

SUPREME COURT OF NIGERIA
FRIDAY 9TH MARCH, 2001. SC. 178/1995
CORAM:- S. M. A. BELGORE, A. I. IGUH,
A. I. KATSINA-ALU, A. O. EJIWUNMI,
E. O. AYOOLA, JJSC

UNITY LIFE & FIRE INSURANCE CO. LTD. APPELLANT
AND
INTERNATIONAL BANK OF WEST
AFRICA LTD. RESPONDENT

BANKING - Document - Entry in banker's book - Admissibility - E.A. s. 96(1)(h) - Secondary evidence may be given of contents of a document - When inter alia the document is entry in banker's book (H1)

BANKING - Document - Admissibility - Secondary evidence - Form of - Under E.A. s. 96(2)(e) is a copy of entry in banker's book - Which is admissible under certain conditions (H2)

BANKING - Statement of account - Admissibility of - Failure to object - As no objection was raised - Appellant is deemed to have consented - Although conditions precedents for its admissibility were not established (H3)

COURTS - Evidence - Admissibility of - Court is expected to admit and act on legal evidence - But where inadmissible evidence is admitted - Court is not to act upon it but discountenance same (H4)

APPEALS - Court - Document - Admissibility of - Where document is unlawfully admitted without objection at trial - Appellant can still object on appeal - Particularly where miscarriage of justice occurred (H5)

COURTS - Procedure - Irregularity in - Waiver - Where party at trial consented to a procedure which is merely wrong - It is late to complain against same on appeal - Simply because he lost the case (H6)

COURTS - Evidence - Admissibility of - Objection - Where inadmissible evidence is tendered - And party or counsel on other side fails to object - Court in civil cases may and in criminal cases must reject such evidence (H7)

PLEADINGS - Issues - Evidence - Court proceeds on trial on issues in pleadings - But where party fails to call evidence in support of his issues - Court may resolve such issues against the defaulting party (H8)

COURTS - Unchallenged evidence - Weight of - Where evidence given by party was not challenged by the opposite party - Court can act on such unchallenged evidence before it (H9)

APPEALS - Pleadings - Defence - Failure to raise - Appellant cannot rely on defence not pleaded at trial - Because respondent would have due to his failure - Lost opportunity of calling evidence to controvert (H10)

BANKING - Loan facility - Liability - Appellant's liability under the Deed of Guarantee includes - Interest, commission and banking charges - As clearly indicated in clauses 1-3 and 10 (H11)

FACTS

Before the High Court of Lagos State Holden in Lagos, plaintiff/respondent commenced this action claiming jointly and severally against defendants/appellant, the sum of N238,203.27. 1st defendant in the matter before the trial court applied for and was granted loan/overdraft facility by respondent to the tune of N140,000.00 with interest at the rate of 11.5% to purchase a Jetty at Warri. 2nd defendant/appellant agreed to and duly secured the transaction by executing a Deed of Guarantee in favour of respondent. The debt was however not liquidated as and when due. The debt having not been liquidated in spite of repeated demands, respondent was left with no option than to institute the action. At the trial, respondent tendered several documents including appellant's statement of account with respondent (Exhibit 5). Exhibit 5 was tendered by respondent without objection and was accordingly admitted in evidence

by consent of the parties. Appellant neither called evidence nor cross-examined respondent's witness. At the close of the case, respondent addressed the court.

In reply, appellant submitted that there was no proof of the amount claimed by respondent as Exhibit 5 was inadmissible in evidence for non-compliance with the provisions of section 96(1)(h) and 96(2)(e) of the Evidence Act Cap 62 LFN and Lagos 1958. In his judgment, the learned trial Judge upheld appellant's submission and held that the lacuna in respondent's evidence rendered Exhibit 5 inadmissible. However, on the basis of other documentary evidence adduced in the matter, the court held that respondent established its claim to the tune of N139,351.39. No finding or award was made in respect of respondent's claim for interest and other bank charges. Both parties were dissatisfied with the judgment. Hence, appellant filed the main appeal, while respondent filed cross-appeal in the Court of Appeal, Lagos Division. The court dismissed the main appeal and allowed the cross-appeal. Judgment of the trial court was set aside and in substitution thereof, judgment was entered for respondent in the sum of N238,203.27 together with interest at the rate of 11.5% per annum from the 12th of February 1982 until the liquidation of the judgment debt. Aggrieved, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(2) Whether the Court of Appeal erred in law in over-ruling the decision of the High Court which in its judgment rejected the statement of the 1st defendant's account with the plaintiff (Exhibit 5) for noncompliance with section 96(2)(e) of the then Evidence Act, Cap 62, Laws of Nigeria, 1958 Edition which the High Court had earlier admitted in evidence without any objection by the two defendants.

(3) Whether the Court of Appeal erred in holding that, even excluding the statement of account (Exhibit 5), the plaintiff was entitled to judgment for the full amount of N238,203.27 together with interest at 11.5% claimed based on (a) the pleadings and/or (b) the oral and documentary evidence adduced at the trial.

(4) Whether the Court of Appeal erred in law in giving judgment against the appellant in the sum of N238,203.27 with interest considering the provisions of the Deed of Guarantee (Exhibit 4) ex-

HELD (Unanimously dismissing the main appeal and

- B striking out cross-appeal per **IGUH JSC**)
Document - Entry in banker's book - Admissibility
1. It is indisputable that under section 96(1)(h) of the Evidence Act, secondary evidence may be given of the existence, condition and contents of a document when, inter-alia, the document is an entry in a banker's book. (p. 2837 A)

- Document - Admissibility - Secondary evidence*
D **2. Although that section of the law does not state what form of secondary evidence that is admissible thereunder, it is clear under section 96(2)(e) of that Act that it is a copy of an entry in a banker's book that is admissible. Such a copy may not however be received as evidence of the entry in the relevant banker's book unless it is first established:-**
E (i) **that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank;**
(ii) **that the entry was made in the usual and ordinary course of business;**
F (iii) **that the book is in the custody and control of the bank; and**
(iv) **that the copy has been examined with the original entry and is correct.**

- G **It is however, necessary to point out that it is not the length of evidence given in tendering a copy of entries in a banker's book that determines its admissibility or otherwise under the said section 96(2)(e) of the Evidence Act. What matters is whether the substance of such evidence, broadly speaking, covers the requirements set out in that section of the relevant Act. In this regard, it ought to be pointed out that such evidence needs not be in the precise language of section 96(2)(e) of the Evidence Act so long as it is in substance in compliance with the provisions of the subsection. Provided**
- H

the evidence adduced before the court substantially covers the requirements of subsection 2(e) of the relevant section of the Evidence Act, the secondary evidence in question will become admissible in proof of the existence, condition and contents of the entries in the banker's book. It is also sufficient to satisfy the requirements of the said section 96(2)(e) if from the totality of the evidence tendered on the matter, necessary and natural inference can be made which would amount to compliance with the section. (p. 2837 B)

BANKING - Statement of account - Admissibility of

3. However, in resolving this submission of learned appellant's counsel, it is pertinent to point out, in the first place, that the witness who tendered the statement of account, Exhibit 5, and whose testimony in this regard I have already reproduced was not cross-examined at all by the appellant on any issue concerning its correctness or accuracy. This witness who is a banker and an officer of the plaintiff bank testified in clear terms that he copied the statement of account - Exhibit 5 from the plaintiff's ledger. By section 2 of the Evidence Act, a ledger is one of the ordinary books of the Bank and it is from those original books of the Bank that the witness copied Exhibit 5. From the oral evidence of this witness, as confirmed by Exhibit 5, the outstanding balance in respect of the 1st defendant's account with the plaintiff as at February, 1982 was N238,203.27k. This is the amount claimed by the plaintiff against the defendants. As I have already stated, this witness was not cross-examined in any way on the accuracy of any of the entries in Exhibit 5. I think I am inclined, in these circumstances, to agree with the court below that in the absence of any issue having been joined on the question of the accuracy or correctness of the entries in Exhibit 5 and in further absence of any evidence from the defendants to the contrary, it may reasonably be presumed that the entries in Exhibit 5 were correctly copied from the original bank ledger.

In the second place, and certainly more importantly, it must be observed that no objection whatsoever was raised by either of the two learned counsel for the defendants to the

admissibility of the statement of account, it is right to say that the appellant, by implication, consented to the admissibility of Exhibit 5 although the conditions precedent or the necessary requirements for its admissibility were not established.

On appeal however, and provided the evidence complained of is one which by law is admissible albeit under certain conditions and the party complaining did not object to or consented to its admissibility at the trial although the conditions precedent to its admissibility were not shown to have been satisfied, he cannot be allowed to raise any objection as to its admissibility in the appellate court.

In the present case, it is section 96(2)(e) of the Evidence Act, which governs the admissibility or otherwise of Exhibit 5, a certified true copy of a bank's statement of account which, pursuant to the said section of the law, is expressly declared to be admissible if certain conditions therein stipulated are satisfied. Exhibit 5 is not therefore a document which by law is absolutely inadmissible in all courts of law in any event and in all circumstances. That being so and the appellant not having objected to its admissibility in evidence at the time it was tendered but rather consented thereto and, therefore, waived formal proof thereof before the trial court, it may not now raise the question of the inadmissibility of the document before this court or in the court below. I think the appellant is estopped both in the court below and before this court from asserting that the said Exhibit 5 was and remains inadmissible by virtue of the failure on the part of plaintiff to testify that the document was examined with the original entries in the bank ledger and found to be correct. (pp. 2838 E/2840 E/2841 C)

Evidence - Admissibility of

4. It cannot be over-emphasised that a court of law is expected in all proceedings before it to admit and act only on legal evidence. Accordingly, where a trial court inadvertently admits evidence which is absolutely inadmissible, it has a duty generally not to act upon it but rather to discountenance it. (p. 2839 D)

Court - Document - Admissibility of

5. So, too, if a document is unlawfully received in evidence in the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though learned Counsel at the trial court did not object to its admission in evidence. Although, therefore, a document is unlawfully received in evidence in the trial court without objection by or on behalf of an appellant, it would still be open to such appellant in the appellate court, particularly where a miscarriage of justice is thereby occasioned, to object to it since it is the duty of the appellate court to exclude inadmissible evidence which was erroneously received in evidence during the trial. (p. 2839 E)

COURTS - Procedure - Irregularity in - Waiver

6. Where however, a party to a civil proceeding consented to a procedure at the trial which procedure is neither unconstitutional nor amounts to a nullity but is merely wrong or irregular and he in fact suffered no injustice and no miscarriage of justice is thereby occasioned, it would be too late to complain on appeal about such wrong procedure having been adopted simply because that party lost the case in the trial court.

This is because in the case of documentary evidence in a civil case, formal proof thereof can always be waived by a party to the proceeding where the document is not absolutely inadmissible in law for all purposes. (p. 2839 H)

Evidence - Admissibility of - Objection

7. Where, therefore, inadmissible evidence is tendered, it is the duty of the other party or counsel on his behalf to object immediately to the admissibility of such evidence. If, however, such other party fails to raise any objection as aforesaid or consents to the admissibility of such evidence, the trial court in civil cases may (and in criminal cases must) reject such evidence ex proprio motu. (p. 2840 C)

PLEADINGS - Issues - Evidence

8. The law is well settled that once pleadings have been settled and issues are joined, the duty of the court is to proceed to trial on those issues as settled in the pleadings of the parties.

B Where, however, one party fails or refuses to submit the issues he has raised in his pleadings for trial and does not give or call evidence in support thereof, the trial court, unless there are other legal reasons to the contrary, may resolve such issues against such defaulting party.

C No doubt, the appellant filed its pleadings in the case but it is trite law that pleadings cannot constitute and does not tantamount to evidence and a defendant who does not give evidence in support of his pleadings or in challenge of the evidence of the plaintiff, as the appellant did in the present case, is deemed to have accepted the facts in dispute as adduced in evidence by the plaintiff, notwithstanding the general traverse in his pleadings. (pp. 2844 D/2845 B)

E COURTS - Unchallenged evidence - Weight of

9. In the same vein, where evidence given by a party to any proceeding was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it.

F (p. 2844 F)

Pleadings - Defence - Failure to raise

G 10. In this connection it is necessary to stress not only that evidence at a trial must be directed and confirmed to the proof or disproof of the issues as settled by the pleadings but that it is not open to a defendant, such as the present appellant, to rely on defences which it should have but had not pleaded at the trial because the plaintiff, such as the present respondent, would have owing to his failure to plea such new defences in his pleadings, lost the opportunity of calling evidence to controvert them. I do not therefore conceive that the appellant, not having pleaded its new defence to the effect that its liability is limited to the principal sum advanced to the 1st defen-

dant and did not include any interest or bank charges thereto, is entitled to raise the issue in the court at this appellate stage of the hearing. (p. 2846 C)

BANKING - Loan facility - Liability

11. At all events, a close study of the Deed of Guarantee, Exhibit 4 shows that the appellant's liability thereunder includes interest, commission and banking charges. These are clearly indicated in clauses 1, 2, 3 and 10 thereof. Clause 1 extends the appellant's liability to include "all usual banking charges" and clause 2, apart from the principal amount advanced, also holds the appellant responsible for "such further sum for interest thereon and other banking charges in respect thereof". Clause 3 similarly brings in the question of the appellant's liability for interest whilst clause 10, in particular, defines the appellant's liability under the Guarantee to include "interest, commission and banking charges." (p. 2846 F)

NOTABLE POINT OF INTEREST

IGUH JSC

1. Admissible and inadmissible evidence – Distinction of

A distinction must, however, be drawn between where the evidence complained of is one which by law is prima facie admissible albeit under stipulated conditions as against where such evidence is by law inadmissible in any event and in all circumstances. In the latter class of cases, such evidence ought never to be acted upon by any court of law whether, of first instance or of appeal, and it is immaterial that its admission in evidence was by the default or consent of the party complaining in failing to raise the necessary objection at the appropriate time. In other words, where the evidence, complained of is by law inadmissible in any event and all circumstances, the evidence cannot be acted upon by any court of law even if the party complaining failed to raise any objection or consented to the admission of such evidence in the proceeding. The appellate court in such circumstance is duty bound to entertain a complaint on the admissibility of such evidence by the trial court, reject it if it finds it absolutely inadmissible in any event and in all circumstances and decide the case on

2830 Unity Life & Fire Ltd. v. Int. Bank (2015) 9 KLR Iguh JSC
the legal evidence before the court. (p. 2840 G)

REPRESENTATION

Chief T. A. Ezeobi, for the Appellant
Onyeabo C. Obi Esq., for the Respondent

B

CASES REFERRED TO

Yassin v. Barclays Bank D.C.O. (1968) NMLR 380

Alade v. Olukade (1976) 2 SC 183

C Yaya v. Mogoga (1947) 12 WACA 132

Ajayi v. Fisher (1956) SCNLR 279

Esso West Africa Incorporated v. Alli (1968) NMLR 414

Oba Ipinlaiye II v. Olukaturun (1996) 6 NWLR (pt. 453) 148

Ayanwale v. Atanda (1988) 1 NWLR (pt. 68) 22

D Okwechime v. Igbinador (1964) NMLR 132

Okeke v. Obidife (1965) 1 All NLR 50

Gilbert v. Endean (1878) 9 Ch D 259

Etim v. Ekpe (1983) 1 SCNLR 120

Alashe v. Olori-Ilu (1964) 1 All NLR 390

E Jacker v. International Cable Co. Ltd. (1888) 5 TLR 13

Owonyin v. Omotosho (1961) 2 SCNLR 57

Akunne v. Ekwunno (1952) 14 WACA 59

STATUTES REFERRED TO

F Evidence Act Cap. 62 LFN & Lagos 1958, s. 96(1)(h), (2)(e)

LEAD JUDGMENT BY IGUH JSC

In the Lagos Judicial Division of the High Court of Lagos State, the plaintiff instituted an action claiming, jointly and severally, against the defendants the sum of N238,203.27. This amount was said to be due and payable by the defendants to the plaintiff as at the 28th February, 1982 as per the plaintiff's amended statement of claim. The said amount comprised the principal amount lent, interest at the rate of 11 1/2% and other Bank charges outstanding against the 1st defendant as at the 25th February, 1982 as reflected in the 1st defendant's statement of account with the plaintiff Bank. The transaction was secured by a Deed of Guarantee executed by the 2nd defendant in favour of the plaintiff.

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

The brief facts of the case are that the 1st defendant applied for and was granted some loan/overdraft facility by the plaintiff Bank to the tune of N140,000.00 with interest at the rate of 11 1/2% to purchase a Jetty at Warri. The 2nd defendant agreed to and duly guaranteed the overdraft extended by the plaintiff to the 1st defendant. The 1st defendant utilized the said facility and as at the 28th February, 1982 became indebted to the plaintiff in the sum of N238,203.27 as claimed. Both defendants having failed or neglected to liquidate the debt in spite of repeated demands, the plaintiff was obliged to file this action.

The defendant's position was a general denial of the plaintiff's claim.

At the subsequent trial, one witness testified on behalf of the plaintiff and tendered several documentary exhibits. These included the 1st defendant's statement of account with the plaintiff Bank, Exhibit 5. Exhibit 5 was tendered by the plaintiff without any objection by both defendants and was accordingly admitted in evidence by consent.

At the close of the plaintiff's case, both counsel for the defendants elected not to call any evidence. It must also be pointed out that both defendants had earlier declined to cross-examine the plaintiff's sole witness even though his testimony was strictly in line with the averments in the plaintiff's statement of claim. Accordingly, learned Counsel for the plaintiff at the close of the case for both parties addressed the court.

In their reply, learned Counsel for the defendants submitted that there was no proof of the amount claimed by the plaintiff as Exhibit 5, the 1st defendant's statement of account with the plaintiff was inadmissible in evidence for non-compliance with the provisions of section 96(1)(h) and 96(2)(e) of the Evidence Act, Cap 62, Laws of the Federation of Nigeria and Lagos 1958. This contention found favour with the learned trial Chief Judge, Johnson, C.J. who was of the view that there was failure on the part of the plaintiff to establish that Exhibit 5 was examined with the original entry in the plaintiff's ledger. He therefore held that this lacuna in the evidence of the plaintiff rendered the document inadmissible.

Said he:-

“There is in this case no evidence of the requisite examination of the copy made with the original and a confirmation of its correctness. This failure to my mind is fatal to the admission of Exhibit 5 which is hereby rejected.”

B He, however, proceeded on the basis of the other documentary evidence before the court to hold that the plaintiff had established its claim against both defendants in the sum of N139,351.39. Referring to the said documentary evidence, the learned Chief Judge commented:-

C *“The above correspondence in my considered view constitute an admission by both defendants of their indebtedness to the plaintiff, at least, in the sum of N139,351.39. Exhibit 4, the guarantee executed by the 2nd defendant and not disputed or challenged*
D *in anyway, covers the sum of N140,000.00 up to 24.8.81. The balance of N139,351.39k represents the total indebtedness up to 11.6.81 as shown in the series of correspondence earlier referred to.*

It is therefore my conclusion that there is enough admissible evidence establishing the indebtedness of both defendants to the plaintiff jointly and severally in the sum of N139,351.39k. I hereby enter judgment in favour of the plaintiff jointly and severally against both
E *defendants, in the sum of N139,351.39K with costs to be assessed.”*

No finding or award was made in respect of the plaintiff’s
F claim for interest and other bank charges.

Dissatisfied with the judgment of the trial court, both parties appealed against the same to the Court of Appeal, Lagos Division. On the 4th of July, 1989, the court below in a unanimous judgment dismissed the main appeal of the defendants but the plaintiff’s cross-
G appeal was allowed. The judgment of the learned trial Chief Judge was set aside and, in substitution thereof, judgment was entered for the plaintiff against the defendants jointly and severally in the sum of N238,203.27 together with interest at the rate of 11 1/2% per annum from the 12th day of February, 1982 until the liquidation of the
H judgment debt.

Aggrieved by this decision of the Court of Appeal, the 2nd defendant has further appealed to this court. The plaintiff did also appeal against that part of the decision of the court below which dismissed its objection that there was no valid appeal filed by the

defendants in the suit. I may, in passing, observe that the 1st defendant, the principal debtor, has not appealed against this decision of the Court of Appeal.

Five grounds of appeal were filed by the 2nd defendant against this decision of the Court of Appeal. The plaintiff, for its own part, filed three grounds of appeal against the same decision of the court below. It is unnecessary to reproduce them in this judgment. It suffices to state that the 2nd defendant pursuant to the Rules of this court filed its brief of argument in which five issues were identified for the determination of this court. These are framed thus:-

“(1) Whether the court below was not right in holding that there was a valid appeal before it.

(2) Whether in all the circumstances of this case the court below was right in treating the 2nd defendant/appellant’s amended statement of defence filed out of time with leave of court as void and thereby deemed all the averments in the amended statement of claim as admitted by the appellant entitling the plaintiff/respondent to judgment in terms of its said amended statement of claim.

(3) Whether on all the facts and circumstances of this case the court below was right in holding that there was compliance with section 96(2)(e) of the Evidence Act and therefore that Exhibit 5 in the proceedings (the respondent bank’s statement of account) was, in the first instance, rightly admitted in evidence at the trial but subsequently wrongly rejected, by the learned trial Chief Judge, in his judgment.

(4) Whether the court below was right in entering judgment against the 2nd defendant/appellant when no liability of the 1st defendant to the plaintiff/respondent for which the appellant was answerable was established by legal evidence.

(5) Whether the court below was right in entering judgment against the appellant for N238,203.27 together with interest thereon from 12/2/82, or at all, when by the relative guarantee, the amended statement of claim and other facts on the record, the appellant’s liability (if any) as especially endorsed on the said guarantee and claimed by the appellant was for a fixed and determined sum of N140,000.00 and no more.”

The plaintiff, for its own part, similarly identified five issues for resolution in these appeals. These issues are set out in the 2nd

respondent's brief of argument as follows:-

B “(1) *Whether the Court of Appeal erred in law in discountenancing the amended statement of defence of the 2nd defendant (appellant herein) dated the 4th day of October, 1985 filed on the 8th day of October 1985 (one year outside time and without any extension of time).*

C “(2) *Whether the Court of Appeal erred in law in over-ruling the decision of the High Court which in its judgment rejected the statement of the 1st defendant's account with the plaintiff (Exhibit 5) for noncompliance with section 96(2)(e) of the then Evidence Act, Cap 62, Laws of Nigeria, 1958 Edition which the High Court had earlier admitted in evidence without any objection by the two defendants.*

D “(3) *Whether the Court of Appeal erred in holding that, even excluding the statement of account (Exhibit 5), the plaintiff was entitled to judgment for the full amount of N238,203.27 together with interest at 11.5% claimed based on (a) the pleadings and/or (b) the oral and documentary evidence adduced at the trial.*

E “(4) *Whether the Court of Appeal erred in law in giving judgment against the appellant in the sum of N238,203.27 with interest considering the provisions of the Deed of Guarantee (Exhibit 4) executed by the appellant in favour of the respondent.*

F “(5) *In the event that this Honourable court allows the appellant's appeal, whether the Court of Appeal was right in setting aside the judgment for N139,351.39 awarded by the High Court on the ground inter alia that “there is nothing in Exhibits 11 and 11A to justify the inference that the writer of the letters was making an admission of debt on behalf of anyone.”*

G At the oral hearing of the appeal on the 2nd day of December, 2000, learned Counsel for the 2nd defendant/appellant, Chief T.A. Ezeobi adopted his brief of argument and proffered oral arguments in amplification of the submissions therein contained. He sought the leave of court to abandon the first two issues formulated in his
H brief of argument. The application not having been opposed was granted and the two issues were accordingly struck out. This left the appellant with only issues 3, 4 and 5.

A close study of the appellant's remaining three issues reveals that they substantially correspond with issues 2, 3 and 4 in the

respondent's brief of argument. However, having regard to the grounds of appeal filed and the arguments of counsel in their respective briefs of argument, it seems to me that issues 2, 3 and 4 as formulated in the respondent's brief of argument are more germane for my consideration of this appeal than the appellant's issues 3, 4 and 5. I therefore propose in this judgment to adopt issues 2, 3 and 4 as formulated in the respondent's brief of argument for my resolution of this appeal. B

The main thrust of the submissions of learned counsel for the appellant under issue 2 is that with the 1st defendant's statement of account, Exhibit 5, being inadmissible in evidence under section 96(2)(e) of the Evidence Act, there is no other legal evidence on record to sustain any indebtedness on the part of the principal debtor, the said 1st defendant and that there is therefore no consequential liability on the part of the appellant. He stressed that in the absence of evidence that Exhibit 5 was "examined" and compared "with the original entry" and found to be "correct", the statement of account cannot be admissible in evidence. He invited this court to hold that Exhibit 5 was therefore rightly rejected by the trial court and that the court below was in grave error to have interfered with this finding. On issues 4 and 5 which concern the question of liability, learned Counsel contended that the award of N238,203.27 against the appellant with interest at the rate of 11 1/2% per annum from the 12th February, 1982 is outside the guarantee contract and beyond the claim of the respondent against the appellant which, although this was not conceded, did not exceed the fixed sum of N140,000.00. C D E F

Learned Counsel for the respondent, Onyeabo C. Obi Esq. in his reply pointed out that Exhibit 5 was tendered by the plaintiff/respondent at the trial without any objection by the appellants. He submitted that Exhibit 5 was properly admitted in evidence by the trial court and that there was sufficient evidence in compliance with the requirements prescribed under the provisions of section 96(2)(e) of the Evidence Act. He cited a number of decided cases to buttress his contention that in order to comply with the requirements of section 96(2)(e) of the Evidence Act, the words of the section need not be strictly adhered to. It is sufficient if the relevant conclusions can be inferred from proved facts. He referred to the decisions of this court in Ibrahim Yassin v. Barclays Bank D.C.O. (1968) NMLR 380 1 All G H

NLR 171 and Abolade Alade v. Salawu Olukade (1976) 2 SC 183(1976) 10 NSCC 34 and submitted that in as much as Exhibit 5 was admissible under certain conditions and not inadmissible in evidence in any event, and the same was tendered and admitted in evidence without objection at the trial, it was no longer open to the appellant to challenge its admissibility in the court below having regard to all the evidence led in respect thereto at the trial.

One witness testified for the plaintiff at the trial in this case. He is one Ademola Sunday Moronkeji who described himself as a Banker and a Credit Officer with the plaintiff Bank. His evidence with regard to Exhibit 5 reads as follows:-

“Defendant has not repaid the outstanding sum. I have a prepared statement of account. It was prepared by me, copied out from the Ledger kept by the plaintiff Bank. This is the account. Tendered. No objection by Sagoe. No objection by Akinosho. Admitted, marked Exhibit 5. The balance outstanding as at February 1982 is N238,203.27k” (Italics supplied)

I will now examine the relevant section of the law under which the court below held that the statement of account, Exhibit 5, was properly admitted in evidence by the trial court in compliance with the provisions of section 96(2)(e) of the Evidence Act but wrongly rejected by the same trial court in its judgment.

Section 96(1) of the Evidence Act provides as follows:-

“96(1) Secondary evidence may be given of the existence, condition and contents of a document in the following cases:.....

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

There is then section 96(2) of the same Act which goes thus:-

“96(2) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of subsection (1) is as follows:-

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

given by some person who has examined the copy with the original entry and may be given orally or by affidavit."

It is indisputable that under section 96(1)(h) of the Evidence Act, secondary evidence may be given of the existence, condition and contents of a document when, inter-alia, the document is an entry in a banker's book. Although that section of the law does not state what form of secondary evidence that is admissible thereunder, it is clear under section 96(2)(e) of that Act that it is a copy of an entry in a banker's book that is admissible. Such a copy may not however be received as evidence of the entry in the relevant banker's book unless it is first established:-

(i) that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank;

(ii) that the entry was made in the usual and ordinary course of business;

(iii) that the book is in the custody and control of the bank; and

(iv) that the copy has been examined with the original entry and is correct.

It is however, necessary to point out that it is not the length of evidence given in tendering a copy of entries in a banker's book that determines its admissibility or otherwise under the said section 96(2)(e) of the Evidence Act. What matters is whether the substance of such evidence, broadly speaking, covers the requirements set out in that section of the relevant Act. In this regard, it ought to be pointed out that such evidence needs not be in the precise language of section 96(2)(e) of the Evidence Act so long as it is in substance in compliance with the provisions of the subsection. Provided the evidence adduced before the court substantially covers the requirements of subsection 2(e) of the relevant section of the Evidence Act, the secondary evidence in question will become admissible in proof of the existence, condition and contents of the entries in the banker's book. See Ibrahim Yassin v. Barclays Bank D.C.O. (1968) All NLR 171, Festus Yesufu v. A.G.B. Ltd. (1976) 1 NMLR 83. It is also sufficient to satisfy the re-

quirements of the said section 96(2)(e) if from the totality of the evidence tendered on the matter, necessary and natural inference can be made which would amount to compliance with the section. So, in Yassin s case, the witness at the trial did not

B expressly or specifically testify that the books he examined were in the custody and control of the bank. It was urged on appeal that this constituted non-compliance with the provisions of section 96(2)(e) of the Evidence Act. Dismissing this contention, this court per Lewis, J.S.C. stated:-

C *“Finally, though we agreed that Mr. Perrit never specifically said the books he examined were in the custody and control of the bank, this was the only natural inference to be derived from his evidence as an officer of that bank...”*

D Learned Counsel for the appellant has urged this court to hold in the present case that there was no evidence of the requisite examination of the copy made with the original and a confirmation of its correctness and that this failure is fatal to the admission of Exhibit 5 in evidence by the court below.

E It cannot be doubted that under section 96(2)(e) of the Evidence Act, secondary evidence of entries in a banker’s book may be given and received in any proceeding in proof thereof if the four requirements I have already set out above are complied with by one seeking to establish such facts. **However, in resolving this submission of learned appellant’s counsel, it is pertinent to point**
F **out, in the first place, that the witness who tendered the statement of account, Exhibit 5, and whose testimony in this regard I have already reproduced was not cross-examined at all by the appellant on any issue concerning its correctness or**
G **accuracy. This witness who is a banker and an officer of the plaintiff bank testified in clear terms that he copied the statement of account - Exhibit 5 from the plaintiff’s ledger. By section 2 of the Evidence Act, a ledger is one of the ordinary books of the Bank and it is from those original books of the**
H **Bank that the witness copied Exhibit 5. From the oral evidence of this witness, as confirmed by Exhibit 5, the outstanding balance in respect of the 1st defendant’s account with the plaintiff as at February, 1982 was N238,203.27k. This is the amount claimed by the plaintiff against the defendants. As I have al-**

ready stated, this witness was not cross-examined in any way on the accuracy of any of the entries in Exhibit 5. I think I am inclined, in these circumstances, to agree with the court below that in the absence of any issue having been joined on the question of the accuracy or correctness of the entries in Exhibit 5 and in further absence of any evidence from the defendants to the contrary, it may reasonably be presumed that the entries in Exhibit 5 were correctly copied from the original bank ledger.

In the second place, and certainly more importantly, it must be observed that no objection whatsoever was raised by either of the two learned counsel for the defendants to the admissibility of the statement of account, it is right to say that the appellant, by implication, consented to the admissibility of Exhibit 5 although the conditions precedent or the necessary requirements for its admissibility were not established.

It cannot be over-emphasised that a court of law is expected in all proceedings before it to admit and act only on legal evidence. Accordingly, where a trial court inadvertently admits evidence which is absolutely inadmissible, it has a duty generally not to act upon it but rather to discountenance it. So, too, if a document is unlawfully received in evidence in the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though learned Counsel at the trial court did not object to its admission in evidence. See *Mallam Yaya v. Mogoga* (1947) 12 WACA 132 at 133. **Although, therefore, a document is unlawfully received in evidence in the trial court without objection by or on behalf of an appellant, it would still be open to such appellant in the appellate court, particularly where a miscarriage of justice is thereby occasioned, to object to it since it is the duty of the appellate court to exclude inadmissible evidence which was erroneously received in evidence during the trial.** See *Ajayi v. Fisher* (1956) SCNLR 279, *Esso West Africa Incorporated v. Alli* (1968) H NMLR 414 at 423.

Where however, a party to a civil proceeding consented to a procedure at the trial which procedure is neither unconstitutional nor amounts to a nullity but is merely wrong or ir-

regular and he in fact suffered no injustice and no miscarriage of justice is thereby occasioned, it would be too late to complain on appeal about such wrong procedure having been adopted simply because that party lost the case in the trial court.

See Oba Ipinlaiye II v. Chief Julius Olukatun (1996) 6 NWLR (Pt. 453) 148, Akhiwu v. The Principal Lotteries Officer, Mid-Western State of Nigeria and Another (1972) 1 All NLR (Pt. 1) 229 at 238, Ayanwale and others v. Atanda and Another (1988) 1 NWLR (Pt. 68) 22, Okwechime v. Philip Igbínador (1964) NMLR 132, etc.

This is because in the case of documentary evidence in a civil case, formal proof thereof can always be waived by a party to the proceeding where the document is not absolutely inadmissible in law for all purposes. See Okeke v. Obidife and others (1965) 1 All NLR 50 (1965) 4 NSCC 36. Where, therefore, inadmissible evidence is tendered, it is the duty of the other party or counsel on his behalf to object immediately to the admissibility of such evidence. If, however, such other party fails to raise any objection as aforesaid or consents to the admissibility of such evidence, the trial court in civil cases may (and in criminal cases must) reject such evidence ex proprio motu. On appeal however, and provided the evidence complained of is one which by law is admissible albeit under certain conditions and the party complaining did not object to or consented to its admissibility at the trial although the conditions precedent to its admissibility were not shown to have been satisfied, he cannot be allowed to raise any objection as to its admissibility in the appellate court. See Gilbert v. Endean (1878) 9 Ch D 259 at 269, Salau Olukade v. Abolade Alade (1976) 1 All NLR (Pt. 1) 67 at 62, Chief Bruno Etim and others v. Chief Okon Udo Ekpe and Another (1983) 1 SCNLR 120.

A distinction must, however, be drawn between where the evidence complained of is one which by law is prima facie admissible albeit under stipulated conditions as against where such evidence is by law inadmissible in any event and in all circumstances. In the latter class of cases, such evidence ought never to be acted upon by any court of law whether, of first instance or of appeal, and it is immaterial that its admission in evidence was by the default or consent of the party complaining in failing to raise the necessary objection at the

appropriate time. In other words, where the evidence, complained of is by law inadmissible in any event and all circumstances, the evidence cannot be acted upon by any court of law even if the party complaining failed to raise any objection or consented to the admission of such evidence in the proceeding. The appellate court in such circumstance is duty bound to entertain a complaint on the admissibility of such evidence by the trial court, reject it if it finds it absolutely inadmissible in any event and in all circumstances and decide the case on the legal evidence before the court. See *Alashe v. Olori-Ilu* (1964) 1 All NLR 390 at 397 at *Jacker v. International Cable Co. Ltd.* (1888) 5 TLR 13. See too *Salau Olukade v. Abolade Alade* (supra), *Owonyin v. Omotosho* (1961) 2 SCNLR 57, *Yassin v. Barclays Bank DCO* (supra), *Alashe v. Olori Ilu* (1964) 1 All NLR 390 at 397.

In the present case, it is section 96(2)(e) of the Evidence Act, which governs the admissibility or otherwise of Exhibit 5, a certified true copy of a bank's statement of account which, pursuant to the said section of the law, is expressly declared to be admissible if certain conditions therein stipulated are satisfied. Exhibit 5 is not therefore a document which by law is absolutely inadmissible in all courts of law in any event and in all circumstances. That being so and the appellant not having objected to its admissibility in evidence at the time it was tendered but rather consented thereto and, therefore, waived formal proof thereof before the trial court, it may not now raise the question of the inadmissibility of the document before this court or in the court below. I think the appellant is estopped both in the court below and before this court from asserting that the said Exhibit 5 was and remains inadmissible by virtue of the failure on the part of plaintiff to testify that the document was examined with the original entries in the bank ledger and found to be correct.

So on *Chukwura Akunne v. Matthias Ekwunno and others* (1952) 14 WACA 59, Foster Sutton, P. explained this proposition of law as follows:-

"Appellant's counsel argued that the evidence of witnesses 5 and 6 for the defence was inadmissible. We declined to allow him to argue that point: The evidence was not objected to, it was cross examined and its admissibility was not put in question at any stage of

the trial. It was also argued that Exhibits 4, 5, 6 and 8 were inadmissible, not being relevant to any issue in the case. As we pointed out to Counsel for the appellants, no exception was taken to Exhibits 5, 6 and 8 at the trial, but apart from the consideration, in my view, the evidence was clearly admissible under the provisions of sub-section B (b) of section 12 of the Evidence Ordinance." (Italics supplied)

Similarly in *Salau Olukade v. Abolade Alade*, (supra) Idigbe, J.S.C. succinctly put the matter thus:-

"In a trial by a judge alone as in the case in hand, a distinction must be drawn between those cases where the evidence complained of is in no circumstances admissible in law and where the evidence complained of is admissible under certain conditions. In the former classes of cases the evidence cannot be acted upon even if parties admitted it by consent and the Court of Appeal will entertain D a complaint on the admissibility of such evidence by the lower court (although the evidence was admitted in the lower court without objection); in the latter class of cases, if the evidence was admitted in the lower court without objection or by consent of parties or was used by the opposite party (e.g. of the purpose of cross examination) then it E would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence." (Italics supplied)

In *Okeke v. Obidife and others* (supra) at page 38, Brett, J.S.C on the same issue had this to say:-

"Secondly, the appellant submits that the judge ought not to have treated the statement contained in the police's me as admissible evidence, on the ground that the officer to whom it was made was not called as a witness. In a criminal case this would be a valid objection, but in a civil case formal proof of a document can always be waived. One of the first questions which a lawyer instructed for the defence in a running-down case might be expected to ask his client is whether he had made any statement about the accident and it would have been open to the defence to ask for discovery of any documents on which the plaintiff intended to rely. In our view the appellant must be treated as having waived any objection to the statement."

There is next a statement of the law on the same issue in *Kossen (Nig.) Ltd. v. Savannah Bank (1995) 9 NWLR (Pt.420) 439*

at 453 per Mohammed, J.S.C. where he observed as follows:-

"I think the argument of the learned Counsel for the appellants in respect of the Exhibits 24 - 28 is very weak for the simple reason that those Exhibits are extracts from a banker's book. They are admissible if certain conditions have been fulfilled. That condition shall be the oral evidence showing that the Exhibits are extracts from a Banker's Book, kept by the banker and that the figures copied out had been compared with the original and found correct." B

Since the appellant's counsel had not raised any objection when the Exhibits were tendered this court will not entertain any complaint on their admissibility. In Raimi v. Akintoye (1986) 3 NWLR (pt.26) at page 97 this court held that where certain documents are admissible in evidence upon fulfillment of certain conditions or under certain circumstances, an appellant who fails to object to their admissibility in the trial court cannot do so in the Appeal Court." D

I cannot but respectfully endorse the above statements of the law as utterly sound and well founded. In my view, the learned trial Chief Judge having admitted Exhibit 5 in evidence by consent and without any objection to its admissibility and the said Exhibit 5 not being a document that was inadmissible in law in any event and in all circumstances, erred in law by expunging the same from the proceedings. I think also that the court below was on sound ground when it overruled the said decision of the trial court. See Oguma v. International Bank of West Africa Ltd. (1988) 1 NWLR (Pt.73) 658 at 670. Issue 2 must therefore be resolved in favour of the respondent. F

Issues 3 and 4 deal essentially with whether the court below was in error by holding that apart from Exhibit 5, the plaintiff was entitled to judgment in the sum of N238,203.27 representing the principal loan together with interest at the rate of 11.5% as claimed, having regard to the provisions of the Deed of Guarantee, Exhibit 4. It is the contention of Chief Ezeobi that if statement of account, Exhibit 5, is declared inadmissible under section 96(2)(e) of the Evidence Act, there is no other legal evidence to sustain the alleged indebtedness on the part of the principal debtor. In that event, he argued, no consequential liability on the part of the appellant may therefore arise. It was his further submission that any liability on the part of the appellant, which was denied, is limited to the principal G H

sum of N140,000.00 advanced to the 1st defendant by the plaintiff and no more as per the guarantee agreement.

Mr. Onyeabo Obi, for his own part strenuously argued that apart from Exhibit 5, there is abundant unchallenged evidence on record establishing the indebtedness of both defendants to the plaintiff in the sum claimed. He referred to paragraph 10 of the plaintiff's amended statement of claim together with the oral testimony of the plaintiff's only witness and stressed that the sum of N238,203.27 claimed comprised the principal, interest and other bank charges outstanding against the 1st defendant as at the 28th February, 1982. He finally argued that the appellant neither pleaded nor argued before the court of trial that its liability was limited to N140,000.00. He submitted that since the appellant did not challenge or controvert the respondent's evidence that the sum of N238,203.27k was due to it from both defendants, the said appellant could not now raise the point on appeal before the court below or in this court.

The law is well settled that once pleadings have been settled and issues are joined, the duty of the court is to proceed to trial on those issues as settled in the pleadings of the parties. Where, however, one party fails or refuses to submit the issues he has raised in his pleadings for trial and does not give or call evidence in support thereof, the trial court, unless there are other legal reasons to the contrary, may resolve such issues against such defaulting party. See *Imana v. Robinson* (1979) 3-4 SC 1(1979) 12 NSCC 1 at 5. ***In the same vein, where evidence given by a party to any proceeding was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it.*** See *Isaac Omoregbe v. Daniel Lawani* (1980) 3-4 S.C. 108 at 117, *Odulaja v. Haddad* (1973) 11 SC 357; *Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi* (1978) 2 S.C. 79 at 81. So, in *Akanbi v. Alao* (1989) 3 NWLR (Pt.1 08) 118 at 153.

H Karibi-Whyte, J.S.C. explained the position as follows:-

"The peculiar circumstance of this case is clearly disclosed from the fact that Counsel for the defendants who had the authority of the defendants at all times materials to this case made a no case submission on the close of the case of the plaintiff; relied on the case of the

plaintiffs for that of the defendants and offered no evidence. It is well settled that in such circumstances where the defendant has elected not to call evidence, he must be taken as admitting the facts of the case as stated by the plaintiffs and must stand on his submission and is bound." (Italics supplied)

In the case on hand, the plaintiff's only witness testified in the clearest possible terms on the exact liability of the defendants to the plaintiff as at the relevant date but was not cross-examined at all by either of the defendants on any issues raised both in the plaintiff's pleadings and in the oral testimony of the witness. **No doubt, the appellant filed its pleadings in the case but it is trite law that pleadings cannot constitute and does not tantamount to evidence and a defendant who does not give evidence in support of his pleadings or in challenge of the evidence of the plaintiff, as the appellant did in the present case, is deemed to have accepted the facts in dispute as adduced in evidence by the plaintiff, notwithstanding the general traverse in his pleadings.** See FCDA v. Naibi (1990) 2 NWLR (Pt.138) 270 at 281, U.B.N. Ltd. v. Ogbob (1995) 2 NWLR (Pt.380) 647, Insurance Brokers of Nigeria v. A. T.M Co. Ltd. (1996) 8 NWLR (pt.466) 316 at 327, etc. I think the court below was perfectly right when it held that the uncontroverted and unchallenged evidence adduced by the plaintiff's only witness which the defendants declined to test by cross-examination provided enough proof of the plaintiff's case in the absence of contrary evidence to put on the defendants' side of the imaginary scale of justice. See too Egbunike v. A.C.B. Ltd. (1995) 2 NWLR (Pt.375) 34 at 55. It is also clear to me in all the circumstances of this case that apart from Exhibit 5, there is clear-cut unchallenged evidence before the trial court in support of the judgment of the Court of Appeal in favour of the plaintiff in the sum of N238,203.27 representing balance of the over-draft facility granted to the 1st defendant and guaranteed by the 2nd defendant with interest at the rate of 11 1/2% per annum and other bank charges as at the 28th February, 1982.

There is finally the appellant's contention that its liability under the guarantee was limited to the principal sum of N140,000.00 advanced to the 1st defendant and did not include any interest or bank charges claimed by the plaintiff. In this regard it ought to be pointed out that this contention never arose from the case presented by the

appellant before the trial court. The issue was neither pleaded in its amended statement of defence nor was there any attempt on the part of the appellant to further amend its statement of defence to plead this material fact and consequently to lead evidence thereupon.

All the appellant pleaded in effect was that the Deed of Guarantee Exhibit 4 was void and of no effect for want of consideration in that the 1st defendant failed to pay some premium allegedly due under the guarantee which was a condition precedent to its validity. The appellant did not, however, adduce any evidence either in proof of the said alleged defence which it duly pleaded or in the establishment of its present posture that its liability is limited to the principal sum of N140,000.00 advanced to the 1st defendant.

In this connection it is necessary to stress not only that evidence at a trial must be directed and confirmed to the proof or disproof of the issues as settled by the pleadings but that it is not open to a defendant, such as the present appellant, to rely on defences which it should have but had not pleaded at the trial because the plaintiff, such as the present respondent, would have owing to his failure to plea such new defences in his pleadings, lost the opportunity of calling evidence to controvert them. See J.O. Idahosa and Another v. D.N. Oransaye (1959) 4 F.S.C. (1959) SCNLR 407,186. ***I do not therefore conceive that the appellant, not having pleaded its new defence to the effect that its liability is limited to the principal sum advanced to the 1st defendant and did not include any interest or bank charges thereto, is entitled to raise the issue in the court at this appellate stage of the hearing.***

At all events, a close study of the Deed of Guarantee, Exhibit 4 shows that the appellant's liability thereunder includes interest, commission and banking charges. These are clearly indicated in clauses 1, 2, 3 and 10 thereof. Clause 1 extends the appellant's liability to include "all usual banking charges" and clause 2, apart from the principal amount advanced, also holds the appellant responsible for "such further sum for interest thereon and other banking charges in respect thereof". Clause 3 similarly brings in the question of the appellant's liability for interest whilst clause 10, in particular, defines the appellant's liability under the Guarantee to include

“interest, commission and banking charges.”

Additionally there is the letter of the offer of the over-draft facility, Exhibit 2, which was accepted by the defendants. This contains the terms of the lending with the interest rate expressly fixed at 11 1/2% while the appellant's security was stated as -

“Full guarantee of Unity, Life and Fire Insurance Company Ltd. For principal plus interest.” ^B

As I explained earlier on in this judgment, part of the evidence of the plaintiff's only witness stated as follows:-

“The balance outstanding as at February, 1982 is N238,203.27k. The rate of interest was 11 1/2%.” ^C

The witness was not cross-examined by the appellant as to the amount outstanding unpaid or as to the extent of the appellant's liability under the Deed of Guarantee. I think having regard to all I have said above that issues 3 and 4 must also be resolved in favour of the respondent. ^D

Learned Counsel for the respondent, Onyeabo Obi Esq. did intimate the court that he would be withdrawing his cross-appeal in the event of the main appeal not succeeding. I need only state that all the issues having been resolved against the appellant, the main appeal accordingly fails and it is hereby dismissed. ^E

The cross-appeal, on the application of learned Counsel for the respondent/cross appellant is hereby struck out. There will be the costs of these appeals to the respondent against the appellant which I assess and fix at N10,000.00. ^F

BELGORE JSC

I also dismiss the main appeal for the reasons fully set out in the judgment of my learned brother, Iguh, J.S.C. The main appeal having failed, the cross-appeal is withdrawn and it is struck out. I make the same orders as to costs as contained in the judgment of Iguh JSC. ^G

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KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Iguh, J.S.C. I entirely agree with it and for the

reasons he has given I too would dismiss the appeal and strike out the cross-appeal with N10,000.00 costs to the respondent.

EJIWUNMI JSC

B I have had the privilege of reading in draft the judgment just delivered by my learned brother Iguh, J.S.C. Being satisfied that in the judgment, all the issues raised in the appeal were properly considered and eventually resolved against the appellant, I adopt the
C said judgment as my own. I therefore would also dismiss the main appeal, and strike out the cross-appeal as prayed for by learned Counsel for the respondent. In the result the appeal is dismissed in its entirety by me, and the respondent is awarded costs in the sum of N10,000.00 only.

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AYOOLA JSC

E I have had the privilege of reading in advance the judgment delivered by my learned brother Iguh, JSC. I am in entire agreement with the conclusion he arrived at on each of the issues raised in the appeal and with his decision that this appeal should be dismissed. I agree with his reasons for coming to that conclusion. I do not think that I should, merely for the sake of making a contribution, repeat in
F different words the points he has so clearly made. In the result I do not wish to add anything. I too would dismiss the appeal and strike out the cross-appeal with N10, 000.00 costs to the respondent.

Appeal dismissed. Cross-appeal struck out.

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