

SUPREME COURT OF NIGERIA
FRIDAY 24TH MAY, 2013. SC. 72/2001
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

REPTICO S. A. GENEVA APPELLANT
AND
AFRIBANK NIGERIA PLC RESPONDENT

ACTIONS - Commencement - Legal personality - Party who institutes action in court must be a legal person - Either as a natural person - Or as an institution having juristic personality (H1)

PARTIES - Issues - Proof - When issues are joined by parties in pleadings - Evidence is required to prove them as averred - And the person with the burden of proving the issue - Must adduce satisfactory evidence (H2)

COMPANY LAW - Company - Incorporation - Proof - No document will satisfactorily establish the legal personality of a company - Than its certificate of incorporation (H3)

ACTIONS - Commencement - Validity - Appellant does not exist in law - For failing to prove its juristic personality to sue and be sued - Hence its action in the trial court is incompetent (H4)

FACTS

Plaintiff/appellant (Reptico S.A. Geneva) commenced this action at the High Court of Lagos State against defendant/respondent, claiming several sums of money as special and general damages for breach of contract. It also claimed for 20% interest rate on N17,100,000.00 per annum until judgment debt is satisfied. At the trial, respondent challenged the competence of appellant to sue it. This was however overruled by the court. At the end of the trial, the court found for appellant and awarded the sum of N17,100,000.00 being the price of the rice, the subject matter of the contract. The court also awarded some interest rate on the sum.

Dissatisfied, respondent filed appeal at the Court of Appeal, Lagos Division. The court allowed the appeal and set aside the judgment of the trial court. The court relying on the issue of lack of legal capacity to initiate the matter, ordered the dismissal of appellant's claim in its entirety. Aggrieved, appellant lodged an appeal at Supreme Court.

ISSUE FOR DETERMINATION

Whether notwithstanding Exhibits P11 and D20, the appellant still needs to prove its incorporation status.

HELD (Unanimously striking out the appeal per
ARIWOOLA JSC)

ACTIONS - Commencement - Legal personality

1. Generally, the law recognizes two categories of persons who can sue and be sued in court. They are natural persons, with life, mind, brain and physical body and other artificial persons or institutions having juristic personality.

In Alhaji Afia Trading & Transport Company Ltd. vs. Vesitas Insurance Company Ltd. (1986) 4 NWLR (Pt.38) 802, the court held that a party who should commence action in court must be a person known to law, that is, a legal Person.

In other words, no action can be brought by or against any party other than a natural person or body of persons, unless such a party has been given by statute, expressly or impliedly either (a) a legal personality under the name by which it sues or is sued or (b) a right to sue or be sued by that name.
(p. 2115 E)

PARTIES - Issues - Proof

2. There is no doubt and it is a fundamental procedural requirement that when issues are joined by parties in the pleadings, evidence is required to prove them as averred. It is the person upon whom the burden of establishing that issue lies that must adduce satisfactory evidence. It therefore necessarily follows that when there is no such evidence, the issue, must be resolved against him and the consequences of that

are as decisive of the case presented as the materiality of that issue. Generally, the nature of the evidence that will suffice, as to whether in oral or documentary, may well depend on the issue in question and the requirement of the law. (p.2116 B)

COMPANY LAW - Company - Incorporation - Proof

3. In an attempt to prove its incorporation, the appellant relied on Exhibit P11, the power of Attorney it produced and tendered, and Exhibit D20, a Form claimed to have been filled by the respondent where it described the appellant by the name by which it sued - Reptico S.A. Geneva.

Interestingly, the trial court accepted and relied on these documents to establish that the appellant proved that it is an incorporated company in Switzerland, in particular, by what the learned trial Judge called an admission by the respondent. This, with respect, was to say the least, a misconception of the fundamental procedural requirement. There is no statement of admission in any document prior to litigation by a defendant that can confer the required legal personality on a party when issue has been joined on the matter.

There is nothing in Exhibits P11 and D20 to take place of a certificate of Incorporation.

No other document will satisfactorily establish the legal personality of an artificial person such as an incorporated liability company than its certificate of Incorporation.

It is interesting to note that Exhibit P11 was not tendered as evidence of incorporation of the appellant but only to certify that the person who signed the document - Power of Attorney, was a member of the Board of Directors and as such had the legal capacity to donate the Power of Attorney on behalf of the appellant. The Power of Attorney is not and cannot take the place of Certificate of Incorporation. No other evidence, either oral or documentary was adduced by the appellant at the trial court to show any other way of proving that the appellant is an incorporated company in Switzerland other than the name it calls itself.

It follows therefore that the appellant in the instant case failed to prove that it has a juristic personality that enables it to sue

and be sued. This issue is resolved against the appellant as it did not establish its legal personality with Exhibits P11 and D20. (pp. 2117 A/H/2120 A)

ACTIONS - Commencement - Validity

- B **4. The appellant as plaintiff, not having been proved to be a legal entity or juristic person entitled to sue and be sued in law, does not exist, so to speak, in the eye of the law. As a result, the whole action in the trial court is incompetent, to say the least, and I so hold. The appellant's case as constituted before the trial court is hereby struck out as it was not shown or proved to have been instituted by a person known to law. In the final analysis, the appeal could not be sustained as there is not a competent appellant.** (p. 2120 B)

D

NOTABLE POINTS OF INTEREST

ARIWOOLA JSC

1. Appellate court can reformulate issues for clarity sake

- E As stated earlier, the appellant distilled six issues for determination of this appeal and these have been argued. However, there is no doubt that an appellate court has the power to reformulate the issues for determination of a matter, as long as the reformulated issues are within the grounds of appeal filed by the appellant but not outside. This is usually done by the court mostly for the purpose of clarity and precision when it is noticed by the court that the issues as distilled are clumsy, not precise and sometimes are proliferated. (p. 2111 G)

2. Plaintiff – Meaning of

- G First and foremost, who is a plaintiff or claimant? A plaintiff is the party who brings a civil suit in a court of law. While a claimant is one who asserts a right or demand, or one who asserts a property interest in land, chattels or tangible things. (p. 2112 B)

- H ***3. Plaintiff is to formulate his claim as court is not to do so for him***

Therefore, it is the duty of the plaintiff who has instituted a civil action in court to formulate his claim or relief being sought. The court is not

to create or formulate relief not sought by plaintiff against the defendant. The only and primary duty of court is to ensure that plaintiff's claim or case is cognisable. That is, capable of being judicially tried or examined by the court. As a result, in considering whether or not a Court has jurisdiction to try or examine a claim brought by a plaintiff, only the claim endorsed on the writ of summons and statement of claim should be considered. No reference is to be made to whatever defence, the defendant may put up against the plaintiff's claim. (p. 2112 C)

REPRESENTATION

Prof. S. A. Adesanya SAN., with G. O. Okusanya Esq., for Appellant
Chief Tunde Olojo, with Bode Omoboriowo, Esq., for Respondent

CASES REFERRED TO

Overseas Construction Ltd v. Creek Enterprises Ltd (1985) 3 NWLR (pt. 13) 407
Adeniyi v. Adeniji (1972) 4 SC 10
Shitta Bay v. The Federal Public Service Commission (1981) 1 SC 40
Bourhill v. Young (1943) AC 92
Ezeanya v. Okeke (1995) 4 NWLR (pt. 388) 142
Sande v. Abdullahi (1989) 4 NWLR (pt. 116) 387
Ogunlowo v. Ogundare (1993) 7 NWLR (pt. 307) 610
Brawal Shipping Ltd v. Onwadike (2000) 11 NWLR (pt. 678) 387
Okonji v. Njokanma (1999) 14 NWLR (pt. 638) 250
Anason Farms v. Nat. Merchant Bank (1994) 3 NWLR (pt. 331) 241
J.K. Randle v. Kwara Breweries Ltd. (1986) 6 SC 1
Odofin v. Mogaji (1978) NSCC Vol. II 275
Nwana v. FCDA (2004) 7 SCM 25
Agbakoba v. INEC (2008) 12 SCM (pt. 2) 159

STATUTES REFERRED TO

Evidence Act, ss. 27, 68(2), 75
Limitation Law Cap. 118 Laws of Lagos State, s. 1

BOOKS REFERRED TO

Charlesworth on Negligence 7th Ed. p. 6 para. 106
Black's Law Dictionary 9th Ed. pp. 1267, 282

LEAD JUDGMENT BY ARIWOOLA JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Division, hereinafter referred to as the Court below, delivered on 15th day of December, 1999 in appeal number CA/L/303/98. The facts of this case are as follows:

The plaintiff, Reptico S.A. Geneva, herein-after referred to as the appellant, had commenced an action by a writ of summons dated 18th September, 1991 in the Lagos Judicial Division of the Lagos State High Court. The statement of claim was subsequently filed on 12th November, 1991 against the Defendant, herein after referred to as the Respondent.

The appellant had by the amended statement of claim filed on 25/3/92 in paragraph 30 claimed as follows:

“the sum of N37,886,000 being the Naira equivalent of US\$1,994,000.00 comprising special and general damages, the sum of N17,100,000 being the Naira equivalent of US\$900,000.00 the value of a bill of exchange, the subject matter of this suit, N11,286,000.00 the Naira equivalent of US\$594,000.00 being the interest thereon at 12% per annum from 24th March, 1986 to date and N9,500,000.00 the Naira equivalent of US\$500,000.00 as general damages, which claim arose when the Defendant confirmed in writing to the plaintiff through the plaintiff’s agent/banker, Swiss Volksbank in Geneva in a letter dated 24th March, 1986 issued in Lagos that funds are available, representing the Naira counter-value of the said bill to settle the bill immediately the defendant received promissory notes for rescheduling of the payment as well as a written admission that the foreign exchange for the said bill was awaiting allocation by the Central Bank of Nigeria upon the deposit of the Naira counter-value thereof with the said Central Bank and it is the duty of the defendant to secure the payment of the bill either immediately or by rescheduling by applying to and complying with the relevant Central Bank or Nigeria rules, regulations and conditions precedent but the defendant failed, refused and or neglected to comply with the said conditions, rules, regulations and procedures. Moreover, in the said letter of 24th March, 1986, the defendant expressly requested Swiss Volksbank to bring the representation therein to the plaintiff’s, knowledge and attention. This was done and the plaintiff

relied upon the said representation and suffered loss as highlighted herein.

The plaintiff claims interest on the sum of N17,100,000.00 being the Naira equivalent of US\$900,000.00 at 20% per annum until judgment and thereafter at a further rate of 20% per annum until judgment shall have been satisfied. B

PARTICULARS OF DAMAGES

SPECIAL DAMAGES:

i. Value of the accepted Bill of exchange N17,100,000.00, the Naira equivalent of US\$900,000.00. C

ii. Interest on the bill at 12% per annum March, 1986 - September, 1991, N11,286,000.00, the Naira equivalent of US \$594,000.00, D

iii. General Damages - N9,500,000.00, the Naira Equivalent of US\$500,000.00. D

Total: - N37,886,000.00 being the Naira equivalent of US \$1,994,000.00.

The respondent filed an amended statement of defence to which the appellant filed a reply on 2nd June, 1992. The case proceeded to trial. The appellant called five (5) witnesses who testified while two (2) persons testified for the respondent. At the conclusion of the trial, the court found that the appellant was entitled to judgment against the respondent in the sum of Seventeen Million, One Hundred Thousand Naira (N17,100,000.00) being the price of the rice which the respondent was expected to collect and to the appellant's order. Interest was also awarded on the amount at the rate of 12% per annum from 24th March, 1986 until September, 1991, which amounted to N11, 286,000.00 and at the rate of 12% from October, 1991 until the judgment and thereafter at the rate of 10% per annum being interest on judgment debt until the judgment debt is fully and finally liquidated. F

Being dissatisfied with the judgment of the trial court, the respondent appealed to the Lagos Division of the Court of Appeal, hereinafter referred to as the court below. The respondent's appeal was allowed leading to the setting aside of the judgment of Ade Alabi, J. (as he then was) delivered on 6th October, 1995. In its place, the court below ordered the dismissal of appellant's claim in its entirety. G

Dissatisfied with the judgment of the court below led to the

instant appeal. Pursuant to the rules of this court as amended, parties upon service on them of the records of appeal, filed and exchanged their respective brief of argument. On pages 4 to 5 of the appellant's brief of argument filed on 10/12/2001, the appellant formulated six (6) issues for determination of the appeal as follows:

B Issues for Determination:

"1. Whether it was proper for the Court of Appeal to make a case, which the appellant did not make or purport to make as the plaintiff in the trial court.

C *2. Whether the claim as formulated is statute barred.*

3. Whether the Court of Appeal was right in holding that a (Swiss) foreign company must be proved as provided for by the Nigerian Companies Law and the decision of the Supreme Court in J.K. Randle V. Kwara Breweries Limited when both companies and Allied Matters Act and the decision of the Supreme Court cited do not deal or purport to deal with a foreign company.

4. Whether the Court of appeal was right in holding that what has been admitted should still be proved.

E *5. Whether the Court of Appeal was right by ignoring the law of nations which is part of Nigeria law as set out in Hutcheon v. Mannington that a statement of a Notary Public is given credit everywhere, when the said court ignore (sic) a certification by a Notary Public in Geneva contained in exhibit P11 that the appellant is a Swiss incorporated company.*

F *6. Whether the Court of Appeal was right in concluding that, the appellant's case was an attempt to avoid being confronted with the argument that there was no contract between the plaintiff and the defendant that prompted the lower court to create a contract*
G *between the Swiss Volksbank and the defendant."*

From the respondent's brief of argument filed on 10/02/2006, the respondent, after paying all required penalty for filing late, formulated four (4) issues from the grounds of appeal filed by the appellant. There is no doubt that the said issues, though slightly differently couched, they are encompassed by the issues distilled from the said grounds by the appellant. I shall therefore use the issues as formulated by the appellant to determine this appeal. The parties took the said issues in argument as follows -

Issue No. 1 -

In arguing this issue, the appellant submitted that it is trite law that courts are bound to decide a case only as formulated in the pleadings of the parties. Thus, it was contended that it is a violation of a principle of law or procedure for a court to depart from the issues before it and speculate on matters which are neither pleaded nor proved by evidence. Learned counsel contended further that a corollary of the above rule is that a court must not make a case different from that made by the parties. Reliance was placed on *Overseas Construction Limited v. Creek Enterprises Limited* (1985) 3 NWLR (pt. 13) 407. He submitted that where a court formulates its own issues and bases its decision thereon such decision will be set aside. He cited *Adeniyi V. Adeniji* (1972) 4 SC 10 at 17; *Shitta Bay v. The Federal Public Service Commission* (1981) 1 SC 40 at 59. Learned counsel referred to pages 379 and 392 to submit that the above principles on judicial adjudication were violated by the court below. And that the court misunderstood the appellant's case and thereby created an imaginary cause of action in contract.

Learned counsel referred to the endorsement on the writ of summons and statement of claim and contended that the appellant's case was founded on the doctrine of estoppel by negligence, in particular, paragraphs 10, 11 and 13 of the amended statement of claim. On the principle or doctrine of estoppel by negligence, learned counsel referred to *Charlesworth on Negligence*, 7th Edition page 6 paragraph 106. He submitted that the duty of care in tort of negligence is imposed by law, as a result, there need not be a contract between the parties before an action for negligence can arise. The test whether a duty of care exists is, in turn based on reasonable foreseeability. He relied on *Bourhill v. Young* (1943) AC 92 at 101.

The appellant referred to exhibit P7, the letter of 24th March, 1986 written by the respondent upon which the appellant relied. It was contended that the drawer referred to in the said letter is the appellant. Therefore, it is not in dispute that the appellant was within the contemplation of the respondent. Learned counsel contended further that the negligence in this case consisted in the failure of the respondent as a prudent banker to follow up the payment or the rescheduling of the payment by the Central Bank of Nigeria. He stated further that this is manifested the more in the fact that the respondent failed to deposit the Naira counter value of the money to be

remitted with the Central Bank when requested to do so, even though the respondent had admitted to the appellant in its letter of 24th March, 1986 that it had the fund and also of failure to communicate relevant information which was peculiar within the respondent's knowledge on the batch number, batch date, batch amount etc. which
B would enable Volksbank to also apply abroad for matching, for the purpose of rescheduling.

Learned counsel contended that the appellant in its case alleged and gave the particulars of negligence and evidence of the
C same which made the trial judge make a finding of negligence. He submitted that there was no appeal against the finding of fact that the respondent was negligent. It therefore stands. He contended further that the court below based its decision on the issues formulated or
D raised suo-motu by the court without an opportunity given to the parties to be heard, leading to denial of justice. He relied on several decisions including: Ezeanya V. Okeke (1995) 4 NWLR (PT 388) 142; Sande V. Abdullahi (1989) 4 NWLR (pt 116) 387; Ogunlowo V. Ogundare (1993) 7 NWLR (pt 307) 610.

He urged the court to resolve the issue against the respon-
E dent but in favour of the appellant and set aside the decision of the court below.

On this issue, the respondent referred to the case as made by the appellant at the trial court as plaintiff, the pleadings, the evidence
F adduced and the judgment of the trial court. Learned counsel related them to the judgment of the court below. He contended that there was misconception in the appellant's evidence and the trial court's judgment which resulted in the judgment of the court below. Learned counsel submitted that the appellant was wrong in its
G contention that the lower court formulated a case outside the case the appellant presented to the trial court as plaintiff. He submitted further that the trial court itself was in doubt, as to which of the emerging scenarios of causes reflected or represented the appellant's case as presented before it by the appellant, but it settled for what it de-
H scribed as "*negligence in the performance of a duty arising out of contract*" which contract the trial court found not to have existed.

Learned counsel submitted that the appellant failed to draw a distinction between tortious liability imposed in law that is, resulting without regard to contractual relationship between the tortfeasor

and injured party and tortuous liability arising from or hinged on contract. The former is, to the extent that it did not form the basis of the trial court's decision irrelevant, while the latter is the one on which arguments necessarily remove. If any, the appellant's grouse should be with the decision of the trial court which erroneously found a contract relationship and not the lower court which, upon examining the premises on which the trial court's judgment is predicated, held that there was no contract. B

The respondent contended that even though the cases cited by the appellant establish, among others, the fact that tort can arise out of contract or from contract, they do not serve as answer to the appellant's predicament on the potent issue that the trial court did not find tortuous liability as arising out of the contract of the parties, but that the tort of negligence arose out of a contract, which the lower court found not to exist. C

The respondent submitted that the case which the appellant tends to make before this court is not that there was a contract, but that its case was unalterably based on contract *dehors* (sic). D

Learned counsel contended that in the light of the above argument, particularly, in so far as the lower court did not make any case different from that which the appellant as plaintiff made before the trial court, the respondent submitted that the judgment of the court below is unassailable. Hence, he urged the court to resolve the issue against the appellant and dismiss the appeal on this ground. E

Issues 3, 4, and 5 F

These issues are argued together being inter related. They turn on (a) whether an admitted fact must still be proved; (b) whether a foreign company as distinct from a Nigerian Company must still be proved in accordance with the Company and Allied Matters Act, (CAMA), (c) whether the decision in *J.K. Randle V. Kwara State Breweries Limited* applies to proof of a foreign company and (d) whether Nigeria is obliged to give effect to the law of Nations whereby a statement of a Notary Public is given effect and recognition, in particular, where a foreign Notary Public certifies that a foreign company is incorporated. G

In dealing with these issues, the appellant referred to Exhibit D20, a Form which was filled by the respondent and sent to the Central Bank of Nigeria. H

Learned counsel pointed out that (a) in the form, the respondent had described the appellant by its corporate name, Reptico S. A. Geneva, the name in which the present suit was instituted, (b) The respondent has not at any stage of the proceedings stated or even suggested that it does not know what the letters “S.A.” stand for.

B Learned counsel contended that in common parlance, the letters “S.A.” stand for “Societe Anonym”, that is “a limited liability company.” It was submitted that, deliberately and consciously describing the appellant in its corporate name particularly to a third party - regulatory institution, amounts to an admission. The appellant further submitted that the respondent is estopped from stating that it did not know that the appellant is an incorporated body.

Learned appellant counsel contended that the question whether the representation by the respondent in Exhibit D20 amounted to an estoppel and whether the doctrine of estoppel applied was raised, rather than decide the very crucial issues’ the Court of Appeal sidetracked them and opined that whatever Form the respondent had filled in the past describing the appellant in the same name by which the present suit was brought would not make the appellant an incorporated company, if it has not been incorporated.

It was further contended that a determination whether Exhibit D20 amounted to admission and whether it raised the issue of estoppel would no doubt have affected the evidential burden of proof. The reason being that once the respondent acknowledged as per F Exhibit D20 that the appellant bears its corporate name, it would be incumbent on the respondent to prove that notwithstanding the admission of the appellants corporate name, it (that is respondent) did not understand that the letters “S.A.” stand for a limited liability company. There was no such evidence. Learned counsel contended that it is important to decide whether a party can, in its pleadings deny what it has already admitted in a written document. He submitted that failure by the Court of Appeal to resolve this important issue could amount to a denial of fair hearing. It would deprive this court H of an opportunity of knowing what the intermediate court has decided. It would result in a miscarriage of justice. He relied on *Brawal Shipping Limited V. Onwadike* (2000) 11 NWLR (pt.678) 387.

On the admitted facts, learned counsel submitted that what has been admitted need not be proved. An admitted fact, in law, is

not a fact in issue and it needs not be proved. He referred to Section 75 of the Evidence Act and *Agbanelo V. Union Bank of Nigeria plc* (2000) 7 NWLR (pt.666) 534.

Learned counsel contended that with the observation of the court below that at the trial, the appellant did not directly call any evidence of its incorporation presupposes that the court below recognized that there was, at least, indirect evidence of the incorporation of the appellant. It was further contended that the Court of Appeal raised and applied suo motu the proviso to Section 75 of the Evidence Act, without inviting argument from counsel. He submitted that, that was wrong relying on *Okonji V. Njokanma* (1999) 14 NWLR (pt.638) 250. B
C

Learned counsel referred to *Randle V. Kwara Breweries Ltd.* (supra) and submitted that the court below quoted the Supreme Court out of context and purportedly wrongly relied on the said quotation to insist on production of Certificate of Incorporation to prove the appellant's incorporation in Geneva. D

Learned Counsel contended that, the appellant being a foreign company but not a Nigerian company, its incorporation must only be proved in accordance with the appropriate foreign law. He submitted that, foreign law itself is a question of fact. It was therefore wrong for the court below to apply the Nigerian law on the manner of proving a foreign (Swiss) Company when there was no evidence that Swiss Law is conterminous with Nigerian law. It was further contended that foreign law, in particular, Swiss Law cannot and should not be assumed. It was therefore the wrong assumption and conclusion that the Swiss company must be proved in accordance with Nigerian law that led the court below to the rejection of the written evidence of a Swiss Notary Public that the appellant was a Limited Liability Company under the Swiss Law. E
F
G

Learned counsel referred to Exhibit P11, the written affirmation of Jean Rodolphe Christ, a Notary in Geneva. He contended that in rejecting the written assertion of the Notary Public, the court below had ignored the well known principle of the Law of Nations of which Nigeria is a part, that a statement of a Notary Public is given credit everywhere in which Law of Nations applies. He relied on *Hutchison v. Mannington* (1802) Ves, 823 at 824. He submitted that there was no evidence by the respondent that the certification by the H

Swiss Notary Public was not admissible evidence under Swiss Law. He urged the court to resolve the issues in favour of the appellant against the respondent.

The respondent covered the above issues in its issue No.1 - whether the lower court was right in its decision that the appellant
B had a duty to prove its juristic personality and if so, whether it has duly discharged the duty.

Learned respondent's counsel referred to the contention of the appellant as follows:

C (i) That there was an admission by the respondent contained in Exhibits P11 and D20, that the appellant was a juristic Person;

(ii) that foreign companies need not prove legal status by way of their certificate of incorporation, in accordance with the provisions of CAMA and whether the decision in J.K. Randle V. Kwara
D State Breweries Limited applies to proof of a foreign company;

(iii) that effect should be given to the "Law of Nations" whereby in this case, the statement of Notary Public should be given effect and recognition.

Learned counsel contended that the trial court had found at
E the close of pleadings, that an issue was joined by the parties on the juristic personality of the appellant, which finding the court below agreed with. He submitted that it then became necessary to establish direct and material evidence on the legal status of the appellant. And
F that appellant did not file a respondent's Notice on it. The respondent took those points seriatim as follows:

On the alleged admission, learned counsel referred to the appellant's basic argument as anchored on the contention that there was an admission founded upon the contents of Exhibits P11 and
G D20 and that the admission constituted an estoppel under Section 27 of Evidence Act.

He referred to Exhibit P11 as a Power of Attorney donated by appellant to one Nurudeen Abiodun Adesanya, to prosecute the case while Exhibit D20 is a Form alleged to have been filled by the
H respondent, and sent to the Central Bank.

Before addressing the argument on those two Exhibits, learned counsel addressed two issues, viz: burden of proof and admission on their jurisprudential sense and applied their postulates to the specific points manifest in the two Exhibits.

Burden of proof: - It is trite law that he who asserts must prove. He referred to Sections 135, 136 and 137 of the Evidence Act, to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist. He contended that when the provisions of the Evidence Act are applied to the instant case, the burden of proof that the appellant was an incorporated company as averred in its claim rests squarely with the appellant. B

Learned counsel contended that the court below held, inter alia, that it was the appellant who averred its incorporation under Swiss Law that had the duty to prove. He contended that the appellant did not challenge this finding, yet had contended in its ground of appeal that the issue of Swiss Law does not arise because of estoppel by admission. C

On admission, the respondent submitted that, admission as a veritable element in civil trial process has been given both statutory and judicial interpretations. Broadly, an admission is a statement made by a party to civil proceedings which in effect, legally relieves the adverse party of the need or requirement to prove the facts so admitted. He referred to Section 75 of Evidence Act. He contended that from the provisions of the Evidence Act, it is obvious that before an admission can be inferred, there should either be an agreement to admit at the hearing or before the hearing, parties agree to admit by any writing or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings. D E F

Learned counsel submitted that there is no evidence whatsoever that the parties agreed on the issue of legal personality of the appellant or in their pleadings. On the contrary, the evidence was that there was no correspondence or communication whatsoever between the parties prior to, during or after the filing of the suit by the appellant and that the trial court itself found an issue to have been joined on the appellant's juristic status. G

It was submitted that in the light of the provisions of section 75 of Evidence Act, and lack of evidence of agreement, coupled with the state of the pleadings by which the trial court found issues on legal personality by appellant to have been joined, there cannot be any admission of the incorporation of the appellant. If issues were not joined, the respondent wondered why the appellant relied on H

Exhibits P11- Power of Attorney and D20, the Refinance Form. He submitted that any inference of admission in the circumstance will be operating in the realm of speculations or fiction.

Learned counsel further submitted that, admission on which the court can rely must be full, clear, unambiguous, and lead irresistibly to a conclusion that the party making the admission accepts or concedes to a factual situation or does not show any objection or opposition to the factual situation. He accepts it as correct. He relied on *Anason Farms V. Nat. Merchant Bank* (1994) 3 NWLR (Pt.331) 241.

Learned counsel contended that in some cases, in particular, as relates to the competence of an action, admission would still not obviate the application of the provision of Section 135 of the Evidence Act. He relied on *ACB V. Emostrate Ltd.* (2002) 8 NWLR D (Pt.770) 501 at 518.

Learned counsel submitted that there was no admission whatsoever by the respondent that the appellant was a juristic person, and as such, the Court of Appeal was absolutely right that the appellant had to prove its juristic personality.

Treatment of Exhibits D20 and P11.
Exhibit D20

This is a form filled by the respondent and sent to the Central Bank of Nigeria wherein the respondent was said to have described the appellant by its corporate name, *Reptico S.A. Geneva*. This is the name on which the appellant, as plaintiff, filed the action. This according to the appellant, exempted the need to establish by direct evidence, the actual or true name by which appellant became incorporated. Learned counsel contended that the appellant had variously been described as *Reptico S.A. Geneva* or “*Reptico SA*” simpliciter, so much that its true name still remains till date uncertain. He stated that “*Reptico S.A. Geneva*” is not the same as “*Reptico S.A.*”; in the determination of corporate personality.

Learned counsel submitted that even where there is no difference between the two names, the reference to whatever name a company calls itself cannot, by any stretch of imagination, be direct evidence that the company is an incorporated (legal) entity.

The respondent observed that at the trial, the appellant had contended that Exhibit D20 had no probative or any value at all,

while the trial court itself pronounced it worthless and meaningless, yet the said Exhibit was relied upon as proof of admission of incorporation by the respondent. In other words, learned counsel contended that the trial court had found the Exhibit as lacking in authorization of respondent and thus meaningless and worthless, yet it found the same document as evidence of admission by the same respondent who was adjudged not to have initiated the Form. B

Learned counsel submitted that the appellant cannot on one hand accept the trial court's finding that issue was joined on its juristic personality and contend on the other hand that there is an admission. The argument on admission cannot stand in the face of the trial court's finding that issues were joined on the fact of corporate personality of the appellant. And the appellant cannot also contend at the same time that it has proved juristic personality by virtue of the Notary Public "Statement" and further argued that there was admission by respondent, suggesting that it was unnecessary for it to prove its juristic status. C D

Learned counsel submitted that on Exhibit D20, there is no admission by estoppel in this instance and Section 27 of Evidence Law is absolutely irrelevant and inapplicable in this case. E

Exhibit P11

This is a Power of Attorney in which, the learned counsel contended, for the purpose of compliance with Section 118 of Evidence Act, the Notary Public "certified" the signature of the representative, who, according to the Notary Public signed the document and having legal capacity to grant this Power of Attorney on behalf of Reptico S.A. Limited Company in Geneva. F

Learned counsel contended that the appellant's PW5 through whom Exhibit P11 was tendered did not give evidence on the document as constituting evidence of incorporation. He contended further that the admissibility of the document was severely objected and the weight was shredded at both the trial court as well as argued at the court below. Foreign Companies and J. K. Randle case: G

Learned counsel referred to the contention of the appellant that the decision in *Randle V. Kwara State Breweries* case to the effect that certificates of incorporation constitute proof of incorporation would not hold, in the case of foreign companies like the appellant. H

Learned counsel contended, firstly, that the trial court did not

deny the efficacy of the *Randle V. Kwara State* case but merely held that there was an admission, without which it would have been itself bound. Secondly, that every proof of incorporation of foreign companies is not through certificate of incorporation. It was submitted that in so far as the appellant pleaded its Incorporation under Swiss
B law, it was only the appellant that has the duty to prove. He submitted that neither Exhibit D20 nor Exhibit P11 has in it evidence that it is the manner of proving incorporation under Swiss Law.

Thirdly, on who was to prove Swiss Law, learned counsel
C contended that there is no shift in the burden of proof to require that the respondent proves Swiss Law on incorporation method. He relied on *Odofin v. Mogaji* (1978) NSCC Vol. II 275; to the effect that, until plaintiff proves its case by legally admissible evidence, the burden of proof does not shift to the defendant.

D On Law of Nations - Learned counsel observed that neither at the trial court nor at the court below did the appellant argue the Law of Nations postulate or seek leave of the court to raise it to justify it being allowed. He submitted that the Law of Nations postulate is not only too late in the day but an afterthought. He relied on *A.I.C. Ltd. V. NNPC* (2005) 1 NWLR (Pt.937) 563 at 569/560.
E

It was contended that if credence is to be given to a Notary Public's statement under "the Law of Nations" which was conceded, the situation must be appropriate, (not in Power of Attorney) and the
F Statement must be cogent, direct, unambiguous and lead unequivocally to the fact that the Notary Public was confirming that the appellant was an incorporated company. Such a fact should be made as a statement on its own, and not in certification of a signature of a donee in a Power of Attorney. He submitted that the Power of Attorney
G was not the Notary Public's document.

Learned counsel contended that, assuming without conceding that the law of nations postulates operate in this case, the important point is to seek to know what it was that the Notary Public "Certified", if any or at all. To all intents and purposes, it was submitted
H that;

(a) the Notary Public is not the donor of the Power of Attorney, that is, he is not the maker of the document;

(b) the Notary Public "Certified" the legal capacity of the donor of the Power of Attorney and not that of the appellant on whose

behalf Mr. Tanmam gave the power;

(c) the Notary Public did not give evidence at the trial to make his said statement acquire credibility. The “certification” was merely to ensure compliance with Section 118 of Evidence Law, and not in any way connected with the contents of the Power of Attorney.

(d) There is no evidence whatsoever as to the manner by which incorporation of companies under the Swiss Law is established. B

On the appellant’s contention that the lower court did not give any reason on its position in respect of the Notary Public’s statement, it was submitted that the lower court gave reason for rendering irrelevant the Notary Public’s description of Appellant as an incorporated body in Exhibit P11. He referred to pages 390 - 391. He submitted that the appellant’s contention and the cases cited are misconceived and should be ignored. C

On proof of incorporation of foreign company, learned counsel submitted that once issue on incorporation was joined by parties, it was the burden of the party that averred its incorporation that was bound to prove its legal status by direct evidence, whether the company is a Nigerian company or foreign. It was submitted that, in the absence of such proof or anything to the contrary, the Nigerian courts will be left with no choice but to apply the Nigerian law - Company and Allied Matters Act in such a case. D E

Learned counsel submitted that the position remains the same regardless of the inclusion of the word “Limited” or “Plc”. He contended that if the position is so with the Nigerian cases, it mutatis mutandis ought to operate to cases of “S.A” which is said to stand for “Societe anonym”. He relied on *ACB Plc. V. Emonstrade Limited* (2002) 8 NWLR (pt. 770) 501; *Bank of Baroda vs. Iyalabani Company Limited* (2002) 13 NWLR (pt 785) 551 - 576. F G

He submitted further that on the authority of *Odofin v. Mogaji* (supra) until the appellant proves its case by legally admissible evidence, the scale of burden of proof does not tilt from it to the respondent. He urged the court to resolve the issues in its favour against the appellant to the effect that the appellant had a duty to establish its juristic status but failed to do so. H

Now issue No 2 - whether the claim as formulated was statute barred, the appellant contended that in law, in determining or computing the limitation of time, the time runs from when the cause

of action arises. Learned counsel referred to the findings of the court below at page 391 of the record and contended that the conclusion of the court below that the appellant's case was statute barred was wrong because from the onset it misunderstood the appellant's case. He contended further that the Court of Appeal's conclusion has no relationship with the appellant's claim. He referred to *Egbe v. Adefarasin* (1987) 1 NWLR 2 per Oputa, JSC at p. 20 on how to determine the limitation of time. This, he submitted is by looking at the Writ of Summons and Statement of Claim.

Learned counsel stated that a cursory look at the appellant's writ of summons and statement of claim show that the appellant's claim was that of negligence arising from a representation contained in the letter dated 24th March, 1986 and that the action was filed on 18th September, 1991, - less than the six (6) years limitation period. The appellant referred to the findings of the trial court on pages 280 lines 9 - 15 and 291 lines 16 - 20 to find that the appellant's case was premised on negligent performance of its duty by the respondent and thereby held that it was in breach of its duty of care.

The appellant referred to the respondent's brief of argument before the court below where it had conceded that the appellant's claim had nothing to do with contract but that it was based on an alleged negligent representation made by the respondent in Exhibit P7, the letter dated 24th March, 1986.

On this point, learned counsel submitted that it was not surprising that the court below came to the wrong conclusion on the applicable limitation period since the court found that the appellant's case was based on an imaginary contract when the case was a claim in negligence by representation arising on the 24th March, 1986. He urged the court to so hold.

On issue 6, learned appellant's counsel submitted that the Justices of the court below erred in law when they concluded that the appellant's case was an attempt to avoid being confronted with the argument that there was no contract between the plaintiff and the defendant that prompted the lower court to create a contract between the Swiss Volksbank and the respondent.

Learned counsel submitted that the above conclusion by the court below was speculative as it was never based on any pleaded fact and no evidence was led in that direction. He relied on *Oyinloye*

V. Esinkin (1999) 10 NWLR (pt. 624) 540 at 551.

It was further submitted that that conclusion was a manifestation of the fact that the court below did not understand the appellant's case, which was in negligence.

It was finally urged on the court to hold that the court below did not understand the appellant's case hence the decision based on that misunderstanding must be set aside, relying on *Shitta-Bay V. The Federal Public Service Commission* (supra). He finally urged the court to allow the appeal and set aside the judgment of the court below.

Issues 2 and 6 which were issues 3 and 4 of the respondent were argued together by the respondent.

The respondent examined the applicability of the Limitation Laws, Cap 118, Laws of Lagos to the various points germane to this appeal. The respondent had a recourse to the findings of the trial court, in particular, as resting on Exhibit P7, the letter dated 24th March, 1986.

Learned counsel contended that by reason of the fact that the appellant did not file any Respondent's notice, there was no alternative to the argument that the decision of the trial court becomes necessary in determining the issue.

Learned counsel referred to the findings of the court below that the contract which the trial court relied upon came into existence in 1982 and payment under it became due in 1982. He contended that, in effect the action should have been brought in 1988 after which year the cause of action is deemed to have lapsed by virtue of Section 1 of the Limitation Law Cap 118, Laws of Lagos State rather than in 1991, thus rendering it statute barred. He submitted that the action is statute bared having regard to the evidence relating to bill of exchange transactions and or the Refinancing/Rescheduling Scheme either of which would have made recourse to court statute barred. He finally urged the court to dismiss the appeal.

As stated earlier, the appellant distilled six issues for determination of this appeal and these have been argued. However, there is no doubt that an appellate court has the power to reformulate the issues for determination of a matter, as long as the reformulated issues are within the grounds of appeal filed by the appellant but not outside. This is usually done by the court mostly for the purpose of clarity and precision when it is noticed by the court that the issues as

distilled are clumsy, not precise and sometimes are proliferated.] See; Unity Bank Plc V. Bouari (2008) 2 SCM 193; (2008) All FWLR (Pt.416) 1825; (2008) 7 NWLR (Pt.1086) 372 Emeka Nwana V. FCDA & Ors. (2004) 7 SCM 25, Agbakoba V. INEC (2008) 12 SCM (pt. 2) 159; (2008) All FWLR (Pt. 410) 799; (2008) 18 NWLR (Pt. B 1119) 489.

First and foremost, who is a plaintiff or claimant? A plaintiff is the party who brings a civil suit in a court of law. While a claimant is one who asserts a right or demand, or one who asserts a property interest in land, chattels or tangible things. See Black's Law Dictionary Ninth Edition pages 1267 and 282. Therefore, it is the duty of the plaintiff who has instituted a civil action in court to formulate his claim or relief being sought. The court is not to create or formulate relief not sought by plaintiff against the defendant. The only and D primary duty of court is to ensure that plaintiff's claim or case is cognisable. That is, capable of being judicially tried or examined by the court. As a result, in considering whether or not a Court has jurisdiction to try or examine a claim brought by a plaintiff, only the claim endorsed on the writ of summons and statement of claim should be E considered. No reference is to be made to whatever defence, the defendant may put up against the plaintiff's claim. In Alphonsus Nkuma V. Joseph Otunuya Odili (2006) 4 SCM 127 at 135, this court opined as follows:

F *"It is a plaintiff who brings a suit that also nominates the issues for decision in the case. Once a plaintiff's suit is based on a right, which is cognisable under the law, it is not for the court to dictate to such plaintiff the manner by which to frame the remedy being sought. The crucial question is - has the plaintiff called sufficient evidence that G will enable the court grant to him the relief being sought."*

What is material for consideration is the case as presented by the plaintiff before the court. The court cannot formulate a different case for the plaintiff. See; S.O. Ilodibia V. Nigerian Cement Company Limited (1997) 7 NWLR (pt. 512) 54 - 55; Ekpenyong V. Nyong H (1975) 2 SC 71 at 80.

The plaintiff in the instant case is Reptico S.A. Geneva - the appellant herein before us.

The amended statement of claim sequel to the writ of summons dated 18th September 1991 by which the plaintiff's action was

commenced in the Lagos State High Court contains the case as presented by the plaintiff before the trial court. The said claim in paragraph 30 of the amended statement of claim was said to be founded on the doctrine of estoppel by negligence. The *"claim arose when the respondent confirmed in writing to the appellant through the appellant's agent/banker, Swiss Volksbank in Geneva in a letter dated 24th March, 1986 issued in Lagos that funds are available, representing the Naira counter-value of the said bill to settle the bill immediately the respondent received promissory notes for rescheduling of the payment etc."*

Before I proceed further, it is pertinent to note the following facts that are not in dispute and need not be proved again having been established.

(i) Kano Cooperative Federation Limited ordered for consignment of rice from Geneva, Switzerland.

(ii) The appellant sold and shipped the consignment of rice to the Kano Cooperative Federation Limited on the account of one Alhaji Ado Dandawaki.

(iii) The sale of the rice was effected on bill for collection basis whereby the appellant drew a bill of exchange for US\$900,000.

(iv) The respondent was the banker to the importer of the rice who was the drawee of the bill.

(v) There was a remittance instruction to the effect that the proceeds should be remitted to the Swiss Volksbank in Geneva, Switzerland being the appellant's bank/agent.

(vi) The drawee of the bill as an importer submitted the documents for exchange control purposes and the respondent submitted the application for foreign exchange to the Central Bank of Nigeria which was processed by the Central Bank.

(vii) Up till today the costs of the rice consignment sold and then exported by the appellant has remained unpaid and unsettled.

As this case stands I am of the firm view that the issue of juristic personality of the appellant to institute this action ab initio should be considered first before considering any of the other issues raised, if at all, by the appellant from the grounds of appeal. The issue can be and shall be couched as follows -

Whether notwithstanding Exhibits P11 and D20, the appellant still needs to prove its incorporation status.

In otherwords, whether the appellant established its legal personality that it is a juristic person entitled to sue and be sued. There is no doubt that the issue of juristic personality of the parties before the court goes to the competence of the action itself and that of the trial court where the action originated.

B The appellant had by its amended statement of claim averred that it is a company incorporated in Switzerland. In its amended statement of defence, the respondent denied and joined issue with the appellant on the fact of its being a Company incorporated with legal
C personality to institute the action. It averred as follows:

“The defendant specifically denies that the plaintiff is an incorporated company and further denies that any power of Attorney was duly executed by it in favour of Mr. Nurudeen Adesanya to prosecute this action and therefore puts the plaintiff to strict proof of paragraph 1 of the statement of claim.”
D

Both counsel to the parties addressed the trial court which on this point came to the following conclusion:

*“The issue was joined on that matter. The plaintiff proceeded to tender the Power of Attorney in evidence and it was admitted in
E evidence as Exhibit P11. In the Power of attorney, Exhibit P11, the plaintiff addressed itself as Reptico S.A. of Rue Robert-de-Trax 11 206 Geneva, Switzerland, which is, the Swiss system of saying that it is an incorporated Company Limited. Also, in the Power of Attorney, a Notary Public by name - Jean R. Christ stated thus -*
F

“I Jean - Rodolphe Christ, Notary in Geneva hereby certify that the signature... is to my own personal knowledge the true signature of Mr. Albert Tam..., who signed this document and having legal capacity to grant this Power of Attorney on behalf of Reptico S.A. Limited Company in Geneva-a member of the Board of Directors.”
G

Exhibit D20 is a form which the defendant claimed to have filled. In there, the defendant referred to the plaintiff as Reptico S.A. as the name of the exporter/supplier. This is another way of saying that the plaintiff is an incorporated company.

H *Having themselves described the plaintiff company as a limited liability company; it is no longer available to the defendant to assert that the plaintiff is not an incorporated company.*

In the light of the above, I am satisfied that there is evidence that the plaintiff is an incorporated company in Geneva Switzerland.

That naturally takes me to the issue of whether the Power of Attorney in this case is relevant. There is no doubt that for purposes of enabling a foreign company to sue and be sued in Nigeria, no power of Attorney is necessary and because a foreign company incorporated outside Nigeria can sue in its registered name, such company needs power of Attorney to enable someone else to sue for it or on its behalf."

The court below however, on this issue of legal personality of the appellant to institute the action had stated thus:

"With respect to the learned trial Judge, I think that he did not fully appreciate the importance of being incorporated body to enable a person bring an action in court. If indeed the plaintiff company was not an incorporated body, it would not have a capacity to initiate an action in court. It would not be able to accept juridical obligation as it is not a juristic person."

As shown earlier, the respondent had challenged the capacity of the appellant to sue as it did before the trial court. It was overruled. The appellant relied on Exhibits P11 and D20. There is no doubt that none of the said documents is a Certificate of Incorporation by which the appellant was incorporated and came into being to become an artificial person.

Generally, the law recognizes two categories of persons who can sue and be sued in court. They are natural persons, with life, mind, brain and physical body and other artificial persons or institutions having juristic personality. See Attorney General of Federation Vs. All Nigeria Peoples Party & Ors (2003) 12 SCM 1 at 12; (2003) 18 NWLR (Pt.851) 182; (2003) 12 SC (Pt. 11) 146.

In Alhaji Afia Trading & Transport Company Ltd. vs. Vesitas Insurance Company Ltd. (1986) 4 NWLR (Pt.38) 802, the court held that a party who should commence action in court must be a person known to law, that is, a legal Person.

In other words, no action can be brought by or against any party other than a natural person or body of persons, unless such a party has been given by statute, expressly or impliedly either (a) a legal personality under the name by which it sues or is sued or (b) a right to sue or be sued by that name. See; Knight and Searle Vs. Dove (1964) 2 All ER 307, Admin Estate

of Gen. Sanni Abacha Vs. Eke-Spiff & Ors (2009) 3 SCM 1; (2009) NWLR (Pt.1139) 92.

The appellant herein, no doubt is not a natural person He claimed to have acquired the status by which it instituted the action having been incorporated in Switzerland, as a limited liability company hence, the name “Reptico S. A., Geneva.” It is therefore an artificial person generally referred to as a corporation. See Carlen (Nig) Ltd vs. University of Jos & Anor (1994) 1 NWLR (Pt.323) 631.

There is no doubt and it is a fundamental procedural requirement that when issues are joined by parties in the pleadings, evidence is required to prove them as averred. It is the person upon whom the burden of establishing that issue lies that must adduce satisfactory evidence. It therefore necessarily follows that when there is no such evidence, the issue, must be resolved against him and the consequences of that are as decisive of the case presented as the materiality of that issue. Generally, the nature of the evidence that will suffice, as to whether in oral or documentary, may well depend on the issue in question and the requirement of the law. See; African Continental Bank Plc. & Anor Vs. Emostrate Limited (2002) 7 SCM 17 (2002) 8 NWLR 503.

It is trite law that whatever fact is admitted needs no further proof. It is deemed established. See; Mozie & Ors Vs. Mbamalu, & Ors 1 (2006) 12 SCM (Pt.1) 306 at 317, Olubode V. Oyesuxi (1977) 5 SC 79, Balogun V. Labiran (1988) 3 NWLR (Pt.80) 66. But in the instant case there was no proof that the respondent admitted expressly or impliedly that the appellant was an incorporated company, hence the denial in the averments in its pleadings, that is, the statement of defence, by which issue was joined requiring proof of the fact by the appellant who asserted that it is an incorporated company. In the instant case, what was required to be proved as to the juristic personality of the appellant was whether there was evidence that it was duly incorporated.

As earlier stated in this judgment, the appellant had averred that it was incorporated as a limited liability company in Switzerland. This fact and assertion was challenged and vigorously contested by the respondent. Issue was therefore joined on the matter requiring the appellant to prove satisfactorily by admissible documentary evi-

dence that it was indeed incorporated.

In an attempt to prove its incorporation, the appellant relied on Exhibit P11, the power of Attorney it produced and tendered, and Exhibit D20, a Form claimed to have been filled by the respondent where it described the appellant by the name by which it sued - Reptico S.A. Geneva. B

Interestingly, the trial court accepted and relied on these documents to establish that the appellant proved that it is an incorporated company in Switzerland, in particular, by what the learned trial Judge called an admission by the respondent. This, with respect, was to say the least, a misconception of the fundamental procedural requirement. There is no statement of admission in any document prior to litigation by a defendant that can confer the required legal personality on a party when issue has been joined on the matter. C D

There is nothing in Exhibits P11 and D20 to take place of a certificate of Incorporation.

In A.C.B. & Anor V. Emostrade Ltd. (Supra) a case whose facts are similar, this court posed the following question:

“...would it not have been a more positive approach to tender the Certificate of Incorporation at the trial? I think so, since the respondent pleaded that it was incorporated as a limited liability company and the appellants categorically denied this. The certificate should have been produced by the respondent rather than what looks like the pranks played about its status because it is only by that certificate of incorporation its legal personality can be proved in the circumstance. That is firmly established by the authorities of this court.” E F

This court in the said case approved the position of Salami, JCA (as he then was) in his dissenting judgment that G

“there was need for the plaintiff to produce the certificate of Incorporation, if it was duly incorporated as a limited liability company, and that nothing else would suffice”. The learned justice was said to be absolutely right and I am in complete agreement with the position. ***No other document will satisfactorily establish the legal personality of an artificial person such as an incorporated liability company than its certificate of Incorporation.*** H

It is interesting to note that Exhibit P11 was not tendered as evidence of incorporation of the appellant but only

to certify that the person who signed the document - Power of Attorney, was a member of the Board of Directors and as such had the legal capacity to donate the Power of Attorney on behalf of the appellant. The Power of Attorney is not and cannot take the place of Certificate of Incorporation. No other evidence, either oral or documentary was adduced by the appellant at the trial court to show any other way of proving that the appellant is an incorporated company in Switzerland other than the name it calls itself.

In Bank of Baroda Vs. Iyalabani Company Limited (2002) 12 SCM 7, this court opined as follows:

“It is not sufficient for a plaintiff being a corporation or a defendant for that matter to establish its juristic personality by merely stating its name with the addition of “LIMITED” or “PLC”. That status which it is claiming for itself has to be proved, except it is admitted by the opposing party, by tendering its certificate of incorporation or such other evidence as would prove its juristic personality.”

The appellant did not produce the evidence, or better still, the certificate of its incorporation in Switzerland where it claimed to have been incorporated and operating from.

In the Registered Trustees of Apostolic Church v. Attorney General Mid-Western State (1972) SC 247, there was some evidence of admission about the status of the apostolic church. But this court observed as follows:

“We are in agreement with the learned trial Judge, that whatever may be the admission of the 3rd respondent of the status of the appellant, there is no evidence before the court that the appellant (i.e. the apostolic church) was ever a corporate body. This could only be established as a matter of law by the production in evidence of the Certificate of Incorporation, admission inter parties notwithstanding.”

In J.K. Randle v. Kwara Breweries Ltd. (1986) 6 SC 1, this court, per Bello, CJN stated as follows:

“In his pleadings, the appellant averred in paragraph one of his statement of claim that the company was incorporated under the Companies Act, 1968 which averment was specifically denied in paragraph one of the respondent’s Statement of defence. Before the trial, the appellant served a Notice on the respondent to produce the Certificate of Incorporation of the respondent but the respondent did

not produce the Certificate. The matter appeared to end there for the appellant did not adduce any evidence of the Incorporation of the respondent, if any. At the hearing of the appeal before us, learned counsel for the appellant was candid in his submission. He said he assumed the respondent was incorporated and he did not adduce evidence of incorporation. In my considered opinion since the appellant as plaintiff failed to prove the very basis of the constitutional issue, which is the only ground of appeal before us, the appeal must be and is hereby dismissed."

In the same case, this court, per Uwais, JSC (as he then was, later CJN) observed as follows:

"The appellant sued the respondent as a company incorporated under the Company Act, 1968. He failed to prove the incorporation by the production of the Certificate of Incorporation. As the averment in the statement of claim that the defendant was so incorporated was categorically denied by the respondent in its statement of defence, the failure to prove the incorporation was fatal to the appellant's case."

As the saying goes, "when you are in Rome, do as Romans." In other words, when one is in another land other than land of origin, you play the game according to the rules of the land. On this land, Nigeria, the only acceptable and legally recognized way of establishing that a company is an incorporated limited liability company entitled to sue and be sued, in particular, when parties join issue on the matter, is by producing in evidence the Certificate of Incorporation. No other document will suffice. Indeed, there was no iota of evidence adduced by the appellant as to how the fact of incorporation of a company is established in Switzerland. The burden to prove the assertion that it is an incorporated company entitled to sue and be sued lies with the appellant. It is trite law that he who asserts must prove the assertion. See; Section 135 of Evidence Act. *Elias V. Omo-Barre* (1982) 5 SC 2, *Elias V. Disu* (1962) 1 All NLR 214, *Wuchem V. Gudi* 1 (1981) 5 SC 291, *Agala & Ors V. Egwere & Ors* (2010) 5 SCM 22 at 37. It has also been held that it is not enough to assume that because a company uses the name "Limited" on the writ of summons as plaintiff or in the transactions that led to litigation, that company must be a Limited Liability company entitled to sue. The company status must be proved especially where the plaintiff was denied

to be a limited liability company at the time of the transaction. It must be proved but cannot be presumed. See; *ACB & Anor Vs. Emostrate Ltd* (Supra) per Kalgo, JSC at page 17 of SCM.

It follows therefore that the appellant in the instant case failed to prove that it has a juristic personality that enables it to sue and be sued. This issue is resolved against the appellant as it did not establish its legal personality with Exhibits P11 and D20.

The appellant as plaintiff, not having been proved to be a legal entity or juristic person entitled to sue and be sued in law, does not exist, so to speak, in the eye of the law. As a result, the whole action in the trial court is incompetent, to say the least, and I so hold. The appellant's case as constituted before the trial court is hereby struck out as it was not shown or proved to have been instituted by a person known to law. In the final analysis, the appeal could not be sustained as there is not a competent appellant.

Having resolved the issue of legal personality against the appellant, I consider it unnecessary to further consider other issues raised by the appellant. The appellant having been found to be incompetent to institute the action before the trial court, no other issue can be predicated on the case. Failure to prove its incorporation has knocked the bottom out of the appellant's appeal rendering it lifeless and non-existent in the eye of the law, with no capacity to institute the action at the trial court in the first place. You cannot put something on nothing and expect it to stay. It will certainly fall. See; *Macfoy V. U.A.C* (1962) AC 152; or (1961) 3 All ER 1169.

Therefore, for the appellant's failure to establish its juristic personality, the appeal is liable to dismissal. Accordingly, it is dismissed.

Even though costs ordinarily follow events, I am not inclined to award any cost. Accordingly, I make no order on costs.

H **ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal Holden at Lagos in appeal no. CA/363/98 delivered on the 15th day of December, 1999 in which the court allowed the appeal of the present respondent, set aside the judgment of the Lagos State High

Court in suit no. LD/2171/91 delivered on the 6th day of October, 1995 in favour of the appellant who was the plaintiff before that court.

The facts of the case have been exhaustively stated in the lead judgment of my learned brother, ARIWOOLA, JSC just delivered and with which I am in full agreement. I do not therefore deem it needful to reproduce the said facts herein except as may be needed in emphasizing the point being made or under consideration. B

Learned senior counsel for appellant PROF. S. A. ADESANYA, SAN has submitted a total of six issues for the determination of the appeal, which are stated in the appellant brief filed on 10th December, 2002 as follows:- C

“3.1 Whether it was proper for the Court of Appeal to make a case, which the appellant did not make or purport to make, as the plaintiff in the trial court?” D

3.2 Whether the claim as formulated is statute barred?

3.3 Whether the Court of Appeal was right in holding that a (SWISS) foreign company must be proved as provided for by the Nigerian Companies Law and the decision of the Supreme Court in S.K. Randle v. Kwara Breweries Limited when both the companies and Allied Matters Act and the decision of the Supreme Court cited do not deal or purport to deal with a foreign company? E

3.4 Whether the Court of Appeal was right in holding that what has been admitted should still be proved? F

3.5 Whether the Court of Appeal was right by ignoring the law of nations which is part of Nigeria Law as out in Hutcheon v. Mannington that a statement of a Notary Public is given credit everywhere, when the said court ignore a certification by a Notary Public in general contained in Exhibit 11 that the appellant is a swiss incorporated company? G

3.6 Whether the Court of Appeal was right in concluding that the appellant's case was “an attempt to avoid being confronted with the argument that there was no contract between the plaintiff and the defendant that purported the lower court to create a contract between the swiss Volksbank and the defendant?” H

I hold the view that some of the above issues could have come together such as issues 3, 4 and 5 as they deal with the issue of proof of legal personality of a foreign company just as issues 1 and 6

dealing with the creation of a case by the lower court for the plaintiff/appellant contrary to the case set out in the pleadings (Statement of Claim).

In any event, issue nos. 2 and 3 ought to come first as they deal with the competence of the action, appellant and the Court to entertain same. In short, issues 2 and 3 raise the question of jurisdiction of the court which issue is fundamental to adjudication.

Looking at the two issues i.e. issues 2 and 3, it is clear that the first one to be considered is issue no. 3 which deals with the question of the legal personality of appellant to institute the action in the first place. This is a primary issue as it affects the competence of the action and the court in which it was instituted.

It is the contention of learned senior counsel for appellant that there was an admission by the respondent contained in Exhibits P11 and D20 to the effect that the plaintiff/appellant is a juristic person; that foreign companies need not prove their legal status by production and tendering of their certificate of incorporation in accordance with the provisions of the Companies and Allied Matter Act as the decision of this court in *J. K Randle v. Kwara State Breweries Ltd* does not apply to proof of a foreign company etc.

From the pleadings of the parties, it is very clear that both parties joined issues on the legal personality of appellant particularly as the respondent denied the incorporation of appellant. The lower courts agreed that issues were clearly joined on the legal personality of appellant.

It is settled law that where issues are so joined, it is the duty of the plaintiff or the party that would fail if no evidence is adduced/produced in proof of the issue so joined, to adduce the needed evidence to establish the fact in issue.

In the instant case, it was the duty of appellant to establish by direct and material evidence the legal personality of appellant.

It is not disputed that appellant did not plead neither did it tender the certificate of incorporation of appellant as a limited liability company. The law is settled that he who asserts must prove. In the instant case, once issues had been joined on the legal personality of appellant, it becomes the burden of appellant to prove same. In the case of *J. K Randle v. Kwara State Breweries Ltd.* this court stated clearly that where the issue is whether a company is a limited liability

or not, the evidence needed to prove its incorporation is the certificate of incorporation and nothing else. It is the contention of learned counsel for appellant that the said decision does not apply to foreign companies. I do not agree.

Once a company sues or issued in this country and the issue arises as to its legal personality, it has to be proved in accordance with our law, by the production of the necessary document of incorporation which may even be from the foreign country concerned. B

However, if there is any difference in the law relating to proof of legal personality or incorporation of a foreign company, that fact must be pleaded and evidence adduced at trial to establish same, else the laws of this country which is relevant to the issue must apply. C
There should be no assumption or speculation at all on the matter.

In the instant case, the legal personality of appellant was not established by evidence neither was there any admission of that capacity by the respondent as held by the trial court. It is in any event, a contradiction in terms to talk of admission when issues have been clearly joined in the pleadings. The issue of incorporation is so fundamental that only the production of a certificate of incorporation can satisfactory prove the fact of incorporation of a company. D E

It is for the above reasons and the more detailed reasons contained in the lead judgment of my learned brother ARIWOOLA, JSC that I too strike out suit no. LD/217/91 as being incompetent and dismiss the instant appeal. F

I abide by other 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 now the lead judgment just delivered by my learned brother Ariwoola JSC, I beg to adopt the reasons and conclusions relied upon by my learned brother Ariwoola JSC in dismissing the appeal as mine. I intend not to add anything. The judgment without doubt is comprehensive. I too dismiss this appeal. G H

NGWUTA JSC

I had the privilege of reading in draft the lead judgment just delivered by My Lord, Ariwoola, JSC. I entirely agree with the reasoning and conclusion reached.

I wish to add an observation on the legal personality vel non
B of the appellant.

In paragraph 1 of the Amended Statement of Claim, the appellant pleaded that:

*“The plaintiff is a company incorporated in Switzerland with
C its office at 2 Rue Nibert, Geneva and engages in the sole, exportation and dealership in commodities including long grain per boiled rice...” See page 46 of the record.*

In paragraph 2 of the Amended Statement of Defence, the Respondent, then defendant, pleaded:

“The defendant specifically denies that the plaintiff is an incorporated company and further denies that any power of attorney was duly executed by it...” See page 142 of the record.
D

I do not share the views of the learned Silk for the Appellant that by mere writing the name of the appellant in Exhibits P11 and
E D20, the respondent admitted the alleged legal personality of the Appellant. It is the name the appellant is known to the Respondent and writing that name in any process in the suit does mean an admission that the appellant is what it claims it is. It means no more than the name by which the appellant is identified in the suit it filed.
F

Furthermore, the fact that *J. K. Randle v. Kwara State Breweries Limited* (1986) 6 SC 1 did not expressly exclude foreign companies in the mode of proof of incorporation does not imply that it is excluded from the requirement of proof by production of the
G Company’s Certificate of Incorporation. The production of Certificate of Incorporation is the accepted means of proof of corporate status of a body. See *Apostolic Church Ilesha v. A-G Mid-Western Nigeria* (1972) 4 SC 150 at 158-159.

In *Saeby Jernestoberi Maskine fabric A/S v. Oluogun Enterprises Ltd* (1999) 73 LRCN 3358 at 3381, the Court did not require
H proof of incorporation of the appellant by its certificate only because the Respondent admitted that the appellant is a limited liability company with its registered office in Copenhagen and not because the law relating to proof of incorporation of companies in Nigeria does

not apply to the foreign company. There is no dichotomy in the application of the law on proof of incorporation of companies or incorporated bodies.

If the law in the foreign country where the appellant was allegedly incorporated accepts averment in an affidavit as proof of incorporation, that law will have to be pleaded and proved as an issue of fact. See Section 68 (2) Evidence Act, 2011; Abejide v. Ashiru (1967) NMLR p.365. B

For the above and the fuller reasons in the lead judgment, I also dismiss the appellant's appeal for its failure to establish its juristic personality. Parties shall bear their respective costs. C

MUHAMMAD JSC

I have read in draft the lead judgment of my learned brother Ariwoola JSC, with whose reasoning and conclusion I entirely agree that the appeal which lacks merit should be dismissed. D

The facts of the case have been fully reproduced in the lead Judgment. It is pointless to further reproduce them here. I rely on those facts as captured in the lead judgment to state a few words of mine purely by way of emphasis. E

The principle must outrightly be restated that parties to an action are always bound by their pleadings. Once parties by their pleadings have joined issue on a matter, evidence must be led, except the fact asserted by the one on the basis of which the court will determine the controversy between the parties on the particular matter has been admitted by the other, to enable the court make a decision on the point. Only evidence led in respect of pleaded facts count as the courts, by the very principle, are only empowered to consider cases consequent upon parties' pleadings. Evidence led in respect of facts not pleaded must be discountenanced by the court as same goes to no issue. Again, the principle is that pleaded facts in respect of which evidence is not led by a party is deemed abandoned. See Arjay Ltd v. Ams Ltd. (2003) 7 NWLR (pt. 820) 577 SC and Okoebor H v. Police Council (2003) 12 NWLR (Pt. 834) 444 SC. F G

In the case at hand, the appellant as plaintiff pleads under paragraph 1 of its amended statement of claim dated 23rd March 1992 as follows:-

"The plaintiff is a company incorporated in Switzerland with its office at 1, Rue Robert traz, Geneva and engages in the sale, exportation and dealership in commodities including long grain per boiled rice and the plaintiff institutes this action by its attorney Mr. Nurudeen Adesanya of Unity House 37. Marina, Lagos. The Plaintiff will at the trial found upon the said power of attorney."

The respondent pleads under paragraph 2 of the amended statement of defence dated 13th April 1994 as follows:-

"The Defendant specifically denies that the Plaintiff is an incorporated company and further denies that any power of attorney was duly executed by it in favour of Mr. Nurudeen Adesanya to prosecute this action and therefore puts the Plaintiff to strict proof of paragraph 1 of the statement of claim."

With issue having been so joined on that matter, the trial court on the issue so joined held at p. 281 of the record as follows:-

"Exhibit D20 is a form which the defendant claimed to have filled. In there, the defendant referred to the plaintiff as Reptico S.A. as the name of the exporter/supplier. This is another way of saying that the plaintiff is an incorporated company. Having themselves described the plaintiff company as a limited liability company; it is no longer available to the defendant to assert that the plaintiff is not an incorporated company."

In the light of the above, I am satisfied that there is evidence that the plaintiff is an incorporated company in Geneva Switzerland. That naturally takes me to the issue of whether the power of Attorney in this case is relevant. There is no doubt that for purposes of enabling a foreign company to sue and be sued in Nigeria, no power of Attorney is necessary and because a foreign company incorporated outside Nigeria can sue in its registered name, such company needs power of Attorney to enable someone else to sue for it or on its behalf."

The lower court at p. 393-394 of the record held firstly thus:-

"With respect to the learned trial Judge, I think that he did not fully appreciate the importance of being an incorporated body to enable a person bring an action in Court. If indeed the plaintiff company was not an incorporated body, it would not have a capacity to initiate an action in Court. It would not be able to accept juridical obligations as it is not a juristic person."

The court concluded at page 394-395 as follows:-

“I do not think that the lower Court was right in the approach which it adopted to the issue of the incorporation of the Plaintiff. It was too casual an approach for such a serious matter. The lower Court should have struck out the case of the Plaintiff. If, as argued by the Respondent’s counsel in his brief before this Court that foreign law was a matter of evidence, then it was the plaintiff whose incorporation was challenged who should have called such evidence. As the plaintiff did not do so, it has itself only to blame for the serious lapse.” B

In *J.K Randle v. Kwara Breweries Ltd (1985) 6 SC 1* one of the cases the lower court appositely relied upon to arrive at its foregoing decision on the point, this court per Bello CJN, as he then was, held thus:- C

“In his pleading, the appellant averred in paragraph one of his statement of claim that the company was incorporated under the Companies Act, 1968 which averment was specifically denied in paragraph one of the respondent’s Statement of defence. Before the trial, the appellant served a Notice on the respondent to produce the Certificate of Incorporation of the respondent but the respondent did not produce the Certificate. The matter appeared to end there for the appellant did not adduce any evidence of the incorporation of the respondent, if any. At the hearing of the appeal before us, learned counsel for the appellant was candid in his submission. He said he assumed the respondent was incorporated and he did not adduce evidence of incorporation. In my considered opinion since the appellant as plaintiff failed to prove the very basis of the constitutional issue, which is the only ground of appeal before us, the appeal must be and is hereby dismissed.” D E F

From the foregoing it is glaring that the lower court’s finding G in the point is unassailable. The trial court had exercised jurisdiction that it never had. The lower court should have struck out appellant’s action on that note. It is for this and the fuller reasons contained in the lead judgment that I also dismiss the appeal. I abide by the consequential orders made in the lead judgment including those on costs. H