

SUPREME COURT OF NIGERIA

FRIDAY 13TH DECEMBER, 2013. SC. 291/2008

**CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
O. ARIWOOLA, C. B. OGUNBIYI, K. B. AKA'AH, JJSC**

NIGERIAN BOTTLING COMPANY PLC APPELLANT
AND
CHIEF UZOMA UBANI RESPONDENT

COURT PROCESSES - Service - Defect in - By Cross River HC Rules O. 2 rr. 1 & 2 - Defect in service amounts to non compliance - And the irregularity is deemed as waived - Where party after being aware of same - Took further steps in the proceedings (H1)

JUDICIAL PRECEDENTS - Stare decisis - Principle of - It states that lower courts are bound to follow principles of law - Established in prior cases by superior courts - As such helps to steady justice on its proper course (H2)

COURT PROCESSES - Service on company - Mode of - By virtue of CAMA s. 78 - Service must comply with the rules of the particular court prevailing in the jurisdiction (H3)

COURT PROCESSES - Service - Validity - The State HC Rules has relaxed mode of service on company - Hence service on the depot manager is proper - Since he is principal officer served within jurisdiction (H4)

COURT PROCESSES - Service - Defect in - Waiver - Effect - Appellant having let go of its right is not allowed to resurrect same in SC - As the right is deemed waived - And it cannot rely on same to set aside service on it (H5)

EVIDENCE - Pleadings - Unchallenged averments - Evidence on amount claimed constituted sufficient proof of special damages - Recoverable by respondent - As the evidence was admitted without objection (H6)

4028 Nigerian Bottling Co. Plc v. Ubani (2013) 8-12 KLR

PLEADINGS - Amendment - Validity - Amendment is allowed provided that averments are material - And intends to bring out real issues in controversy between parties before court - In order to avoid multiplicity of actions (H7)

DAMAGES - General damages - Trespass - Plaintiff who has by evidence established that defendant is a trespasser - Is entitled without more to general damages for trespass (H8)

DAMAGES - Special damages - When plaintiff has suffered specific losses as to his income - In addition to general damages on account of trespass - He can claim the losses by way of special damages (H9)

DAMAGES - General damages - Where plaintiff pleaded and gave particulars of special damages - He is entitled to be granted relief over and above general damages awarded (H10)

DOCUMENTS - Admissibility - Mere fact that Exhibits E, F & C were prepared during pendency of suit - Does not render them inadmissible - As it has not been shown that the maker has financial or tainted interest - In the outcome of the case (H11)

DOCUMENTS - Made during pendency of suit - Fate - By EA s. 91 - Such document is inadmissible for it is capable of gross abuse to advantage of maker - Whose interest negates principle of fair hearing (H12)

APPEALS - Issues - Failure to raise - Question of entitlement to general damages was not raised under any of appellant's issue - Hence submissions made in that regard - Go to no issue and ought to be discountenanced (H13)

APPEALS - Grounds - From which no issue arose - Fate - As no issues have been raised from grounds 5 & 6 - The grounds must be deemed as having been abandoned by appellant (H14)

APPEALS - Issues - Objection - Not challenged - Appellant must be deemed as having known respondent's stance on the issue - Since

the brief containing the objection was served on it - And it made no effort to counter the objection (H15)

APPEALS - Issues - Different from case - Where party has premised his case on issue that does not cover his case - His arguments under the said issue literally goes to no issue - And is liable to be struck out (H16)

APPEALS - Concurrent findings - Damages - Award of - No ground exists for Supreme Court to interfere with award of N15 million - As there is no credible case - That the amount is ridiculously high (H17)

APPEALS - Issues - Abandonment - Issue 5 is deemed abandoned as no argument was proffered by appellant under it - As such the issue is struck out having been abandoned (H18)

APPEALS - Fresh issue - Raised without leave - Fate - Issue 5 not having been taken in lower courts - Cannot be competently raised in SC - Without leave of the court (H19)

FACTS

Plaintiff/respondent commenced this action against defendant/appellant at the High Court of Cross River State Calabar, claiming inter alia various sums of money for loss of rent, loss of income and cost incurred for repairs done on his property. The parties filed their pleadings in the court and matter proceeded to hearing. Appellant's contention is that the property (i.e. large warehouse owned by respondent) was leased to it by respondent's erstwhile wife. Respondent's position is that he secured a contract in England with Messrs. Zorbacrest Ltd to supply 1500 tonnes of fermented Nigerian cocoa beans. The agreement in the contract was articulated in Exhibit D. Respondent went on to state that he returned to Nigeria to make use of the warehouse for fermenting the cocoa beans.

He was shocked upon his arrival to discover that appellant has illegally broken into the said property and was in fact in actual usage of same for its daily business. Respondent wrote to appellant to vacate the premises to enable him (respondent) make use of same for the execution of his contract. Appellant refused to leave even after it

received the letter to quit. Respondent contended further that he lost the contract and had incurred loss of income following his inability to recover the premises from appellant for the execution of the contract. At the end of hearing, the court awarded to respondent the sum of N19,618,089.00 as special and general damages for trespass committed by appellant. Dissatisfied, appellant appealed to the Court of Appeal Calabar Division challenging the award for damages. The court considered the case and reduced the amount awarded to N18,982,700.00. Not satisfied, appellant appealed to Supreme Court contending among other things that the court processes in the matter was improperly served on it.

ISSUES FOR DETERMINATION

“(1) Whether the writ of summons issued and the service thereof effected on the Appellant was proper and in accordance with relevant laws and court rules.

“(2) Whether Exhibits E, F, and G purportedly prepared at the behest of the Respondent during the pendency of the instant case do not offend against the provisions of section 91(3) Evidence Act, Laws of Federation of Nigeria, 1990 and thus in admissible.

“(3) Whether Exhibit D tendered by the respondent supports the award of N15 Million special damages to the respondent.

“(4) Whether the Court of Appeal was right in holding that Exhibit D constituted a binding contract for the respondent to supply 1,500 or 100 tonnes of cocoa beans especially given the alleged lack of cross examination on its contents by the appellant.

“(5) Whether Zobacrest Ltd. is not a separate and distinct personality from the respondent and ought to have been joined in the suit as a party.”

HELD (Unanimously dismissing the appeal per **CHUKWUMA-ENEH JSC**)

COURT PROCESSES - Service - Defect in

1. Furthermore, the plaintiff/respondent has relied on the cases decided by this court as per *Bank of Ireland v. Union Bank (1998) 7 SCNJ 385 at 396 to buttress his stance in this matter. He has also argued that this court’s stance in the above cases is consistent with the provisions of order 2 Rules 1 and*

2 of the Cross River State High Court (Civil Procedure) Rules 1987 to the effect that any defect in the service of court processes as here amounts to a non-compliance and so an irregularity under the said Rules that has to be deemed as having been waived where a party as the defendant/appellant hereof after becoming aware of the irregularity has taken further steps in the proceedings. B

I must concede by interjecting pre-emptorily at this stage that he has correctly stated the application of the provisions of the said Rule as it relates to the facts in this suit. It is settled law that as in this instance that the consequences of waiver defeats the issue of non-compliance. C

The practical effect of the steps so far taken here by the defendant/appellant is that where a non-compliance under Order 12 Rule 8 is sustainable in its favour, in other words as amounting to a non-compliance; even then that by virtue of Order 2 Rules 1 and 2 (supra), the non-compliance amounts to no more than a mere irregularity which can be waived and indeed has been deemed waived in the circumstances as set out in extenso herein in this case. (pp. 4046 E/4051 D) D E

JUDICIAL PRECEDENTS - Stare decisis - Principle of

2. Wherefore the only option before this court in the circumstances is merely to follow the precedents already set by this court in those cases decided on similar facts based on the hallowed principle that similar matters should be treated alike and so make for predictable outcome. This point is rooted in the principle of judicial precedents otherwise known as the doctrine of stare decisis which has to be adhered to strictly here as clearly for that matter, in an age this court is increasingly being challenged by its conflicting decisions. This invaluable legal principle by which (according to the hierarchy of the courts), courts are bound to follow the principles of law established in prior cases is an important corner stone of the Common Law. In a synopsis, it directs that once a point of law in a case has been pronounced by a court of competent jurisdiction that depending on the court's position in the hierarchical ladder, such pronouncement on the legal principle F G H

on the point in deciding the matter before it is not open to be re-examined or revisited by the same court or courts below it otherwise bound to follow the decision. This principle helps to steady justice on its proper course as well as make for settled matters and it is not therefore open to every court's opinion. In that vein this court is bound to toe the line as it is bound by the above cited cases in construing these provisions which are binding on this court.

In other words, this court as the apex court is bound to follow its decisions in this instance as in the immediate above cited cases. Meaning in effect that the validity of services of the instant processes being initiating processes have to comply as provided by the combined effect of Section 78 of CAMA and order 12 Rule 8 (supra) as decided in the said above cited cases, otherwise, such services are incompetent.

(pp. 4047 D/4048 C)

COURT PROCESSES - Service on company - Mode of

3. In that regard section 78 (supra) has prescribed that service of processes as here complies with the Rules of the particular court prevailing in the jurisdiction. The defendant/appellant has suggested that service of processes as aforesaid on a company or corporation for that matter must be at the registered or head office of the company or corporation. However, I tend to agree more with the plaintiff/respondent that a close scrutiny of the said provisions does not so support. The above plain and unambiguous provisions of Rule 8 (supra) clearly do not stipulate as contended by the defendant/appellant that service of court processes as here must be at the registered or head office of a company. A closer examination of the same has showed that service of court processes has to follow in the manner provided by the rules of the particular court concerned, which in this instance is the Cross River State High Court (Civil Procedure) Rules 1987 more particularly order 12 Rule 8 thereof. The said Rule 8 if I may put in parenthesis provides "that a writ may be served when the suit is against a corporation or a company authorized to sue or be sued in its name or in the name of an officer or

trustee the writ or document may be served subject to the enactment establishing that corporation or company or under which it is required as the case may be."

(pp. 4048 D/4049 A)

COURT PROCESSES - Service - Validity

4. All the same, the reasonable conclusion from construing the provisions of this Rule is that being an ordinary Rule and not being a mandatory statutory requirement as in the case of the provisions as per companies Act 1968, it is apparent that where a court is not dealing with an issue of competency of the processes per se, but with their service on a defendant, the instant rule has relaxed the mode of service of court processes as aforementioned on a company by making it a lot easier now. I therefore agree with the plaintiff/respondent that the service of the instant court processes as per the above mode on the Depot Manager is proper service being a principal officer served within jurisdiction. The instant Depot Manager is to all intents and purposes a principal officer in charge of the defendant/appellant's expansive complex at Ikom. It cannot be otherwise where the instant Depot Manager is responsible for the day to day running of the defendant/appellant's large complex at Ikom encompassing its branch office, soft drink depot, staff quarters and distribution trucks garage.
(p. 4050 E)

COURT PROCESSES - Service - Defect in - Waiver - Effect

5. The concept of waiver as articulated in the cases of *Ariori v. Elemo* (1983) NWLR (pt.353) 171 and *Kano State Development Board v. Franz Construction Ltd.* (1994) 4 NWLR (Pt.142) equals to simply failing to take advantage of a right very obvious to a party where it is clear that there is no other reasonable presumption in explanation of the party's steps so far taken in the proceedings before the court (as in this case) than that the right is let to go. He has acquiesced in his right putting it naively. In the circumstances of this case, the defendant/appellant having let go his right here as rightly found by the two lower courts cannot be allowed to resurrect in this

court the said right already deemed waived and so to speak rely on it to set aside the instant service on it (defendant/appellant) of the aforesaid processes (already deemed waived). It does not lie in its mouth to so contend. It must take the consequences of its acts. Issue One is therefore, resolved in
B the plaintiff/respondent's favour. (p. 4051 F)

Pleadings - Unchallenged averments

6. These allegations of facts in law have rightly been deemed as having been admitted and so as requiring no further proof.
C Further, that evidence given by the plaintiff/respondent nonetheless, in this regard being consistent as per his pleadings has not even been challenged at the trial (as they have been admitted without objection) nor even denied; and again he has
D relied on Usman v. Owoeye (2003) FWLR (Pt.152) 38 to submit rightly that the said unchallenged evidence as per the said Exhibits on the amount so claimed thereof have constituted sufficient proof of the special damages recoverable by the plaintiff; again, with respect, it has been deemed admitted.
E Clearly from the above pleadings, the defendant/appellant cannot be said in law to have joined issues on the material facts as averred in the aforesaid plaintiff/respondent's paragraphs 16 and 17. His averments therein have remained un-
F challenged. Indeed, the defendant/appellant has literarily not challenged the facts as pleaded by the plaintiff/respondent and so the effect of their being unchallenged in its pleadings as well as at the trial is an admission of the amount so claimed by the plaintiff/respondent without further proof based on the
G principle of minimum evidence; if I may add what is admitted need no proof as the evidence has gone one way. The defendant/appellant being completely silent on this issue it has in law to be deemed on having admitted the averments of paragraphs 16 and 17 of the plaintiffs/respondent's further amended
H pleadings. It is my view otherwise in consonance with the views of the two lower courts that the plaintiff/respondent's case on this point is insurmountable as it is the principle of pleading that the defendant admit or deny what the plaintiff has expressly alleged in his statement of claim or be deemed as having ad-

mitted the same.

It is noteworthy and also significant that no objection has been taken by the defendant/appellant to their admissibility at the hearing. I must therefore, observe that apart from attacking the Exhibits purely on legal grounds there has been no dispute of fact in the circumstances as to the amount of N909,500.00 the plaintiff has allegedly expended on the said repairs of his property and in the absence of any such challenge the law is that the same is taken as admitted by the defendant/appellant although it will not exonerate a party as the plaintiff here from adducing a minimum of evidence as he has done here in proof the same and so the lower courts have rightly in law relied on it as proved in making the said award. (pp. 4053 C/4054 G/4056 F)

D

PLEADINGS - Amendment - Validity

7. It must be noted that the foregoing averments with regard to exhibits E, F & G have been introduced by the further amended pleadings of both parties filed in the matter by the amendment of the original pleadings. The trial court has rightly opined that the law allows such amendments of the pleadings at a trial even up to and before judgment so long as the averments (i.e. in this regard the said Exhibits in this case) are material and intended to bring out the real issues in controversy between the parties before the court for adjudication once and for all in order to avoid a multiplicity of actions. And I uphold the same as the introduction of the said Exhibits at that stage of proceedings by the amendment cannot be faulted. (p. 4055 D)

G

DAMAGES - General damages - Trespass

8. However, the law is trite that a plaintiff who has by evidence established that a defendant is a trespasser is entitled without more to general damages for trespass. (p. 4055 H)

H

DAMAGES - Special damages

9. On the question of special damages in the storm's eye on this issue, the law is also quite certain that when a plaintiff has

suffered some specific losses as to his income in addition to general damages on account of the trespass, he can as well claim these specific losses by way of special damages.

It is the law as found by both lower courts and I agree that a plaintiff who has also suffered some specific loss of income on account of the trespass occasioned to him can properly as well claim those specific losses by way of special damages as a direct and immediate result of the said trespass.

I therefore, hold on the peculiar facts of this case that the loss of earning as caused to the plaintiff in this case is not too remote consequent upon the defendant's acts of trespass. I make this finding clearly having earlier on by empirical considerations found that Exhibit D represents a binding and enforceable agreement between the plaintiff/appellant and Messrs. Zorbacrest Limited - without which the instant claim is a non-starter. And that the instant special damages are the direct consequences of the defendant's trespass and therefore recoverable by the plaintiff. (pp. 4056 A/4067 A/4068 B)

DAMAGES - General damages

10. Furthermore, it is trite law that where a successful plaintiff has pleaded and given particulars of special damages he is entitled to be granted the relief over and above the general damages awarded and this is very pertinent to the plaintiff/respondent's case here in relation to his relief for N10 Million for general damages. (p. 4056 C)

DOCUMENTS - Admissibility

11. The next question that arises on the backdrop of the admission of these Exhibits as admissible evidence is whether in the circumstances the mere fact of having prepared them - Exhibits E, F & C during the pendency of the suit does render them inadmissible in law. Certainly not; this is particularly so as the documents have not been rendered ab initio illegal and absolutely inadmissible in law for having been so prepared during the pendency of the case. The law also requires that it must be showed that the maker of the document has an interest in the outcome of the case to render such documents in-

admissible. It is crucial to note that the documents here are not in the class of documents absolutely prohibited as inadmissible in law. In that wise, it is my view that once the documents have been admitted at the trial as in this instance without objection, the two lower courts have rightly acted and relied on them.

The instant Exhibits E, F & G in the context of this matter have been prepared by one Mr. Ephraim Obot of C. Y. Obi Builders otherwise known as their maker but he has not been showed to have any financial or other tainted interest in the outcome of this case and so the instant documents i.e. Exhibits E, F & C cannot come within the ambit or be caught under Section 91(3) (supra). In other words, these Exhibits being legal evidence have been rightly admitted in evidence by the trial court. It is even moreso here when the defendant/appellant has not at the trial objected to their admissibility and so the defendant/appellant cannot now be heard albeit belatedly to urge against their admissibility howbeit by having them expunged from the record. The trial court again relying on the instant Exhibits as admissible evidence in proving the instant special damages, if I may repeat, without any objection at the tendering of the said Exhibits - has rightly admitted them and acted on them as requiring no further proof. The two lower courts have rightly acted and relied on the said documents. (pp. 4057 A/4058 G)

DOCUMENTS - Made during pendency of suit - Fate

12. What has emerged from a combined reading of the foregoing provisions of sub-sections 3 and 4 of section 91 of the Evidence Act 1990 is that a document which is prepared or authenticated by a person interested in the outcome of a matter before the trial court that is, when the proceedings are pending or anticipated and which document is intended to be used and relied on by the person and indeed has been so used or relied on to establish a fact in issue in the pending matter, albeit in the outcome of the case, is clearly inadmissible - meaning that it must be rejected as inadmissible evidence. There is much good sense grounding this principle of law as there is also no gainsaying that for a party to a suit to indulge

in such exercises is self serving as it is capable of gross abuse to the advantage of the maker. Besides, a maker's interest in such circumstances negates the principle of fair hearing, a constitutional principle which is basic for a pure adjudication of a matter before the court; clearly, such interest distorts the evenness of the level playing ground, the court always attempts to provide for both parties to litigation in the interest of justice. Such interests can be financial as is being alleged in this case and a comparable offence in this regard is the offence of champarty which is a bargain wherefore a party in a suit is assisted by another person with a view to sharing the proceeds of the suit. (p. 4058 B)

APPEALS - Issues - Failure to raise

13. Unfortunately, it has to be noted that the question of entitlement to general damages has not been raised under any other issue formulated for determination by the appellant in this appeal and so all the submissions made in that regard by the defendant/appellant go to no issue and are incompetent, and so ought to be discountenanced and set aside. (p. 4064 B)

APPEALS - Grounds - From which no issue arose - Fate

14. Again, that as no issues have been raised from grounds five and six; the said grounds must therefore be deemed as having been abandoned by the appellant.

It has not challenged the award to the respondent of general damages of N3 Million and so cannot by any stretch of its wordings as couched conceivably be taken to encompass the said award of general damages as that is reading into issue 3 as raised what it does contemplate as an issue for determination. The matter is made worse as no issue for determination has been raised from ground 6 that has specifically complained against the said award of general damages; it is apparently abandoned and must be struck out; also the same consideration affects ground 5. (p. 4064 C/H)

APPEALS - Issues - Objection - Not challenged

15. I think the plaintiff/respondent cannot be wrong for taking

the foregoing stance in support of his instant objection. The appellant must be taken as seised of the respondent's stance on this issue in that the respondent's brief of argument containing the instant objection has been duly served on it; it has made no effort to counter the objection either by amending its brief of argument to enable it address the instant objection or even to do so at the oral hearing of appeal before us by seeking leave of this court to make a reply albeit orally rather it has ignored the objection to its peril. (p. 4064 D)

APPEALS - Issues - Different from case

16. It is trite that where a party has erroneously premised his case on an issue which by its clear ambit does not cover his case as clearly envisaged by the issue raised for determination his arguments under the said issue literarily goes to no issue and is liable to be struck out as discountenanced. (p. 4065 B)

APPEALS - Concurrent findings - Damages - Award of

17. I must also observe that I am in agreement with the two lower courts in regard to their concurrent findings on the supply and purchase of 1500 tonnes of cocoa beans as per Exhibit D as agreed between the parties to Exhibit D as well as the credible evidence of the calculation of how the respondent has arrived at his claim of N15 Million and in strict proof thereof even on his ipse dixit alone, that is to say, in the circumstances where the plaintiff's Exhibit D has not been objected to and the evidence thereupon has not been challenged by the defendant. There is no ground whatsoever upon which this court can rely to interfere with and set aside the award of N15 Million on the principle articulated by this court in Uwa Printers (Nig) Limited v. Investment Trust Co. Ltd. (supra) and Akinkughe v. H.N. Ltd. (supra) as it does not arise here where there is no credible case on the facts of this case that the sum of N15 Million is ridiculously high. (p. 4068 E)

APPEALS - Issues - Abandonment

18. The appellant for reasons not apparent on the record has

not proffered any arguments in its brief of argument under this issue. In other words, no arguments have been canvassed by the appellant under issue 5. It looks totally abandoned mid stream in the appeal. Against this imponderable situation, the said issue is left rightly to be swept away as it is clearly in the
B **circumstances of the appeal incapable as the last straw to save the plaintiff's "drowning" case in this matter. In that vein, issue 5 is hereby struck out having been abandoned.** (p. 4069 B/F)

C **APPEALS - Fresh issue - Raised without leave - Fate**
19. There is the fact of this issue not having been taken in the lower courts, it cannot therefore as a fresh issue without leave of this court be competently raised in this appeal in this court.
D **The defendant having perhaps become too aware of these harsh realities afflicting this issue has abandoned it howbeit ungracefully without saying so in its brief or even at the oral hearing of the appeal to save the time of the respondent and the court.** (p. 4069 D)

E
REPRESENTATION

O. Opasanya Esq. SAN with Dr. K. U. K. Ekwueme, Godswill N. Iwuajoku, O. C. Anujulu, for the Appellant
F Essien H. Andrew Esq., for the Respondent

CASES REFERRED TO

Mark v. Eke (2004) 5 NWLR (pt. 865) 54
Okurinmeta v. Agitra (2002) 6 WLR (pt. 100) 1377
G Daewoo Nigeria Ltd. v. Uzoh (2008) AFWLR (pt. 399) 456
Nigeria Airways Ltd. v. Ahmadu (1991) 6 NWLR (pt. 198)
Rivers State Govt. v. Specialist Consult (2005) 2 SC (pt. 11) 121
Bank of Ireland v. Union Bank (1998) 7 SCNJ 385
Ezomo v. Oyakhire (1985) NSCC vol. 16 (pt. 1) 280
H Menakaya v. Menakaya (2001) 16 NWLR (pt. 738) 215
Ariori v. Elemo (1983) NWLR (pt. 353) 171
Bearman Ltd. v. Metropolitan Police District Receiver (1961) 1 WLR 634
Oladehin v. C.T.M.L. (1978) 2 SC 24

Imana v. Robinson (1978) 3 - 4 SC 1

Usman v. Owoeye (2003) FWLR (pt. 152) 38

Concord Press Ltd. v. Obijo (1990) 7 NWLR (pt. 162) 303

STATUTES & RULES REFERRED TO

Companies & Allied Matters Act (CAMA) Cap. 220 LFN 1990, s. 78 B
Evidence Act 1990, s. 91(3)

Cross-River State High Court (Civil Procedure) Rules 1987, O. 2 rr. 1
& 2, O. 12 r. 8

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

This appeal is against the decision of the Calabar Division of the Court of Appeal adjudging the defendant/appellant in this court liable to pay a total sum of N18,982,700 (Eighteen Million, Nine Hundred and Eighty-Two Thousand and Seven Hundred Naira Only) D as general and special damages for trespass occasioned by an unlawful use and occupation of the plaintiff's warehouse and premises situate at No.55, Obudu Road, Ikom, Cross River State.

From the facts of this matter the claim of the plaintiff at the trial court as per his Further Amended statement of Claim is as follows: E

Particulars of Special Damages

(i) N196,274.00 being loss of rent by the plaintiff on the property from August 1991 when the 1st defendant broke into the property to July 1993 (two years) at N98,137.00 per annum.

(ii) N157,020.00 being loss of rent on the property from August 1993 when the value of the property appreciated to July 1994 (one year) at the reviewed rent of N157,020.00 per annum. F

(iii) N15 Million being loss of income by the plaintiff in the 1994/95 cocoa season when the plaintiff was unable to use his premises to execute his contract with Zorbacrest Limited. G

(iv) N353,295.00 being loss of rent on the property from July 1995 to September 1997 when the terminal repairs on the property were completed for the plaintiff to take effective possession (two years and two months) at the rate of N157,020.00 per annum. H

(v) N909,500.00 being cost incurred by the plaintiff in the repairs and renovation of the property after it was abandoned by the 1st defendant.

Total amount of special damages = N16,616,089.00.

(vi) N10 Million as general damages for other losses and expenses incurred by plaintiff as a result of the 1st defendant's trespass and unlawful occupation of the plaintiff's warehouse and premises.

GRAND TOTAL = N26, 616,099.00.

In furtherance to the facts of this matter at the trial court, parties have filed and exchanged their respective pleadings and have called witnesses. It is the defendant/appellant's case that the 2nd defendant at the trial court, the erstwhile wife of the plaintiff/respondent, is the lessor of the said property and premises in question to the defendant/appellant for its use and occupation. The plaintiff/respondent is a cocoa merchant and the owner of the vast warehouse as aforesaid, and in 1990 he has moved to England where he has secured in 1994 a contract to supply 1500 tonnes of "fermented Nigerian cocoa beans" to Messrs. Zorbacrest Limited of No.173 Winchester Road, London, the provisions of the agreement are as articulated in Exhibit D an agreement entered into between the plaintiff/respondent and Messrs. Zorbacrest Limited.

In furtherance of Exhibit D he returned to Nigeria in 1994 with the aim to using the aforesaid warehouse for the process of fermenting cocoa beans in connection with the alleged contract with Messrs. Zorbacrest Limited only to discover that the defendant/appellant has broken into the said warehouse and environs without his knowledge as far back as August 1991 using and occupying the same as its branch office, soft drink depot, staff quarters and distribution trucks garage. In spite of the plaintiff/respondent's request of defendant/appellant to vacate the premises as per his solicitors letter dated 5/8/1994 so as to enable him among other things use the same for processing his cocoa beans in order to meet his contractual obligations to Messrs. Zorbacrest Limited as per Exhibit D or alternatively to pay to him what the plaintiff has called "a concessional sum" to enable the plaintiff to rent a warehouse for "sourcing and drying the cocoa beans to be exported to Messrs. Zorbacrest Limited" as per Exhibit D. The defendant/appellant has not reacted to the letter and has refused or neglected to quit the property and also has brazenly refused to pay any rents for the use and occupation of the premises. The defendant/appellant has remained in the property for seven years and has only vacated the same in 1997 having left the property in most deplorable disrepairs; even although this action has been insti-

tuted against it in September of 1994 for recovery of the property and damages thereof for the unlawful use and occupation of the property. Following the plaintiff/respondent need for the premises for his business and being unable to recover the property and premises from the defendant/appellant as and when needed for the execution of the said contract as per Exhibit D plaintiff/respondent a huge financial loss of earnings has been occasioned to the plaintiff/respondent as a direct result of the defendant/appellant's neglect and failure to vacate the premises for purposes of enabling the appellant to execute his contract with Messrs. Zorbacrest Limited, consequently he has lost that business. B C

It is on the backdrop of these facts situation that the trial court's award to the plaintiff of the sum of N19, 618,089.00 as special and general damages for trespass has been predicated. Aggrieved by that decision, the defendant/appellant has appealed to the lower court which in affirming the trial court's judgment has re-evaluated the total award by reducing it to N18, 982,700.00. D

The defendant/appellant still dissatisfied with the decision of the lower court has appealed the decision to this court as per its Amended Notice and Grounds of Appeal deemed properly so filed and served on 14/10/2012 containing seven grounds of appeal. In the appellant's brief of argument filed in this appeal the defendant/appellant has formulated 5 (five) issues for determination to wit: E

"(1) Whether the writ of summons issued and the service thereof effected on the Appellant was proper and in accordance with relevant laws and court rules. (Grounds 1 and 2 of the Appellant's Amended Notice of Appeal)" F

(2) Whether Exhibits E, F, and G purportedly prepared at the behest of the Respondent during the pendency of the instant case do not offend against the provisions of section 91(3) Evidence Act, Laws of Federation of Nigeria, 1990 and thus in admissible. (Ground 3 of the Appellant's Amended Notice of Appeal)" G

(3) Whether Exhibit D tendered by the respondent supports the award of N15 Million special damages to the respondent. (Ground 5 and 6 of the Appellant's Amended Notice of Appeal)" H

(4) Whether the Court of Appeal was right in holding that Exhibit D constituted a binding contract for the respondent to supply 1,500 or 100 tonnes of cocoa beans especially given the alleged lack

of cross examination on its contents by the appellant. (Ground 4 of the Amended Notice of Appeal)

(5) Whether Zobacrest Ltd. is not a separate and distinct personality from the respondent and ought to have been joined in the suit as a party. (Ground 7 of the Appellant's Amended Notice of Appeal)''

The plaintiff/respondent in reaction thereof has also filed a brief of argument deemed properly so filed and served on 14/10/2012 and therein has raised five issues substantially similar to the defendant/appellant's above mentioned issues for determination; even though I have decided to adopt the appellant's issues as formulated in deciding this appeal all the same, for what they are worth, I set them out as follows:

"1. Whether the Court of Appeal was right to dismiss the appellant's objection against the mode of service of the originating process in this suit. (Appellant's Issue No.1 on Grounds 1 and 2 in the Amended Notice of Appeal).

2. Whether Exhibits E, F and G were properly admitted in evidence and relied on by the courts below. (Appellant's Issue No.2 on Ground 3 in the Amended Notice of Appeal).

3. Whether the special damages of N15 Million awarded for loss of income is supported by the evidence before the court (Appellant's Issue Nos. 3 and 4 argued together on Ground 4 in the Amended Notice of Appeal).

4. Whether in the circumstances of this case the award of N3 Million as general damages for trespass was reasonable. (Grounds 5 and 6 in the Amended Notice of Appeal).

5. Whether Zobacrest Limited was a necessary party in this suit. Appellant's Issue No.5 on Ground 7 in the Amended Notice of Appeal).''

ON ISSUE ONE:

The defendant/appellant has raised the issue of improper service of the originating processes i.e. the Writ of summons and the statement of claim on it as provided in Section 78 of Companies and Allied Matters Act (CAMA) and as per Order 12 Rule 8 of the Cross-River State High Court (Civil Procedure) Rules 1987 by having these processes served on any director, secretary or other principal officer or by leaving the same at the office of the company vis-à-vis these

processes having in fact been wrongfully served on its Depot Manager at No. 55 Obudu Road Ikom i.e. at the premises it has used and occupied as its depot albeit contrary to the mode of service as prescribed by the combined provisions of section 78 of CAMA and order 12 Rule 8 (supra). And so, has submitted that the service of these processes is incompetent not having been effected at its head office in Lagos as clearly provided in section 78 of CAMA and Order 12 Rule 8 (supra). The court is asked to hold even then that the Depot Manager of the defendant/appellant is not a principal officer for purposes of satisfying the provisions of the said order 12 Rule 8 (supra) of the Rules 1987, even although the defendant/appellant in its brief of argument has admitted that the said Rules allow service by giving the writ or document to any director, secretary or other principal officer or by leaving it at the officer of the Company. And so, it has opined, that the crucial question before the two lower courts to decide is whether the said Depot Manager is a principal officer for purposes of the said Rule and if in the affirmative whether the Depot Manager has been properly served in Ikom. It therefore has submitted that it is only if such permissible method as aforesaid has been adopted in effecting service of such processes on a Company as here that the question of irregularity may arise. The defendant/appellant relies on the cases of *Mark v. Eke* (2004) 5 NWLR (Pt.865) 54 and *Kraus Thompson Organization Ltd. vs. University of Calabar* (2004) 9 NWLR (Pt.879) 631 at 656 to submit that it is ineffective service to serve these processes at its branch office i.e. on its Depot Manager at Ikom instead of doing so at the defendant/appellant's Head Office in Lagos on any of the principal officers thereat. And that as the instant complaint touches on the competency of the said service of these processes that the lower court has erred to affirm that the defendant/appellant having taken further steps and participated in the proceedings pertaining to this case has totally misconceived its case on that point hence the decisions of the two lower courts given in error. The court is urged to resolve issue one in the defendant/appellant's favour.

The plaintiff/respondent has posited in response to the foregoing that the said processes do not require to be served at the Registered or Head Office of defendant/appellant in Lagos to be effective service and so has submitted that the service of the instant processes as rightly found by the two lower courts has complied with the com-

bined effect of section 78 of CAMA and order 12 Rule 8 (supra) which course in the contemplation of the relevant Rule could be by either serving the writ or document on the company at its registered office and not at its branch offices or by giving the same to any director, secretary or any other principal officers of the Company where
 B found. He has submitted that it is reading extraneous meaning into the provisions of order 12 Rule 8 (supra) to insinuate that a company must be served at its Head office. See: Daewoo Nigeria Ltd. vs. Uzoh (2008) AFWLR (Pt.399) 456 at 472 paragraphs C-F; and there-
 C fore that the service on the Depot Manager, otherwise a principal officer of the company within jurisdiction is good service. He refers to the cases of Nigeria Airways Ltd. v. Ahmadu (1991) 6 NWLR (pt.198) Daewoo Nig. Ltd. vs. Uzoh (supra) and Rivers State Government v. Specialist Consult (2005) 2 SC (pt.11) 121 to make the point that a
 D Distant Manager as well as a Project Manager also a Liaison Officer - in each instance in the above cited cases has respectively been held to be a principal officer of their respective Companies or Corporations for purposes of proper service of similar processes on each of them.

E ***Furthermore, the plaintiff/respondent has relied on the cases decided by this court as per Bank of Ireland v. Union Bank (1998) 7 SCNJ 385 at 396 and Ezomo v. Oyakhire (1985) NSCC vol. 16 (pt. 1) 280 at 286-287 to buttress his stance in this***
 F ***matter. He has also argued that this court's stance in the above cases is consistent with the provisions of order 2 Rules 1 and 2 of the Cross River State High Court (Civil Procedure) Rules 1987 to the effect that any defect in the service of court processes as here amounts to a non-compliance and so an ir-***
 G ***regularity under the said Rules that has to be deemed as having been waived where a party as the defendant/appellant hereof after becoming aware of the irregularity has taken further steps in the proceedings.***

H ***I must concede by interjecting pre-emptorily at this stage that he has correctly stated the application of the provisions of the said Rule as it relates to the facts in this suit. It is settled law that as in this instance that the consequences of waiver defeats the issue of non-compliance.***

I also agree with the plaintiff/respondent that Menakaya v.

Menakaya (2001) 16 NWLR (pt.738) 215 cited by the defendant/appellant and heavily relied upon, with respect, is inapplicable as what that case decided is as to whether a trial in open court as a constitutional issue can be waived. Surely the immediate cited case is entirely on a different matter of fundamental irregularity that has arisen at that trial i.e. in the cited case touching on jurisdiction. I will come to discuss the doctrine of waiver anon as it is appurtenant to the issue being discussed here. B

It is unarguably true to say that similar cases as per the particular facts of this case have been decided by this court even then as in the specific cases as per Bank of Ireland v. Union Bank (supra) and Ezomo v. Oyakhire (supra) to the effect that the only option open to a defendant mindful of setting aside such processes as here is not to have taken any steps in the matter after service of the processes as entry of appearance etc. ***Wherefore the only option before this court in the circumstances is merely to follow the precedents already set by this court in those cases decided on similar facts based on the hallowed principle that similar matters should be treated alike and so make for predictable outcome. This point is rooted in the principle of judicial precedents otherwise known as the doctrine of stare decisis which has to be adhered to strictly here as clearly for that matter, in an age this court is increasingly being challenged by its conflicting decisions. This invaluable legal principle by which (according to the hierarchy of the courts), courts are bound to follow the principles of law established in prior cases is an important corner stone of the Common Law. In a synopsis, it directs that once a point of law in a case has been pronounced by a court of competent jurisdiction that depending on the court's position in the hierarchical ladder, such pronouncement on the legal principle on the point in deciding the matter before it is not open to be re-examined or revisited by the same court or courts below it otherwise bound to follow the decision. This principle helps to steady justice on its proper course as well as make for settled matters and it is not therefore open to every court's opinion. In that vein this court is bound to toe the line as it is bound by the above cited cases in construing these provisions which are binding on this court*** as clearly stated C D E F G H

in the case of *University of Lagos & ors. v. Olaniyan* (1985) 1 NSCC vol. 1688 where Nnamani JSC (of blessed memory) has said –

“that when a lower court (and I dare say this court) is faced with the construction of a rule in *pari materia* with one that has been construed by the Supreme Court, the lower court (including this court) has no option but to follow the principle laid down by the Supreme Court in its construction” (words in bracket supplied). See also *Karibi-Whyte JSC in Mobil Oil v. IAL* 32 in (2000) FWLR (pt.10) 1632 at 1640. Being so guided with regard to subsequent cases as in the instant one, the principles laid down in those cited cases are to govern and determine the decision in the instant matter and even then subsequent cases albeit in recognition of the principle of *stare decisis*.

In other words, this court as the apex court is bound to follow its decisions in this instance as in the immediate above cited cases. Meaning in effect that the validity of services of the instant processes being initiating processes have to comply as provided by the combined effect of Section 78 of CAMA and order 12 Rule 8 (*supra*) as decided in the said above cited cases, otherwise, such services are incompetent. In that regard section 78 (*supra*) has prescribed that service of processes as here complies with the Rules of the particular court prevailing in the jurisdiction. The defendant/appellant has suggested that service of processes as aforesaid on a company or corporation for that matter must be at the registered or head office of the company or corporation. However, I tend to agree more with the plaintiff/respondent that a close scrutiny of the said provisions does not so support.

Section 78 provides:

“A court process shall be served on a company in the manner provided by the Rules of court and other document may be served on a company by leaving it at or sending it by post to the registered office or head office of the company.”

In order to give vent to the above provisions I also set out the relevant provisions of order 12 Rule 8 as the applicable rules to wit:

“When the suit is against a corporation or a company authorized to sue and be sued in its name or in the name of an officer or trustee, the writ or document may be served subject to the enactment establishing that corporation or company or under which it is

registered as the case may be by giving the writ or document to any director, secretary, or other principal officer or by leaving it at the office of the corporation or company."

The above plain and unambiguous provisions of Rule 8 (supra) clearly do not stipulate as contended by the defendant/appellant that service of court processes as here must be at the registered or head office of a company. A closer examination of the same has showed that service of court processes has to follow in the manner provided by the rules of the particular court concerned, which in this instance is the Cross River State High Court (Civil Procedure) Rules 1987 more particularly order 12 Rule 8 thereof. The said Rule 8 if I may put in parenthesis provides "that a writ may be served when the suit is against a corporation or a company authorized to sue or be sued in its name or in the name of an officer or trustee the writ or document may be served subject to the enactment establishing that corporation or company or under which it is required as the case may be."

As rightly observed by the lower court, this is indeed a remarkable departure from the provisions of the Companies Act 1968 as regards service of court processes on the Director, Secretary or principal officers which has to be at the registered office of the corporation or company. In that instance, being a statutory provision as against the provisions of Rule 8 (supra) is otherwise mandatory which has to be performed as directed or mandated and may where not strictly adhered to lead to invalidating the said processes as improper service; the consequence is setting aside of the same as incompetent processes.

The plaintiff/appellant by construing the word "or" before the word "leaving" in the said Rule disjunctively has submitted that two methods of service on a corporation or the company is contemplated in either –

(1) by leaving the court process at the office of the Corporation or company in which case it has to be left in its registered office or Head office i.e. the company; or

(2) by giving same to any director, secretary or other principal officer not necessarily at the registered or head office of the company but in a place any of them is found within jurisdiction.

This latter method has all the features of personal service on a party at any place he is found within jurisdiction that is to say, as is the case in ordinary suits. It implies in that case that any “director, secretary or other principal officer” can be served anywhere any of them can be found within jurisdiction. In this respect order 12 Rule 8 has not only modified but also simplified the mode of serving the afore-said court processes on a company as the instant one. This is so even as I see the danger that may arise here with regard to the first method of service (as stated above) that is by leaving the process at its office. This apprehension relates to the proof of service on a company where the process is practically left (i.e. construing the words of the Rule literally) as it were, at its offices i.e. dumped at the registered office of a company without more as against what happened in the case of *Dauphin Nig. Ltd. v. Manufacturers Association of Nigeria* (2001) FWLR (pt.47) 1127 where it was left with an employee and was taken to have been served. The situation in that case has raised a prima facie good service although rebuttable by the company where it can be established that the processes have not been brought to a company’s notice.

As for the above second method of service, it has the features of personal service on a party as I have stated above provided it is done within jurisdiction. I do not decide any preference of the two methods as pronounced herein.

All the same, the reasonable conclusion from construing the provisions of this Rule is that being an ordinary Rule and not being a mandatory statutory requirement as in the case of the provisions as per companies Act 1968, it is apparent that where a court is not dealing with an issue of competency of the processes per se, but with their service on a defendant, the instant rule has relaxed the mode of service of court processes as aforementioned on a company by making it a lot easier now. I therefore agree with the plaintiff/respondent that the service of the instant court processes as per the above mode on the Depot Manager is proper service being a principal officer served within jurisdiction. The instant Depot Manager is to all intents and purposes a principal officer in charge of the defendant/appellant’s expansive complex at Ikom. It cannot be otherwise where the instant Depot Manager is re-

sponsible for the day to day running of the defendant/appellant's large complex at Ikom encompassing its branch office, soft drink depot, staff quarters and distribution trucks garage. The cases of Nigerian Airways Ltd. v. Ahmadu (supra), Daewoo v. Nigeria Ltd. v. Uzoh (supra) and Rivers State Government v. Specialist Consult (supra) have been rightly invoked in aid by the plaintiff as they are cases wherefore a District manager as well as a project manager also a liaison officer respectively, each one of them has been held to be a principal officer in the context of serving each one of them court processes as here.

The defendant/appellant has not contested nor denied in this case that the court processes have been brought to the said Company's knowledge having knowingly thereafter taken steps in the proceedings and it has done so without any challenge hence it has duly entered an appearance obtained an extension of time to file its statement of defence in 1995; applied and obtained leave to amend its statement of defence in 1997 and has otherwise taken steps by taking part in the proceedings of this matter as aforesaid until its instant objection. **The practical effect of the steps so far taken here by the defendant/appellant is that where a non-compliance under Order 12 Rule 8 is sustainable in its favour, in other words as amounting to a non-compliance; even then that by virtue of Order 2 Rules 1 and 2 (supra), the non-compliance amounts to no more than a mere irregularity which can be waived and indeed has been deemed waived in the circumstances as set out in extenso herein in this case.**

The concept of waiver as articulated in the cases of Ariori v. Elemo (1983) NWLR (pt.353) 171 and Kano State Development Board v. Franz Construction Ltd. (1994) 4 NWLR (Pt.142) equals to simply failing to take advantage of a right very obvious to a party where it is clear that there is no other reasonable presumption in explanation of the party's steps so far taken in the proceedings before the court (as in this case) than that the right is let to go. He has acquiesced in his right putting it naively. In the circumstances of this case, the defendant/appellant having let go his right here as rightly found by the two lower courts cannot be allowed to resurrect in this court the said right already deemed waived and so to speak

rely on it to set aside the instant service on it (defendant/appellant) of the aforesaid processes (already deemed waived). It does not lie in its mouth to so contend. It must take the consequences of its acts. Issue One is therefore, resolved in the plaintiff/respondent's favour.

B On Issue Two:

The defendant/appellant has challenged the lower court's reliance on Exhibits E, F & G otherwise representing the build-up as to the measure of special damages culminating in the total expenditure in the sum of N909, 500.00 incurred by the plaintiff/respondent for the repairs of the said property. These exhibits have been prepared in 1997 at the instance of the plaintiff/respondent. And as events have turned out during the pendency of this matter at the trial court, even though the actual amount claimed under this head of special damages has not been challenged as a fact, it has been contended by the defendant/appellant that the said Exhibits have contravened Section 91(3) of the Evidence Act 1990 as the maker of the Exhibits is otherwise an interested party in the outcome of the case even as it is the case that no objection has been taken at the trial court against their admissibility respectively. Furthermore, that the instant special damages have not been specifically proved as the claim is granted in a lump sum of N909, 500.00, in other words, without particularising the special damages so granted. See: Anyaebosi v. R. T. Briscoe Nig. Ltd. (1987) 3 NWLR (pt. 54) 84 and Bearman Ltd. & Anor. V. Metropolitan Police District Receiver (1961) 1 WLR 634 at 655 per Delvin L.J.

It is also submitted, if I may emphasize, that these documents having been prepared during the pendency of the instant case have prima facie contravened the provisions of section 91(3) (supra) and are otherwise illegal documents and so inadmissible evidence and inadvertently have been admitted and acted howbeit in error by the trial court. The defendant/appellant additional grouse is that the damages being of special nature have not even been strictly proved by the plaintiff/respondent as contemplated as per the decisions in Oladehin v. C.T.M.L. (1978) 2 SC 24 and Imana v. Robinson (1978) 3-4 SC 1 at 23. The court is urged to expunge the said inadmissible evidence from the record and consequently to vacate the award of the sum of N909,500.00 granted to the plaintiff/respondent as hav-

ing no legal basis.

The plaintiff/respondent on the other hand, has repudiated the submissions challenging the admissibility of Exhibits E, F & G as well as the trial court's reliance on them to make the award as rather spurious and untenable. He posits that this is even moreso as the extent of the damages to his property has been pleaded in paragraphs 16 and 17 of the further Amended Statement of Claim and as the material allegations of facts averred therein have not been severally traversed in paragraphs 18 and 19 of its Further Amended Statement of Defence resulting severally in the defendant/appellant not having joined issues with the plaintiff/respondent on his specific averments. ***These allegations of facts in law have rightly been deemed as having been admitted and so as requiring no further proof. Further, that evidence given by the plaintiff/respondent nonetheless, in this regard being consistent as per his pleadings has not even been challenged at the trial (as they have been admitted without objection) nor even denied; and again he has relied on Usman v. Owoeye (2003) FWLR (Pt.152) 38 to submit rightly that the said unchallenged evidence as per the said Exhibits on the amount so claimed thereof have constituted sufficient proof of the special damages recoverable by the plaintiff; again, with respect, it has been deemed admitted.*** See Usman V. Owoeye (supra).

As can be seen from the defendant/appellant's submissions on the averments in paragraphs 16 and 17 of the Further Amended Statement of Claim vis-à-vis the traverse of the same in paragraphs 18 and 19 of its Further Amended Statement of Defence, it is a question of law whether the defendant/respondent has joined issues on the pleadings with the plaintiff/respondent on the crucial point of disrepairs etc vis-à-vis the making of these Exhibits since the averments in their respective pleadings speak for themselves, and have become contentious as to whether issue has been joined. It is only proper to set them out in extenso as follows:

Paragraphs 16 and 17 of the Further Amended Statement of Claim read as follows:-

"16 The plaintiff aver (sic) that the 1st defendant occupied his property at No.55 Obudu Road, Ikom from August 1991 until sometime in January 1997 when the plaintiff received information that

the 1st defendant had vacated the premises without handing it over formally to the plaintiff. The plaintiff consequently visited the premises and found it in a serious state of disrepair. The plaintiff had to write to the 1st defendant on the 15th of January 1997 to invite them for a joint inspection and assessment of the damage on the property with the view of effecting the necessary terminal repairs before a formal hand over to the plaintiff. The 1st defendant in their usual manner ignored the plaintiff's letter which is hereby pleaded.

17. After waiting for three months to see if the 1st defendant will effect the repairs on the property to no avail, the plaintiff had to invite a number of builders to evaluate the cost of renovating the premises which entailed among other things the re-enforcement of the concrete floors damaged by the 1st defendant crates, trucks and machines, and the reconstruction of the fence and gate which had cracked and fallen in several places due to a collision with one of the 1st defendant's trucks. Eventually the plaintiff retained and paid the firm of C. Y. Obi Builders the sum of N909,500.00 to renovate the property. The firm's quotation for the job dated 14th April 1997; the plaintiff's letter of acceptance dated 20th July 1997 and some of the receipts for the payments made to the firm are hereby pleaded. The plaintiff however aver that he has misplaced some of the receipts."

In answer to the foregoing averments the defendant/appellant in its Further Amended Statement of Defence has alleged as follows:-

"18. Paragraph 16 of the Further Amendment Statement of Claim is denied. The 1st defendant avers that at the end of its tenancy it formally handed over the premises as was agreed in the tenancy agreement.

19. Paragraph 17 of the further Amended Statement of claim is denied. The 1st defendant avers that the issue raised by the plaintiff in paragraph 17 is strictly within the plaintiff's personal knowledge and thus the plaintiff shall be put to the strictest proof thereof."

Clearly from the above pleadings, the defendant/appellant cannot be said in law to have joined issues on the material facts as averred in the aforesaid plaintiff/respondent's paragraphs 16 and 17. His averments therein have remained unchallenged. Indeed, the defendant/appellant has literarily not challenged the facts as pleaded by the plaintiff/respondent and so the effect of their being unchallenged in its pleadings as

well as at the trial is an admission of the amount so claimed by the plaintiff/respondent without further proof based on the principle of minimum evidence; if I may add what is admitted need no proof as the evidence has gone one way. See National Investment Properties Ltd. v. The Thompson Organization (1969) 1 ANLR 138 at 142. ***The defendant/appellant being completely silent on this issue it has in law to be deemed on having admitted the averments of paragraphs 16 and 17 of the plaintiffs/respondent's further amended pleadings.*** See Mandrides v. A. J. Tangelakis & Co. (1937) II NLR. ***It is my view otherwise in consonance with the views of the two lower courts that the plaintiff/respondent's case on this point is insurmountable as it is the principle of pleading that the defendant admit or deny what the plaintiff has expressly alleged in his statement of claim or be deemed as having admitted the same.***

It must be noted that the foregoing averments with regard to exhibits E, F & G have been introduced by the further amended pleadings of both parties filed in the matter by the amendment of the original pleadings. The trial court has rightly opined that the law allows such amendments of the pleadings at a trial even up to and before judgment so long as the averments (i.e. in this regard the said Exhibits in this case) are material and intended to bring out the real issues in controversy between the parties before the court for adjudication once and for all in order to avoid a multiplicity of actions. See Concord Press Ltd. v. Obijo (1990) 7 NWLR (pt. 162) 303 at 305. ***And I uphold the same as the introduction of the said Exhibits at that stage of proceedings by the amendment cannot be faulted.*** It is doubtful if the plaintiff/respondent would have had the legal basis to commence an independent claim for the said special damage on having subsequently concluded the instant action. Let me pause here to commend the lower court as per the lead judgment of Owoade, JCA for having done a good job to this issue.

I now proceed to examine the legal principles directly relevant for deciding this appeal.

However, the law is trite that a plaintiff who has by evidence established that a defendant is a trespasser is entitled without more to general damages for trespass. See: Okurinmeta

v. Agitra (2002) 6 WLR (pt. 100) 1377 held 3. The plaintiff has therefore claimed entitled to N10 million as general damages although the court has the discretion as to the amount to award eventually under that head. I shall come to this issue under general damages anon.

On the question of special damages in the storm's eye on this issue, the law is also quite certain that when a plaintiff has suffered some specific losses as to his income in addition to general damages on account of the trespass, he can as well claim these specific losses by way of special damages. See Uba v. Sambapeter Co. Ltd. (2003) FWLR (Pt.137) 199 at 284. ***Furthermore, it is trite law that where a successful plaintiff has pleaded and given particulars of special damages he is entitled to be granted the relief over and above the general damages awarded and this is very pertinent to the plaintiff/respondent's case here in relation to his relief for N10 Million for general damages.*** See Jaber v. Basma (1952) 14 WACA) 140, and Uba v. Sambapeter Co. Ltd. (2005) FWLR (pt. 137) 199 at 284 at page 175.

Unarguably therefore, Exhibits E, F & G represent the total expenditure incurred for the repairs of the said property by the plaintiff resulting directly from the acts of trespass brazenly committed by the defendant/appellant in the use and occupation of his property without his leave. The law allows claims as per these Exhibits hence the necessity of the amendment as here of the pleadings i.e. before judgment by which it is intended to bring all the issues in controversy before the trial court for adjudication once and for all; again, see Concord Press Ltd. v. Obijo (1990) 7 NWLR (Pt.162) 303 at 305.

It is noteworthy and also significant that no objection has been taken by the defendant/appellant to their admissibility at the hearing. I must therefore, observe that apart from attacking the Exhibits purely on legal grounds there has been no dispute of fact in the circumstances as to the amount of N909,500.00 the plaintiff has allegedly expended on the said repairs of his property and in the absence of any such challenge the law is that the same is taken as admitted by the defendant/appellant although it will not exonerate a party as the plaintiff here from adducing a minimum of evidence as he has done here in proof the same and so the lower courts have

rightly in law relied on it as proved in making the said award.

The next question that arises on the backdrop of the admission of these Exhibits as admissible evidence is whether in the circumstances the mere fact of having prepared them - Exhibits E, F & C during the pendency of the suit does render them inadmissible in law. Certainly not; this is particularly so as the documents have not been rendered ab initio illegal and absolutely inadmissible in law for having been so prepared during the pendency of the case. The law also requires that it must be showed that the maker of the document has an interest in the outcome of the case to render such documents inadmissible. It is crucial to note that the documents here are not in the class of documents absolutely prohibited as inadmissible in law. In that wise, it is my view that once the documents have been admitted at the trial as in this instance without objection, the two lower courts have rightly acted and relied on them. See *Igbinovia v. Aghoiro* (2002) FWLR (Pt.103) 505 held 10. The admission of Exhibits E, F & G cannot therefore be faulted. However, that is not the end of their travails in this matter as the interest of their maker in the outcome of the case has also been put in issue and must firstly be resolved.

The facts of this case before the trial court have showed that Exhibits E, F & G have been prepared during the pendency of this matter. The defendant/appellant has raised before the trial court the fundamental question of whether the maker of the said Exhibits notwithstanding that they (i.e. the Exhibits) already have been admitted in evidence is an interested person to the outcome of the case; also whether he has not thereby contravened section 91(3) of the Evidence Act 1990. Section 91(3) provides:

“(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.”

Section 91(3) (supra) has to be construed alongside section 91(4) (supra) in order to attain the fullness of its legal import as admissible evidence in these proceedings hence I have also for ease of reference reproduced it as follows:

“4 For the purposes of this section, a statement in a document

shall not be deemed to have been made by a person unless the document or material fact thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible."

B What has emerged from a combined reading of the foregoing provisions of sub-sections 3 and 4 of section 91 of the Evidence Act 1990 is that a document which is prepared or authenticated by a person interested in the outcome of a matter before the trial court that is, when the proceedings are pending or anticipated and which document is intended to be used and relied on by the person and indeed has been so used or relied on to establish a fact in issue in the pending matter, albeit in the outcome of the case, is clearly inadmissible -

C meaning that it must be rejected as inadmissible evidence. There is much good sense grounding this principle of law as there is also no gainsaying that for a party to a suit to indulge in such exercises is self serving as it is capable of gross abuse to the advantage of the maker. Besides, a maker's interest in

E such circumstances negates the principle of fair hearing, a constitutional principle which is basic for a pure adjudication of a matter before the court; clearly, such interest distorts the evenness of the level playing ground, the court always attempts to provide for both parties to litigation in the interest of justice. Such interests can be financial as is being alleged in this case and a comparable offence in this regard is the offence of champarty which is a bargain wherefore a party in a suit is assisted by another person with a view to sharing the proceeds of the suit.

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The instant Exhibits E, F & G in the context of this matter have been prepared by one Mr. Ephraim Obot of C. Y. Obi Builders otherwise known as their maker but he has not been showed to have any financial or other tainted interest in the outcome of this case and so the instant documents i.e. Exhibits E, F & C cannot come within the ambit or be caught under Section 91(3) (supra). In other words, these Exhibits being legal evidence have been rightly admitted in evidence by the trial court. It is even moreso here when the defendant/appeal-

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lant has not at the trial objected to their admissibility and so the defendant/appellant cannot now be heard albeit belatedly to urge against their admissibility howbeit by having them expunged from the record. The trial court again relying on the instant Exhibits as admissible evidence in proving the instant special damages, if I may repeat, without any objection at the tendering of the said Exhibits - has rightly admitted them and acted on them as requiring no further proof. See: Chukwura Akunne v. Markias Ekwuno & Ors. (1952) 14 WACA 59 and Usman v. Owoeye (supra). ***The two lower courts have rightly acted and relied on the said documents.***

Furthermore, this court has had cause to scrutinize the provisions of section 91(3) of the Evidence Act in the case of Mohammed v. Kayode (1997) 11 NWLR (pt.530) 584 where as in this case estimates for the repairs of an accidented vehicle and the receipts for the purchase of the spare parts supplied to the plaintiff during the pendency of the suit by his mechanic and the spare parts dealer have been held as not having offended section 91(3) as both the mechanic and the spare dealer have not been caught as interested parties in the case within the purview of section 91(3) (supra). The cited case is on all fours with the instant matter and a supportive precedent. It has put to rest all the defendant/appellant's vehement contentions against these Exhibits as not being legal evidence rightly relied upon by the trial court in deciding this matter. I therefore hold that the trial court's admission and reliance on Exhibits E, F & G being documents otherwise prepared as estimates for the repairs to be carried out in the said property in the circumstances of this case cannot be defeated by section 91(3) of the Evidence Act as the maker of these Exhibits has no financial interest nor other tainted interest in the outcome of the matter. The lower court rightly has affirmed the same.

On the question of proving the sum of N909, 500.00 as special damages as per these Exhibits by particularizing the damage, I have already adverted to the underlying law on this point which the admission of the said Exhibits in question has laid to rest. The defendant/appellant has not severally opposed the admission of these Exhibits as pleaded nor at the trial, thus this has properly accentuated the implication in law that what has been admitted need no further

proof. Even moreso, apart from attacking these Exhibits on legal principles under Section 91(3) (*supra*) no serious challenge has been posed against them on the facts of the sum of N909, 500.00 granted to the plaintiff/respondent under this head of his reliefs and both lower courts have found the same proved and have accepted as well
 B as acted on the same in granting the relief. Having not opposed the admission of these Exhibits, the law, if I may come again, is that the amount so claimed therein is admitted. The defendant/appellant has not showed how the award of the instant relief by the two lower
 C courts based on their concurrent findings on law and facts is contrary to any principles of any law or as not having been solidly based on the evidence as found and accepted by the trial court and as affirmed by the lower court nor after all how it has occasioned a miscarriage of justice. Having woefully failed in these respects I see no grounds upon
 D which to interfere with the two lower courts' decisions in granting the award as claimed. I therefore resolve this issue against the appellant.

On issues three and four:

The defendant/appellant has taken an exception to the award of N15 Million as special damages for loss of profits and in that regard
 E has castigated Exhibit D upon which the grant of the said relief is founded describing it as suspect, unreliable and highly speculative on the plaintiff's loss of earnings. And to make matters worse it is alleged that it has created no legal relations between the parties to it. In that
 F vein, it submits that the compensation which a claim of this nature affords to a party as the respondent here for acts of trespass on the authorities is for the use and occupation by a trespasser as the defendant/appellant here; in this case otherwise known as "user principle". The defendant has referred to a host of authorities as per Stoke on
 G Trent City Council v. W. & J. Wass Ltd. (1988) 3 AER 394, G. B. Amancio Stantos v. Ikosi Industries Ltd & Anor. 8 WACA 29 at 37-38, Halbury's Laws of England 4th Ed. Vol. 12 at paragraph 1170; and Sworthdheath Properties Ltd. v. Tabet (1979) 2 AER 24 as being in sync with its contention here and as expounding the underlying
 H principle in trespass as the "user principle". In other words, if I may say this principle contemplates where a person without the leave of another has used another's land for his own purposes as here, in that case he ought to pay for such use. It has for emphasis supported the proposition by a pronouncement of the Court of Appeal (England)

per Megaw, L. J. in the Tabet's case cited above to wit:

"The plaintiff is entitled without bringing any evidence that he could or would have let the property... to someone else in the absence of trespassing defendant to have as damages for the trespass the value of the property as it would fairly be calculated, and in the absence of anything special in a particular case, it would be the ordinary letting value of the property that would determine the matter of damages. See Privy Council decision in Inverugie Investments Ltd. v. Hackett (1995) 3 AER 841"

The defendant/appellant further submits that all that the plaintiff is entitled to is an election between compensation for loss of use of the premises or disgorgement of the benefits that might have accrued to the defendant during the period of trespass. Let me interpose to say here that there is no evidence on the issue of the benefits that have otherwise accrued to the defendant during its unlawful use and occupation of the property and that question does not arise from the pleadings of the parties. And so the question of putting the plaintiff to an election does not arise. It is also argued that the claim on Exhibit D for loss of profits is too remote a damage to be awarded in this case under the "user principle" as further expounded in the cases of Ministry of Defence v. Thompson (1995) 25 HLR 552, and Ministry of Defence v. Ashmai (1993) 25 HLR 513. The defendant has attacked the lower court as well as the trial court for having erred to assume Exhibit D as an irrevocable contract even as Exhibit D is not a binding contract. The defendant opines that from its terms that Exhibit D is no more than a mere agreement to contract or an expression of intention to purchase 100 tonnes and not 1500 tonnes of cocoa beans and in any event that it is not a binding contract. And even then that it is wrong to have awarded compensation over and above 100 tonnes of cocoa beans being the quantity expected to be exported by 31/12/95 as against 1500 tonnes accepted and acted upon by the trial court as affirmed by the lower court.

Again, that it is not for lack of warehouse that has prevented the plaintiff from performing his contract and so has submitted that the alleged loss of profits allegedly occasioned to the plaintiff is therefore concocted as Exhibit D is not moreso founded upon any evidence that is realistic and credible hence that the loss of profits is at best a guess work. And even then that the estimated profits have

failed to take into account of the necessary outgoings as costs of shipping, insurance premium etc in the computation of the loss of earnings. The defendant/appellant makes the point that loss of profits or earnings must be specifically pleaded and proved. See: *W.A.S.A. (Nig) Ltd. v. Kalla* (1978) 3 SC. 21, *Haway v. Mediowa (Nig.) Ltd* (2000) B 13 NWLR (Pt.683) 77 at 85-86 H to B. Further, it is posited that the pleadings as well as evidence led by the plaintiff/respondent to prove his loss of profits is insufficient nor reached the legal standard to sustain the award particularly so on his evidence alone, i.e. on his mere ipse dixit which the defendant/appellant submits is no proof at law vis-à-vis in particularizing special damage. Also the defendant makes the point that failure to challenge the ipse dixit as here does not translate the said ipse dixit into strict proof as required by law to sustain an award of the colossal sum of N15 Million in special damages. See: D *Ohadugha v. Garba* (2000) 14 NWLR (pt.687) 226, 251 E, *Adel Boshali v. Allied Commercial Exporter Ltd.* (1961) ANLR 917, *Odulaja v. Haddad Ltd.* (1973) 11 SC 357, *Onwuka v. Omogui* (1992) 13 NWLR (pt.230) 393 and *Udoh v. Okitipupa Oil Palm Plc* (2005) 9 NWLR (pt. 929) 58. Because the defendant/appellant has E also treated the issue of the award of general damages of N3 Million under this head I have decided to set out its case/argument, on the same as per its brief of argument before advertng to the preliminary objection against raising that issue under issues 3 and 4.

F On the award of N3 Million for general damages and the defendant's case hereof that the award amounts to double compensation; wherefore it is argued that the plaintiff is not legally so entitled after having been awarded special damages for the same injury, in other words, he is not entitled to recover twice under this head of the claim for the same injury. See: *Usman v. Owoeye* (supra) and G *Gamboruwa v. Borno* (1997) 3 NWLR (pt.495) 53. and it refers to *Anthony M. Soetan & Anor v. V. Z. Ade Agunwo* (1975) 6 SC 67 at 67 and to opine that the two lower courts having ignored the principle against double compensation that this court ought to interfere H in this regard as in the cases of *Uwa Printers (Nig) Ltd v. Investment Trust G. Ltd.* (1998) 3 NSCC 195 at 207 and *Akinkugbe v. F.H.N. Ltd.* (2008) 12 NWLR (pt.1098) 375.

The plaintiff/respondent on the other hand submits that N15 Million awarded him represents the loss of profits the plaintiff is oth-

erwise entitled to, for the use of his property for his cocoa business as per Exhibit D. And that he would have made N15 Million from 1500 tonnes of cocoa beans ordered by Messrs. Zorbacrest Limited as per Exhibit D and that the computation of the same is not based on guess work as Exhibit D is a binding contract for a definite supply of 1500 tonnes of cocoa beans to Messrs. Zorbacrest Limited. On proof of the instant special damages he relies on *Boshali v. Allied Commercial Exporters Ltd.* (supra) to further urge that even though the award is entirely predicated on the plaintiff is ipse dixit that the Privy Council it posits as per the above cited case has awarded a similar claim based on the plaintiff's evidence alone also as in the cases of *Calabar East Cooperative Thrift and Credit Society Ltd. v. Ikot* (1999) 14 NWLR (Pt.638) 225 at 248 Paragraphs C-E, *West African shipping Agency v. Kalla* (supra) and *Odulaja v. Haddad* (supra).

The point is also made that the plaintiff's evidence on this claim has not been challenged at the trial and that the lower court has rightly affirmed the award. On the crucial question of whether Exhibit D is a binding contract, it is submitted that Exhibit D speaks for itself and it is not a bare agreement-to-contract as there are present all the ingredients of a binding contract therein that is to say, an offer and an acceptance with regard to a definite quantity of African cocoa beans to be supplied, clearly put at 1,500 tonnes; the prices and date of delivery of the commodity and the date for the supply of the last batches of 100 tonnes of the same before 31/12/1995 and that without any doubt that Exhibit D as a binding agreement has created legal relation between the parties. The plaintiff contends he has established without any challenge to his evidence at the trial as to how his inability to secure his property has directly incapacitated him from performing his part of the contract for the supply of 1500 tonnes of cocoa beans to Messrs. Zorbacrest Limited and the consequent loss of profits thereof, directly occasioned to him. He submits that it is misconceived to say that special damages cannot be awarded along with general damages and submits that *Soetan's* case relied on for so submitting examined closely contemplates a situation as here where the plaintiff's loss covers his financial loss that cannot be computed arithmetically thus justifying in that case the instant award in general damages.

On the competency of the defendant's arguments on the

award of general damages of N3 million as argued under issue 3 by the defendant, the plaintiff/respondent has reacted to the arguments as misconceived for want of proper basis for the same. Firstly, he has taken an objection to the defendant's arguments under issue 3 by which the defendant/appellant is contesting the award of general damages as they cannot conceivably arise under issue 3 as presently couched as issue 3 speaks exclusively of special damages.

Unfortunately, it has to be noted that the question of entitlement to general damages has not been raised under any other issue formulated for determination by the appellant in this appeal and so all the submissions made in that regard by the defendant/appellant go to no issue and are incompetent, and so ought to be discountenanced and set aside. See: Adebayo v. Shogo (2005) AFWLR (Pt. 253) 739 at 755 paragraphs A-B. ***Again, that as no issues have been raised from grounds five and six; the said grounds must therefore be deemed as having been abandoned by the appellant.*** See WAEC v. Adeyanju (2008) AFWLR (pt. 428) 206 at 221 paragraphs A-B.

I think the plaintiff/respondent cannot be wrong for taking the foregoing stance in support of his instant objection. The appellant must be taken as seised of the respondent's stance on this issue in that the respondent's brief of argument containing the instant objection has been duly served on it; it has made no effort to counter the objection either by amending its brief of argument to enable it address the instant objection or even to do so at the oral hearing of appeal before us by seeking leave of this court to make a reply albeit orally rather it has ignored the objection to its peril.

Clearly the defendant/appellant's ground 5 of its Amended Notice of Appeal has complained against special and general damages while ground 6 has complained specifically of general damages and no more. Issue 3 for determination as raised by the appellant reads as follows:-

"Whether Exhibit D tendered by the respondent supports the award of N15 Million special damages to the respondent."

It has not challenged the award to the respondent of general damages of N3 Million and so cannot by any stretch of its wordings as couched conceivably be taken to encom-

pass the said award of general damages as that is reading into issue 3 as raised what it does contemplate as an issue for determination. The matter is made worse as no issue for determination has been raised from ground 6 that has specifically complained against the said award of general damages; it is apparently abandoned and must be struck out; also the same consideration affects ground 5. It is trite that where a party has erroneously premised his case on an issue which by its clear ambit does not cover his case as clearly envisaged by the issue raised for determination his arguments under the said issue literarily goes to no issue and is liable to be struck out as discountenanced.

Therefore, where an appellant as here has advanced arguments on grounds of appeal in his notice of appeal from which he has not formulated any issue for determination, the arguments so advanced likewise go to no issue and are liable to be discountenanced.

I uphold the objection and hold that the appellant's arguments on the award of N3 Million general damages not having been predicated on any issue raised for determination is baseless and the same is hereby struck out. As no issue has been raised from grounds 5 and 6, they are presumed abandoned and are hereby struck out.

Now I am left to consider the parties' cases as to the claim of special damages only. The respondent has claimed as per Exhibit D the sum of N15 Million as special damages for loss of profits and the two lower courts have granted them. Firstly, it is crucial for the grant of N15 Million as special damages to test the validity of Exhibit D as the loss of profits depends on the validity or voidity of Exhibit D.

The plaintiff/respondent on the peculiar facts of the case has been awarded N15 Million as claimed for special damages arising out of loss of profits or earnings as per Exhibit D. In that vein, if I have understood the foregoing excerpt culled from the Tahet's case per Megaw, L.J. that "*in the absence of anything special in a particular case, it would be the ordinary letting value of the property that would determine the matter of damages*". The defendant/appellant has challenged the decisions of the two lower courts as regards the legal basis for the award of N15 Million under special damages and the validity of Exhibit D.

The two sides of the central question under this issue are firstly

whether the plaintiff is entitled to recover consequential losses for the alleged injury occasioned to him in the course of the instant trespass. And secondly the other aspect of the appellant's grouse against the relief of N15 Million is propped up by its contention that the relief cannot be conceived let alone being accommodated under the heading
 B of special damages even conceding that Exhibit D is a binding agreement.

My reaction to the aforesaid two posers, I think, the starting point is to consider Exhibit D against the plaintiff's assertion that it is
 C an enforcement contract. Exhibit D is an agreement for the supply and purchase of 1500 tonnes of cocoa beans at the price of s980 per tonne, the mode of delivery is to be in batches of 100 tonnes and the last batch of 100 tonnes has to be completed on 31/12/95. It is the finding of this court that Exhibit D contains all the ingredients of a
 D binding agreement coupled with a clear intention to create legal relations between the plaintiff and Messrs. Zorbacrest Limited; it is well grounded as an enforceable contract. Even then there is a concurrent finding by the two lower courts on this question.

There is evidence accepted by the trial court that the defend-
 E ant has failed to yield his property to him but has continued its unlawful use and occupation of the said premises otherwise up to and including 31/12/1995. By its unlawful occupation of the premises, the plaintiff has been denied the use of his business premises to execute the contract to supply 1500 tonnes of cocoa beans to
 F Messrs. Zorbacrest Limited between June 1994 to 31/12/1995.

The defendant has countered by saying that the inability to execute the contract is not due to its trespass. In my view, the defendant cannot so allege as it has not so pleaded.

G And so in the face of the plaintiff's overwhelming evidence that the property is a warehouse built and used specifically to process cocoa beans for export and that it has not been so used on this occasion to execute the instant contract with Messrs. Zorbacrest Limited due to the unlawful use and occupation of the property by the de-
 H fendant.

Furthermore, the defendant by pleading as in paragraph 10 of its further statement of defence has clearly admitted paragraph 8 of the plaintiff's further statement of claim. Having done so, it has admitted that the plaintiff is a produce merchant with essential tools of

the trade as “his Avery Scale, jute bags and numerous other tools and equipments” used in his trade and stored in the said warehouse.

It is the law as found by both lower courts and I agree that a plaintiff who has also suffered some specific loss of income on account of the trespass occasioned to him can properly as well claim those specific losses by way of special damages as a direct and immediate result of the said trespass. See Uba v. Sambapeter Co. Ltd. (2003) FWLR (Pt.137) 199 held 28 and 29. I must refer at this stage to the lower court’s finding in conformity with the principles of law I have adumbrated above to wit:-

“I agree with the learned counsel for the respondent, not only that Exhibit D on which the award of N15 Million Naira was based was not objected to, or that the respondent as PW1 was not cross-examined as to figures and the circumstances of the contract with Zorbacrest Limited but also that the entire evidence of the respondent on the subject matter was in no way challenged or contradicted. I therefore have no hesitation in accepting that the learned trial judge was justified on the award of N15 Million Naira as a loss of profit”.

This holding cannot be faulted. So that where as here the plaintiff has lost earning as a direct result of the defendant’s unlawful use and occupation of the plaintiff’s property, the plaintiff is entitled to recover loss of earnings so occasioned him as well as other specific losses not too remote being a direct result of the defendant’s trespass. Besides, I have outlined herein particular facts present in this case showing that the relief as granted is by means too remote being particulars loss as having followed directly in the course of the defendant’s trespass.

And as found by the trial court on this question and affirmed by the lower court, the plaintiff also avoided the risk of double compensation in the instant suit i.e. for the period June 1994 to 31/12/1995. It is to be noted that the plaintiff has not raised any claim as to his loss of rents for the period so covered by the instant claim of N15 million founded as per Exhibit D. And so, the defendant’s attack on the award of granting this relief on the ground of double compensation has no basis and is rejected.

I therefore find the defendant’s case that Exhibit D is irrelevant to the question of damages due to the respondent from the alleged unlawful use and occupation of his premises by the appellant totally

unacceptable so also, if I may repeat, the defendants' further contention for putting the plaintiff/respondent to his election between compensation for the loss of profits for use and occupation of his premises vis-à-vis disgorgement of the benefit that has accrued to the defendant/appellant during the period of the alleged trespass as the two propositions are not tenable on the peculiar facts of this case thus rendering the rationale of the decisions in *Ministry of Defence v. Thompson* (supra), and *Ministry of Defence v. Ashman* (supra) inapplicable here.

I therefore, hold on the peculiar facts of this case that the loss of earning as caused to the plaintiff in this case is not too remote consequent upon the defendant's acts of trespass. I make this finding clearly having earlier on by empirical considerations found that Exhibit D represents a binding and enforceable agreement between the plaintiff/appellant and Messrs. Zorbacrest Limited - without which the instant claim is a non-starter. And that the instant special damages are the direct consequences of the defendant's trespass and therefore recoverable by the plaintiff. See: *Ibama v. SPDC* (Nig.) Limited (2005) 17 NWLR (Pt.954) 364 at 374 paragraph H and *Adeghite v. College of Medicine University of Lagos* (1973) 5 SC 149.

I must also observe that I am in agreement with the two lower courts in regard to their concurrent findings on the supply and purchase of 1500 tonnes of cocoa beans as per Exhibit D as agreed between the parties to Exhibit D as well as the credible evidence of the calculation of how the respondent has arrived at his claim of N15 Million and in strict proof thereof even on his ipse dixit alone, that is to say, in the circumstances where the plaintiff's Exhibit D has not been objected to and the evidence thereupon has not been challenged by the defendant. See: *Ohadugha v. Garba* (2000) 14 NWLR (pt.687) 226 at 251 paragraph E, *Adel Boshali v. Allied commercial Exporters Ltd.* (supra), *Odulaja v. Haddad* (supra), *Onwuka v. Omoegui* (supra) and *Udoh v. Okitipupa Oil Palm* (supra). ***There is no ground whatsoever upon which this court can rely to interfere with and set aside the award of N15 Million on the principle articulated by this court in Uwa Printers (Nig) Limited v. Investment Trust Co. Ltd. (supra) and Akinkugba v. H.N. Ltd.***

(supra) as it does not arise here where there is no credible case on the facts of this case that the sum of N15 Million is ridiculously high. Issues 3 and 4 are resolved against the appellant.

Issue five:

On the non-joinder of Messrs. Zorbacrest Limited to this suit as a party albeit a necessary party also as a trespasser in this action for trespass against the defendant and in which Messrs. Zorbacrest Limited speaking on the backdrop of the plaintiff's postulation on this question is neither on the land nor has any claim or interest therein.

The appellant for reasons not apparent on the record has not proffered any arguments in its brief of argument under this issue. In other words, no arguments have been canvassed by the appellant under issue 5. It looks totally abandoned mid stream in the appeal. Against this imponderable situation, the said issue is left rightly to be swept away as it is clearly in the circumstances of the appeal incapable as the last straw to save the plaintiff's "drowning" case in this matter.

There is the fact of this issue not having been taken in the lower courts, it cannot therefore as a fresh issue without leave of this court be competently raised in this appeal in this court. The defendant having perhaps become too aware of these harsh realities afflicting this issue has abandoned it howbeit ungracefully without saying so in its brief or even at the oral hearing of the appeal to save the time of the respondent and the court. In that vein, issue 5 is hereby struck out having been abandoned.

Having exhaustively dealt with this matter, I see no merit in the appeal and I accordingly dismiss it in its entirety and affirm the decisions of the two lower courts and I award the sum of N100, 000.00 as costs to the plaintiff/respondent against the defendant/appellant. Appeal dismissed.

MOHAMMED JSC

I have had the opportunity before today of reading the judgment just delivered by my learned brother Chukwuma-Eneh JSC. The facts of the case are well set out in that judgment as well as the issues raised in the appeal is also fully discussed therein. There is no

need therefore for me to repeat the facts and the issues considered and resolved in my concurring judgment.

Let me say straight away that I entirely agree with my learned brother in his lead judgment that after resolving all the five issues raised in the Amended Appellant's brief of argument against the Appellant, the ultimate decision to arrive at, is the dismissal of the appeal. However, let me say a word or two on the Appellant's issue one in which the Appellant sought to attack the initiating processes at the trial Court relating to the mode of service of the writ of summons on Appellant at its premises at the Depot in Calabar. That issue reads -

"1. Whether the Writ of Summons issued and the service thereof effected on the Appellant was proper and in accordance with relevant laws and Court rules"

The answer to the above issue is of course in the positive having regard to the provisions of Section 78 of the Companies and Allied Matters Act and order 12 Rule 8 of the Cross-River State High Court (Civil Procedure) Rules, 1987. Section 78 of the Companies and Allied Matters Act makes provisions for service of two types of documents. The relevant one in the instant case is the provision for service of Court processes where the Section provides -

"A Court process shall be served on a Company in the manner provided by the rules of Court"

The relevant Rules of Court in this respect are contained in Order 12 Rule 8 of the Cross-River State High Court (Civil Procedure) Rules, 1987 which provides mode of service of Court process on a Company by

"giving the same to any Director, Secretary or other principal officer or by leaving it at the office of the Corporation or company."

In the instant case therefore, applying the law and rules of court as postulated in the issue being resolved, it is not difficult to see that the service of process effected on Depot Manager of the Appellant who was the Principal Officer of the Appellant at its Depot, was service effectively carried out on the Appellant to justify resolving this issue against the Appellant.

On the whole therefore, I am at one with my learned brother that this appeal must fail. Accordingly, I also dismiss the appeal and abide by the orders contained in the lead judgment including the order on costs.

ARIWOOLA JSC

I had the privilege of reading in draft the lead judgment just delivered by my learned brother, Chukwuma-Eneh, JSC. I agree entirely with the reasoning therein and the conclusion arrived thereat, that the appeal is lacking in merit. It deserves to be dismissed, Accordingly, I dismiss same. B

I abide by the consequential order in the lead judgment.

OGUNBIYI JSC

The facts and genesis of this case have been well spelt out in the lead judgment of my learned brother Chukwuma-Eneh, JSC. I agree with my learned brother that the appeal should be dismissed. I however wish to add a few words in further support of the judgment. D

The question of lack of service in the present concept has been outrightly defeated by the conduct and action taken by the defendant/appellant wherein it had waived the purported non compliance alleged. The defendant/appellant having not challenged the anomaly at the earliest opportunity is deemed to have waived its right and cannot now be heard to complain as it is too late in the day. It is deemed to have conceded the defect by taking steps and acted thereupon. E

On the merit of the 1st issue raised, the governing provisions are section 78 of CAMA and Order 12 Rule 8 of the Cross River State High Court (Civil Procedure) Rules which are called for interpretation. I also seek to add that the latter provision is a remarkable departure from section 78 of the Act, which provides that service of court processes have to be on the Director, Secretary or Principal Officers, who must be served at the registered office of the corporation or company. It is further evident that the use of the phrase, “*by leaving it at or sending it by post to the Registered office or Head office of the Company*” in the Act, has clearly distinguished the said section 78 from the provision of Rule 8 (supra), where service could be effected, “*by giving the writ or document to any Director, Secretary or other Principal officer or by leaving it at the office of the Corporation or Company.*” F G H

Put differently, while the mode of service under the Act could

be burdensome and restrictive, Rule 8 has watered it down by giving some leverage. Unlike under the Act which provided that the place of service should be at the Registered or Head Office, the Rules of Court however provide that possible personal service could be effected and it does not necessarily have to be at the Registered or
 B Head Office. The confirmation is the use of the word “giving” which signifies personal service. Service under the Rules is therefore deemed competent provided it is carried out within the jurisdiction of the court and effected on the appropriate designated officers, that is to say,
 C Director, Secretary or other Principal officer. The Rules of court had in the circumstance, clearly defeated the contemplation by the appellant that, service of the processes must be effected at the Registered or Head Office.

While Rule 8 proscribes two methods of service and thus an
 D improvement on the Act, the effect of service on “other principal officer,” is a further additional relaxation on the rudimental rigidity of the Act. The service effected on the Depot Manager in the instant case is, I hold, good service within the meaning of the Rules of Court. The Depot Manager is a Principal Officer of the Corporation. The
 E rider however is the question, who qualifies as a Principal Officer? The caliber of the officers coming within this definition have not been specified; this could pose the problem of interpretation. The competence of the service in the instant case can no longer be in question with the appellant having taken steps in response thereof. The sub-
 F mission by the appellant wherein it denied service, does not hold in the circumstance. The issue is hereby resolved against the appellant.

On the competence of Exhibits E, F and G, it is the appellant’s contention that with same having been made during the pendency
 G of the case, they have, by nature offended section 91 (3) of the Evidence Act. I hasten to state at this point that the appellant did not at anytime object to the admissibility of the said exhibits during the course of trial. For the appellant to reap the benefit of such submission, it must be shown on the record that objection was raised tim-
 H eously. The documents in the circumstance were properly admitted and the trial court rightly relied on them. This is because paragraphs 16 and 17 of the respondent’s further amended statement of claim were unchallenged in the absence of an effective denial of the paragraphs by the defendant/appellant. The law is well settled in plethora

of authorities that unchallenged evidence is deemed admitted. The averments on the respondent's paragraphs 16 and 17 (*supra*) are facts and therefore needed no further proof in the absence of any denial. The trial court in the circumstance rightly admitted the facts as proved and the further endorsement by the lower court was also in order. B

The law is also well settled that claims of special damages must be specifically pleaded and particularized. It is further expected as a matter of law that the plaintiff should prove the heads of claims with exactitude. However, with the absence of any denial on the part of the defendant/appellant in this case, the onus of proof on the plaintiff/respondent was minimal. This burden had successfully been discharged by the plaintiff/respondent and consequent upon which I hold that exhibits E, F and G were rightly admitted by the trial court and affirmed by the lower court. The fact of the documents' coming into existence during the pendency of this case did not, in my view, affect their credibility and admissibility in evidence. The appellant's reliance on section 91(3) of the Evidence Act does not therefore hold in the circumstance. This is especially where it has not been shown that the maker of the documents is a person with interest in the outcome of this case, either financial or otherwise. The onus was on the defendant/appellant to have shown such interest, if any, by adducing credible evidence. As a matter of fact, it is on record that the defendant/appellant did not object to the admissibility of the documents at the trial. It is now too late in the day for it to complain. The two lower courts, I hold, were on the right track in relying and acting on the documents as they did. C
D
E
F

The concurrent findings of the two lower courts cannot, in my view be faulted on this point and the appellant, therefore, has to contend with it. G

On the question of whether or not Exhibit D is a binding agreement and therefore enforceable, while the plaintiff/respondent holds the document a binding contract having all the features of such status, the defendant/appellant holds the contrary. In the face of this controversy, the overwhelming evidence avails in favour of the plaintiff/respondent that the property in question is a warehouse and the purpose of its use as claimed on the plaintiff's pleadings, was not controverted by the defendant/appellant, who had by its act deprived H

the former of its use. The pleadings of the parties are also in support of the plaintiff/respondent's claim. In other words, paragraph 10 of the defendant/appellant's further amended statement of defence was an admission of paragraph 8 of the plaintiff/respondent's further amended Statement of Claim. The appellant's admission binds it to its detriment. The respondent had suffered some loss of income as a result of the appellant's act of trespass. The nature of the losses herein which are specific, qualify as special damages. In the circumstance, this is what the trial court had to say at page 177 of the records:-

"I am satisfied that plaintiff has discharged the burden of proof in this regard, his claim thereon not being controverted by either D.WI who testified on 1st defendant's behalf and under cross-examination."

In affirming that decision the learned justices of the court below at page 309 of the Records also said:

"Exhibit D. on which the award of N15 Million was based was not objected to, ...the respondent as P.W.1 was not cross-examined as to the figures and the circumstances of the contract with Zorbacrest Limited but also that the entire evidence of the respondent on the subject matter was in no way challenged or contradicted. I therefore have no hesitation in accepting that the learned trial judge was justified on the award of N15 Million as loss of profit."

There is no reason why this court should depart from the concurrent findings of the two lower courts. I also endorse same for the reasons advanced. The law is well settled that in the circumstance of this nature, both special and general damages can be awarded for trespass without indulging in double compensation. See the case of *Odiba V. Azege* (1998) 7 SCNJ 119 where this court per Iguh JSC had the following to say at page 136.

"The law is firmly established that where in a trespass action general damages are claimed and established, it is the duty of the court of trial to assess, quantify and award the appropriate amount it considers reasonable where additionally special damages are pleaded, claimed and strictly proved, these will also be awarded to the plaintiff."

Also in *Eliochin (Nig) Ltd. V. Mbadiwe* (1986) 1 NWLR (Pt.14) 47 at 64 it was the view of this court per Obaseki JSC that:-

"The law is settled that when a claim of trespass is established

and general damages are claimed, the court of trial will proceed to assess, quantify and award the appropriate amount. If special damages are claimed in addition and proved strictly, this will be awarded in addition."

Further authorities on the same principle are:- Obanor Vs. Obanor (1976) 10 NSCC 69 at 72 and Calabar East Cooperative Thrift and Credit Society Ltd. V. Ikot (1999) 14 NWLR (Pt. 638) 225, where both special and general damages for trespass were awarded by the lower courts and affirmed by this court. B

In stressing the point further, the law is also firmly positioned that, for an appellate court to interfere with award of general damages, it must be satisfied that the trial court in assessing the damages applied a wrong principle of law, or took into account some irrelevant factors or left out some relevant factors such that the amount awarded is ridiculously too low or too high to represent a fair estimate of the damage - see Ogini Vs. Ogo Oluwa Motors Ltd. (1998) 1 SCNJ 20 at 28 - 29. C D

The appellant, as rightly submitted by the respondent's learned counsel, has failed to establish any of the factors which would justify this court's interference in the general damages awarded by the learned trial court judge and affirmed by the court below. I will also endorse and affirm same as reasonable. E

On the totality of this appeal, from the foregoing deductions and more particularly on the very comprehensive reasoning arrived thereat in the lead judgment of my learned brother Chukwuma-Eneh, JSC, I also dismiss same as lacking in merit and abide by the order made as to costs. F

AKA'AH'S JSC

I read in draft the judgment of my learned brother, Chukwuma-Eneh JSC. I agree that the appeal lacks merit and should be dismissed. The issues raised in the appeal were exhaustively dealt with. I adopt the reasoning and conclusion which my Lord reached and wish to add for emphasis the award of N15,000,000.00 (Fifteen Million Naira) that the trial judge made to the respondent and upheld by the lower court as damages for the loss of the contract to supply 1500 tones of cocoa beans to Messrs. Zorbacrest Limited was quite G H

justifiable. Learned counsel for the appellant attacked Exhibit D which formed the basis of the award of special damages and described Exhibit D as suspect, unreliable and highly speculative on the plaintiff's loss of earnings. Relying on the user principle learned counsel submitted that the compensation which is payable to a claimant for acts of trespass is for the use and occupation by a trespasser. By this argument, learned counsel is limiting the amount payable to the rent accruable on the property.

It is indisputable that the respondent was using No. 55, Obudu Road as a ware house for the storage of cocoa and for drying and processing of his cocoa beans. He was deprived of the facility at the time he secured the contract to supply the cocoa beans. The damages accruable therefore are not too remote. For the period the contract subsisted, the respondent did not claim for the rent of the property. I therefore see nothing wrong in making it a specific item of special damage. The respondent was not given a double compensation. The respondent adduced sufficient evidence to entitle him to the award.

For this and the more detailed reasons contained in the leading judgment I too find there is no merit in the appeal and I dismiss it accordingly. I endorse the order made as to costs.

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