

COURT OF APPEAL LAGOS DIVISION
THURSDAY 14TH JANUARY, 2010. CA/L/26/2003
CORAM:- B. RHODES-VIVOUR, P. A. GALINJE,
H. MUKHTAR, JJCA

DANIEL EHOHAN OGHONYONE APPELLANT
AND
1. PATIENCE ADESUA OGHONYONE RESPONDENT
(otherwise Known as PATIENCE
ADESUA AMAHIAN

MATRIMONIAL CAUSES - Void marriage - Meaning - One that produces no legal consequences - That is a marriage that never took place - But under Matrimonial Causes Act s. 69 - It is still considered as a marriage (H1)

CONTRACTS - Agreement - Written document - Oral evidence is inadmissible to alter the memorandum signed by the parties - On how the property should be shared (H2)

FAMILY LAW - Property - Division - Married Women's Property Act s. 17 - Empowers the trial Judge to order equal division of the property between the parties (H3)

COMPUTER EVIDENCE - Banking - Document - Admissibility - Computer print out of bank statement of account is admissible in evidence - Save where witness fails to testify that he personally examined the statement - And compared it with original bank books (H4)

EVIDENCE - Facts - Pleadings - Facts are pleaded and documents tendered in support thereof - Hence facts are pleaded and not documents (H5)

COMPUTER EVIDENCE - Banking - Document - Admissibility - Weight - As there was substantial compliance with Evidence Act s. 97(2)(e) - The computer statements of account tendered by respondent are admissible (H6)

APPEALS - Cross appeal - Purpose - Cross appeal is filed by respondent dissatisfied with a crucial finding in a case - To correct any error standing in the way of respondent in the main appeal (H7)

APPEALS - Evidence - Evaluation - Trial court assesses credibility of witnesses - And CA does not interfere - Save where findings of trial court cannot be supported by evidence - Or is perverse (H8)

FACTS

Plaintiff/respondent commenced divorce proceedings against defendant/appellant (her husband) before the High Court of Lagos State Ikeja, seeking inter alia for a declaration that the marriage celebrated between her and appellant in Lagos is null and void on the ground that appellant was at the time of the aforesaid marriage, lawfully married to another person and for declarations that respondent is the absolute owner of property acquired during the union. Appellant married one Wilhemina Agatha Huyssodin, a Dutch national in 1990. Meanwhile, during the subsistence of the said marriage, appellant contracted another marriage with respondent in 1994 at a place in Lagos. Appellant and respondent jointly traded in second hand imported cars.

Prior to their marriage in 1994, they signed memorandum of understanding on the sharing of the joint business interests and properties. Appellant in his cross petition sought for similar reliefs as those of respondent. Six witnesses inclusive of respondent testified for her, while four witnesses inclusive of appellant testified for him. In its judgment, the court declared the marriage between the parties void and ordered inter alia that the couple's matrimonial home situate at Plot L, Block 26, Amuwo Odofin Estate Lagos be sold along with furniture and fixtures therein. The proceeds arising from the sale was ordered to be divided into two equal parts between the parties. Aggrieved by this order, appellant lodged appeal in the Court of Appeal Lagos Division, while respondent cross appealed.

ISSUES FOR DETERMINATION

ISSUE 1:

Whether the learned trial Judge was right in law in treating the property known as Plot L, Block 26, Amuwo Odofin Layout as the

matrimonial home of the appellant and the respondent and that the respondent has a joint interest therein thereby ordering its sale and division of the proceeds thereof between the parties in equal shares when both parties had executed a written agreement (Exhibit P 52) as to the disposition of their joint assets to the exclusion of the property in question.

ISSUE 2

Assuming but without conceding that the learned trial Judge is entitled to go outside Exhibit P 52 to make her findings as to properties jointly owned by the appellant and the respondent, whether the computer generated statements of Account Exhibits P 16 - P 23 tendered by the respondent were admissible in law to prove the fact of contribution by the respondent to the acquisition of the property described as matrimonial home of the parties by the learned trial Judge.

Cross appeal issue

Whether having regard to the facts of this case, the cross appellant was entitled in law to a share of the property known as Plot 316, Block 18, Amuwo Odofin Residential.

HELD (Unanimously dismissing the appeal and cross appeal per **RHODES-VIVOUR JCA**)

MATRIMONIAL CAUSES - Void marriage - Meaning

1. Section 69 states that “marriage” includes a purported marriage that is void.

A void marriage is a marriage that produces no legal consequences. That is to say it is a marriage that never took place. See Section 3(1) of the Matrimonial Cause Act. A void marriage is still a marriage by the provisions of Section 69 supra. (p. 3083 B)

CONTRACTS - Agreement - Written document

2. Now, the parties signed a memorandum which shows how they intend to divide/share their property. The law appears well settled that oral evidence is inadmissible to contradict, alter, add to or vary it. See Section 132 (i) of the Evidence

Act. The law is clear. Where parties have reduced into writing their contract the rule is that oral evidence is not allowed to be given to add, vary it, but oral evidence can be adduced to show that there is a mistake in the written agreement. That is by the way. The issue is what becomes of the house at Plot L Block 26 Amuwo Odofin Layout. (p. 3083 C)

FAMILY LAW - Property - Division

3. And with the above the learned trial Judge exercised her jurisdiction under Section 17 of the Married Women's Property Act and made the order on Plot L Block 26 Amuwo Odofin Scheme that the said property be sold and proceeds from it be divided equally between the parties.

Anyway one looks at it, the learned trial Judge was correct. Since it is clear that the said property is not included in the list of properties in Exhibit P 52, that the parties agreed to share (see pages 463-467 of the Record of Appeal). The learned trial Judge had a duty to make a pronouncement on what becomes of the property after the marriage had been declared void. Section 17 of the Married Women's property Act confers on the Judge power to make orders in respect of property in dispute as he thinks fit and such an order must be fair, just and equitable. That the parties share proceeds of the sale equally is what is expected in equity.

If on the other hand the fact that the marriage is void means no property rights accrue, then the parties were simply living together as friends or in a similar manner. What then becomes of property they both claim to have contributed to purchase? Surely such property can only be addressed in the way the learned trial Judge has done. (p. 3084 B)

Banking - Document - Admissibility

4. The issue as to the admissibility of computer generated evidence has been the subject of controversy for quite some time now in Nigeria and presently the legislature is working on appropriate amendments to accommodate such evidence.

As the law stands today computer printout of Bank Statement of Account can be admitted in evidence. Section

97 (1) (h) and (2) (e) of the Evidence Act are relevant for consideration and explanation.

In Yesufu V A.C.B. (1976) 4 SC p. 1. The Supreme Court recommended the following guidelines to be followed when dealing with this type of document-

(i) When the books of the Bank cannot be produced, a certified copy of the account is enough. The production of a certified true copy of account is affirmative evidence that there is in existence a book from which the copies were made.

(ii) Where an official of the Bank certifies the copy and he gives evidence under oath this is compelling evidence that he compared the copy with the original before he certified it.

(iv) Where books of the Bank are produced by official of the Bank, e.g. Accountant, the said books must have been in the custody of the Bank.

Such evidence is inadmissible where a witness fails to testify that he personally examined the statement of account and compared it with the entries in the original Bank books and found it to be correct. (pp. 3085 H/3086 E)

EVIDENCE - Facts - Pleadings

5. If I may add for emphasis, facts are pleaded and documents tendered in support of facts pleaded. Facts are pleaded and not documents. (p. 3087 D)

BANKING - Document - Admissibility - Weight

6. Once there is substantial compliance with the provisions of Section 97 (2) (e) of the Evidence Act Banking documents are admissible in evidence. The fact that pw 2 said on oath (and he was not challenged) that he made comparison as required, then there is substantial compliance with the provisions of Section 97 (2) (e) of Evidence Act. Exhibits P 16 - P 23 are secondary evidence and their admissibility in evidence as Exhibits was correct. Furthermore since Exhibit P 16 - 23 (Statement of Accounts) are not inadmissible, they are admissible subject to certain conditions earlier explained, and since they were admitted (Exhibits P 19, P 21, P 22 and P 23) without any objection to their admissibility, any further objec-

tion to their admissibility is deemed waived and this court cannot open the admissibility of the said Exhibits.

Finally and for emphasis, since Exhibits P 16 - P 23 were documents admissible under Section 97 (1) (h) and 2(e) of the Evidence Act provided certain conditions were met and those conditions were met (the testimony of p w 2). There has been substantial conformity with the section supra. Consequently the computer generated Statements of Account (Exhibits P 16 - P 23) tendered by the respondent were admissible in law. (p. 3087 H)

Cross appeal - Purpose

7. A cross appeal is filed by a respondent who is dissatisfied with a finding which is crucial and fundamental to the case. The purpose really is to correct any error standing in the way of the respondent in the main appeal. (p. 3088 E)

Evidence - Evaluation

8. It is very well settled that it is not the business of this court to assess the credibility of the witnesses who testified and substitute its own views for the views of a trial court which is in a much better position to assess the credibility of the witness who testified before it.

The duty to appraise evidence is pre-eminently that of the trial court and when there is evidence to support the conclusion of the trial court this court would not interfere.

Though this court would interfere where satisfied that the findings cannot be supported by evidence or is perverse. (p. 3090 B)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JCA

1. Equity in judicial decisions

The idea of equity has always been associated with judicial decisions, and emphasises that cases should be decided in a way which is fair and right so that justice is achieved between the parties. (p. 3090 G)

REPRESENTATION

Tayo Oyetibo SAN with N. Obele, C. I. Umeche, O. Akinla, for the Appellant

A. A. Adegbomire, I. F. Robinson, for the Respondent

CASES REFERRED TO

Revenille v. Revenille (1948) 1 ALL E.R 56

Amadi v. Nwosu (1992) 5 NWLR (pt. 241) 272

R. v. Alger (1953) 2 All E.R. 381

Shethmari v. Nwokoye (1991) 9 NWLR (pt. 213) 60

Sajere v. Ireter (1991) 3 NWLR (pt. 179) 340

Yassin v. Barclays Bank Ltd. (1968) 1 ALL NLR 771

Egbue v. Araka (1996) 2 NWLR (pt. 433) 688

Yesufu v. A.C.B. Ltd. (1976) ANLR 264

N.I.P.C. v. Thompson Organisation (1969) All NLR 134

James v. Mat- Motors Ltd. (1978) 11-12 SC 31

Oguma v. I.B.W.A. (1988) 1 NWLR (pt. 73) 658

Woluchem v. Gudi (1981) 5 SC 291

Odunsi v. Bamgbala (1995) 1 NWLR (pt. 374) 641

Eliochin (Nig) Ltd. v. Mbadiwe (1986) 1 NWLR (pt. 14) 47

Lagos City Council v. Ajayi (1970) 1 ALL NLR 291

STATUTES REFERRED TO

Married Women's Property Act, s. 17

Evidence Act, s. 97, 132(i)

Matrimonial Causes Act, ss. 3(1), 69, 72(1)(2)

BOOK REFERRED TO

Halsbury's Laws of England 4th Edn. vol. 13

LEAD JUDGMENT BY RHODES-VIVOUR JCA

The respondent commenced divorce proceedings against her husband, the appellant, before the Lagos High Court at Ikeja. Phillips J. presided. She sought the following:-

(i) A Declaration that the marriage in fact celebrated between her and the appellant at the marriage Registry, Lagos on the 9th of April, 1994 is null and void on the ground that the appellant was, at the time of the aforesaid marriage, lawfully married to another per-

son.

(ii) Orders granting the respondent such financial provision and such property adjustment orders as may be just and in particular:-

(a) A Declaration that the entire property comprised in Plot L, Block 26, Amuwo Odofin Layout, consisting of (a) one six bedroom suite detached house, (b) two twin duplex houses (of three bedroom suites each) and (c) a three bedroom flat boys' quarters, together with all the furniture and fixtures therein are owned by the respondent absolutely. OR SUCH OTHER DECLARATION as the ownership thereof or interest therein as may be just;

(b) A Declaration that the entire property comprised in Plot 316 Block 8, Amuwo Odofin Residential Estate, together with buildings and appurtenances thereon are owned by the respondent absolutely OR SUCH OTHER ORDER/DECLARATION as to the ownership or interest therein as may be just;

(c) As Order that the aforementioned property and furniture be sold and the net proceeds of the sale be divided between the respondent and the appellant, such that the respondent shall receive two - thirds of the proceeds while the appellant shall receive one - third of the proceeds. OR otherwise as may to the Honourable Court appear just;

(d) In the alternative to (a) (b) and (c) above. An Order that the appellant shall settle the entire property comprised in Plot L Block 26, Amuwo Odofin Layout and consisting of (a) one six bedroom suit detached house, (b) two twin duplex houses of three bedroom suites each and (c) a three bedroom flat boys' quarters together with all the furniture and fixtures therein on the respondent for life, and that thereafter the aforesaid property shall be sold and two thirds of the proceeds thereof paid into the estate of the respondent while the remaining one third thereof shall be paid to the appellant (or his estate as the case may be);

(e) In the alternative to (a) (b) and (c) above, An Order that the appellant shall settle the entire property comprised in Plot 316, Block 18, Amuwo Odofin Residential Estate, together with buildings and appurtenance as thereon on the respondent for life and that thereafter the aforesaid property shall be sold and two thirds of the proceeds thereon paid into the estate of the respondent while the remaining one third thereof shall be paid to the appellant (or his

estate, as the case may be).

The appellant as respondent cross petitioner sought the following:-

(a) A Decree of nullity of the marriage contracted between the appellant and the respondent on 9th April, 1994 on the grounds that the respondent deceived and stampeded the appellant into going through a form of marriage with her whilst the appellants previous marriage with his spouse was still subsisting. B

(b) An Order declaring that the appellant is the exclusive owner of:-

(i) Plot L, Block 26, Amuwo Odofin layout, Lagos. C

(ii) Plot 316, Block 13, Amuwo Odofin Residential Estate.

(iii) One Plot of land at Lekki Peninsula of the two Plots acquired through the joint contribution of the appellant.

(c) An Order against the respondent to render full account of the sum of N389,000 (three hundred and eighty nine thousand Naira) which she withdraw without the appellants consent and or her sole use from Daniel and Patience Oghoyone's Joint Investment Account and to refund half of the said amount to the appellant. D

(d) An Order that the appellant's share of all monies lodged and kept by the respondent in her Bank in any other place being proceeds from the parties Joint Venture business be paid to the appellant forthwith. E

(e) An Order restraining the cross respondent from further harassing, molesting, intimidating and/or embarrassing the cross petitioner with Security Agents and persons whose intentions are not known and or conducting herself in a manner that is likely to lead to breach of peace or disturbance or public tranquility. F

(f) An Order directing the cross respondent to enter into recognizance to keep the peace and be of good behaviour. G

The respondent called six witnesses, herself inclusive, while the appellant called four witnesses including himself. A total of sixty seven documents were tendered and admitted as Exhibits.

The learned trial Judge on the 29th of September, 2000 H declared the marriage between the parties void and made some orders not relevant to this appeal. One of the orders made had to do with what the learned trial Judge referred to as the matrimonial home. The reasoning and order is as follows:-

“In order therefore to give effect to the order made in respect of the matrimonial home situate at Plot L, Block 26, Amuwo Odofin Estate and since the respondent is presently living in the premises it is ordered that the respondent shall vacate same forthwith and that the said property shall be sold in the open market by an Estate Valuer of repute to be nominated by the Petitioner since it was she who was deceived into this relationship in the first place. It is further ordered that the proceeds of the said sale shall be (after the deduction of all taxes, fees etc) divided into two equal halves and divided between the Petitioner and the respondent herein. It is also ordered that all the furniture and fixtures in the property shall be sold along with it and the proceeds shall be divided into two equal halves between the parties with the exception of the contents of the respondents bedroom, which he shall be allowed to take away.”

This appeal is against that order.

The facts of this case are clear. In 1990 the appellant married one Wilhemina Agatha Huysodan, a Dutch national. While the marriage was still subsisting he married the respondent on the 9th of April, 1994 at the Lagos City Hall. They had no issues. Both parties are involved in the sale of used cars imported from abroad. Before the marriage was contracted in 1994 they both signed a document titled:-

“Memorandum of understanding between Mr. D. E. Oghoyone and Mrs. S. Patience Oghoyone on the sharing of the joint business interests and properties.”

All the property owned by both of them were listed and they agreed to share them as shown in Exhibit P. 52.

Briefs of argument were subsequently filed. The appellants brief and reply brief were filed on 14th of May, 2004 and 9th of January, 2008, while the respondent cross appellants brief and reply brief were filed on 21st February, 2007, deemed properly filed on 24th May, 2007, and 20th October, 2009 and deemed properly filed on 20th October, 2009. Learned counsel for the appellant formulated two issues for determination. They read:-

ISSUE 1:

Whether the learned trial Judge was right in law in treating the property known as Plot L, Block 26, Amuwo Odofin Layout as the matrimonial home of the appellant and the respondent and that

the respondent has a joint interest therein thereby ordering its sale and division of the proceeds thereof between the parties in equal shares when both parties had executed a written agreement (Exhibit P 52) as to the disposition of their joint assets to the exclusion of the property in question.

ISSUE 2

B

Assuming but without conceding that the learned trial Judge is entitled to go outside Exhibit P 52 to make her findings as to properties jointly owned by the appellant and the respondent, whether the computer generated statements of Account Exhibits P 16 - P 23 tendered by the respondent were admissible in law to prove the fact of contribution by the respondent to the acquisition of the property described as matrimonial home of the parties by the learned trial Judge.

C

Learned counsel for the respondent cross appellant adopted both issues formulated by learned counsel for the appellant word for word. I shall adopt both issues for determination of this appeal.

D

At the hearing of the appeal on the 20th of October, 2009 learned counsel for the appellant Mr. Tayo Oyetibo SAN adopted the appellants brief and the reply brief and emphasised that void marriages are incapable of giving any rights whatsoever. Reliance was placed on *Revenille V Revenille* (1948) 1 ALL E.R p. 56.

E

He observed that the court must make finding as to the question of contribution of respondent. Reliance was placed on *Amadi V Nwosu* (1992) 5 N.W.L.R. PT. 241 P. 272.

F

Learned counsel for the respondent cross appellant adopted his briefs and observed that marriages that are void are recognized and property from it are distributed, contending that the trial court can give any order provided it is fair and just. He urged us to dismiss the appeal and sustain the cross appeal.

G

On Issue No. 1 learned counsel for the appellant observed that where a marriage is void the courts regard the marriage as never having taken place and no status of matrimony as ever having been conferred. Reliance was placed on *Halsbury's laws of England* 4th Edition Vol. 13. R. V Alger (1953) 2 All E.R. p. 381.

H

On the question of properties from a void marriage learned counsel observed that the learned trial Judge wrongly exercised her jurisdiction under Section 17 of the Married Women's Property Act

because the power cannot be exercised in respect of a void marriage. Reliance was placed on RE: Ames Settlement Dinwiddy V Ames and others (1946) 1 All E.R. p. 689, RE: Garnet (1905) 74 UCH p. 570.

In RE: Wombwell's Settlement, Clerke V. Menzies (1922) 2 CH. P. 298. Concluding learned counsel submitted that since the parties have reduced into writing their agreement as to the disposition of their joint stand, contending that oral evidence is not admissible to contradict, alter, add to or vary it. Reference was made to Section 132 (i) of the Evidence Act, contending that (Exhibit P 52) correctly represents the assets jointly owned by the appellant and the respondent and so the learned trial Judge exceeded her jurisdiction under Section 17 of the Married Women's Property Act.

In reply learned counsel for the respondent cross appellant observed that it is only where Exhibit P 52 has comprehensively addressed and determined all the property rights and issues between the parties that the court would be debarred from looking outside it to determine the rights of the parties, contending that Exhibit P 52 only affects specific property mentioned therein.

Learned counsel submitted that by the provision of Section 72 of the Matrimonial Causes Act the court is empowered to make any order as the court considers just and equitable for the benefit of the parties. Reliance was placed on Akinbuwa V Akinbuwa (1998) 7 N.W.L.R. Pt. 559 p.661.

Concluding, he observed that the court below was right to have ordered that Plot L Block 26 Amuwo Odofin layout should be sold and that the proceeds of sale be divided equally between the appellant and the respondent. Section 17 of the Married Women's Property Act 1882, a statute of general application in Nigeria states that:-

"In any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise in any summary way to a Judge ... and the Judge may make such order with respect to the property in dispute as he thinks fit."

Section 72 (1) and (2) of the Matrimonial Causes Act reads:-

"72 (1) The court may, in proceedings under this Decree by order require the parties to the marriage, or either of them, to make, for the benefit of all of the parties to... the marriage, such settlement

of property to which the parties are, or either of them is entitled (whether in possession or reversion as the court considers just and equitable in the circumstances of the case.)

(2) The court may... make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties..."

Section 69 states that "marriage" includes a purported marriage that is void.

A void marriage is a marriage that produces no legal consequences. That is to say it is a marriage that never took place. See Section 3(1) of the Matrimonial Cause Act. A void marriage is still a marriage by the provisions of Section 69 supra.

Now, the parties signed a memorandum which shows how they intend to divide/share their property. The law appears well settled that oral evidence is inadmissible to contradict, alter, add to or vary it. See Section 132 (i) of the Evidence Act. Shethmari V. Nwokoye (1991) 9 N.W.L.R. Pt. 213 p. 60 Sajere V Iretor (1991) 3 NWLR Pt. 179 p. 340.

The law is clear. Where parties have reduced into writing their contract the rule is that oral evidence is not allowed to be given to add, vary it, but oral evidence can be adduced to show that there is a mistake in the written agreement. That is by the way. The issue is what becomes of the house at Plot L Block 26 Amuwo Odofin Layout.

In answering this question the learned trial Judge had this to say:-

"I have examined all the exhibits tendered before this court especially all the files from the Bank in particular Exhibit D 03, the Bank draft from the Petitioners account with which the land was purchased and all the Bank statement and I am convinced that in truth that the Petitioners fund purchased the land on which the matrimonial home now stands. I am also convinced beyond any doubt at all that her funds definitely went into the construction of all the building on the disputed plot."

Her Lordship continued:-

"The respondent did not tender any document other than some receipts from his supervisor on site to show his contribution towards

this property so I believe that I can safely assume that his own contribution came too from the joint account maintained by both parties. I therefore conclude that the Petitioner has an interest in Plot L Block 26 Amuwo Odofin Scheme on which the matrimonial home stands and is accordingly entitled to a share thereof."

B And with the above the learned trial Judge exercised her jurisdiction under Section 17 of the Married Women's Property Act and made the order on Plot L Block 26 Amuwo Odofin Scheme that the said property be sold and proceeds from it be divided equally between the parties.

C Anyway one looks at it, the learned trial Judge was correct. Since it is clear that the said property is not included in the list of properties in Exhibit P 52, that the parties agreed to share (see pages 463-467 of the Record of Appeal). The
D learned trial Judge had a duty to make a pronouncement on what becomes of the property after the marriage had been declared void. Section 17 of the Married Women's property Act confers on the Judge power to make orders in respect of property in dispute as he thinks fit and such an order must be
E fair, just and equitable. That the parties share proceeds of the sale equally is what is expected in equity.

If on the other hand the fact that the marriage is void means no property rights accrue, then the parties were simply living together as friends or in a similar manner. What then
F becomes of property they both claim to have contributed to purchase? Surely such property can only be addressed in the way the learned trial Judge has done.

G I am satisfied that the order of the learned trial Judge on Plot L Block 26 Amuwo Odofin Scheme was fair, just and equitable. It would be unconscionable for any party to claim exclusive ownership. Bearing in mind the changing social and economic realities, a Judge is to ascertain the parties shared intentions, actual, inferred with respect to the property in the light of their conduct. In that light I am
H satisfied that when the going was good the parties made contributions to ensure that they had good living accommodation. When the going turns bad it is only right and equitable that each side recoups its contribution and call it a day.

Once again I am of the firm view that the learned trial Judge

was correct in the orders made on Plot L Block 26 Amuwo Odofin Scheme.

On Issue 2 learned counsel for the appellant observed that the learned trial Judge relied heavily on computer generated statements of accounts (Exhibits P 16 - 23) in coming to the conclusion that the property in dispute was a joint property of the appellant and respondent. He submitted that the tendering of computer generated documents do not comply with the requirement of Section 97 of the Evidence Act and so are not admissible in evidence. Reliance was placed on *Yassin V. Barclays Bank Ltd.* (1968) 1 ALL NLR p. 771, *Egbue V Araka* (1996) 2 N.W.L.R Pt. 433 p. 688 F. S. *Yesufu V A.C.B. Ltd.* (1976) ANLR P. 264. B
C

Learned counsel observed that the learned trial Judge ought to have treated the admissible evidence as it had never been admitted when aware that the said evidence ought not to have been admitted. Reliance was placed on *N.I.P.C. V Thompson Organisation* (1969) All NLR p. 134. *James V Mat- Motors ltd.* (1978) 11-12 SC p. 31. D

Concluding he submitted that the learned trial Judge should have rejected Exhibits P 16 - 23 as inadmissible evidence. E

Replying learned counsel for the respondent cross appellant observed that Exhibit P 16, P 19, P 21, P 22 and 23 were tendered and admitted without any objection from counsel for the appellant. Relying on *Oguma V I.B.W.A.* (1988) 1 N.W.L.R. Pt. 73 P.658 *New Nigerian Bank V Legemah* (1986) 2 N.W.L.R. Pt. 25 p. 785 he submitted that the appellant cannot at this stage raise the issue of the alleged non-compliance with Section 97 of the Evidence Act. F

On Exhibits P 17, P 18 and P 20 learned counsel observed that when they were tendered objection was raised on the ground that the documents were not pleaded and that they did not bear any account number. He submitted that the learned trial Judge was correct to overrule the objection and that Exhibits P 16 - P 23 were properly admitted in evidence. G

The argument canvassed by learned counsel for the appellant is that the learned trial Judge was wrong to admit computer generated evidence contrary to the provisions of Section 97 of the Evidence Act. H

The issue as to the admissibility of computer generated

evidence has been the subject of controversy for quite some time now in Nigeria and presently the legislature is working on appropriate amendments to accommodate such evidence.

As the law stands today computer printout of Bank Statement of Account can be admitted in evidence. See Trade Bank V Chami (2003) 13 N.W.L.R. Pt. 836 p. 158. **Section 97 (1) (h) and (2) (e) of the Evidence Act are relevant for consideration and explanation.**

“97 (1) Secondary evidence may be given of the existence condition or contents of a document in the following cases-

(h) When the document is an entry in a Banker’s book.

2(e) In paragraph (h) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the Bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the Bank, which proof may be given orally or by affidavit by a partner or officer of the Bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.”

In Yesufu V A.C.B. (1976) 4 SC p. 1. The Supreme Court recommended the following guidelines to be followed when dealing with this type of document-

(i) When the books of the Bank cannot be produced, a certified copy of the account is enough. The production of a certified true copy of account is affirmative evidence that there is in existence a book from which the copies were made.

(ii) Where an official of the Bank certifies the copy and he gives evidence under oath this is compelling evidence that he compared the copy with the original before he certified it.

(iv) Where books of the Bank are produced by official of the Bank, e.g. Accountant, the said books must have been in the custody of the Bank.

Such evidence is inadmissible where a witness fails to testify that he personally examined the statement of account and compared it with the entries in the original Bank books and found it to be correct. See A.C.B. V Oba (1993) 7 N.W.L.R.

Pt. 304 p. 173 P.B. Olatunde and Co. V N.B.N. LTD. (1995) 3 N.W.L.R. Pt. 385 p. 550.

How then were Exhibits P16 - P23 admitted in evidence.

When learned counsel sought to tender Exhibits P17, P18 and 20 learned counsel for the respondent (now appellant) objected that the account number has been changed, was not pleaded, and the document sought to be tendered, bears no account number. B

In a short ruling the learned trial Judge said:-

"...The account No is 5014803019 and since it is from proper custody I will admit same in evidence. I agree also with the submission that it is no longer necessary by our rule of practice to plead specific document in pleadings as the court will admit same if it could reasonably be informed from the pleadings..." C

The objection was overruled and the statement of the Petitioners Savings Account was admitted as Exhibit P 17. The learned D trial Judge repeated the above reproduced ruling and admitted in evidence Exhibits P 18 and P 19.

If I may add for emphasis, facts are pleaded and documents tendered in support of facts pleaded. Facts are pleaded and not documents. See Moniar Construction Co. Ltd. V. T.I. Azubike E (1990) 3 N.W.L.R. Pt. 136 p. 74, Odunsi V Bamgbala (1995) 1 N.W.L.R. Pt. 374 p. 641.

As regards Exhibits P 16, P 19, P 21, P 22 , P 23 (See from page 150 of the Record of Appeal) Pw 2 was recalled and he testified F thus:-

"Yes I have the Statement of Account of Account No, 0674501122 here with me, this is it. It was printed from the Banks computer system. I have compared the entries in the statement with the entries into the computer and they are the same. The entries G were made in usual cause of the Bank."

And with that the Statement of Account was admitted as Exhibit P 16. This was also the case with Exhibit P 19, P 21, P 22 and P 23. They were all tendered without any objection from learned H counsel for the appellant.

Once there is substantial compliance with the provisions of Section 97 (2) (e) of the Evidence Act Banking documents are admissible in evidence. The fact that pw 2 said on oath (and he was not challenged) that he made comparison as

required, then there is substantial compliance with the provisions of Section 97 (2) (e) of Evidence Act. Exhibits P 16 - P 23 are secondary evidence and their admissibility in evidence as Exhibits was correct. Furthermore since Exhibit P 16 - 23 (Statement of Accounts) are not inadmissible, they are admissible subject to certain conditions earlier explained, and since they were admitted (Exhibits P 19, P 21, P 22 and P 23) without any objection to their admissibility, any further objection to their admissibility is deemed waived and this court cannot open the admissibility of the said Exhibits. See Oguma V.I.B.W.A. (1988) 1 N.W.L.R. Pt. 73 p. 658. Finally and for emphasis, since Exhibits P 16 - P 23 were documents admissible under Section 97 (1) (h) and 2(e) of the Evidence Act provided certain conditions were met and those conditions were met (the testimony of p w 2). There has been substantial conformity with the section supra. Consequently the computer generated Statements of Account (Exhibits P 16 - P 23) tendered by the respondent were admissible in law.

In the light of all that I have been saying this appeal fails and it is hereby dismissed.

CROSS APPEAL

A cross appeal is filed by a respondent who is dissatisfied with a finding which is crucial and fundamental to the case. The purpose really is to correct any error standing in the way of the respondent in the main appeal. See *African Continental Seaways Ltd. V. Nigerian Dredging Roads and General Works Ltd.* (1977) 5 SC p. 235, *Eliochin (Nig) Ltd. V. Mbadiwe* (1986) 1 N.W.L.R. PT. 14 P. 47, *Lagos City Council V Ajayi* 1970 1 ALL NLR p. 291.

Learned counsel for the respondent cross appellant formulated two issues for determination of the cross appeal.

1. Whether the learned trial Judge was right from the facts and evidence available before the lower court in holding that the cross appellants ownership of Plot 5 Block 28, Amuwo Odofin, disentitles her from a share in Plot 316 Block 18, Amuwo Odofin Residential Estate.

2. Whether it was right of the learned trial Judge not to have made a finding in respect of the cross appellant's claim, that she had contributed to the acquisition of Plot 316, Block 18, Amuwo Odofin

Residential Estate.

Learned counsel for the appellant/respondent to the cross appeal formulated a sale issue for determination. It reads:-

Whether having regard to the facts of this case, the cross appellant was entitled in law to a share of the property known as Plot 316, Block 18, Amuwo Odofin Residential. B

The cross appeal was filed simply because learned counsel for the respondent/cross appellant is of the view that his client ought to have been given a share in the property at Plot 316, Block 18, Amuwo Odofin Residential Estate. In view of the above I am satisfied C with the issue formulated by the appellant/respondent to the cross appeal. I adopt the sole issue for the determination of the cross appeal. This is so because an Appeal Court can adopt or even formulate issues that it believes would determine the real grievance in the cross appeal. See Shona-Jason ltd. V Omega Air Ltd. (2006) 1 D N.W.L.R. Pt. 960 p. 1.

In his brief learned counsel for the respondent cross appellant observed that the cross appellant established her proprietary interest in Plot 316 Block 18, Amuwo Odofin Residential Estate and so the lower court ought to have made a definite finding in favour of the cross appellant as to her proprietary interest in the property. Relying on Awoyale V Ogunbiyi (1986) 2 N.W.L.R. Pt. 24 p. 226. E

He urged us to allow the cross appeal.

Learned counsel for the appellant/respondent to the cross appeal observed that the learned trial Judge made findings of fact on Plot 316 Block 18, Amuwo Odofin Residential Estate, and this court should not disturb those findings. Reliance was placed on Ogbechie V Onochie (1988) 1 N.W.L.R. Pt. 70 p. 370, Ebba V Ogodo (1984) 1 SC NCR p. 372. F

On Plot 316 Block 18, Amuwo Odofin Residential Estate the learned trial Judge said. G

“Plot 316 Block 18, Amuwo Odofin Residential Estate. The Petitioner is claiming an interest on the above premises to which the respondent claims is his exclusively. DW1 gave evidence that he sold the property to the respondent who paid him and for which he issued a receipt. The Petitioner also testified that she also bought a Plot of Land Plot 5 Block 28, Amuwo Odofin in her own name. I am not going to go into the details of who paid for what in respect of this Plot H

because I am of the view that if the Petitioner can have a plot in her name, the respondent is entitled to one in his own name too. It is the justice of the matter that should always prevail. For this reason I will not grant the Petitioner's prayer in respect of this Plot of Land and will declare that it remains the exclusive preserve of the respondent herein.

B *I accordingly hold that she has no interest herein.*”

And with that the learned trial Judge’ declared the appellant/respondent to the cross appeal the exclusive owner of Plot 316 Block 18, Amuwo Odofin Residential Estate.

C ***It is very well settled that it is not the business of this court to assess the credibility of the witnesses who testified and substitute its own views for the views of a trial court which is in a much better position to assess the credibility of the witness who testified before it. See***

D *Woluchem V Gudi* (1981) 5 SC p. 291.

The duty to appraise evidence is pre-eminently that of the trial court and when there is evidence to support the conclusion of the trial court this court would not interfere. See *Olugbolu V Okeluwa* (1981) 6 - 7 SC p. 99.

E ***Though this court would interfere where satisfied that the findings cannot be supported by evidence or is perverse.***

Before concluding as to who is the rightful owner of Plot 3J Block 18, Amuwo Odofin the learned trial Judge examined the evidence in detail particularly the testimony of both parties and DW1 who sold the property to the cross appellant and came to the conclusion which I am satisfied with. I must observe that in matters of this nature a Judge must be guided by what is just and fair in the circumstances. Plot 316 Block 18, was ordered to be given to the appellant/respondent to cross appeal exclusively, while Plot 5 Block 28 is owned by the respondent cross appellant exclusively. Both are to share Plot L Block 26 equally. To my mind this sharing formula is justice and fairness.

H The idea of equity has always been associated with judicial decisions, and emphasises that cases should be decided in a way which is fair and right so that justice is achieved between the parties.

I am satisfied with the learned trial Judge’s order on Plot 316 Block 28, Amuwo Odofin Residential Estate.

Cross appeal fails and it is hereby dismissed. There shall be no

order on costs.

For the avoidance of doubt appeal and cross appeal are dismissed.

GALIJE JCA

B

I have had a preview of the judgment just delivered by my learned brother, Rhodes-Vivour, JCA and I agree with the reasoning contained therein and the conclusion arrived thereat.

Accordingly this appeal and the cross appeal fail and are hereby dismissed. I make no order as to cost.

MUKHTAR JCA

I read before now the judgment of my learned brother Rhodes- Vivour, JCA in this appeal which has just been delivered. I agree with him that both the main appeal and the cross appeal are totally lacking in merit and are deserving of nothing else other than an outright dismissal. I too dismiss both the appeal and the cross appeal without any order as to costs.

F

G

H