be accepted before there is a valid contract. See *College of Medicine v. Adegbite* 1973 5 SC p. 149, *Majekodunmi v. NBN* 1978 3 SC p. 119. E F

The above is the traditional view. There are some contracts where it is difficult to identify offer, acceptance, consideration, e.g. multi-partite contracts, and settlement contracts. In such a situation a valid contract exists when the parties are ad idem on all the terms of their agreement, and this is established by all sides to the agreement appending their signatures to the contract document. G

On 25/2/92 the respondent raised a Local Purchase Order in favour of the appellant for the supply of America crane spare parts. On the same day, the appellant brought some spare parts to the respondent. The respondent asked the appellant for his source documents, (that is the practice with all imported items). The appellant was unable to produce the source documents and said so in court. The respondent refused to accept the goods and subsequently wrote to the appellant to come and take away his goods. H

In determining whether there has been an acceptance of an offer, the total circumstances of the case including the conduct of the offeror and offeree are factors to be taken into consideration. Where it is clear that the parties have been dealing with each other over the years, surely the parties are deemed to be aware of each other's conditions of contract and to have assented to it by conduct.

In evidence in chief, the appellant said:

"I have done jobs for the defendant before and I was issued with L.P.O... Previous L.P.O. issued by the defendant to me Exhibit A1

In cross-examination the appellant said:

...I told Oboh and Omars to accompany me to supply, but to make available the documents to back up the American crane spare parts. I told them that except that my way bill will not be signed..."

"The document" means "the source documents", that document reveals that the goods are genuine. It is produced before delivery can take place.

My lords, the appellant was very much aware that before the respondent takes delivery of the goods, he (the appellant) must produce the source documents (see cross-examination above). Intrinsic in an L.P.O. prepared by the respondent is the requirement that the supplier produces a source document at the time he is delivering the goods. The appellant is aware of this. There is conclusive evidence provided by the appellant that he is aware of this vital document since he claimed to be supplying goods to the respondent on an LPO and that the respondent would not accept delivery except a source document is produced. It is in the circumstances safe to conclude that the source document and the LPO forms the contract and the respondent was justified to refuse to accept delivery of the goods since the source document was not produced by the appellant.

Furthermore, in the absence of due execution of the waybills, the buyers (the respondent) never accepted the goods and so there was no contract. The respondent refused to accept the goods and called on the appellant verbally and by letter to take away his goods.

The judgment of the Court of Appeal reveals the correct position of the law. The appeal is dismissed with costs of N100, 000 to the respondent.

ARIWOOLA JSC

I had the opportunity of reading in draft, the lead judgment, of my learned brother, Galadima, JSC just delivered. I am in agreement with the reasoning therein and the conclusion arrived thereat. The appeal without any doubt is unmeritorious. It is also lacking in substance and deserves to fail and be dismissed. Accordingly, it is dismissed by me. B

I abide by the consequential order in the lead judgment, including the order on costs. C

MUHAMMAD JSC

My learned brother Galadima JSC has obliged me a preview of his lead judgment. I entirely agree with his lordship that the appeal lacks merit. I have nothing useful to add and do therefore I adopt the judgment as mine in dismissing the appeal. I abide by the consequential orders made including the one on costs in the lead judgment. D

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