

SUPREME COURT OF NIGERIA
FRIDAY 20TH DECEMBER, 2013. SC. 26/2007
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
K. M. O. KEKERE-EKUN, JJSC**

U.T. C. NIGERIA PLC APPELLANT
AND
ALHAJI ABDULWAHAB LAWAL RESPONDENT

EVIDENCE - Admissibility - Evidence Act s. 91(3) does not support appellants case - And Exhibits 4, 5, 6 & 7 are admissible - Since the maker acted in official capacity - And not as a person interested (H1)

APPEALS - Evidence - Reevaluation - Appellate court would be in as good a position as trial court had been - To reappraise documentary evidence - Since doing so does not involve credibility of witness (H2)

FACTS

Before the High Court of Lagos State, the original plaintiff (one B.F.N. Ltd) commenced this action against defendant/respondent. By an amended statement of claim, the said original plaintiff claimed the sum of N437,832.07 against respondent being the balance due and owing by him in respect of ten different hire purchase transactions and pre and post judgment interest of 15% and 6% respectively. Subsequently, appellant was upon the application of the original plaintiff, joined as 2nd plaintiff in the matter. Respondent amended its statement of defence and counter claimed for the sum of N1,264,200.00 as damages and for an order directing the release of his vehicles seized by appellant. Respondent tendered several exhibits in evidence in the matter including Exhibits 4, 5, 6 and 7 which were documents (mainly on the state of indebtedness of respondent to appellant on the hire purchase transaction) prepared by one A. K. Gadzama, Esq in his official capacity as the General Manager of the original plaintiff company. The exhibits were admitted in evidence at the trial in the matter. However, appellant abandoned its case mid-stream. As a result, the learned trial Judge closed its case and heard the counter-claim.

At the end of hearing, the court entered an order of non-suit against appellant. On the counter claim of respondent, the learned Judge expunged the already admitted exhibits from the records. He held that they were not admissible on the ground that they were made long after the commencement of the action by person interested in the dispute. The counter claim was therefore dismissed. There was no appeal against the order of non-suit. However, respondent appealed to the Court of Appeal Lagos Division against the order dismissing his counter claim. The court reversed the decision of the trial court on the counter claim and held that the documents were admissible. After a thorough evaluation of the documents, the court found merit in them and allowed the appeal by granted the reliefs in the counter-claim. The court also ordered the release of respondent's vehicles that were seized by appellant. Aggrieved, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether having regard to the facts and circumstances of this case, Exhibits 4, 5, 6, and 7 were legally admissible regardless of the provisions of section 91(3) of the Evidence Act.

2. Whether the Court of Appeal properly evaluated the evidence in overturning the decision of the trial court and allowing the appeal in the court below.

HELD (Unanimously dismissing the appeal per

MUNTAKA-COOMASSIE JSC)

EVIDENCE - Admissibility

1. The provisions of the Evidence Act relied upon by the Appellant's counsel in this matter do not support his case. The Exhibits 4, 5, 6 and 7 could be admissible. The said A. K. Gadzama, who made the said document, did it in his official capacity and not involved personal opinion. Having considered the totality of the Appellant's brief, Respondent's brief and the Appellant's reply brief, I hold that Mr. A. K. Gadzama at the material time was not biased. That being the case, issue one is resolved in favour of the Respondent herein. A. K. Gadzama I emphasised cannot be described as a person interested. (p. 4142 F)

APPEALS - Evidence - Reevaluation

2. The court below rightly held that “where the evidence to be appraised are documentary evidence, because the exercise does not hinge on the credibility of witness seen and assessed only by the trial court the appeal court would be in as good a position as the trial court had been. The court would lawfully intervene to re-appraise the relevant evidence with a view to checking the injustice the perverse decision of the trial court would have caused the appellant”.

My lords, having considered all the issues submitted to us for our consideration and having also considered closely the submissions of both counsel I come to the conclusion that all the two issues formulated by the appellant herein are hereby resolved against the appellant. (p. 4144 H)

NOTABLE POINT OF INTEREST**ARIWOOLA JSC*****1. Actions – “Person interested” – Meaning of***

A “person interested” is said to mean one who has pecuniary or other material interest in the result of the proceeding. A person whose interest is affected by the result of the proceedings, and therefore would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means “*an interest in the legal sense, which imports something to be gained or lost*” (p. 4148 E)

REPRESENTATION

Dr. Adewale Olawoyin Esq., for the Appellant

P. O. Ayoola Esq., for the Respondent

CASES REFERRED TO

Bearmans Ltd. v. Metropolitan Police District Receiver (1961) 1 WLR 364

NITEL v. Ogunbiyi (1992) 7 NWLR (pt. 255) 543

Onuoha v. State (1989) 2 NWLR (pt. 106) 34

Ugo v. Ndiamaow (1999) 13 NWLR (pt. 663) 152

- Fan Milk Ltd. v. Edmeroh (2000) 9 NWLR (pt. 672) 402
 Omoregbe v. Ehigiatoredo (1971) All NLR 285
 Barkway v. South Wales Transport Co. Ltd. (1949) 1 KB 54
 High Grade Maritime Serv. Ltd. v. First Bank Nig. Ltd. (1991) 1 NWLR (Pt. 167) 290
 B Holton v. Holton (1946) 2 All ER 534
 Mogaji v. Nig. Army (2008) 8 NWLR (pt. 1089) 338
 Ogbuanyinya v. Okuda (1979) 6-9 SC 32
 Fadlallah v. Arewa Textiles Ltd. (1997) 7 SCNJ 202
 C ACN v. Lamido (2012) 8 NWLR (pt. 1303) 560
 Abubakar v. Chuks (2007) 18 NWLR (pt. 1066) 386

STATUTES REFERRED TO

- Evidence Act LFN 1990, s. 91(3)
 D Evidence Law Cap. 39 Laws of Lagos State of Nigeria 1973, s. 90(3)
 Evidence Act 2011 (as amended), s. 83(1)

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

- This is an appeal against the judgment of the Court of Appeal,
 E Lagos Division herein referred to as court below. The plaintiff now respondent took out a writ of summons against the defendant, the Appellant herein. The writ says:-

- The plaintiff's claim in the amended writ of summons dated
 F the 18th July 1988 is for the sum of (Four hundred and thirty seven thousand, eight hundred and thirty two naira, seven kobo) 437,832.07k being the outstanding defaults of installments due from the defendant to the plaintiffs under ten separate agreements whereby the plaintiffs let on hire with option to purchase the said subject matter at a total purchase price of N716,175,39. In a nutshell, the defendant willfully and persistently failed, refused and/or neglected to liquidate the sum due and owing despite repeated demands by the plaintiffs. The plaintiffs then claim the outstanding balance of
 G N437,832.07 together with interest at the rate of 15% from 31st July, 1993 being the last date of default until judgment and thereafter at the rate of 6% until the outstanding debt and costs are fully paid. The plaintiffs further seek an order for leave of this (Court of Appeal) court to sell the seized vehicles.
 H

Pleadings were filed and exchanged and the case set down for

trial. Further amended writ of summons and statement of claim were filed. While the amended statement of defence and counter-claim dated and filed on 27/9/90 were intact.

The plaintiffs called two witnesses who testified in proof while the defendant testified on his own behalf and called no witness. The 2nd plaintiff's witness one Ahmed Tijani and one Mr. Ekisola appeared abruptly and asked for adjournment. Both failed to appear in court any more. The learned counsel for the Defendant also appeared in court.

On 5/2/92 one Mr. Awuja, a representative of the plaintiffs was in court but could not explain why Mr. Ekisola, was not in court. Again Ahmed Tijani was not in court to continue testifying for the plaintiffs. The learned Judge at this stage close the case for plaintiffs.

The Defendant, Abdulwahab testified with the hope of proving his counter-claim. The trial court non-suited the plaintiffs. He stated thus:-

"I am aware of the fact that before an order for non-suit is made the court should give the parties the opportunity of being heard on the non-suit but the plaintiffs and their counsel have stopped attending court while it will be an unfair advantage to allow only the defendant to be heard on the issue when from my findings he is indebted to the plaintiffs but the amount being claimed falls short of the amount he is owing but which amount I cannot ascertain.

I accordingly enter a non-suit against the plaintiffs. With regards to the counter-claim of the defendant, I hold that the defendant has failed to establish his counter-claim and it is accordingly dismissed". See pages 142 - 158 of the record.

The Appellant Alhaji Abdulwahab Lawal unsuccessfully appealed to the Court of Appeal Lagos Division. He filed a Notice of Appeal containing nine (9) grounds of appeal. I reproduce the grounds without their particulars thus:-

GROUND ONE

The learned trial judge erred in law in rejecting Exhibit 5 already admitted in evidence on the ground that the letter was not addressed to the defendant nor copied to him and that it is inadmissible through the defendant.

GROUND TWO

The learned trial judge erred in law when he held:

"I have earlier on stated the arrangement between the parties for the repayment of the cost price of the vehicle by installments. I therefore find it difficult to understand why the defendant decided to jettison that arrangement by by-passing the 2nd plaintiff to deal with the 1st plaintiff through Gadzama".

B **GROUND THREE**

The learned trial judge erred in law when he held:

"Where issues are joined on such vital fact, my humble view is that each party is enjoined to establish his case and not depend on the weakness of the other party's case. Although one Gadzama General Manager of 1st plaintiff wrote on behalf of 1st plaintiff to the General Manager of 2nd plaintiff that three accounts have been settled - see Exhibit "G" - one would have expected the defendant to establish this positive act of payment by tendering receipts of such payments issued to him by 1st plaintiff as was done with regard to Exhibits "1 and 1A", since the normal procedure would have been for him to pay to 2nd plaintiff who would then inform 1st plaintiff of such payments and not the other way round. In terms of proof there is no proof of such payments before me having regard to the pleading of the plaintiffs and the evidence of the plaintiff witnesses. As further proof, one would have expected the defendant to call the said Gadzama as his witness. This is so because the pleading of the plaintiffs and the evidence of plaintiff witnesses with documents admitted in evidence show that the defendant is in arrears in the following accounts:... What is more these accounts were tendered by the 1st plaintiff whose General Manager wrote that accounts Nos. 65875, 65876 and 66057 have been settled".

GROUND FOUR

G The learned trial judge erred in law when he expunged Exhibits 2 and 4 in his judgment on the ground that the documents were inadmissible through the defendant and discountenanced their contents accordingly.

GROUND FIVE

H The learned trial judge erred in law when he held:-

"This action was filed on 15/4/87, Exhibit "4" was written on 11/9/87 long after this case has started ditto Exhibit 5 which is not addressed to the defendant and should not have been tendered through him. Defendant's statement of defence and counter-claim

was filed on 30/9/87 that is some five months after the action was filed and some three months after Exhibits "G" was written and nineteen days and eight days respectively after Exhibits 4 and 5 were written. Exhibits 6 letter from defendant's solicitor to the 2nd plaintiff dated 30/6/87. The reply Exhibit 7 dated 14/7/87 were written after this case was already in court. This fact would make all these documents inadmissible as documents made when proceedings were pending or anticipated. See Section 90 (3) of the Evidence Law Cap 39 Laws of the Lagos State of Nigeria 1993".

GROUND SIX

The learned trial judge erred in law when he held.-

"I hold that there is no credible evidence before me that the defendant has settled fully any of the ten agreements. By virtue of clause 8 of the agreement the plaintiffs acted lawfully by repossessing the vehicles. This finding of course disposes of issue (iv) posed by learned counsel for the defendant. I hold that the plaintiffs are not liable to pay damages for failure to release the vehicles repossessed by the plaintiffs. What one sees in this case is a collusion between the said Gadzama and the defendant to manipulate this case to his advantage after the defendant had been sued to court".

GROUND SEVEN

The learned trial judge erred in ordering non-suit without hearing the defendant.

GROUND EIGHT

The learned trial judge erred in law when he relied on and used the evidence of the 2nd plaintiffs witness against the defendant in his judgment despite the fact that the said 2nd plaintiffs witness was unable to conclude his examination in chief and was not cross examined by the defendant.

GROUND NINE

The judgment is against the weight of the evidence.

The judgment of the court below is unanimous and held thus:

"With the foregoing, Respondents' lone issue is resolved against them while Appellant's five live issues are resolved in his favour; s. 16 of the Court of Appeal Act is invoked in ordering respondents to release to the Appellant vehicles with Registration NO. PL 6315 JD; PL 2529 JD and PL 2527 JD covered by agreements numbers 66707, 66057, 65875 and 65876 - the accounts

having been fully settled by the Appellant. Damages in the sum of N1,264,200 claimed by the Appellant is awarded to him in toto same having been made out as well. The appeal having been found meritorious and allowed, its cost is fixed at N10,000 against the respondents in favour of the Appellant”.

B When the appeal was allowed by the Court below the Appellant Alhaji Abdul-wahab Lawal appealed to this honourable court and filed Notice of Appeal containing three grounds of appeal. They are hereunder reproduced without their particulars:

C **GROUND ONE**

The lower court erred in law when it held that Exhibit 5 was legally admissible regardless of the provisions of Section 91 (3) of the Evidence Act.

GROUND TWO

D The lower court erred in law when it held that relevancy determines admissibility or otherwise of any pieces of evidence.

GROUND THREE

E The lower court erred in law when it attributed Exhibits 4, 2 and 5 to Mr. Gadzama rather than the first respondent (the 1st plaintiff) in the High court.

Parties filed and exchanged briefs of argument; both adopted their respective briefs of argument before us on 30/9/13.

F The appellant’s counsel formulated two issues for the determination of this appeal thus:-

1. Whether having regard to the facts and circumstances of this case, Exhibits 4, 5, 6, and 7 were legally admissible regardless of the provisions of section 91(3) of the Evidence Act.

G 2. Whether the Court of Appeal properly evaluated the evidence in overturning the decision of the trial court and allowing the appeal in the court below.

H On issue one, the Appellant’s counsel contended before us that it is not in dispute that Exhibits 4 and 5 are documents on the state of indebtedness of the Respondent to the Appellant by virtue of the Hire Purchase Agreement and the documents were written by A. K. Gadzama, an employee of the Appellant. More significantly, it is not in dispute that the Exhibits were made during the pendency of the suit.

The crux of the complaint of the Appellant against the decision

of the Court of Appeal relates to the finding that Mr. Gadzama was not an interested party within the meaning of Section 91 (3) of the Evidence Act. That section provides thus:-

“Nothing in this section shall render admissible as evidence any statement made by the 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”. In analysing this provision the Court of Appeal relied on three decisions from England where the same provisions, i.e. Section 91 (3) had been considered. There is dearth of Nigerian Britain authorities on the point. In *Beamans Limited & Anor v. Metropolitan Police District Receiver* (1961) 1 WLR 364; (1961) 1 All E. R. 384 per Seelers L J. at p. 388.

“In opening the case learned counsel for the defendant, the appellant, cited to the court every authority on this first question of “a person interested” which has arisen since the Act of 1938 was passed. They show a not altogether uniform view about how the essential provisions of s. 91 (3) should be considered, if I felt that it would be helpful to interpret this subsection by substituting words from the cases or my own words in this court for those of the Act, it might have been profitable to go through all those cases and see if any such solution could be found, but the more I think of this matter the more I feel satisfied that, whilst the cases can be looked at as a guide, it is desirable in every case that the words of the section should be looked at and interpreted in the light of particular circumstances”.

Again the Court of Appeal in its judgment at page 304 of the record referred to the case of *Evan v. Noble* (1949) 1 KB 222, at 225 as authority for the proposition that the more fact that the maker of a statement is the servant of one of the parties to the suit will not make him “a person interested”. However, the court of Appeal did not allude to the earlier and in one humble submission, crucial part of the judgment at page 224 where Birkett J. Stated thus:-

“In the course of my judgment I referred to the observation of Morton J. M. Plomien Fuel Economic Co. v. National Marketing Co. Where he said “it may be that there are circumstances in which it might be said that a servant of the company was not “a person interested”. Note that he used the word Might.

Learned counsel for the Appellant herein humbly submitted that their Lordships in the court below wrongly assumed that a gen-

eral proposition such as they suggested actually emanated from the case of *Evan & Evan v. Noble* (supra) which is evidently not the case.

The Appellant argued that it is instructive to note that the court below in its judgment at page 302 of the record mentioned the added reason for rejection of the those documents by the trial court which
B was that they had been fraudulently supplied by A. K. Gadzama to enable the Respondents defraud the Appellant. The court below dismissed such conclusion without stating why.

That being the case, learned counsel further submitted that it
C was the rejection of this crucial fact that paved the way for the Court of Appeal's wrong reliance on the English cases of *Bearmans Limited V. Metropolitan Police District Receiver* and *Evan V. Noble Supra*. Counsel emphatically argued that the particular circumstances of this case clearly show that A. K. Gadzama was an interested person within
D the meaning of S. 91(3) of the Evidence Act and therefore the trial court was right in rejection of Exhibits 4, 5, 6 and 7. He relied on the decision of this court in *Samson Owie V. Solomon E. Igaiwi* (2005) 5 NWLR. It was concerning a letter Exhibit E was made when the proceedings were before the trial court in anticipation of the proceedings
E pending at the material time. See especially the statement of Tobi JSC pp 219 last paragraph. More importantly in this case, the admission of the exhibits played a significant role in the decision of the Court of Appeal in overturning the trial court.

There is no proper evaluation by the Court of Appeal. ***The provisions of the Evidence Act relied upon by the Appellant's counsel in this matter do not support his case. The Exhibits 4, 5, 6 and 7 could be admissible. The said A. K. Gadzama, who made the said document, did it in his official capacity and not
F involved personal opinion. Having considered the totality of the Appellant's brief, Respondent's brief and the Appellant's reply brief, I hold that Mr. A. K. Gadzama at the material time was not biased. That being the case, issue one is resolved in favour of the Respondent herein. A. K. Gadzama I emphasised
G cannot be described as a person interested.*** NITEL v. Ogunbiyi
H (1992) 7 NWLR (pt. 255) 543 at 563 - 567 F - C.

On issue No. 2, whether the Court of Appeal properly evaluated the evidence in overturning the trial court and allowing the appeal of the respondent.

Learned counsel for the appellant contended that the lower court came to the erroneous conclusion that the combined effect of all the Exhibits contravenes S. 91 (3) of the Evidence Act, in that the Respondent has successfully proved that he stood liable to the tune of N181,158,02k in respect of the accounts he had not settled. He has also proved that five other accounts had been settled. Learned appellant's counsel continued and argued that contrary to the erroneous conclusion of the court below, there was unchallenged documentary and viva voice evidence of PW1 in the trial court to the effect that the sum of N434,832.07k was still outstanding from appellant in the court below (see page 82 of the record).

He then submitted that PW1 not only identified the total outstanding due and unpaid by the respondent hirer contained in the agreement but the Respondent's counsel had every opportunity to cross-examine PW1 on the evidence given by him. He then cited Onuoha v. The State (1989) 2 NWLR (pt. 106) 34 G - H. This court in that case in dealing with veracity and credibility of witness highlighted the following crucial points as follows:-

- a. Knowledge of the facts to which the witness testified;
- b. His dis-interestedness in the case;
- c. His integrity; and
- d. Whether the evidence is contradictory or is contradicted by surrounding circumstances.

He also, on that line, added the following cases;

- i. Ugo v. Ndiamaow (1999) 13 NWLR (pt. 663) 152 at 164 A-B; and
- ii. Fan Milk Limited V. Edmeroh (2000) 9 NWLR (pt. 672) 402 at 417 D-E.

Learned counsel for the appellant then submitted that the assertion of the lower court on page 16 - 17 of the judgment to the effect that "*from the evidence led in proof of his pleadings, the Appellant has established that the Respondents were wrong to have repossessed those vehicles in respect of which he had fully paid for. He has also established the injury he suffered as a result of the Respondents' conduct*" is clear evidence of their lordships' failure to evaluate the evidence of a key witness of the Appellant in the person of Mr. Theophilus Anaesoronye Awoja (PW1). He further submitted that this singular act on the part of the lower court renders the judg-

ment liable to be set aside. He cites Paul O. Omoregbe v. Ehigiatoredo (1971) All NLR 285.

Learned counsel for the appellant Dr. A. Olawoyin humbly urged this court to declare the judgment of the Court below as erroneous and liable to be set aside and uphold the judgment of the trial court for the following reasons:-

- i. There is no explanation as to why there was no probative value ascribed to the evidence of PW1.
- ii. That Exhibits 4, 5, 6 and 7 may be relevant but are inadmissible as contravening the provisions of Section 91 (3) of the Evidence Act.

In his own position, learned counsel for the respondent P. O. Ayoola arguing issue No. 2 above said that there are plethora of cases that define the jurisdiction of the Court of Appeal as to how, and when, to evaluate the evidence of the trial court, in the case of major Umoru and Anor v. Zibri and Ors (supra), the Supreme court held inter alia.

“it is well settled that a trial judge who sees and hears the witnesses giving evidence before him has the exclusive right to assess their demeanor so as to determined whether they are telling the truth or not. He can in this way determine the credibility or otherwise of the testimony of every witness who testified before him. If this is done properly, it is not for the appeal court to interfere in any way possible. (Italics mine)

There is no doubt, that at the trial court the appellant abandoned their case mid-way and thereby the trial court had closed the case for the Appellant. The judge evaluated the evidence the Appellant was able to put on record and entered a “non-suit” for the Appellant. The court below on page 305 paragraph 4 of the record referred to this fact... (Light it).

Learned counsel for the respondent submitted forcefully that unless and until there is a miscarriage of Justice in the findings, the Court of Appeal does not have the jurisdiction to evaluate the evidence of the PW1 - as argued by the appellant. Counsel further so contended that it is not the same with the case of the Respondent at the trial court, where the trial court unlawfully rejected the documentary evidence and dismissed the counter-claim of the respondent.

The court below rightly held that “where the evidence to

be appraised are documentary evidence, because the exercise does not hinge on the credibility of witness seen and assessed only by the trial court the appeal court would be in as good a position as the trial court had been. The court would lawfully intervene to re-appraise the relevant evidence with a view to checking the injustice the perverse decision of the trial court would have caused the appellant”.

Learned counsel for the Respondents urged this court to resolve this issue No. 2 against the appellant and to dismiss this appeal and to uphold the judgment of the court below.

My lords, having considered all the issues submitted to us for our consideration and having also considered closely the submissions of both counsel I come to the conclusion that all the two issues formulated by the appellant herein are hereby resolved against the appellant.

Appeal lacks merit and same is hereby dismissed. The judgment of the court below was correct and in order and is hereby sustained and affirmed. I make no order as to costs.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother MUNTAKA-COOMASSIE, JSC just delivered. I agree with his reasoning and conclusion that the appeal has no merit and should be dismissed.

The primary issue before the court is Issue 1, formulated by learned counsel for appellant in the brief of argument deemed filed on 2nd December, 2009 as follows:-

“Whether having regard to the facts and circumstances of this case, Exhibits 4, 5, 6 and 7 were legally admissible regardless of the provisions of Section 91(3) of the Evidence Act”.

Exhibits 4, 5, 6 and 7 are very crucial to the facts of this case and a resolution of Issue 1 one way or the other will radically affect a consideration of Issue 2, which is:

“Whether the Court of Appeal properly evaluated the evidence in overturning the decision of the trial court and allowing the appeal in the court below”.

What does Section 91 (3) of the Evidence Act provide? It sim-

ply states that:

“Nothing in this section shall render admissible as evidence any statement made by the 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”.

B From the record Exhibits 2, 4, 5, 6, 7 and G were duly admitted in evidence during the trial but were later expunged from the record by the learned trial judge on the ground that they were made long after the commencement of the action and by persons interested in the dispute. The above decision was reversed by the lower court which held that the documents were admissible and proceeded to evaluate them and came to the decision that the appeal had merit and consequently allowed same.

D To determine whether Exhibits 4, 5, 6 and 7 are inadmissible in evidence in view of the provisions of Section 91(3) of the Evidence Act earlier reproduced in this judgment, we need to know what the exhibits are and the person(s) who made them as well as the circumstances in which they were so made.

E From the record Exhibit 4 is a document made by A. K. Gadzama in his official capacity as the General Manager of the 1st plaintiff (B.FN Ltd) to the 2nd plaintiff, who is the appellant in this case, in which the said A. K. Gadzama stated that the respondent in this appeal had settled his accounts in respect of five (5) vehicles supplied/sold by hire purchase.

F Exhibit 5 is another document also written by A. K. Gadzama in his official capacity to the banker of the respondent, in which he stated the state of indebtedness of the respondent in respect of the other five (5) vehicles also purchased by hire purchase agreement G for the purpose of liquidation of the said indebtedness.

H On the other hand, Exhibit 6 is a document written by the solicitor to the respondent on the instructions of the said respondent demanding the release of the detained vehicles, while Exhibit 7 is the reply to Exhibit 6 written by the solicitor to the appellant on its instructions.

The issue is whether the authors of Exhibits 4, 5, 6 and 7 are persons interested in the suit as envisaged under Section 91(3) of the Evidence Act?

It is not disputed that the documents in issue are relevant to

the facts in issue in the case. Also not disputed is the fact that A. K. Gadzama was the General Manager of appellant and wrote Exhibits 4 and 5 in that official capacity. He was, at the material time, an employee of appellant. I agree with the lower court that the mere fact that a maker of a statement tendered in evidence is in the employment of a party to an action does not, in itself, necessarily qualify him as a person interested in the proceedings within the provision of Section 91(3) of the Evidence Act, *supra*. It is settled law that evidence by a servant or agent of a company is relevant and consequently admissible to establish/prove any transaction entered into by that company. B C

There is no evidence on record that Mr. Gadzama had any personal interest in the matter neither was it the case of the parties that he was in any way likely to be biased.

It is not in dispute that Exhibits 6 and 7 were written by the solicitors to the parties in their professional capacity and there is also no evidence on record that they had any direct interest in the transaction resulting in the action. D

The above notwithstanding, there is evidence on record to still ground the finding by the lower court that respondent had settled the accounts in respect of the vehicles. For instance, Exhibit 2 confirms that respondent had settled fully accounts 66706 in respect of vehicle No. PL3614JD and 66707 in respect of vehicle No. PL 3615JD. E

On the other hand, Exhibit G confirms full settlement by the respondent of accounts relating to three other vehicles stated therein. F

It is for the above and the more fuller reasons contained in the said lead judgment of my learned brother that I too find no merit whatsoever in the appeal and consequently dismiss same with costs as assessed and fixed in the said lead judgment. Appeal dismissed. G

NGWUTA JSC

I read in draft the lead judgment just delivered by my learned brother, Muntaka-Coomassie, JSC and I agree with the reasoning and conclusion that the appeal is devoid of merit. H
Consequently, I also dismiss the appeal and order that parties bear their respect costs.

ARIWOOLA JSC

I was privileged to have read in draft the lead judgment of my learned brother, Muntaka-Coomassie, JSC just delivered.

I agree entirely with the reasoning in the lead judgment that Exhibits 4, 5, 6 and 7 were legally admissible and properly admitted by the court below. The authors of the said documents marked Exhibits 4, 5, 6 and 7 are not persons interested in the suit within the provisions of Section 91 (3) of the Evidence Act.

Generally, it is trite law that document made by a party to a litigation or person otherwise interested when proceedings are pending or is anticipated is not admissible. See *Barkway Vs South Wales Transport Co. Ltd.* (1949) 1 KB 54. However, the interest that is envisaged by the law which disqualifies is a personal interest not merely interest in an official capacity. See *Bearmans Ltd. Vs. Metropolitan Police District Receiver* (1961) 1 NLR 634. Therefore, where the interest of the maker of a document is purely official or as a servant or employee without a direct interest of a personal nature, the document is not excluded pursuant to the provision of Section 91 (3) of the Evidence Act. See, *High Grade Maritime Services Ltd. Vs First bank of Nigeria Ltd* (1991) 1 NWLR (Pt.167) 290; (1991) 2 SCNJ 110; (1991) 1 SC (Pt. II) 26; (1991) LPER 1364 (SC).

A “person interested” is said to mean one who has pecuniary or other material interest in the result of the proceeding. A person whose interest is affected by the result of the proceedings, and therefore would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means “an interest in the legal sense, which imports something to be gained or lost” See; *Holton Vs Holton* (1946) 2 All ER 534 at 535; *Nigeria Social Insurance Trust Vs. Klifco Nigeria Ltd* (2010) 13 NWLR (Pt.1211) 307; (2010) 8 SCM 212.

The provision of Section 91(3) of the Evidence Act reads thus:
“Nothing in this Section shall render admissible as evidence any statement made by the 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.”

It is noteworthy that Exhibits 4 and 5 were documents made by A. K. Gadzama in his capacity as the General Manager of the 1st

plaintiff at one time or the other in his official capacity. Exhibit 6 was written by the Solicitor to the respondent on his instruction while Exhibit 7 is the reply to Exhibit 6.

The main issue in the appellant's brief of argument is as follows:

"Whether having regard to the facts and circumstances of this case Exhibits 4, 5, 6 and 7 were legally admissible regardless of the provisions of Section 91 (3) of the Evidence Act."

In view of the available facts on printed record, the makers of Exhibits 4,5,6 and 7 were not and could not be said to be qualified to be persons interested to render the said documents inadmissible and thereby wrongly admitted by the court below. The documents were relevant and were properly admitted and relied on by the court below.

Accordingly the above issue should be and is hereby resolved against the appellant.

For the above reason and the fuller and more detailed reasoning of my learned brother in the lead judgment, with which I am in total agreement, I too consider the appeal lacking in merit and deserve to be dismissed. It is hereby dismissed by me.

I abide by the order on costs in the said lead judgment.

KEKERE-EKUN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, MUNTAKA-COOMASSIE, JSC, just delivered. I agree entirely with the reasoning and conclusion that the appeal lacks merit and should be dismissed. I wish to add a few comments in support of the lead judgment.

The facts of the case briefly stated are as follows: The original plaintiff (B.F.N. Ltd.) commenced a suit against the respondent herein as defendant on 15/4/87. By its amended statement of claim dated 7/12/1987 the plaintiff claimed the sum of N437,832.07 against the defendant being the balance due and owing by him in respect of ten different hire purchase transactions and pre and post judgment interest of 15% and 6% respectively. The appellant herein was subsequently joined as plaintiff upon the application of the original plaintiff. The respondent filed a further amended statement of defence,

which included a counter claim for the sum of N1,264,200.00 as damages and an order directing the plaintiff to release four of his vehicles seized by the appellant. At the trial, the appellant abandoned its case mid-stream. The learned trial Judge closed its case and proceeded to hear the counter claim. At the conclusion of the trial the court entered an order of non-suit against the plaintiff and dismissed counter claim. The appellant did not appeal against the order of non-suit. However, the respondent herein appealed to the lower court against the order dismissing his counter claim. The appeal was successful. The respondent's claims as per his counter claim were granted. He was awarded damages in the sum of N1,264,200.00. It was also ordered that his four vehicles seized by the appellant should be released to him. The appellant was dissatisfied with the judgment and filed this appeal.

Interestingly there is no appeal against the order of non-suit. The appellant's main grouse is the grant of the respondent's counter claim.

From the seven grounds of appeal contained in the Amended Notice of Appeal filed on 13/5/2008 the two issues distilled for determination by the appellant are:

1. Whether having regard to the facts and circumstances of the case, Exhibits 4, 5, 6 & 7 were legally admissible regardless of the provisions of s.91(3) of the Evidence Act.
2. Whether the Court of Appeal properly evaluated the evidence in overturning the decision of the trial court and allowing the appeal in the court below.

In the course of the proceedings at the trial court, several exhibits, including Exhibits 4, 5, 6 and 7 were admitted in evidence. However, in the course of delivering judgment the said exhibits were held to be inadmissible by virtue of Sec. 90(3) of the Evidence Law Cap 39 Laws of Lagos State of Nigeria, 1973 having been made some time after the proceedings had commenced. They were accordingly expunged from the record. A brief description of the exhibits is as follows:

(i) Exhibit 4: Letter written by A.K. Gadzama Esq. in his capacity as General Manager of BFN Ltd. (1st plaintiff) dated 11/9/87 to the effect that the appellant had settled his liability in respect of five hire purchase agreements.

(ii) Exhibit 5: Letter dated 22/6/87 addressed to the respondent's bankers by A. K. Gadzama Esq. indicating the appellant's indebtedness in respect of five other agreements.

(iii) Exhibit 6: Letter from the respondent's solicitors to the appellant demanding the release of wrongly repossessed vehicles by the present appellant (UTC Nig. Ltd.).

(iv) Exhibit 7: Reply to Exhibit 6.

The first consideration is whether the aforesaid documents were relevant to the facts in issue. It is firmly settled that the admissibility of a document can be based on relevance: See: *Mogaji vs Nig. Army* (2008) 8 NWLR (Pt.1089) 338 per Ogbuagu, JSC; *Ogbuanyinya & ors vs Okuda* (1979) 6-9 SC 32; (1979) ANLR 105 @ 112-113; *Fadlallah vs Arewa Textiles Ltd.* (1997) 7 SCNJ 202 @ 217 per Ogwuegbu, JSC. It is also important to note that the admissibility of a document is quite different from the probative value to be attached to it. While admissibility is based on relevance, probative value depends not only on relevance but also on proof. See: *Dalek Nig. Ltd. Vs. OMPADEC* (2007) ALL FWLR (Pt.364) 204 @ 236 G - H; (2007) 2 SC 305; *ACN Vs Lamido & Ors.* (2012) 8 NWLR (Pt. 1303) 560 & 592 D - F; (2012) LPELR-SC.25/2012; *Abubakar Vs Chuks* (2007) 18 NWLR (Pt.1066) 386 @ 403-404 E-A. Having regard to the facts of the instant case there is no doubt that the documents are relevant to the facts in issue. The issue is whether any probative value could be attached to them.

The complaint against Exhibits 4 and 5 is that A.K Gadzama wrote the letters after the proceedings had commenced thereby rendering them inadmissible within the meaning of sec. 90 (3) of the Evidence Law Cap. 39 Laws of Lagos State of Nigeria 1973, which provides:

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

The provision is in *pari materia* with Section 91 (3) of the Evidence Act 1990 and Section 83 (1) of the Evidence Act 2011 (as amended). A person interested has been described as a person who has a personal interest, financial, material or otherwise in the outcome of the proceedings. An "independent person" on the other

hand is a person who has no temptation to depart from the truth on one side or the other; a person not swayed by personal interest but completely-detached, judicial, impartial and independent. In interpreting the provision, the courts are enjoined to give the expression a narrow rather than a broad meaning. See: Gbadamosi Vs Kabo Travels Ltd. (Pt.2010) 8 NWLR (Pt.668) 243; Peterside Vs Wabara (2010) LPELR-CA/PH/188M/2003 @ 8 D - G; Anyaebosi Vs R.T. Briscoe Nig. Ltd. (1987) 3 NWLR (Pt.59) 84; (1987) 6 SCNJ 9 @ 22.

It has also been held that there must be a real likelihood of bias before a person making a statement can be said to be a “person interested”. A person acting in an official capacity is generally not considered to be a “person interested”. There was nothing before the court to suggest that A. K. Gadzama Esq. had any personal interest or stake in the outcome of the litigation or that he acted other than in his official capacity. Exhibits 6 & 7 are also letters written in official capacity. The mere fact that the letters were written after the proceedings had commenced without more is not sufficient ground for invoking section 91 (3) of the Evidence Act. I therefore agree with my learned brother in the lead judgment that the lower court was right to hold that the documents were wrongly expunged from the record of the trial court.

With regard to the second issue, it is significant that the evidence before the trial court was mostly documentary. The credibility of witnesses therefore did not arise. In its appraisal of the evidence, the trial court disregarded Exhibits 4, 5, 6 and 7. The lower court having found (rightly) that those exhibits were wrongly expunged was bound to take them into consideration alongside the evidence led by the appellant. After a review of the entire evidence led at the trial, the lower court rightly concluded that the respondent had proved his counter claim, having proved that he had settled five out of the ten accounts and was therefore entitled to have his seized vehicles released.

For these and the reasons advanced in the lead judgment of my learned brother, Muntaka-Coomassie, JSC, I also find no merit in the appeal and dismiss it accordingly. I affirm the judgment of the lower court and abide by the order on costs.