

SUPREME COURT OF NIGERIA
FRIDAY 12TH APRIL, 2013. SC. 215/2003
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

MAOBISON INTER-LINK ASSOCIATED LTD APPELLANT
AND
U.T.C. NIGERIA PLC RESPONDENT

APPEALS - Grounds - Issue - Any ground from which no issue is formulated - Is deemed abandoned and is liable to be struck out (H1)

ACTIONS - Counter claim - Proof - It is an independent and separate action - In which defendant/counter claimant has burden to prove the counter claim - To be entitled to judgment thereon (H2)

ACTIONS - Counter claim - Reply to - As there was no dispute on the amount counter claimed - Appellant's failure to file reply was not damaging to its case - And respondent is entitled to the amount (H3)

FACTS

Plaintiff/appellant negotiated with defendant/respondent for the supply of a Dorman Diesel Generating set. Exhibit A (receipt of payment) was issued as evidence of the transaction. The set was to be delivered within four (4) days after the payment of the full purchase price. However, respondent was not able to deliver the set to appellant as agreed. Nevertheless, respondent offered to sell a Perkins brand of a higher quality than the Dorman brand to appellant. The Perkins brand was thus delivered to appellant. However, appellant denied ever agreeing to take the Perkins brand in place of a Dorman set. It claimed that Exhibit B was written to terminate the original agreement for a Dorman generator set. Exhibit B was written on a letterhead of another company – Polema Industries Ltd which is not party to the initial contract. Respondent stated that the said Exhibit B was not delivered to it and that the company on whose letterhead it was written has no privity of contract.

Respondent maintained that the Chairman of appellant (PW1) not only agreed to buy the Perkins brand, but was also present when the set was delivered to appellant. It went on to say that appellant's worker took delivery of the generator and duly signed the way bill (Exhibit C). It was on the basis of the above circumstances, that appellant commenced this action against respondent before the High Court, claiming the sum of N10 million naira for breach of contract. Respondent counter claimed for the balance of the Perkins brand. Appellant did not file reply to the counter claim. In its judgment, the court held that the reply was not necessary as there was an implied joinder of issues. The court dismissed the counter claim having found in favour of appellant as per its claim. Aggrieved, respondent appealed to the Court of Appeal, Port Harcourt Division. The court held that the contract had been performed by virtue of Exhibit C and Exhibit F (sales invoice for the Perkins brand). The appeal and counter claim of respondent were thus allowed. Dissatisfied, appellant lodged appeal at Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court below was right to have entered judgment in favour of the Defendant/respondent on the counter claim"

HELD (Unanimously dismissing the appeal per

ARIWOOLA JSC)

APPEALS - Grounds - Issue

1. As earlier noted, the Notice of Appeal upon which this appeal was predicated contains three Grounds of appeal numbered as Grounds 1, 2 and 3 respectively. In the brief of argument filed on 16th February 2005 but which was deemed properly filed and served on 6th February, 2005, the appellant formulated Issue No. 1 from Ground 2 alone while no issue was distilled from grounds 1 and 3 of the grounds of appeal. It is trite law that any ground of appeal from which no issue is formulated for determination by the appellant is deemed abandoned and shall no longer be relevant in the determination of the appeal in question. It is liable to be struck out.

Accordingly, grounds 1 and 3 of the Notice of Appeal having

been abandoned are hereby struck out. (p. 1877 D)

ACTIONS - Counter claim - Proof

2. Generally, a counter claim is a claim for relief asserted against an opposing party after an original claim has been made, that is a defendant's claim in opposition to or as a set-off against the plaintiff's claim.

In other words, a counter claim is a claim by the defendant against the plaintiff in the same proceedings. It is regarded as an independent and separate action in which the defendant/counter claimant is in the opposition of the plaintiff and therefore has the burden of proving the counter claim to be entitled to judgment thereon. (p. 1880 F)

ACTIONS - Counter claim - Reply to

3. On the necessity or otherwise of a reply to counter claim, it is true that it is necessary for a plaintiff to file and serve defence to a counter claim to join issues with the counter claimant. If the plaintiff fails to file a defence to properly traverse the material averment in the counter claim, then there will be no issues joined between the parties on the subject matter of the counter claim, and the allegation contained in the counter claim will be regarded as admitted.

Ordinarily, failure of a plaintiff to file a defence to a counter claim may not be damaging or disastrous if he succeeds in his claim. The success may after all render useless the counter claim, depending on the nature of the counter claim. But where he fails in his claim and he had filed no defence to the counter claim, the defendant's counter claim will be taken as uncontroverted.

There is no doubt, there was indeed no need for filing of any defence to the counter claim of the respondent herein. There was no dispute on the amount claimed as the balance on the deposit made by the appellant for the purchase of Perkins generating set which costs more than the Dorman generating set. Failure to file defence to the counter claim was therefore not damaging to his case. The case of the appellant deserves to fail for different reason and on different grounds. In the in-

stant case, the counter claim was based on the balance of the cost price of the Perkins generating set which was delivered to and delivery acknowledged by the appellant. Indeed as noted by the Court below upon which there was no appeal, the said Perkins generating set has remained in possession of the appellant since it was delivered sometime in 1994.

I am therefore not in the slightest doubt that the respondent is entitled to the balance of the cost price of the Perkins generating set counter claimed. The Court below properly awarded same. (p. 1880 H)

REPRESENTATION

Chidozie Ogunji Esq., for the Appellant

Chike Onyemenam Esq. with Philips Adu-Odogwu Esq., for the Respondent

CASES REFERRED TO

Tukur v. Govt. of Taraba State (1997) 6 NWLR (pt. 510) 549

Emespo J. Continental Ltd v. Corona Shifah-Rtsquese Haschatt (2006) 8 SCM 149

Ebba v. Ogodo (1984) 1 SCNLR 372

Olaniyan v. Unilag (1985) 2 NWLR (pt. 6) 211

Sumonu v. Oladokun (1996) 8 NWLR (pt. 467) 387

F Ndiwe v. Okocha (1992) 7 NWLR (pt. 252) 12

Adegoke v. Agerifa (1990) 3 NWLR (pt. 136) 94

Finnih v. Imade (1992) 1 NWLR (pt. 219) 511

Ijale v. Leventis (1959) 4 FSC 108

Ogbonna v. A-G Imo State (1992) 1 NWLR (pt. 647) 698

G Ikpeazu v. ACB Ltd (1965) NMLR 374

Snelling v. Snelling (1972) 2 All ER 79

Maj. Umoru (Rtd.) v. Zibiri (2003) NSC QLR (Vol.14) 781

Jonason Triangles Ltd v. Charles Moh & Partners Ltd (2003) NSC QLR (vol. 12) 1

H

BOOK REFERRED TO

Black's Law Dictionary 9th Ed. p. 402

LEAD JUDGMENT BY ARIWOOLA JSC

This is an appeal against the judgment of the court of Appeal, Port Harcourt Judicial Division, Holden at Port Harcourt, hereinafter called the court below, delivered on the 16th day of January, 2003. The appellant herein was the plaintiff before the trial court wherein it had instituted an action against the respondent herein as defendant and in paragraph 17 of the statement of claim filed on 25/10/94 claimed, inter alia, as follows:

“The plaintiff claims against the defendant the sum of N10, 000, 000.00 being special and general damages for breach of contract.”

After pleadings were filed and exchanged and issues, were joined, the case proceeded to hearing. In its judgment delivered on 3rd November, 1999 judgment was given in favour of the plaintiff against the defendant as claimed.

Aggrieved by the decision of the trial court, the respondent proceeded to the court below.

The gist of the case goes simply thus: The appellant had sometime approached the respondent for purchase of a Dorman Diesel Generating set which the respondent agreed to sell at an agreed sum, A receipt, Exhibit A was issued upon payment of the agreed sum as evidence of the transaction. The set was to be delivered within four (4) days after the payment of the full purchase price. Upon contact with the Lagos Headquarters, the respondent later learnt that the last Dorman brand of generating set had been sold and delivered hence was no longer available to be sold and delivered to the appellant as agreed. The respondent then offered to sell to the appellant a Perkins brand generating set of the same 500 KVA capacity but of a higher quality which the appellant was said to have agreed to buy in place of the Dorman brand it had earlier sought to buy. The appellant denied it ever agreed to take Perkins brand in place of Dorman brand of generating set.

However, the Perkins generating set was delivered to the appellant's factory even though the appellant claimed to have written Exhibit B earlier to terminate the original agreement. But the respondent stated that the chairman of the appellant who testified as PWI, not only agreed to buy the Perkins brand but was present when the set arrived from Lagos.

Exhibit B was a letter written on the letter head of Polema Industries Limited purportedly meant to terminate the agreement to purchase Dorman brand of generating set by the appellant but the respondent claimed that not only was the said letter not delivered to it after the Perkins generating set had been delivered to the appellant and duly acknowledged, the Polema Industries Limited that claimed to have written was not part of the contract to buy and sell Dorman brand generating set.

It is interesting to note that the court below had found that the Perkins set was actually delivered to the premises of the appellant and its workers took delivery and duly signed the way Bill, Exhibit c on 19th August, 1994. The sales invoice was also admitted as Exhibit F. For this reason, the Court below held that the contract had been performed.

The court below had found the appeal meritorious and allowed same while the counter claim of the respondent was also allowed and granted as claimed. That decision led to the instant appeal filed with a Notice of Appeal on 4th February, 2003 at the court below on three (3) Grounds of appeal.

However, on 6th April, 2007 the appellant had filed four (4) additional Grounds of Appeal numbered as Grounds 4, 5, 6 and 7 respectively. This was latter discovered by the counsel to have been filed out of time and counsel sought leave of court to regularize, with a deeming order for both the said additional grounds of appeal and appellant's brief of argument.

It is instructive to note that on 27th January, 2010, the said appellant's application was taken in chambers and was granted in part. Appellant was granted leave as sought, to file additional grounds of appeal but the deeming order sought was refused. This meant that the appellant was required and expected to file yet the new additional grounds of appeal and appellant's brief of argument.

When the matter came up for hearing on 5th February, 2013, both counsel identified their respective briefs of argument, adopted and relied on same as their submissions in support of their respective cases.

It is interesting to note that the appellant's counsel having become aware that he had failed to file appellant's additional grounds of appeal and appellant's brief of argument wherein he had argued

the said additional grounds of appeal readily and admirably threw in the towel on this issue. He sought to withdraw the 2nd, 3rd, 4th and 5th issues formulated from Grounds 4, 5, 6 and 7 of the additional Grounds of appeal. He readily admitted that he did not file the additional grounds and brief of argument as ordered by the court.

It is note-worthy that not having been filed as ordered, the additional grounds of appeal are incompetent, and cannot be countenanced in this appeal. It necessarily follows therefore, that the issues formulated therefrom are equally incompetent and having been withdrawn by the appellant's counsel are accordingly struck out. In other words, issues 2, 3, 4 and 5 of the five issues formulated for determination which were said to be distilled from Ground 5, 6, 4, 5 and 7 respectively are to be discountenanced and are hereby so discountenanced.

As earlier noted, the Notice of Appeal upon which this appeal was predicated contains three Grounds of appeal numbered as Grounds 1, 2 and 3 respectively. In the brief of argument filed on 16th February 2005 but which was deemed properly filed and served on 6th February, 2005, the appellant formulated Issue No. 1 from Ground 2 alone while no issue was distilled from grounds 1 and 3 of the grounds of appeal. It is trite law that any ground of appeal from which no issue is formulated for determination by the appellant is deemed abandoned and shall no longer be relevant in the determination of the appeal in question. It is liable to be struck out. See: *Tukur v. Government of Taraba State* (1997) 6 NWLR (Pt. 510) 549; *Emespo J. Continental Limited v. Corona Shifah-Rtsquese Haschatt & Ors.* (2006) 8 SCM 149 at 161; (2008) 3 NWLR (Pt.1075) 610 at 624. ***Accordingly, grounds 1 and 3 of the Notice of Appeal having been abandoned are hereby struck out.*** The only surviving issue for determination of this appeal as distilled in the appellant's brief of argument is Issue No. 1 which reads thus:

"Whether the Court below was right to have entered judgment in favour of the Defendant/respondent on the counter claim" - (Distilled from ground 2).

In arguing this issue, learned appellant's counsel referred to the findings of the trial court on pages 194 lines 25-29 of the record of appeal and contended that the respondent did not file any ground

of appeal against the decision of the trial court on the issue, as such the issue of counter claim was not before the court below. He relied on Ebba vs. Ogodo (1984) 1 SCNLR 372 at 375. Learned counsel submitted that a finding against which there is no appeal remains final relying on Olaniyan Vs Unilag (1985) 2 NWLR (Pt.6) 211,
 B Sumonu Vs. Oladokun (1996) 8 NWLR (Pt.467) 387.

Learned counsel referred to the omnibus ground of appeal filed at the court below by the respondent but contended that omnibus ground of appeal cannot be the basis for challenging a specific finding of the court. He relied on Ndiwe vs. Okocha (1992) 7 NWLR
 C (pt.252) 128 at 139-140, Adegoke Vs Agerifa (1990) 3 NWLR (Pt.136) 94 at 112, Finnih Vs Imade (1992) 1 NWLR (pt.219) 511 at 534.

He referred to the contention of the respondent at page 226
 D of the record, that the appellant did not file a defence to the counter claim before the trial court and did not call any witness to challenge the respondent's counter claim. Learned counsel therefore contended that the respondent did not raise any complaint in any of the grounds of appeal against the finding on the counter claim by the trial court
 E and as such that argument was not open to it. He relied on Ijale vs Leventis (1959) 4 FSC 108.

Learned counsel referred to page 246 of the record of appeal where the attention of the court below was drawn to the fact that the respondent as appellant before the court below did not raise
 F any ground of appeal on the counter claim, hence the issue predicated on same should be discountenanced. He submitted that the court below failed to consider the issue and resolve same against the respondent but proceeded to enter judgment in respect of a matter
 G not before it. He urged the court to hold that the court below was wrong to have considered the issue of the counter claim at page 267 of the record and in the process enter judgment for the respondent who did not challenge the trial court's finding on the counter claim.

From the respondent's brief of argument filed on 8th March,
 H 2006 the respondent did not formulate separate issues for determination. It only responded to the issues as formulated by the appellant in its brief of argument. In its response, on Issue No.1, the respondent stated that on the 19th May, 1995 it successfully as defendant before the trial court' counter claimed in suit No. A/511/94 against

the instant appellant, claiming the sum of N473,666.92 being the balance of the price of 500 KVA Perkins Generating set together with interest in its statement of defence. It was contended that the appellant did not defend the said counter claim. Learned counsel submitted that the sum claimed as counter claim is directly related to the amount claimed. B

On the record at page 61, it is clear that the respondent while defending the appellant's action at the trial court counter claimed as follows:

"1. The defendant repeats paragraphs t (sic) to 72 of the statement of defence. C

2. On or about the 19th of August, 1994 the defendant at the plaintiffs request sold and delivered to the plaintiff at Aba a Perkins 500KVA (sic) Generating set at a cost of N3, 750, 000.00 for which the plaintiff made part payment of N3, 124, 633.09 leaving a balance of N473, 666,092 and which balance the plaintiff has refused to pay despite repeated demands. D

3. Whereof the defendant claims from the plaintiff as follows:-

(i) N473,666,092 being balance E

(ii) Interest at the current banking rate of 15% from the 19/8/94 until judgment.

(iii) Interest at the rate of 40/o per annum from the date of judgment till full payment." F

It is evident on the record that there was no response to the above counter claim by the appellant.

However, the trial court in its judgment on page 193 opined that it was not necessary to file a reply to the counter claim. In its words, the trial court held, inter alia, as follows: G

"...It is now settled that it is not necessary in all cases to file pleadings or reply to a counter claim. It is not vital in all cases. There is an implied joinder of issues between the Statement of Claim of the plaintiffs (sic) in the instant case and the counter claim."

The trial court accordingly dismissed the counter claim having given judgment in favour of the appellant as per claim. H

The respondent being dissatisfied with the said judgment had appealed to the court below on five (5) grounds of appeal and formulated five (5) issues therefrom. Issue (c) reads as follows:

“(c) Is the defendant/appellant entitled to its counter claim having regard to the fact that the plaintiff offered no evidence.”

It is instructive to note that before the court below, the appellant herein as respondent also formulated four (4) issues for determination of the appeal. Issue (d) of the respondent reads thus:

B *“(d) Whether the appellant proved his counter claim in this suit.”*

On this issue of counter claim, the court below on page 267 of the record opined as follows:

C *“I now come to the issue of the appellant’s counter claim. It is on record that the respondent paid the sum of N3,124,833.08 in full payment for a Dorman Diesel Generating plant which could not be supplied. The sum paid according to the appellant, was therefore treated as deposit for the Perkins Brand of Generator which was eventually supplied at a cost of N3,750,000.00. The difference between the amount deposited and the cost of Perkins Generator supplied is what the appellant is claiming to wit the sum of N473,666.092. There was no dispute as to the correctness of the value placed on the Perkins Brand generator with the same KVA capacity. No evidence was led to*
D *contradict the amount except the refutal by the respondent that it never placed an order for that particular equipment. As a matter of fact, the respondent’s counsel having abandoned issues (a) and (b) did not go on to challenge the counter claim. Having found that*
E *there was a valid contract which contract had been performed without effective refutal of the sum claimed, that counter claim stands and it is good in law.”*
F

Generally, a counter claim is a claim for relief asserted against an opposing party after an original claim has been made, that is a defendant’s claim in opposition to or as a set-off against the plaintiff’s claim. See Black’s Law Dictionary. Ninth Edition page 402. **In other words, a counter claim is a claim by the defendant against the plaintiff in the same proceedings. It is regarded as an independent and separate action in which**
G **the defendant/counter claimant is in the opposition of the plaintiff and therefore has the burden of proving the counter claim to be entitled to judgment thereon.**
H

On the necessity or otherwise of a reply to counter claim, it is true that it is necessary for a plaintiff to file and

serve defence to a counter claim to join issues with the counter claimant. If the plaintiff fails to file a defence to properly traverse the material averment in the counter claim, then there will be no issues joined between the parties on the subject matter of the counter claim, and the allegation contained in the counter claim will be regarded as admitted. See; Nigerian B Housing Development Society Limited Vs. Yaya Mumuni (1972) 2 SC 57 at 58 - 86.

Ordinarily, failure of a plaintiff to file a defence to a counter claim may not be damaging or disastrous if he succeeds in his claim. The success may after all render useless the counter claim, depending on the nature of the counter claim. But where he fails in his claim and he had filed no defence to the counter claim, the defendant's counter claim will be taken as uncontroverted. See Ogbonna Vs. AG Imo State (1992) D 1 NWLR pt. 647 at 698.

There is no doubt, there was indeed no need for filing of any defence to the counter claim of the respondent herein. There was no dispute on the amount claimed as the balance on the deposit made by the appellant for the purchase of Perkins generating set which costs more than the Dorman generating set. Failure to file defence to the counter claim was therefore not damaging to his case. The case of the appellant deserves to fail for different reason and on different grounds. In the instant case, the counter claim was based on the balance of the cost price of the Perkins generating set which was delivered to and delivery acknowledged by the appellant. Indeed as noted by the Court below upon which there was no appeal, the said Perkins generating set has remained in possession of the appellant since it was delivered sometime in 1994.

I am therefore not in the slightest doubt that the respondent is entitled to the balance of the cost price of the Perkins generating set counter claimed. The Court below properly awarded same.

Without any further ado, this appeal is most unmeritorious and lacking in substance aside from being vexatious. It is liable to dismissal. It is accordingly dismissed.

In other words, the judgment of the Court below delivered on 16th January 2003 is affirmed along with the counter claim of respondent.

There shall be costs of N100,000 to the respondent against the appellant.

B

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, ARIWOOLA, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit and should therefore be dismissed.

I consequently order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal dismissed.

MUNTAKA-COOMASSIE JSC

I have had the privilege of reading before today the leading judgment of my learned brother Ariwoola JSC just delivered.

I entirely agree with his reasoning and conclusions in dismissing this empty appeal. The judgment of the lower court is correct and is affirmed. The appeal is devoid of any merit, same is hereby dismissed by me. I abide by the order of costs awarded to the respondent.

NGWUTA JSC

Having read in draft the lead judgment just delivered by My Learned Brother, Ariwoola, JSC, I entirely concur in the reasoning and conclusion therein.

Exhibit B is a letter purporting to terminate the agreement between the parties herein. Even if the letter was actually delivered as alleged by the appellant, but denied by the Respondent, the author of the letter, Polema Industries Limited, is not a party to the contract of sale of the generating set. Exhibit B could not have, and did not, terminate the contract as there is no privity of contract between the company and the parties to this appeal. See *Ikpeazu v.*

ACB Ltd (1965) NMLR 374; Snelling v. John Snelling (1972) 2 All ER 79.

The counter-claim is the difference in price between a Dorman Diesel Generating set which should have been delivered to the appellant by the Respondent and the Perkins generating set which was, as found by the Court below, delivered to the appellant. B

Appellant did not file a defence to the Court claim. However, as pointed out in the lead judgment, appellant's case on the counter-claim fails for reason other than failure to join issue on same. There was no appeal against the finding of the lower court that the Perkins generating set was delivered to, and remained in the possession of, the appellant since its delivery in 1994. C

There being no issue on the price of the generating set delivered, the Respondent is entitled to the counter-claim as the balance of the cost of the Perkins generating set delivered to the appellant the receipt of which the appellant acknowledged. D

Based on the above and the fuller reasons in the lead judgment, I also dismiss the appeal as devoid of merit. I abide by the consequential orders in the lead judgment, including order on costs. E

MUHAMMAD JSC

My learned brother Ariwoola, JSC had obliged me a preview of his lead judgment just delivered and I agree with his reasoning leading to the conclusion that the appeal lacks merit and accordingly fails. F

Let me also note that the court below has found that the appellant had agreed to purchase from the respondent a 500KVA Perkins Generator in place of the Dorman Diesel Generating set the two earlier agreed upon that it be delivered on availability within four days after full payment of the purchase price. The appellant had paid for the Dorman Diesel set within time even though same was not available at the time of the payment which is evidenced by exhibit "A". G H

In exhibit "B" the appellant purports to terminate the contract for the supply of the Dorman Diesel Generating Set in spite of exhibit "C", the way bill dated 19th August, 1994 evidencing the delivery of the 500 KVA Perkins Generator to the appellant which

delivery note the appellant has duly signed. Exhibit “F” is the sale invoice in respect of the Perkins set which has a price differential to which respondent’s counter claim relates. The court below having found a subsisting agreement between the appellant and the respondent for the purchase of the Perkins Generator which Generator the respondent had delivered to and the appellant by exhibit “C” acknowledged delivery of. The court also found that there was difference in price between what the appellant paid in respect of the Dorman Diesel Generator but was unavailable. In allowing the appeal and having further found merit in the respondent’s counter-claim, the court below held the appellant herein liable for the difference in the price of the two Generating sets. It ordered payment of the difference by the appellant to the respondent.

Dissatisfied, the respondent at the lower court has appealed to this Court on lone surviving issue thus:-

“Whether the court below was right to have entered judgment in favour of the Defendant/respondent on the counterclaim.”

The main plank of appellant’s argument is that since the respondent never appealed against the trial court’s decision on the basis of his counter-claim, the court below is wrong to have pronounced on an issue that was not before it and accordingly the lower court’s decision on the point persists. Counsel relies particularly on *Ebba v. Ogodo* (1994) 1 SCNLR 372 at 375 and *Sumonu v. Oladokun* (1996) 6 NWLR (part 467) 381 and prays that the lower court’s interference being perverse be set aside. Though conceding that though the omnibus ground was one of the grounds in the respondent’s Notice of Appeal at the court below, same it is argued, cannot be the basis of the lower court’s specific finding pertaining respondent’s counter-claim. Counsel support his contention with *Ndiwe v. Okocha* (1992) 7 NWLR (part 252) 129 at 139 - 140 and *Finnih v. Imade* (1992) 1 NWLR (part 219) 512 at 534 and urges that the issue be resolved against the respondent and appeal allowed.

Responding, learned respondent’s counsel argues that respondent has as the defendant in suit No.A/511/94 counter-claimed against the Plaintiff/appellant in paragraphs 2 & 3 of his statement of defence and counter-claimed the balance of the cost of the Perkins 500KVA Generating Set with interest thereon. The trial court in spite of appellant’s silence on the issue, learned respondent’s counsel sub-

mits, dismissed respondent's counter-claim.

One of the issues distilled by the respondent as appellant at the court below, submits learned counsel' is on whether the trial court was right to have dismissed respondent's counterclaim.

Now, the lower court at page 267 has found that appellant had indeed taken delivery of the Perkins 500KVA Generator that costs more than the Dorman Diesel generating set. The latter costs N3,124,833.00k while the former cost, N3,750.000.00k. It is the difference between the cost of the two, N473,666.92, which the respondent counter-claimed and having been borne by the evidence on record, in allowing respondent's appeal against the trial court's decision dismissing the counter-claim that the court below ordered payment to the respondent by the appellant. The appellant argues profusely that this decision of the court below is wrong.

Learned appellant's counsel cannot be right' Respondent's counter-claim is a separate action which, once proved as in the instant case, entitles the respondent to judgment. The trial court's dismissal of the counter-claim that has been established is certainly perverse and the court below is right to have set aside such a decision that is not borne out by the evidence before the trial court. See Major I. Z. Umoru (Rtd) & another v. Alhaji Abubakar Zibiri & 4 others (2003) NSC QLR (Vol.14) 781 and Jonason Triangles Ltd & another v. Charles Moh & Partners Ltd (2003) NSC QLR (vol. 12) 1.

It is for the foregoing but more so the fuller reasons adumbrated in the lead judgment that I also dismiss this appeal and abide by the consequential orders therein including the order on costs.

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